February 28, 2001

Peter G. McCabe, Secretary
Standing Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Proposed Substantive Changes to the Federal Rules of Criminal Procedure Request for Comments, Issued August 15, 2000

Dear Mr. McCabe:

As Co-Chairs of the Committee on Rules of Procedure of the National Association of Criminal Defense Lawyers, we are pleased to submit the following comments on behalf of the more than 10,000 members of our association, and its 80 state and local affiliates with an additional membership of about 28,000. Our comments address proposed changes to Rules 5, 10, 12.2, 26(b), 30, 32, 35(b) and 41. Comments on the proposed habeas and appellate rules as well as on the proposed stylistic changes are being submitted under separate cover.

PROPOSED RULE 5

We strongly object to the Committee's proposal to amend Rule 5 to permit video conferencing at the defendant's first appearance, with or without the consent of the defendant. Although the notes to Rule 5 do not indicate why the Committee thought this change important, the Committee

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Notes to Rule 10 indicate its belief that video conferencing could be more convenient and more cost-effective.[1] While we agree that these goals are certainly important, we do not believe that video conferencing would achieve them. Instead, video conferencing would simply shift the cost and any current inconvenience from one part of the criminal justice system to another, while creating its own additional costs. Even more important, the use of video conferencing would seriously threaten our system of justice by transforming the initial appearance from an opportunity to do justice and create a sense of fairness, to a rote proceeding on a television screen, with its negative effects felt mainly by poor persons of color.

1. The Importance of the First Appearance

As the Committee recognizes, the first appearance serves a number of important purposes, some tangible, some not. For many, it is their first contact with the criminal justice system. It provides reassurance that a judicial officer knows of their existence and will make sure they are treated fairly. It is their first opportunity to meet with counsel and to see counsel in action as their advocate. It is their first opportunity to be released on bond. It may be their first opportunity to hear and understand exactly why they were arrested. At its best, which is how most Magistrate Judges conduct these proceedings, it gives those present a sense of confidence that they will be treated with respect and dignity. We believe each of these purposes is ill-served by providing mechanisms which, in effect, take the accused directly from the hands of law enforcement officers to the hands of prison officials. The symbolism could not be more inappropriate.

It has been the collective experience of the members of NACDL that the first appearance sets the stage for all the events to follow. Especially for persons who cannot afford to retain a lawyer privately, who constitute the

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[1] The Committee Notes to Rule 10 also discuss potential security risks to officials transporting large numbers of defendants across long distances. We do not believe this issue arises to any significant degree at the initial appearance stage.

majority of federal criminal defendants, they begin the process already frightened and in trouble. They have no say as to who will represent them, although they live in a society that believes in the credo, "you get what you pay for." Even for those fortunate enough to be able to hire counsel of their choice, the nature of their first contact with the criminal justice system has far-reaching consequences.

Numerous commentators have written about the importance of a lawyer's initial meeting with a client. Renowned law professor Anthony G. Amsterdam, wrote in his Trial Manual for the Defense of Criminal Cases:

> The initial interview in a criminal case is probably the most important single exchange that counsel will have with the client. It largely shapes the client's judgment of the lawyer. This first judgment may be indelible. At the least, it gravely influences all future dealings of the two. The lawyer's primary objective in the initial interview, therefore is the establishment of an attorney-client relationship grounded on mutual confidence, trust, and respect.

Trial Manual 5 for the Defense of Criminal Cases, vol. 1, Chapter V., "Interviewing The Client: The Initial Interview" (ALI/ABA 1988) at 105.

Ten years later, after conducting a three-year national survey, Professor Douglas L. Colbert concluded that: "The likelihood is greatest for developing a collaborative and trusting relationship when a lawyer is able to interview a client shortly after arrest and represent him at the initial bail proceeding. * * * Clients often distrust court-appointed attorneys and doubt their commitment to providing zealous representation. The best attorney-client relationships usually develop when clients observe their lawyers' efforts on their behalf. Lawyers assigned to represent a client at the initial bail hearing can make an immediate favorable impression by arguing skillfully for release." D. Colbert, "Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings," 1998 U. Ill. L. Rev. 1, 19. Colbert also determined that lawyers who do not meet their client "until long

after arrest have a formidable barrier to overcome in gaining the client's confidence and obtaining a favorable result." *Id.*

A lawyer's first meeting with a client is the time to provide reassurance, to make sure the client's family members are taken care of, and the children are not left alone, to explain how the next few days will go, to begin making contacts. Often, these discussions involve literally holding a client's hand to physically demonstrate the lawyer is there for the client. All of this discussion and reassurance is even more important in the ever-increasing number of cases where the client is unable to speak English and/or resides in a foreign country.

But this reassurance will most likely fall on deaf ears if we cannot take our clients before a judge. If our clients do not experience the authority and understanding of a judicial officer at a time when all the world feels like it is crashing in, our clients are much less likely to put faith in the criminal justice system. And, for the system to work at its full potential, we need our clients to have faith in it. One of the reasons we work so hard to find highly qualified judicial officers, including Magistrate Judges, is because we understand the importance of their role to the effective functioning of the criminal justice system.

As pointed out in *Valenzuela-Gonzalez v. United States District Court*, 915 F.2d 1276, 1281 (9th Cir. 1990), a case cited by this Committee in the Notes to Rule 10: "'Strong reasons' support Federal Rules 10 and 43." (*Quoting In re United States*, 784 F.2d 1062, 1063 (11th Cir. 1986)). "'Without the presence of the defendant, the court cannot know with certainty that the defendant has been apprised of the proceedings.'" *Id.* Just as a defendant receives a different sense of the proceedings when he or she is actually present in the courtroom, so does a judge receive a different sense of the defendant when the defendant is actually in the courtroom. This ability to accurately perceive what is going on is especially significant at the initial appearance, when the court is often called upon to make decisions based on less outside information. And it is difficult to see how a judge

could effectively determine a defendant's competency through a television screen or pick up subtle but important nuances in behavior.

The perception difficulty is compounded by the fact that many people freeze up when they know they are on camera. Few will feel comfortable enough to act naturally or speak sincerely – a difficult task even when all parties are together in the courtroom following a meaningful interview between lawyer and client.

In addition to the importance of the lawyer's initial meeting with the client, the physical presence of the courtroom imbues the proceedings with a feeling of majesty and solemnity that could never be conveyed over a monitor. This sense of the serious nature of the proceedings not only helps calm the fears of those arrested, but also helps them understand the need to proceed thoughtfully. Indeed, the Judicial Conference of the United States has gone to a great deal of trouble to ensure that federal courtrooms convey a sense of importance and solemnity commensurate with the business conducted within their walls. The *U. S. Courts Design Guide*, a hefty 362-page manual, directs that: "Courtroom ceiling heights must be in proportion to the size of the space and the number of people using the space and reflect the solemnity of proceedings. The raised judge's bench and high ceiling height contribute to the order and decorum of the proceedings." *U.S. Courts Design Guide*, Space & Facilities Committee of the Judicial Conference of the United States (12/19/97) at 4-40. And further: "Finishes in the courtroom must reflect the seriousness and promote the dignity of court proceedings." *Id.* at 4-57.

