112th Congress, 2d Session – – – – – – – – – – – – House Document 112–104

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2072

MAY 7, 2012.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

19–011 WASHINGTON : 2012

LETTER OF SUBMITTAL

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 23, 2012.

Hon. JOHN A. BOEHNER,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Prbcedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Supreme Court recommitted proposed amendments to Rules 5(d) and 58 of the Federal Rules of Criminal Procedure to the Advisory Committee for further consideration.

Sincerely,

JOHN G. ROBERTS, Jr.
Chief Justice.

April 23, 2012

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5 and 15, and new Rule 37.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2012, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance

* * * * *

(c) Place of Initial Appearance; Transfer to Another District.

* * * * *

(4) ***Procedure for Persons Extradited to the United States.*** If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

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Rule 15. Depositions

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(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by Rule 15(c)(3), the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by Rule 15(c)(3), a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as

provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

(f) Admissibility and Use as Evidence. An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

* * * * *

Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

* * * * *

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JUDGE THOMAS F. HOGAN
Secretary

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: The Honorable Thomas F. Hogan

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 5, 15, and 58, and new Rule 37 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2011 session. The Judicial Conference recommends that the amendments and new rule be approved by the Court and transmitted to the Congress pursuant to law.

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

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 5, 15, and 58[1], and new Rule 37, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 5 and 58 and new Rule 37 were circulated to the bench and bar for comment in August 2010. Scheduled public hearings on the amendments were canceled because no one asked to testify. The proposed amendment to Rule 15 was circulated to the bench and bar for comment in August 2008 and approved by the Judicial Conference in September 2009, but remanded to the advisory committee by the Supreme Court for further study in April 2010. The advisory committee revised the language in the proposed amendment to Rule 15 and the accompanying committee note and determined that republication was unnecessary.

* * * * *

The proposed amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition. The rule applies even if the defendant first arrives in another district. Interrupting an extradited defendant's transportation to hold an initial appearance in the district

[1] The Supreme Court declined to approve the proposed amendments to Criminal Rules 5(d) and 58. Because the proposed amendments to Rules 5(d) and 58 will not be transmitted to Congress, the discussion of those amendments is not included in the report.

of arrival can impair the defendant's ability to obtain and consult with trial counsel and to prepare a defense in the district where the charges are pending.

* * * * *

The proposed amendment to Rule 15 authorizes the taking of depositions outside the United States without the defendant's presence in specified limited circumstances and with the district judge's approval. The amendment addresses cases in which important witnesses — for both the government and the defense — live in, or have fled to, countries where they cannot be reached by the court's subpoena power. The amendment does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The amendment authorizes only the taking of pretrial depositions; it does not speak to their admissibility. Questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The proposed amendment requires that before such a deposition may be taken, the judge must make case-specific findings regarding: (1) the importance of the witness's testimony; (2) the likelihood that the witness's attendance at trial cannot be obtained; (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States; and (4) the ability of the defendant to meaningfully participate in the deposition through reasonable means.

After the proposed amendment was published for public comment in August 2008, the advisory committee received four comments. The Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some drafting issues. The Federal Defenders and the National Association of Criminal Defense Lawyers (NACDL) opposed the proposed amendment, primarily because of concerns about the effect of the proposed amendment on the defendant's rights under the Sixth Amendment's Confrontation Clause. NACDL argued that the amendment would create a right to introduce a deposition obtained through the new procedure, thereby exceeding the authority of the Rules Enabling Act,

and that the proposed amendment would be a back-door means of achieving the goals of a failed attempt to amend Rule 26 in 2002. To address the concerns raised during the public comment period, the advisory committee revised the proposed amendment by explicitly limiting it to felonies and amending the committee note to clarify that the decision to allow the taking of the deposition in no way forecloses or predetermines challenges to admissibility, whether based on the Confrontation Clause or on the Rules of Evidence. With these changes, the advisory committee approved the amendment for submission to the Standing Committee. The Standing Committee approved it in June 2009, and the Judicial Conference approved it in September 2009. In 2010, the Supreme Court remanded the proposed amendment to the advisory committee for further consideration.

