National Association of Criminal Defense Lawyers
NACDL 1958

April 14, 1993

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Changes in Federal Rules of Evidence,
Federal Rules of Appellate Procedure,
and Federal Rules of Criminal Procedure
Request for Comments, Issued December 29, 1992

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 7500 members of our association, and its 40 state affiliates with a total membership of about 22,000.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

1. Corporate defendant statements

The amendment to subdivision (a)(1)(A) would require the government, in the case of a defendant which is an organization, to produce upon request a written statement of various persons (director, officer, employee or agent) who were so situated "as to have been able legally to bind the defendant in respect to the subject of the statement" or whose conduct would have been able legally to bind the defendant with respect to the conduct.

We endorse the amendment but would suggest that the provision be further modified to provide that it also applies to those persons who the government contends were in a position to bind the defendant. There may be situations where a defendant may not want to acknowledge, and may in fact dispute, that a particular person was able legally to bind it but the government may claim otherwise. If the government's position is that the person could

legally bind the defendant, the person's statement should be disclosable even if the defendant disagrees with the government's position.

2. Disclosure of information relevant to sentencing guidelines

While not included among the proposed amendments, we believe that it is appropriate to take this opportunity to recommend to the Committee that Rule 16 be amended to provide disclosure of certain information relevant to the application of the Sentencing Guidelines. Given the critical importance of the correct application of the guidelines in every case, even when evaluating a decision as to whether to proceed to trial or reach a plea disposition, the discovery rule should explicitly state the prosecution has an obligation to disclose to the defendant information in the possession of the government which may affect the defendant's offense level, role in the offense and mitigating circumstances under the Guidelines.

Rule 29. Motion for Judgment of Acquittal

We welcome and endorse the Committee's proposed amendment to Rule 29 which would make it clear that where the court reserves ruling on a motion for judgment of acquittal at the close of the government's case the court's later decision on the motion must be based only on the information introduced prior to the motion having been made.

Rule 32. Sentencing Procedure

NACDL generally endorses the concept of revising Fed.R.Crim.P. 32 to provide a procedure more in keeping with sentencing under the guidelines. (Either the revised Rule or the commentary should make clear, however, that "old" rule 32 should continue to be applied to "old law" sentencings when they arise.) We do have some suggestions to make and some concerns with the proposed draft.

1. Rule 32(a)

Conditions and caseloads vary sufficiently around the Nation that the federal Rule should not appear to set a standard time frame, even subject to a "good cause" waiver. It is not clear that, apart from individual cases, a local rule could set a different and longer presumptive period on account of local

conditions which the judges of that district consider to be "good cause" for a finding-to-sentencing period of more than 70 days. See also time limits set forth in proposed subsections (b)(6)(A), (B), and (C).

2. Rule 32(b)(2)

The confirmation of a defendant's right to have counsel attend the presentence interview is a welcome clarification.

3. Rule 32(b)(4)(D)

The Rule appears to limit the PSI's discussion of victim impact to the effect of the offense on "any individual." This is too limited in many cases, where the impact of the offense may be felt on a group of unidentified persons (such as consumers in a fraud case), or on a community or polity (as in certain governmental corruption cases, bankruptcy frauds, terrorist crimes, or civil rights offenses), or on a corporation.

4. Rule 32(b)(5)(B) & (C)

The proposed Rule would require withholding of the identity of any source of information to whom confidentiality had been promised, as well as any information which, if revealed, "might" result in harm, "physical or otherwise," to any person. These categories of nondisclosure are much too broad. Where the standard of proof is so lax and the consequences of error so great as in sentencing, the use of secret sources threatens to undermine the reliability of the result to an unacceptable extent. Under proposed (b)(5)(B), simply by "promis[ing]" confidentiality, even without any justification, the probation officer can create a PSI consisting of anonymous accusations, which in turn could result in Guidelines "relevant conduct" determinations, "role in the offense" adjustments, and the like, that could drive a sentence upward without any semblance of confrontation or due process. The PSI is already a confidential document. The only person being kept in the dark by this provision is the defendant. The Rule should allow exclusion of the identities of sources only upon an ex parte showing by the probation officer to the satisfaction of the Court that disclosure would likely result in physical harm to another person; the fact that such a determination has been made should then be required to be disclosed to the defense. (In other words, subsection (B) should be deleted and merged into subsection (C)). Information excluded for fear of psychological harm to the defendant should nevertheless be required to be disclosed, perhaps separately, to defense counsel.