In addition, cases may be more easily negotiated with the prosecutor when everyone is together. Sometimes the conditions of bond can be hammered out with a back and forth discussion between the judge and the parties. Private consultation with the client under these circumstances is also essential, but would be equally impossible if the client was far away. On the other hand, if both the lawyer and the client were together far away, private discussion with the client would be possible, but private conversation with the prosecutor would become impossible. Yet, these conversations, with the

client nearby to answer questions, often result in satisfactory release conditions and sometimes also result in cooperation agreements. For these agreements to be useful, time is often of the essence. Thus, those persons who are present in court are more likely to be released on bond or to benefit from cooperation proposals.

2. **Video Conferencing Would Have a Discriminatory Impact on Minorities in the Criminal Justice System & Would Perpetuate Stereotypes the Criminal Justice System is Working to Dismantle**

That America's minorities are treated unfairly within the criminal justice system is now beyond debate. After years of compiling statistics, The Sentencing Project found: "Poor people generally are over-represented at every stage of the criminal justice system and people of color are also disproportionately poor." The Sentencing Project, "Reducing Racial Disparity in the Criminal Justice System, A Manual for Practitioners and Policymakers" (Wash. D.C., June 2000) at 5.

This disproportionate representation is particularly acute in the pretrial stage. The Department of Justice reports that 35.9% of the persons detained during fiscal year 1996 were Black and 46.7% were Hispanic. What this means is that an extraordinary 82.6% of all persons detained that year were people of color. The Bureau of Justice Statistics Special Report, "Federal Pretrial Release and Detention, 1996," U.S. Department of Justice, Office of Justice Programs (February 1999) at 9. Thus, it is mostly poor people of color who would be excluded from the courtroom, the very people who most need to believe the criminal justice system will be fair to them. This appearance of injustice is simply too great to be tolerated.

In a monograph entitled, "Racial Disparities in the American Criminal Justice System," the Leadership Conference on Civil Rights & the Leadership Conference Education Fund describe the effect racial disparities

have on the criminal justice system, noting that the resulting inequality "compromises the legitimacy of the system as a whole, undermines its effectiveness and fosters racial division." *Id.* at 46, from the Justice on Trial series. The Conference repeated a conclusion being increasingly drawn by participants in and observers of the criminal justice system, which is that: "Persistent inequality in the justice system gives minorities good reason to distrust the system, and to refuse to cooperate with it. Such lack of cooperation can take many forms, each of which has a corrosive effect on the system's strength and continued viability." *Id.*

To that end, The Sentencing Project has suggested that:

> Assuring timely and effective representation immediately after arrest is certainly in the interests of poor, minority defendants whose over-representation in the system may be the most obvious example of disparate treatment. This is an issue which clearly illustrates the need for a close alliance between prosecutors and defense counsel as the timing and conditions of bail and the "rules of engagement" regarding plea negotiations are two of the most critical decision points in the system where disparity can be reduced.

"Reducing Racial Disparity in the Criminal Justice System, A Manual for Practitioners and Policymakers" (June 2000) at 49.

Assuredly, now is not the time to create a system where the initial appearance in a courtroom is reserved *de facto* for the white and the wealthy. Rather, we urge the Committee to amend the rules with a particular eye toward healing the racial divisions in our justice system.

3. Video Conferencing Would Only Shift, Not Eliminate, the Twin Burdens of Inconvenience & Cost

In those cases where the arrestee is first brought to a prison some distance from the courthouse, the convenience to and the costs saved by the U.S. Marshals Service would be offset by the inconvenience to and the costs accrued by the Pretrial Services Office and the Criminal Justice Act. Entrance into a federal prison or local jail can be a frustrating and time-consuming experience for non-prison personnel. Waits of over an hour are not uncommon. No one is available to escort the lawyer. The elevators are not working. The visiting rooms are full. The client cannot be found. Some one forgets to notify the floor personnel to bring down the client. A security crisis requires cessation of all visiting for some unspecified period of time. Even then, at pretrial facilities, there is sometimes no provision at all for contact visitation, even with counsel.

From the lawyer's perspective, the place to be is with the client, not in the courtroom. But how do we get there? Who notifies us? How much time do they give us? In many courthouses, under the current system, there is only a little time to meet with a client in the courthouse before the first appearance. It is therefore imperative that we immediately begin checking on resources -- making telephone calls, trying to bring in friends or family members, working to make sure children are taken care of, talking with the Pretrial Services Officer about possible conditions of release, working with the prosecutor on acceptable conditions of release, researching the law. If our client's first appearance is televised from a remote jail cell, we have no ability to begin our work. We cannot make telephone calls, talk to the prosecutor or the Pretrial Services Officer or begin our research. Nor will the Pretrial Services Officer be able to meet with the client before their first appearance or do the work necessary to complete their report. The end result will be that fewer arrestees will be released on bond at a cost of $59.41 per day according to the Bureau of Prisons. Lawyers will spend more time in travel and visitation and less time working out release plans.

Video conferencing would create other practical problems as well. In most cases, the cost of the lawyer's travel and waiting time would be charged to the Criminal Justice Act. Pretrial Services Officers would often be tied up on one case for a whole day. And what about those clients who need interpreters? Inside the courthouses, the staff of the District Court Clerk's Office have created a working system to provide interpreters on short notice, but to arrange to bring them to the jail would not only be much more costly, but a logistical nightmare as well.

4. <u>There Cannot Be A Knowing Waiver of a First Appearance</u>

As the Committee notes, a written waiver of the initial appearance would not be possible. What that means, is that the request for a waiver will come first from the prosecutor or arresting agent. This is not a question that either of them should be asking an arrestee. Nor is likely that an arrestee will have the understanding of the situation to knowingly waive his or her presence. Nor does it seem feasible or appropriate for a prosecutor or agent to explain the importance of the first appearance to an arrestee. Indeed, it would be unethical.

In addition, by permitting waivers in this situation, the Committee is creating another place where pressure may be brought to bear. If waiver is more convenient for the prosecutor and the Marshals, past experience shows there will be intense pressure to waive appearances. A refusal to do so may make the defendant appear "difficult," may be viewed as a failure to "cooperate," may anger the prosecutor or may later be used against the arrestee at sentencing. To give the prosecution an additional advantage absent a compelling need is both unfair and unwise. There is no compelling need here.

Finally, we believe that it may often appear that convenience outweighs the right to appear in court, to clients and law enforcement officers alike. It is easy to see how law enforcement could explain the first

appearance as a rote exercise, one which would entail a strip search and a long and uncomfortable ride in handcuffs or chains, making the prospect particularly unappealing. Because of the many well documented but intangible benefits which adhere to an arrestee's live appearance in court, even without counsel, we do not believe a knowing choice is possible.