At its April 2011 meeting, the advisory committee reconsidered the proposed amendment. The advisory committee made no change in the text of the amendment approved in 2009, but revised the committee note to further clarify that compliance with the procedural requirements for obtaining the deposition testimony does not predetermine its admissibility at trial. Following its April 2011 meeting, after consultation with the reporters and chairs of the Standing Committee and the Evidence Rules Committee, the advisory committee voted unanimously to revise the text of Rule 15(f) to state explicitly in the text of the rule that authorization to take a deposition does not determine admissibility. The advisory committee also approved a further revised committee note that describes the amendment to subdivision (f) and clarifies the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of the deposition testimony at trial. Because the changes simply move to the text a point previously made in the committee note, further emphasize the point in the committee note, and are in accordance with the comments previously received, republication was unnecessary. The Standing Committee approved the revised amendment to Rule 15, with a few stylistic changes, at its June 2011 meeting.

Proposed new Rule 37 clarifies that the procedure described in Appellate Rule 12.1 and Civil Rule 62.1 for obtaining "indicative rulings" also applies in criminal cases. The proposed rule establishes procedures facilitating the remand of certain postjudgment motions filed after an

appeal has been docketed in a case where the district court indicated it would grant the motion. After considering public comments, the advisory committee recommended approval of the proposed new rule as published.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 15, and 58, and new Rule 37, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

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JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
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MARK R. KRAVITZ
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RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 12, 2011 [revised June 30, 2011]

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Richard C. Tallman, Chair, Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Criminal Rules Advisory Committee

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on April 11-12, 2011, in Portland, Oregon, and took action on a number of proposals.

* * * * *

This report presents four action items:

(1) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (initial appearance in extradition cases and consular notification);[1]

(2) approval to transmit to the Judicial Conference a proposed Rule 37 (indicative rulings);

[1] The Supreme Court declined to approve the proposed amendments to Criminal Rules 5(d) and 58. Because the proposed amendments to Rules 5(d) and 58 will not be transmitted to Congress, the discussion of those amendments is not included in the report.

(3) approval to transmit to the Judicial Conference proposed amendments to Rule 15 (depositions in foreign countries when the defendant is not physically present);

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II. Action Items

1. ACTION ITEM—Rules 5 and 58

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Rule 5(c)(4)

The amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation for the purpose of holding an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending. It should also be noted that during foreign extradition proceedings, the extradited person, assisted by counsel, has already been afforded an opportunity to review the charging document, United States arrest warrant, and supporting evidence.

The Committee received two comments on this rule. The National Association of Criminal Defense Lawyers (NACDL) and the Federal Magistrate Judges Association (FMJA) suggested that the amendment be revised to require the initial appearance to be held "without unnecessary delay." The Advisory Committee declined to make this revision because the rule itself already makes this clear. Subdivision (a) of Rule 5 contains the timing requirements for all initial appearances, and subdivision (c) governs the place of initial appearances. Rule 5(a)(1) already requires all defendants who have been arrested to be taken before a magistrate judge "without unnecessary delay," and contains a provision that directly addresses cases in which the defendant has been arrested outside the United States.

Rule 5(a)(1)(B) now provides:

> (B) A person making an arrest outside the United States must take the defendant *without unnecessary delay* before a magistrate judge, unless a statute provides otherwise.

(Emphasis added). The Advisory Committee concluded that this provision—which is referred to in the Committee Note—addresses the concerns noted by the NACDL and FMJA. The Committee declined to add an additional statement regarding timing to subdivision (c), which governs only the *place* of the initial appearance, not its timing.