5. Rule 32(b)(4)(B)

There is a strong sentiment within the federal criminal defense bar that the requirement that probation officers calculate the applicable guidelines, in light of the burgeoning case law, amendments, and inherent ambiguities, has placed the USPOs in the position of interpreting cases, constitutional provisions, and complex administrative rules, thus acting as untrained lawyers or even magistrate judges. Many among us feel that the presentence report should contain objective findings on all facts pertinent to a guideline calculation, without setting forth the calculation. Instead, each party should be required to submit a calculation based on the draft PSI, to be included as part of the addendum when the revised and corrected final version is forwarded to the Court. While NACDL does not formally take that position, we do wish to make our concern known to the committee for its further consideration. See also comment to Rule 32(b)(6)(B).

6. Rule 32(b)(6)(A)

The document disclosed to counsel at least 35 days prior to sentencing (but see comment to Rule 32(a) above) should be referred to as the "proposed presentence report." The rule should make clear that this draft is not yet to be disclosed to the court. The Rule should provide that during this period any materials, such as documents or reports of interviews, etc., disclosed to the USPO by any person to aid in preparation of the report must be made available to either counsel, upon request, for inspection.

7. Rule 32(b)(6)(B)

The probation officer should not have the power to "require" the defendant or counsel to meet to "discuss" any unresolved issues. The USPO may wish to suggest a conference, but the officer is not a judge and therefore should not exercise the coercive power of the Court. Enhancing the USPO's quasi-judicial powers in this way will only aggravate the current tendency toward an adversarial, hostile relationship between counsel and the probation office. As discussed above (under Rule 32(b)(4)), we are also concerned about the USPO's role in "resolving" or "ruling" upon "legal issues."

8. Rule 32(b)(6)(D), (c)(1)

Subsection (b)(6)(D) refers to a "presentencing hearing," which is a phrase not otherwise used or defined in the Rule. We

agree with the implication of this subsection, which we hope was intended, that it is generally a good practice for the Court to hold a presentencing hearing for the purpose of factfinding and resolution of disputes as to applicable guidelines, separate from the sentencing hearing at which the parties make their presentations as to the actual sentence to be imposed in light of that guideline determination. The litigious atmosphere of the presentencing hearing is quite inconsistent with the proper tone of a sentencing.

In addition, as presently drafted, subsection (c)(1) implies that the only testimony that may be heard in connection with a sentencing is evidence "on the objections." This is too limited; at many sentencing, family members and others have important information to present that may be pertinent to the selection of an appropriate sentence (whether within the guidelines or by way of departure, or which may bear on the selection of a fine or amount of restitution, or the proper conditions of probation) and which does not go to any particular "objection." Finally, Rule 32(c)(1) should require that a copy of the PSI, including the Addendum and any findings as to objections, be transmitted to the Bureau of Prisons in any case in which commitment to the custody of the Bureau is part of the sentence. As written, this appears to be optional.

9. Rule 32(c)(3)

The Advisory Committee Note suggests that the text of the revised Rule is intended to establish the order in which steps are to be taken. If so, then Rule 32(c)(3)(A) is out of place; it should be in (c)(1). If subsections (c)(3)(B)-(D) are intended to suggest the order in which allocutions should be made, we would suggest a change. The prosecutor should speak first, then the defendant personally, and finally defense counsel, with an opportunity for prosecutorial rebuttal of misstatements, in the court's discretion. Giving the defense the last word is more consistent with the order of argument after a trial, and with the respect for the defendant's humanity that is implicit in the common law right of allocution, the rule of lenity, and the statutory command that punishment be "no greater than necessary." 18 U.S.C. § 3553(b).

FEDERAL RULES OF EVIDENCE

Rule 412. Sex Offense Cases; Relevance of Victim's Past Sexual Behavior or Predisposition

1. "Predisposition"

The proposed amendments expand the evidence that is excluded under the rule to include evidence of "predisposition." Predisposition of what? The amendments do not make this clear. Is it predisposition of (for?) sexual behavior or predisposition of (for?) sexual misconduct? Not only is unclear what predisposition is supposed to refer to, but the term "predisposition" itself is not defined by the rule and is never mentioned in the Committee Note.