5. Video Conferencing Should Never Occur Without Defendant's Consent

Nor do we believe that video conferencing should ever occur without a defendant's consent. In the vast majority of cases the decision to proceed by video conference would be made over defense objection, or perhaps, given the timing, without any consultation with the defendant or a defense lawyer. This *ex parte* decision to proceed without the defendant present is untenable in our system of justice. It would greatly magnify the problems discussed above. The time needed to convince indigent clients of the effectiveness of their appointed lawyers would vastly increase. In some cases, perhaps many, the task would be impossible.

Yet, without a meaningful attorney-client relationship, the criminal justice system does not function. It stutters and starts, motions for substitution of counsel are filed, pro se motions are filed, continuances are requested, requests to proceed pro se are made, attorney-client meetings become protracted and sometimes contentious, clients lose hope, attorneys become frustrated, the court's time is used up unnecessarily and the prosecution becomes tired of the whole thing, stops negotiating and blames the defendant, our client.

In addition to the internal problems of cost and efficiency this scenario creates, it also creates external problems of respect by society at large. The breakdown in trust, both internally and externally, would have long-term ramifications that could not be easily fixed.

For all these reasons, the proposed amendment to Rule 5 should be rejected.

PROPOSED RULE 10

Consent Under Rule 10 Should Require a Written Waiver Made After Prior Consultation With Counsel

Although we believe the same problems would obtain under Rule 10 as we have discussed under Rule 5 if video conferencing were permitted at arraignment without a defendant's consent, we do believe there may be situations where a knowing waiver could be obtained under Rule 10. In most cases, a defendant has already had an opportunity to discuss his or her case at length with an attorney prior to arraignment. In many cases, a defendant has already appeared before a judicial officer. **If** Rule 5 is not amended to permit video conferencing, NACDL believes there may be times when a knowing waiver could properly be obtained from a defendant. We suggest that this waiver can only be truly "knowing," if (1) it is obtained after a defendant has had a meaningful opportunity to discuss the case and the indictment with a lawyer; and (2) if it is in writing. If, despite our strong objections, Rule 5 is amended to permit video conferencing, then we believe that any further erosion of a defendant's right to be present in court cannot be allowed, with or without putative consent.

In sum, it seems to us that the answers must lie elsewhere. We cannot take away a defendant's rights at the risk of undermining the appearance of and actual fairness in our system of justice, especially where the benefits are solely economic and speculative. In the end, this "solution" will surely exacerbate rather than alleviate the problem, which is not a serious one in any event.

PROPOSED RULE 12.2

We believe there is a significant drafting error in Proposed Rule 12.2(c)(4)(A), "Inadmissibility of a Defendant's Statements." The language as it appears provides that no statement by a defendant made in the course of a mental state examination, or expert testimony or fruits of the defendant's

statement are admissible at trial on mental state issues EXCEPT WHERE the defendant:

> "(A) has introduced evidence of incompetency *or after notice under Rule 12.2(a) or (b)(1)*, or
>
> (B) has introduced expert evidence after notice under Rule 12.2(b)(2)."

The italicized language is contrary to law and to the rest of the Rule and its commentary. Specifically, the Commentary at 178 correctly notes:

> The Supreme Court has recognized that use of a defendants statements during a court-ordered examination may compromise the defendant's right against self-incrimination. [Citations omitted] But subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. [Citations omitted] That view is reflected in Rule 12.2(c) which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition.

Therefore, we suggest that the language in 12.2(c)(4)(A) should read: "(A) has introduced evidence of incompetency or after notice **has introduced evidence of insanity under Rule 12.2(a) or expert evidence under Rule 12.2(b)(1)**,".

PROPOSED RULE 26(b)

Introduction and Summary of Position

The Committee has published for comment a proposed amendment to Rule 26 which would allow a party to present testimony at trial from a witness who is not in the courtroom by means of contemporaneous video transmission. A court would have the discretion to authorize remote testimony if: (1) the witness was "unavailable" to appear in person due to a physical illness of infirmity, or was beyond the subpoena power of the court; (2) "compelling circumstances" existed for allowing the testimony to be transmitted; and (3) appropriate safeguards were used for transmission of the testimony.

NACDL is opposed to the proposed rule in its present form for three related reasons:

1. The proposed amendment would not limit the use of video testimony to the circumstances where deposition testimony is currently used.

The Committee presents this unprecedented proposal for the use of video testimony in criminal trials as being a "prudent and measured step" because it believes the rule would limit the use of video testimony to "those instances when deposition testimony" would be used under current practice. Despite the Committee's intent and belief, the proposed rule would not so limit video testimony.

The Committee believes that because the proposed rule would subject the admission of video testimony to the same "unavailability" requirement of Fed. R. Evid. 804(a) that is applicable to deposition testimony, video testimony would only be used where deposition testimony could be used currently. The unavailability requirement of Fed. R. Evid. 804(a) however, is not the only limitation on the use of deposition testimony.

A party may not even depose a witness unless it can satisfy the requirement of Fed. R. Crim. P. 15(a) that there be "extraordinary circumstances" which make it in the interest of justice for the witness to be deposed. The proposed rule contains no such limitation on the use of video testimony. As a result, the proposed rule would allow the use of video testimony beyond circumstances where deposition testimony is used under current practice.

2. Adoption of the proposed amendment would allow, and indeed encourage, the use of video testimony as a substitute for in-court testimony.

The Committee's assumption that subjecting the admission of video testimony to the "unavailability" requirement of Fed. R. Evid. 804(a) would result in video testimony only being used in those circumstances where deposition testimony is used under current practice is wrong for another reason. The restrained and rare use of deposition testimony under current practice is better explained as a reflection of the limited effectiveness of deposition testimony (as compared with live testimony), than it is by the unavailability requirement, which only requires a witness be unable to appear in court due to an illness or infirmity. Because of the limited effectiveness of deposition testimony, a party will make efforts to obtain in-court testimony even where the criteria for use of deposition testimony could be satisfied.

The greater effectiveness of video testimony removes this incentive for the calling party to do everything possible to make sure its witnesses testify in-court. Moreover, given the strategic advantages that video testimony offers to the party presenting the testimony, adoption of the rule would create the opposite incentive, as it would encourage parties to substitute video testimony in circumstances where, under current practice, they would make the effort to present in-court testimony.

3. The proposed rule would permit video testimony to be used in circumstances where it would plainly violate the constitution,

Because the proposed rule was considered to be a "measured step" that would result in the use of video testimony only where deposition testimony would be used under current practice, there was no reason for the Committee to draft a rule that would be adequate to govern the use of video testimony other than as a substitute to deposition testimony. As a consequence, the proposed rule does not contain the restrictions and safeguards required for the use of video testimony in broader circumstances to be reliable and constitutionally permissible, even though as drafted it would authorize the use of video testimony in those broader circumstances.