* * * * *

Recommendation–The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 37

Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009, create a mechanism for obtaining "indicative rulings." They establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case where the district court indicated it would grant the motion. Proposed Rule 37, which was published for comment in 2010, parallels Civil Rule 62.1 and clarifies that this procedure is available in criminal cases. After reviewing the comments received following publication, the Advisory Committee recommends that the amendment be approved as published and forwarded to the Judicial Conference.

The Committee received two comments concerning Rule 37. The FMJA stated that it "endorses the proposed changes." Writing on behalf of the NACDL, Peter Goldberger expressed support for the proposal and suggested two additions to the Committee Note that might be helpful to practitioners with little experience in appellate procedures:

> (1) a parenthetical mentioning the possibility that the conditions of release or detention pending execution of sentence or pending appeal may be modified in the district court without resort to the new procedure; and
>
> (2) a reference to the availability of the procedure in Section 2255 cases. The NACDL proposed adding such a reference to the portion of the Committee Note that reads:
>
> In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does

not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal.

After discussion, the Advisory Committee declined both of the NACDL's suggestions. The Committee determined that the first suggestion went substantially beyond the focus of the amendment itself, running the risk of being either over- or under-inclusive and violating the Standing Committee's policy of keeping Committee Notes short. Regarding the NACDL's second suggestion, the language the NACDL identified for purposes of adding a Section 2255 reference tracks the language of the Committee Note accompanying Appellate Rule 12.1, which was approved by the Standing Committee after considerable discussion. Prior to publishing proposed Criminal Rule 37, the Advisory Committee wrestled with whether to include a reference to the use of the indicative rulings procedure in Section 2255 cases. It eventually decided that the Committee Note as written already makes clear that the identified uses are not exclusive. The Advisory Committee maintained that conclusion after considering the NACDL's comments.

At the conclusion of this discussion, the Advisory Committee voted unanimously to recommend that Rule 37 be forwarded to the Standing Committee as published.

Recommendation–The Advisory Committee recommends that proposed Rule 37 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 15

The proposed amendment to Rule 15 would authorize the taking of depositions outside the United States without the defendant's presence in special limited circumstances with the district judge's approval.

The purpose of the amendment

The amendment, which applies only to depositions taken outside the United States, provides a procedural mechanism to address cases in which important witnesses—both government and defense witnesses—live in, or have fled to, countries where they cannot be reached by the court's subpoena power.

The amendment authorizes *only* the taking of pretrial depositions; it does not speak to their ultimate admissibility at trial. As stated in the Committee Note, questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue to arise, in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct.

1312 (2009).[2] The Committee concluded that it was appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure.

The amendment requires case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

The new procedure does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The proposal thus creates a very limited exception to the requirement that the defendant must be present at any deposition under Rule 15 unless the defendant waives the right to be present or is excluded by the court for being disruptive.

Although the amendment would not predetermine the admissibility of any deposition taken pursuant to it, in drafting the amendment the Committee was attentive to both criteria developed in the lower courts and to Supreme Court Confrontation Clause precedent.

The history of the amendment

The Department of Justice wrote to the Advisory Committee in 2006 proposing that Rule 15 be amended. After a period of study and discussion from 2006 to 2008, the Advisory Committee sought and received Standing Committee approval to publish the proposed amendment for public comment in 2008.

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[2] The defendant in *Ali* was convicted of multiple crimes arising from his affiliation with an al-Qaeda terrorist cell and its plans to carry out terrorist acts in United States. Before trial Ali sought to suppress a confession he made in Saudi Arabia, alleging it was the product of torture by Mabahith security officials. As Saudi citizens residing in Saudi Arabia, the Mabahith officers were beyond the district court's subpoena power. The Saudi government denied the United States's request to allow the officers to testify at trial in the United States but permitted the officers to sit for depositions in Riyadh. The Saudi government had never before allowed such foreign access to a Mabahith officer. After finding it was not feasible for Ali (who was in custody following his earlier extradition from Saudi Arabia) to be transported to Riyadh for the depositions, the district court adopted procedures similar to those outlined in the proposed amendment. Ali had defense counsel both in Riyadh and with him in the United States, the Saudi officials testified under oath, defense counsel was able to cross-examine the Mabahith witnesses extensively, and a two-way video link allowed the defendant, judge, and jury to observe the demeanor of the witnesses. At trial the videotape presented side-by-side footage of the Mabahith officers testifying and the defendant's simultaneous reactions to the testimony. On appeal the Fourth Circuit held that introduction of deposition testimony taken under those procedures did not violate the Confrontation Clause.