Unless the rule defines "predisposition" and provides a justification as to why this additional category is necessary, we believe it should not be included in the amended rule. This is especially true because "predisposition" is ordinarily considered to be a term of art that has special application in the defense of entrapment. To include it in a rule on exclusion of past sexual behavior would thus only increase the likelihood of confusion.

It may be that the Committee intended to use the word "propensity," which is a term of art commonly associated with sex crimes cases. See, e.g., 1 McCormick on Evidence § 190, at 803 (4th ed. J.W. Strong, et al., 1992). There is an entire body of law concerning what constitutes "propensity" evidence and discussing its admissibility. If the Committee intended to use the term "propensity," that should be made clear in both the rule and Committee Note and an opportunity to comment should be provided.

2. Notice period

The amended rule, as with its predecessor, requires that 15 days advance notice be given on the intent to introduce evidence of past sexual behavior (and "predisposition" evidence under the amended rule). The notice requirement was reasonable when it applied to cases in which the sexual misconduct was charged as a crime, because the defendant was then on notice of the possible need to introduce evidence of past sexual behavior. Since the amended rule is expanded to include cases in which sexual misconduct is not charged, the notice provision may be unfair. A solution would be to include a provision which says that notice must be given 15 days prior to trial of a party's inten-

tion to offer evidence of past sexual behavior of an alleged victim where the party seeking to include in its case evidence of sexual misconduct has given written notice of its intention to do so where the sexual misconduct is not charged as a crime.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 9. Release in a Criminal Case

1. Suggested clarification as to which subdivision applies before and after sentencing

The rule creates unnecessary confusion as to whether subdivision (a) or (b) applies after a finding of guilt (by plea or trial) and before sentencing. Subdivision (a) says it applies to "Release Before Judgment." "Judgment" in a criminal case is sentencing. See Fed.R.Crim.P. 32(d). If judgment is sentencing, then subdivision (a) would seem to apply any time before sentencing. Subdivision (b) says it applies to "Release After Judgment of Conviction." What is the meaning of the term "judgment of conviction"? If "judgment of conviction" is the entry of a finding of guilt, it would seem that subdivision (b) is meant to apply not only after sentencing, but before sentencing and after a finding of guilt. Either subdivision (a) should be changed to read "Release Before Judgment of Conviction" or subdivision (b) should be changed to read "Release After Judgment."

It is possible to read the Committee Note to suggest that subdivision (b) is meant to apply after a finding of guilt has been made and that subdivision (a) is meant to apply before a finding of guilt and at no time thereafter. If that is the intended division, then the change suggested above to subdivision (a) should be made.

Another possible dividing point between the two subdivisions which would be consistent with the Committee Note and more logical in terms of procedure and jurisdiction would be to make the distinction before and after a notice of appeal has been filed in the principal case. Subdivision (a) could apply any time before a notice of appeal is filed and subdivision (b) could apply any time after a notice of appeal has been filed. This dividing point would also recognize the practical significance of whether there is already in existence a court of appeals case (and file) for the defendant.

2. Clarification that motion must always first be made in the district court

The Committee Note states that even after a notice of appeal of the judgment of conviction and/or sentence has been filed, the defendant must first apply to the district court for release and may not apply directly to the court of appeals. If this is going to be required by the rule, then the text of the rule should state that an application for release or for modification of conditions of release, must always be made in the first instance in the district court.

3. Suggested change to subdivision (c)

Subdivision (c) of the rule provides that the release decision "must be made in accordance with applicable provisions of Title 18 U.S.C. §§ 3142 and 3143." We would suggest that specific statutory references not be used and that the subdivision say that the decision "must be made in accordance with applicable statutory provisions."

Reference to specific statutes increases the likelihood that the subdivision will be incomplete or will become outdated if Congress makes any change in the bail statutes. For example, 18 U.S.C. § 3145 also applies to certain aspects of the release decision, yet it is not mentioned by subdivision (c). Moreover, the benefit to be gained by reference to the specific statutory provisions (alerting the reader to what they are), can be accomplished by making reference to them in the Committee Note.