In sum, either the proposed amendment should be redrafted to insure the text of the rule carefully limits its application to only those circumstances in which deposition testimony would be used under current practice or, alternatively, the Committee should undertake an effort to draft a rule that will include the protections necessary to insure the use of video testimony is reliable and constitutional when used other than as a substitute for deposition testimony.

The Present Law And The Proposed Amendment

1. Present Law

Rule 26 currently provides that trial witnesses must testify orally in open court, unless an Act of Congress or federal rule provides otherwise.[2] There is no Act of Congress or federal rule that presently authorizes the use of video testimony at federal criminal trials.

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[2] "In all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court." Fed. R. Crim. P. 26. The proposed "style" changes to the criminal rules would make non-substantive changes to this provision.

The Supreme Court addressed the question of whether testimony transmitted by video from a witness who is outside the courtroom is constitutionally permissible in Maryland v. Craig.[3] The Court declared that a defendant's right of confrontation "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[4] The Second Circuit has suggested the constitutional requirements established by Craig apply only to one-way closed-circuit testimony, and need not be satisfied if the witness testifies before a video monitor which depicts the courtroom.[5]

The Committee Note suggests that the comparative area of law to consider in evaluating the proposed amendment is the law governing the use of deposition testimony at trial, where a witness who is unavailable to appear personally. Under the current Federal Criminal rules, a party who wants to present testimony at trial of a witness who may be, or is, unavailable to appear personally, may seek permission to depose the witness under Fed. R. Crim. P. 15(a). The party must make a motion to depose the witness; the court is authorized to order the deposition "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of the witness be taken and preserved for use at trial . . ." Fed. R. Crim. P. 15(a).

The hearsay deposition testimony "may be used as substantive evidence [at the trial] if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence . . ." Fed. R. Crim. P. 15(e). A witness is "unavailable" within the meaning of that rule, if the

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[3] 497 U.S. 836, 110 S. Ct. 3157, 111 L.Ed.2d 666 (1990); see also, Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798, 101 L.Ed.2d 857 (1988) (reversing defendant's conviction where 13 year-old alleged victim was allowed to testify out-of-sight of the defendant)

[4] 497 U.S. at 850.

[5] United States v. Gigante, 166 F.3d 73, 80-81 (2nd Cir. 1999).

witness "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity," or "is absent from the hearing and the proponent of the statement has been unable to procure the [witness'] attendance . . . by process or other reasonable means."[6] Fed. R. Evid. 804(a)(4)&(5).

2. The Proposed Amendment

The proposed amendment would allow a court, "[i]n the interest of justice," to "authorize contemporaneous video presentation in open court of testimony from a witness who is at a different location if:

(1) the requesting party establishes compelling circumstances for such transmission;
(2) appropriate safeguards for the transmission are used; and
(3) the witness is unavailable within the meaning of Rule 804(a)((4)-(5), of the Federal Rules of Evidence."

Discussion

1. The Proposed Rule Would Not Limit The Use Of Video Testimony To The Circumstances Where Deposition Is Used Under Current Practice

The Committee presents this unprecedented measure for the use of video testimony as a "prudent and measured step" based on its belief and intent that the proposed rule would limit the use of closed-circuit testimony to "those instances when deposition testimony" would be used under the current federal criminal trials. Despite the Committee's belief and intent, the proposed rule would not limit the use of video testimony to the circumstances where deposition testimony is currently used.

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[6] A witness is also "unavailable" within the meaning of Fed. R. Evid. 804(a) if the witness is exempted from testifying due to a privilege, refuses to testify despite being ordered to do so, or testifies to a lack of memory. A witness who is unavailable for those reasons is likely to be unavailable to provide deposition testimony as well.

The Committee believed that by conditioning the admission of video testimony on a witness being "unavailable" within the meaning of Fed. R. Evid. 804(a)(4)&(5), it would limit the use of such testimony to those circumstances where deposition testimony is currently used, because the admission of deposition testimony also depends on a witness being "unavailable" within the meaning of Fed. R. Evid. 804(a)(4)&(5). This reasoning overlooks the additional requirement that must be satisfied with respect to deposition testimony. To depose a witness, a party must establish that "due to exceptional circumstances of the case it is in the interest of justice that the testimony of the witness be taken and preserved for use at trial . . . ." Fed. R. Crim. P. 15(a). Unless that requirement is satisfied, there will be no deposition to offer, even if the witness is "unavailable" at the time of trial.

No equivalent requirement for the use of video testimony is included in the proposed rule. The proposed rule does require "the requesting party establish[] compelling circumstances for . . . transmission" of the witnesses testimony, even though "compelling circumstances" will exist in circumstances that are not "extraordinary." In order for the criteria for use of video testimony to be equivalent to the criteria for use of deposition testimony, the rule would have to require there be "exceptional circumstances" which make the use of video testimony "in the interest of justice."

2. <u>The Proposed Rule Would Allow, And Encourage The Use Of Video Testimony As A Substitute For In-Court Testimony</u>

Even if the proposed rule contained the same criteria for use of video testimony that apply to the use of deposition testimony under the existing rules, it would not result in video testimony only being used in those circumstances where deposition testimony is used under current practice.

The restrained and rare use of deposition testimony under current practice is a reflection of its limited effectiveness (as compared with live testimony), not a function of the criteria the rules require for its use. The

limited effectiveness of deposition testimony insures that even where a witness may be sick, or outside the jurisdiction, the party offering the witness' testimony will do everything possible to make sure the witness is available to testify in court. Thus, under current practice, a party will make every possible effort to obtain in-court testimony, even in those circumstances where the criteria for use of deposition testimony could be satisfied. The greater effectiveness of video testimony removes this incentive for the calling party to do everything possible to make sure its witnesses testify in-court. This difference alone will result in video testimony being used far more frequently than deposition testimony.

Moreover, adoption of the rule would actually encourage the use of video testimony as a substitute for in-court testimony in some circumstances. The reason is that video testimony, in some instances, will be strategically superior to in-court testimony from the perspective of the calling party. The video transmission of "live" testimony would enable the calling party to gain the benefits associated with "live" testimony, while being able to shield its witness from the credibility testing process associated with testifying, and being cross-examined, in a public courtroom. Where a party believes a witness will testify better by video than in person, or will be better able to withstand cross-examination conducted by video than in the courtroom, the party will actually stand to benefit from the witness being unavailable to appear in person. In light of the relative ease with which unavailability can be established – *e.g.*, a witness who is too ill to come to court, or who is outside the jurisdiction of the court – the potential strategic advantage that video testimony offers to the calling party, will inevitably lead to efforts to substitute video testimony in circumstances where in-court testimony would be used under the current rules.

3. <u>The Proposed Rule Does Not Contain The Restrictions And Safeguards Needed For The Use Of Video Testimony To Be Constitutional As A Substitute For In-Court Testimony</u>

A federal rule authorizing testimony at a criminal trial to be presented from a witness who is not in the courtroom would be an unprecedented step.