After making several changes in response to public comments, in April 2009 the Advisory Committee recommended that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Four comments were received in response to the publication of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Federal Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concerned the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argued that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argued that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argued that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further clarification from the case law. They also urged that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate . . . through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they noted there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience in taking foreign depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Advisory Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within the Department of Justice and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of powers issues. (The Committee did add a provision requiring the attorney for the government to establish that the prosecution advances an important public interest, but this provision was deleted by the Standing Committee.)

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.[3] Second, the Committee declined to require the government to show that the deposition would produce evidence "necessary" to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness's testimony in the United States. In the Committee's view, this might actually water down the requirement in the rule as published that the witness's presence "cannot be obtained."

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when the government (or a codefendant) seeks to introduce deposition testimony, the court will rule on admissibility under the Federal Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high-quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way

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[3] In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

forecloses a Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

The proposed amendment is intended to meet the criteria developed in lower court decisions such as *Ali*, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtably be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Advisory Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. The Standing Committee approved the amendment in June 2009, and the Judicial Conference approved it in September 2009.

In 2010 the Supreme Court remanded the proposed amendment to the Advisory Committee for further consideration. No statement accompanied the Court's action.

The Committee's recommendation

At its April meeting the Advisory Committee voted, with one dissent, to recommend that the Standing Committee approve and transmit a revised Rule 15 proposal to the Judicial Conference. Initially, the Advisory Committee made no change in the text of the amendment approved in 2009, but substantially revised the Committee Note to clarify that authorizing the taking of the foreign deposition does not determine its admissibility at trial. Before the Standing Committee met in June 2011, the Advisory Committee submitted a supplemental memorandum describing revisions in the text of the proposed amendment to Rule 15 and the Committee Note that had been unanimously approved by an e-mail vote of the Advisory Committee. That supplemental memorandum is attached and describes the final version of the amendment proposed by the Advisory Committee. Because the changes further emphasized a point that had already been made in the Committee Note published for public comment, republication remained unnecessary.

As revised, the Committee Note emphasizes that the proposed amendment does not predetermine whether depositions conducted outside the presence of the defendant would be admissible at trial. Rather, it is limited to providing assistance in pretrial discovery. As is the case with all depositions, courts determine admissibility on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The revised Committee Note emphasizes the limited scope of the proposed amendment, which is significantly different from an earlier amendment to Rule 26 that the Supreme Court declined to transmit to Congress. *See* 207 F.R.D. 89, 93-104 (2002). The focus of the proposed 2002 amendment to Rule 26 was the admissibility of evidence at trial; the amendment would have authorized the use of two-way video transmissions in criminal cases in (1) "exceptional circumstances," with (2) "appropriate safeguards," and if (3) "the witness is unavailable."

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as revised and forwarded to the Judicial Conference.

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

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
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SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: May 24, 2011 [revised June 2011]

TO: Hon. Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Hon. Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Proposed Amendment to Rule 15

This memorandum supplements the material previously circulated in the Agenda Book. It includes revisions in the proposed amendment to Rule 15 and the accompanying Committee Note that have been unanimously approved by an e-mail vote of the Advisory Committee. These revisions are the result of consultation with the reporters and chairs of the Standing Committee and Evidence Rules Committee. This memorandum also brings to your attention an issue concerning the interplay between the proposed amendment and the Rules of Evidence.