4. Opportunity to present new information on appeal

We recommend that either the text of subdivision (b) or the Committee Note be amended to make it clear that a party requesting bail from the court of appeals may supplement the record of the district court bail proceedings with appropriate evidentiary material. Certain information may be obtained or events may occur after bail is sought in the district court and before the motion is heard by the court of appeals that would be appropriate for the court of appeals to receive. Rather than requiring the party to start over again in the district court, or not to allow the court of appeals to learn of the information, the party should be able to submit additional evidentiary material to the court of appeals that was not submitted to the district court. This accords with current practice, although not explicitly provided for in the Rule. See, e.g., Truong Dinh Hung v. United States, 439 U.S. 1326, 1329 (1978) (Brennan, Circuit Justice, in chambers).

Rule 28. Briefs

Requiring a summary of argument

Some very good appellate lawyers include a summary of argument in their briefs. Some do not. Some use a summary of argument occasionally, but not always. A brief which raises a single issue, for example, may not benefit from a summary of argument. Unless a particular item is necessary in all appellate briefs, it should not be made mandatory by Rule 28. In our experience, a summary of the argument does not meet that criterion. We would recommend that the decision whether to include a summary of argument be left to the judgment of the lawyer.

Making a summary of argument obligatory is also troubling given local rules which shorten the permissible length of appellate briefs. The Ninth Circuit, for example, will soon limit briefs to 35 pages. Given the steadily increasing amount of information that already is required to be included in a brief, both by the Federal and local rules, eacg additional requirement, such as that of a summary of argument, leaves less room for the argument itself or the facts that must be presented in support of the argument.

Rule 32. Form of a Brief, an Appendix, and Other Papers

1. Single spaced footnotes

Subdivision (a) would require footnotes that contain more than citations be double spaced. Footnotes in all written materials (including general literature and judicial opinions) are single spaced. What need has been shown for imposing a different rule in federal court of appeals briefs? Perhaps it is true that some lawyers use lengthy textual footnotes in an effort to get more information into the 50 pages permitted for a brief. Those efforts are ultimately self-defeating to the lawyer's cause, however, which should be sufficient restraint against misuse of footnotes. There is no reason why all appellate lawyers should be presumed to be incapable of using footnotes properly and in a manner which makes them effective, even when single spaced.

2. Location of the number of the case

Subdivision (a)(1) adds a new provision which states that "the number of the case must be centered at the top of the front

cover." While we question the need for the federal rules to dictate the location of the number of the case, if it is the intention of the provision to require the number to be at the very top of the cover page, the text of subdivision (a)(1) should be clarified. The order of discussion should correspond to the item's location on the cover page, from top to bottom. The subdivision would then read: "(1) the number of the case, which must be centered and placed at the top of the page, above all other information; the name of the court; ...."

3. Form of a petition for rehearing

Subdivision (b) provides that a petition for rehearing or suggestion for rehearing in banc shall be in the form required for a brief under subdivision (a). Since some circuits allow rehearing petitions to be done in the form of a motion, the subdivision should be modified to provide that a rehearing petition or suggestion for rehearing in banc may be in the form of a brief or a motion.[1] Alternatively, subdivision (b) should be modified to provide that the petition shall be in the form prescribed by subdivision (a) unless a local rule provides otherwise.

Rule 38. Damages and Costs for Frivolous Appeals

The amendment would make it explicit that notice must be provided before damages or costs can be imposed. We believe the notice requirement is important and strongly endorse the Committee's proposed amendment.

Rule 41. Issuance of Mandate, Stay of Mandate

Presumptive period of stay pending certiorari

Subdivision (b) provides that the stay of the issuance of the mandate shall be for 30 days unless the period is extended for "cause shown" or unless a petition for a writ of certiorari is filed within the 30 day period and the party files a notice from the clerk of the Supreme Court reflecting the filing of the petition. The 30 day period was written into the rule at a time when the period for filing a petition for a writ of certiorari in a federal criminal case was 30 days. As of January, 1990, the Supreme Court's rules were amended to provide that a party has 90 days to file a petition for a writ of certiorari. The period of time in subdivision (b) should be modified to 90 days so that it corresponds to the Supreme Court rule. Even if the

period is not changed to 90 days, it should be extended to at least 60 days to provide a party with the benefit of a stay a reasonable amount of time within which to prepare and file a petition for a writ of certiorari.

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,

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of Criminal Defense Laywers
Committee on Rules of Procedure