Such a rule would present serious constitutional questions under the Confrontation Clause in its application. Even apart from constitutional concerns, adoption of a rule authorizing the use of video testimony in federal criminal trials raises important and difficult jurisprudential questions, such as whether it allows juries to fully and accurately assess witness credibility, or what can be done to limit the distorting effect of video testimony on perceptions of witness demeanor and other indicia of credibility. Neither these constitutional or jurisprudential concerns are reflected in the proposed rule.

For example, the Supreme Court has indicated that the presentation of testimony from a witness who is not in the courtroom violates the constitution in all but the most narrow of circumstances. Among the requirements for admission of such testimony the Court said the constitution required was that "the reliability of the testimony is otherwise assured."[7] The rule contains no such requirement. Nor does the rule contain a requirement that two-way transmission be used, a fact which the Second Circuit suggested might make the requirements of Craig inapplicable.[8] Indeed, as currently drafted, the proposed rule would authorize the admission of video testimony of a witness who was unavailable to appear in court due to a temporary illness, by means of one-way video transmission, without any independent assurance of the reliability of the testimony.

Because the Committee intended the proposed rule only to authorize the use of video testimony where deposition testimony would be used under current practice, it did not have reason to address or resolve these important and difficult questions. The Committee reasoned that because the use of deposition testimony is sometimes constitutionally permissible, and the proposed rule was only intended to have video testimony be used as a substitute to deposition testimony, the proposed rule was unobjectionable on constitutional grounds. Similarly, because the Committee viewed the

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[7] Maryland v. Craig, 497 U.S. at 850.

[8] Gigante, 166 F.3d at 80-81.

proposed rule as a "measured step," it did not have reason or occasion to draft a rule that would be adequate to govern the use of video testimony other than as a substitute to deposition testimony.

As explained above, however, the proposed rule does not limit the use of video testimony to those circumstances where deposition testimony would be used under current practice. Because the proposed rule would apply beyond the narrow circumstances for which it was drafted, it should not be submitted to the Standing Committee on Rules of Practice and Procedure.

Instead, the proposed rule should be redrafted to insure the text of the rule carefully limits its application to only those circumstances in which deposition testimony would be used under current practice or, alternatively, the Committee should undertake an effort to draft a rule that will include the protections necessary to insure the use of video testimony is reliable and constitutional when used other than as a substitute for deposition testimony.

PROPOSED RULE 30

NACDL objects to the proposed amendment to Rule 30 on two grounds. First, the proposed instruction permits a district court to "reasonably direct[]" a defendant to submit its requested instructions prior to trial. This places an unfair burden on defense counsel to reveal the defendant's theory of defense before the prosecution has even begun to present its evidence, and to provide the government with a road map to the defendant's view of what it would prove. Second, the proposed amendment does not clarify whether defense counsel must restate each and every objection and its grounds ***after*** the district court has instructed the jury or whether objections at the charge conference are sufficient to preserve an error for traditional appellate review (*i.e.*, under a standard other than plain error). Thus, the proposed amendment fails to clarify confusion that exists among the circuit courts of appeal.

Proposed Rule 30(a)

The current version of Rule 30 provides, in pertinent part: "At the close of the evidence or at such earlier time ***during the trial*** as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests." The proposed amendment, as reflected in proposed Rule 30(a), eliminates the requirement that the requested instructions be submitted "during the trial" and gives the district court the discretion to "reasonably direct[]" a defendant to file his written requests "at ***any*** earlier time" before the close of the evidence – *i.e.*, even ***before the trial***. Thus, the amendment threatens to give the government yet another advantage in the prosecution of criminal cases.

It is well-settled that a defendant is entitled to a theory of defense instruction so long as "there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). Indeed, the Supreme Court has recognized that a defendant is entitled to have the jury instructed on inconsistent defenses, so long as the defenses are supported by the evidence. *Id.* at 64. Because the Federal Rules of Criminal Procedure do not permit depositions in criminal cases (except in rare circumstances), *see* Fed.R.Crim.P. 15, nor does the law require the government to produce the statements of its witnesses prior to trial, *see* Fed. R. Crim. P. 26.2 & 18 U.S.C. sec. 3500, a defendant often does not know what defense will be supported by the evidence until the government witnesses take the stand. Thus, a defendant will sometimes formulate his or her theory of defense after the government begins its presentation of the evidence.

Indeed, it is often in a defendant's best interest to decide on an affirmative defense, such as entrapment, self-defense, misidentification, duress or coercion, etc., based on factors that can only be learned *after* the commencement of trial. These factors include, but are not limited to, the manner in which the evidence develops and the composition of the jury. The amended rule is unfair in that it would permit district courts to require a defendant to make those decisions before the commencement of trial.

It is worth noting that, as currently formulated, the federal rules of criminal procedure require a defendant to provide notice of his intended defense at trial only when the defendant intends to raise one of three specifically enumerated defenses: alibi (Fed. R. Crim. P. 12.1), insanity (Fed. R. Crim. P. 12.2), and public authority (Fed. R. Crim. P. 12.3). In those three contexts, the reason for requiring pretrial notice is identified by the Advisory Committee or is readily apparent in the rule itself, and is based on the perceived need for fairness as well as to avoid unnecessary and substantial trial delays. In the case of alibi, notice helps avoid unnecessary interruption and delays in the trial while the government conducts an investigation to locate rebuttal witnesses to meet the defense of alibi. *See* Rule 12.1, Advisory Committee Notes. In the case of insanity, "the objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony," thus avoiding the need for a continuance in the middle of trial. *See* Rule 12.2, Advisory Committee Notes. Finally, in the case of public authority, the unstated purpose is also to give the government time to obtain and review intelligence information to determine whether the defendant was actually exercising public authority on behalf of law enforcement.

A rule permitting the district court to *require* a defendant to file requested instructions prior to trial would, in effect, expand Fed.R.Crim.P. 12 to require notice of the theory of defense in all cases. Yet, there has been no showing, much less an informed debate, to suggest that the needs of fairness and judicial economy identified in the three contexts discussed above apply across the board. Indeed, it appears that the purpose of the proposed amendment to Rule 30 is based solely on convenience to the trial judge, rather than on any perceived need to promote the administration of justice.

It is the position of NACDL that any amendment to Rule 30 should reserve for the defendant the right to submit any but the most routine of his or her requested instructions, after the close of all the evidence, based on the evidence adduced at trial.

Proposed Rule 30(d)

The current version of Rule 30 has generated a disagreement among the circuits regarding whether defense counsel must, ***immediately*** before the jury retires to deliberate, restate with specificity a previously-asserted objection or written request for instruction in order to preserve that objection or instruction for appeal. *Compare United States v. O'Connor*, 28 F.3d 218, 221 (1st Cir. 1994) (holding that Rule 30 prohibits a party from claiming error in the judge's charge unless the party objects after the judge gives the charge but before the "jury retires" and, when objecting, the party must state distinctly the grounds for the objection) *with United States v. Hollinger*, 553 F.2d 535, 543 (7th Cir. 1977) (counsel properly preserves the denial of a requested instruction for appellate review when counsel, after the court instructs the jury, simply incorporates by reference the specific objections made at the charge conference). The proposed amendment to Rule 30 – Rule 30(d) – does not resolve that confusion.

> **(d) Objections to Instructions**. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection ***before the jury retires to deliberate***. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence.

The phrase "before the jury retires to deliberate" is a trap for the unwary, because it fails to specify at what point before the jury retires defense counsel must articulate objections to the charge. Indeed, the charge conference itself occurs ***before the jury retires to deliberate***; therefore, an objection at the charge conference would appear to satisfy the plain language of the rule. Nonetheless, as noted above, courts have held that an objection at the charge conference, without specific renewal after the district court reads the instructions, is insufficient to preserve an error for review.

It is superfluous for the courts to require counsel to restate objections and requests for instruction that have been articulated and argued at length at a charge conference. On the other hand, the purpose of the rule is not served if counsel fail to object to what may be inadvertent omissions or misstatements when the charge is delivered orally. To be sure, penalizing the defendant for his counsel's failure to specifically ***renew*** an objection or requested instruction that has already been denied is unnecessarily punitive and unfair to the defendant. If counsel's argument has been clear and specific enough to put the trial judge on notice of the claimed error in the instructions, the trial judge's denial of the request should be an appealable ruling (subject to a standard other than "plain error").

PROPOSED RULE 32

We suggest that the proposed revised Rule 32 could benefit from further reorganization. The definitions might do better last than first. In any event, the terms defined should appear in alphabetical order. In connection with the new provision barring pretermission of objections on "material" matters, we suggest below that the definition of "material" be taken out of the Committee Note and placed among the definitions. We also suggest below that proposed Rule 32(a)(2)(b)'s expansion of the definition of "crime[s] of violence or sexual abuse" to include offenses under 18 U.S.C. secs. 2251 - 2257 is ill-advised because of the difficulty of determining who the victims are in those cases and because of the expansive effect of the addition.

In subsection **(b)(2)**, the court's authority to "change any time limits" should be limited to authority to "extend" any time limits, but not to shorten them without the defendant's consent. Consistent with the goals of federal sentencing, there should be at least a uniform minimum time period upon which all parties may rely.

Rule 32(c)(2) should provide that any statement made by the defendant to a probation officer during an interview conducted in violation of

the provision for reasonable notice to counsel must, on objection of the defendant, be stricken from the PSR and must not be considered by the court in connection with sentencing.

Language should be added to **Rule 32(e)(1)** that a PSR shall not at any time be disclosed to anyone other than the parties, except to the extent required by the Constitution of the United States. (Disclosure to the defendant of another defendant's PSR may be required by the Due Process Clause as interpreted in *Brady v. Maryland*, 373 U.S. 83 (1963). Based on the negative implications of the language that says there shall be no disclosure "until the defendant ... has been found guilty," representatives of the media have sometimes argued that PSRs must be disclosed at that point to the press under the common law right of access to court records, or even under the First Amendment.)

Under proposed **Rule 32(d)(1)(D)**, the PSR must contain an assessment of the impact of the offense "on any individual against whom the offense has been committed." We believe this section should be expanded to include the names of victims who will speak at sentencing and the content of their intended statement. This notice is required under the Due Process Clause as interpreted in *Burns v. United States*, 501 U.S. 129 (1991). It would also streamline the sentencing process to avoid objections and motions for continuance at sentencing to enable the defense to meaningfully respond to the victim's statement.

We also oppose the expansion of the class of "victims" entitled to speak at sentencing to include an unexplained class of "victims" of child pornography offenses. A criminal prosecution is a public matter between the defendant and the government; the role of private third parties should be minimized, not expanded. Moreover, the offenses defined in 18 U.S.C. secs. 2251-2257 do not have direct victims like sexual assaults or other violent crimes. Are the "victims" in question the young persons depicted in the pornography, regardless of voluntariness and regardless of how long ago the pictures were taken? Or are the victims their parents? Or the persons to whom the pornographic material was distributed or displayed, if this was

done involuntarily? There is no general agreement about whether pornography offenses are "victimless" crimes or about who qualifies as a "victim." Indeed, the answers to these questions implicate public policy issues of a substantive nature which are beyond the procedural purview of these rules. This expansion is ill-advised and should be deleted.

Rule 32(e)(2) should provide that the draft (or unrevised) PSR is to be given to the parties, **but not to the court**, at that time. The entire purpose of the process is to ensure that the court receives only accurate information for sentencing. This is defeated by the practice, common in many districts, of providing the unrevised, draft PSR to the court at the time it is provided to the parties.

NACDL objects to **Rule 32(e)(3)**, which permits the court to keep secret the probation officer's recommendation. This provision is a hold-over from pre-guidelines law. It is no longer appropriate in light of the mandatory nature of guideline sentencing and the more specific constitutional notice requirements it has produced. *See Burns v. United States*, 501 U.S. 129 (1991). The recommendation should ordinarily be disclosed to the parties, unless the court affirmatively finds that serious psychological or physical harm may come to the defendant or a third party from disclosure.

Objections to the PSR should be served on "the adverse party," not on "every other party." **Rule 32(f)(2)**. Co-defendants are not and ordinarily should not be privy to one another's sentencings. This subsection should expressly note that objections to the draft PSR are to be served on the probation officer and on the adverse party, but are not to be filed with or otherwise made known to the court at that time.

The second sentence of **Rule 32(f)(3)** should be amended to provide that: "In any event, the probation officer shall" (not merely "may") "investigate any issues raised by the objections and revise the presentence report as appropriate." Investigation is the probation officer's duty and responsibility. An Addendum (as is seen too often) which merely states, in response to a defendant's objection, "The government does not agree," or

"The government will present evidence to substantiate this fact at the time of sentencing," does not fulfill the purposes of the Rule or the proper function of an independent pre-sentence investigation.

We suggest moving what is now codified at **Rule 32(h)(5)** (notice of grounds of departure) into new **Rule 32(g)**, making it a subsection (2). This would more accurately reflect the time when such notice must be given and help ensure that due process is protected, as discussed in *Burns v. United States*, 501 U.S. 129 (1991).

The first sentence of **Rule 32(h)(2)** should be revised to make clear that the court must afford a party a reasonable opportunity to establish any material objection. A new second sentence should be inserted into Rule 32(h)(2) providing that a party need not offer evidence in support of any objection unless the party has the burden of proof with respect to that objection, while the party that has the burden of proof cannot meet that burden by reliance on the findings of the PSR without at least disclosing the evidentiary basis for those findings or, if so permitted or directed by the court, presenting evidence in support of the objected-to finding.

Concomitantly, **Rule 32(h)(3)(A)** should be amended to clarify that the court must not simply adopt an unsupported portion of the PSR as its finding in response to a party's objection.

We favor the proposed change at **Rule 32(h)(3)(B)(i)** requiring sentencing courts to rule on unresolved objections to material matters in the PSR **whether or not the court will consider those points in imposing sentence.** Information in the PSR unrelated to sentencing may still be important to defendants committed to the Federal Bureau of Prisons. For example, inmates may be eligible for early release if they are non-violent offenders and complete a substance abuse program . *See* 18 U.S.C. sec. 3624(e). If the PSR contains statements which would preclude their early release under this program, or omits information that would facilitate their admission to the program, defendants are denied due process when the court refuses to address this information at sentencing. Presently, it is impossible

in many jurisdictions to get accurate, material information added or incorrect information stricken from the PSR because the current version of Rule 32 does not require it.

To emphasize the importance of this new requirement and to ensure its enforcement, the definition of "material" contained in the Advisory Committee Notes should be added to the "Definitions" section of the Rule itself.

We also suggest that either Rule 32 or its commentary indicate that a co-defendant's actions not involving the defendant be struck from the PSR or an explanation added upon the defendant's request. This will address the common situation of a defendant being found ineligible for certain BOP placements or programs because a co-defendant had a weapon when arrested, even though the defendant was not present and there is no evidence linking him or her to the weapon.

On the other hand, we object to allowing any non-party, victim or otherwise, to address the court without being under oath and subject to cross examination. Rule 32(h)(4)(B). In addition to due process concerns, this provision conflicts with restitution procedure which requires that victim information be in the form of a sworn affidavit or testimony. *See* 18 U.S.C. § 3664(d)(2,4). Indeed, under the Rules Enabling Act it could be argued – wrongly, we hope – that this provision repealed the oath provision of the statute as to the covered class of victims.

Also, we ask that the timetable for preparation and disclosure of the PSR and Addendum be re-examined, as it provides insufficient time for the parties to prepare sentencing memoranda contesting the findings set forth in the Addendum. Additional time is needed because until the Addendum is received, the parties do not know whether objections have been upheld or what reasons the probation office will use in denying their objections. Also, it is inefficient to develop arguments in response to the other parties' objections until the probation officer has advised whether those objections have been accepted or rejected.

Presently, and as proposed, the time available for preparing arguments after receipt of the Addendum may be as short as seven working days. However, a survey of local rules indicates that even less time is available because of deadlines for submission of sentencing memoranda in many jurisdictions:

- 3 days prior to sentencing - E.D., LA
- 10 days prior to sentencing - W.D., LA
- 7 days prior to sentencing - N.D,. TX

Adequate time after receipt of the Addendum is not provided in any of the four jurisdictions noted and in two districts sentencing memoranda are due **before** the Addendum is even received. Therefore, we suggest that the PSR and Addendum be submitted to the court and the parties no less that 14 days before sentencing and that sentencing memoranda be due not sooner than 3 days before sentencing.

For similar reasons, we urge that Rule 32(h)(B)(5) require that the court notify the parties no less than ten days prior to sentencing of potential departure grounds and the reasons therefor and that the parties be notified ten days before sentencing of any information excluded from the PSR. *See* Fed. R. Crim. P. 32(h)(1)(B) & (h)(5).

Subsection 32(h)(3)(C) appears to be misplaced. The act of sending a copy of the court's determinations to the PSR does not ordinarily, and need not, occur "At sentencing ..." This should be moved to a new subsection (k). Instead, a provision should be added expressly stating that the court, prior to inviting the parties to make statements under subsection (h)(4), "(C) must (1) announce its determination of the applicable guideline range and the basis therefor, except that the court may reserve its ruling on the issue of acceptance of responsibility until after the defendant has exercised or waived the right of personal allocution; and (2) rule tentatively on any request for departure from the applicable guideline range, at least to the extent of stating whether the court intends or does not intend to depart, and on what grounds." This procedure, followed very effectively by a number of

district judges, allows the parties to focus their allocutions on achieving a sentence at a certain point within the applicable range, or on the extent of appropriate departure, or on persuading the court to reconsider a tentative disposition, rather than making a statement that does not comport at all with the court's contemplated action.

Rule 32(h)(4) should be revised to reflect the order in which various persons should be invited to speak prior to the imposition of sentence: (A) any victim entitled to speak should have the opportunity to speak first, followed by (B) the attorney for the government, (C) the defendant, and (D) the defense attorney. The Rule should state, in keeping with the common law and longstanding tradition, that the defendant must not be placed under oath for his or her allocution. The reference to the prosecutor's opportunity being "equivalent to that of the defendant's attorney" is confusing and unnecessary, and also wrongly implies that the prosecutor is entitled to speak after the defense attorney at the sentencing. The list of persons who may exercise the victim's right to speak instead of the victim personally should be expanded to include, as an alternative, "one attorney for the victim."

Rule 32(i)(1)(A) would be clearer if it referred to the right of appeal of a defendant who "was convicted after trial or on a plea of guilty pursuant to Rule 12(a)(2) (conditional guilty plea)." Rule 32(i)(1)(C) should be expanded to include advice of the right to counsel, including court-appointed counsel, on appeal, as well as the right to appeal *in forma pauperis.*

PROPOSED RULE 35(b)

Proposed Rule 35(b)(2) should allow reduction for substantial cooperation after more than one year not only if the usefulness of the information "could not reasonably have been have anticipated" within the year, but also if its usefulness could not reasonably have been "fully evaluated" within the year. Ongoing investigations should not have to be rushed to completion to meet an artificial deadline. Moreover, in some

cases the usefulness of the information depends on the willingness of the defendant to testify at a trial which cannot or will not be held within the first year, even though the information was known and its usefulness was "anticipated" within that time.

New subsection 35(b)(3) should be clarified to express its intended meaning better by adding, before the comma, "and the extent to which the sentence should be reduced on that account," and after "the court may consider the defendant's presentence assistance" the words, "as contributing to that showing." Finally, in the Advisory Committee Note, it should be expressly stated that "substantial assistance in investigating . . . another person" includes the provision of truthful information to the government which exonerates that person from suspicion or charges of wrongdoing.

PROPOSED RULE 41

NACDL strongly opposes the proposed amendment to Fed. R. Crim. P. 41 to expressly authorize, for the first time, the issuance of federal search warrants for the purpose of "covertly observ[ing] a person or property." The amendment would place the institutional imprimatur of the federal judiciary on forms of intrusion which are, at best, so like a "general search" and thus so destructive of privacy that it is doubtful they could ever be undertaken in a manner which is constitutionally "reasonable" and which meets the particularity requirements of the Fourth Amendment. "Covert observation" under such warrants might occur either through live "sneak and peek" entries or through the installation of video cameras (and perhaps other electronic devices we can imagine and those which we cannot even imagine).

In the area of search and seizure we all know that rules that can be abused will be abused. Over the past twenty years, according to the uncharacteristically argumentative proposed Advisory Committee Note, barely a half dozen cases appear to have approved searches which are even similar to those which the rule would now affirmatively allow. (One of these is cited incorrectly, *United States v. Villegas*, 899 F.2d 1324 [not 1334], 1333-38

(2d Cir. 1990).) Many of these cases arose out of truly extraordinary facts -- investigations of tightly structured, secretive, violent criminal organizations, where numerous other law enforcement strategies had already been tried unsuccessfully. *See, e.g., United States v. Biascucci*, 786 F.2d 504 (2d Cir. 1986); *United States v. Torres*, 751 F.2d 875 (7th Cir. 1984). Under this proposal, case law derived from extraordinary cases is martialed to justify the proposition that such secret and illimitable intrusions should be viewed as normal. Once again, we see how hard cases make bad law.

When the Supreme Court, having expressly brought the modern-day technology of electronic surveillance within the purview of the Fourth Amendment in *Katz v. United States*, 389 U.S. 347 (1967), then found New York's scheme for the authorization of wiretapping not to meet Fourth Amendment standards, *see Berger v. New York*, 388 U.S. 41 (1967), an elaborate statutory structure, Title III (18 U.S.C. 2510-2520), was designed by Congress. Those detailed procedures resulted from a full, public debate, which resulted in rules describing what might be deemed "reasonable" and which might meet Americans' general standards for freedom from governmental intrusion. Other untraditional forms of electronic search have also been regulated through detailed legislative schemes. *E.g.*, 18 U.S.C. secs. 2701-2708; *id.* at 3121-3127. That is the route the Department of Justice should take in this instance if it wishes advance authority for such searches. Otherwise it should have to continue to take its chances, case by case, that its actions will be deemed reasonable and otherwise constitutional by the judicial officer examining a proposed warrant, or by the judge considering the motion to suppress or tort claim after the fact.

Asking the Judicial Conference to add a few words to Rule 41 is not the right way to take such a significant step, one that is really qualitative, not quantitative, not really procedural but more one of law enforcement policy that should be publicly vetted through the political process. Through this process, we would obtain rules that might seem sufficient to protect the privacy rights of the innocent, as they should. Instead, this amendment would create a situation where only those entries which are productive, leading to the seizure of incriminating evidence, would result in litigation; the

result will be court decisions which justify after the fact more than Congress would have authorized in advance.

Even if Rule 41 is to be amended more or less as proposed, it could and should be withdrawn this year, discussed more fully, reworked, and improved. The key term "covertly observe" in the rule is undefined, but should be explained. (The Reporter's note in the style revision book refers to this revision as authorizing "a covert entry for purposes of noncontinuous observation," while nothing in the revision itself is so limited.) The wording of proposed Rule 41(d)(1) should also be revised to make clear that "or covertly observe" is grammatically an alternative to "seize," not to "search for and seize." In other words, the rule must unambiguously recognize that any entry to covertly observe, as well as the observation itself, is a Fourth Amendment "search," at least, if not itself a form of "seizure" (of information), as held in *United States v. Freitas*, 800 F.2d 1451, 1455 (9th Cir. 1986). *See also* Rule 41(a)(2)(A) (defintion of "property" includes "information") (this version contains a typographical error, in which subsections (a)(1) and (a)(2) are designated "(a)(4)" and "(a)(5)"). The entry is a search, but so is any subsequent action by which anything in the place entered is touched, manipulated or moved. *See Arizona v. Hicks*, 480 U.S. 321 (1987). The latter searches also require probable cause to believe that a seizable object, or evidence of a crime, will be found. Id.

The Advisory Committee Note suggests that the purpose of the entry may be only to obtain further investigative leads or "to determine the layout of [an] office [or home] for purposes of seeking additional warrants to establish surveillance points . . . ." Neither of these objectives (the latter, essentially unintelligible) comports with a traditional notion of the legitimate objects of a search. There must be probable cause to believe that either something that law enforcement officers are entitled to seize, or at least "property that constitutes evidence of a criminal offense," 18 U.S.C. sec. 3103a, will be found. *See also* Rule 41(c). These warrants, by contrast, are apparently designed in part to search for information from which probable cause for some other search can be built. That is not a "search" the Fourth

Amendment considers reasonable, nor what the Amendment means by "probable cause."

If an application seeks issuance of a "covert observation" warrant based on something other than traditional probable cause, the good faith exception to the exclusionary rule would not apply. Nor does good faith apply to challenges to the execution of a warrant.

A few examples of the proposed rule's other deficiencies should be sufficient. "Covert observation" under this Rule could easily be construed to include an entry in which law enforcement officers bring in a computer and a scanner and take away all the information in hundreds of documents for later study. Equally serious, nothing has been drafted to parallel Rule 41(f)(2)-(4) mandating a detailed "inventory" of all that was covertly observed, including a list or contemporaneous record of whatever the entering police choose, for example, to read while present, or what they see on a desktop, or learn from looking at the tabs on the files in a file cabinet. Without some sort of inventory and return, "covert observation" warrants will become a ruse to avoid the notice and return requirements of Rule 41, each of which is part and parcel of the reasonableness of execution of the warrant under the Fourth Amendment.

As the cases show, the need for a "covert observation" warrant, because of its extraordinary intrusiveness and its exemption from the requirement to leave behind a copy of the warrant, should be separately and specially shown. As is the case with a wiretap, there should have to be a special showing that other reasonable methods have failed or are demonstrably inadequate. This is especially necessary because, as the other part of the amendment contemplates, the target of the search will likely not even know about the invasion of privacy for days or months. Rule 41(f)(5). The rule, in light of the Fourth Amendment, inherently requires an advance showing of probable cause to believe that a crime has occurred and that specified evidence will be found to be observed. But, where the target will not even know about it for so long, more should be required to make it "reasonable" -- "the touchstone of the Fourth Amendment." Either these

sorts of restrictions should be written into the rule, or the Committee should leave the issue to Congress or to case by case examination.

There is too much flexibility and discretion in delayed disclosure under Rule 41(f)(5). Time limits will be too easily manipulated by the police. Seven days could become seven months, since there are no restrictions other than "good cause" to delay disclosure repeatedly under the rule. What is a "reasonable period" for the length of the extensions? A citizen should have a right to know promptly that the sanctity of his or her home has been invaded by the government "just looking around." Obviously, the government should not have to disclose and compromise an investigation, but what about an investigation deliberately or negligently delayed? NACDL suggests that the rule allow only one 14-day extension for "good cause." Any further extensions should be allowed only on a detailed showing of "exceptional circumstances." Findings of fact and conclusions of law should be filed with the warrant in the District Clerk's Office on each extension so the target can have a basis for challenging the delay. Thus, one or two extensions should be the practical limit.

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.

Very truly yours,

William J. Genego
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