1. The revision in the text of Rule 15 and the accompanying note.

The proposed amendment, which applies only to depositions taken outside the United States, provides a procedural mechanism to address cases in which important witnesses—both government and defense witnesses—live in, or have fled to, countries where they cannot be reached by the court's subpoena power. Following the Supreme Court's remand for further consideration, at its April meeting the Advisory Committee voted to transmit the text of the rule without change, but it revised the Committee Note to emphasize the limited function of the proposed amendment: it authorizes *only* the taking of pretrial depositions and does not speak to their ultimate admissibility at trial. As stated in the Committee Note, questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

In preparation for the meeting of the Standing Committee, further consultation among the committee chairs and reporters led to a consensus that it would be desirable to state that point in the text of Rule 15(f), which now states that "A party may use all or part of a deposition as provided by the Federal Rules of Evidence." By unanimous e-mail vote, the Advisory Committee approved the following language:

> **Rule 15. Depositions***
>
> * * * * *
>
> **(f) Use as Evidence.** Authorization to take a deposition under this rule does not determine admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

With the exception of this language—which moves to the text a point previously made in the Committee Note—the proposed amendment is identical to that previously approved by the Standing Committee and the Judicial Conference.

By email vote the Advisory Committee also approved a revised Committee Note that describes the amendment to subdivision (f) and clarifies the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of deposition testimony at trial. The revised Note language states:

> While a party invokes Rule 15 in order to preserve testimony for trial, the rule does not determine whether the resulting deposition will be admissible, in whole or in part. Subdivision (f) provides that in the case of all depositions, questions of admissibility of the evidence obtained are left to the courts to resolve on a case by case basis. Under Rule 15(f), the courts make this determination applying the Federal Rules of Evidence, which state that relevant evidence is admissible except as otherwise provided by the Constitution, statutes, the Rules of Evidence, and other rules prescribed by the Supreme Court. Fed. R. Evid. 402.
>
> Rule 15(c) as amended imposes significant procedural limitations on taking certain depositions in criminal cases. The amended rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances after the trial court makes

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*After the distribution of this memorandum, the proposed language was revised to conform to the Standing Committee's style conventions. The restyled language was submitted on behalf of the Advisory Committee and approved at the Standing Committee meeting:

> **(f) Admissibility and Use as Evidence.** An order authorizing a deposition to be taken under this rule does not determine its admissibility.

case-specific findings. Amended Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — on the elements that must be shown. The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved.

2. The relationship between the proposed amendment to Rule 15 and the Rules of Evidence.

Because the admissibility of deposition testimony is governed by the Rules of Evidence, we have attempted to determine whether the amendment would have any implications for or effects on the Rules of Evidence. The Reporter and Chair of the Evidence Rules Committee have noted an ambiguity already present in Rule 804(a)(5) which might come into play if depositions were taken under the proposed amendment. Rule 804(a)(5) provides:

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—
>
> > (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

Subdivisions (b)(2), (3), and (4) govern dying declarations, statements against interest, and personal and family history. These forms of hearsay are admissible only when the declarant is unavailable under (a)(5). Under (a)(5), a declarant is unavailable only if the proponent has been "*unable to procure* the declarant's attendance (or in the case of a hearsay exception *under subdivision (b)(2), (3), or (4), the declarant's* attendance or *testimony*)." (Emphasis added.)

Because the parenthetical in Rule 804(a)(5) refers simply to "testimony," it might possibly be read to include testimony that is for one reason or another not admissible at trial. For example, a prior deposition or testimony in a different case is inadmissible if the party against whom the testimony is now offered did not have an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. *See* Fed. R. Evid. 804(b)(1). In the criminal context, the government often has grand jury "testimony" by a witness which will not be admissible because there was no confrontation or cross examination. In any of these cases, Rule 804(a)(5) might be read at present to bar the admission of hearsay statements under Rule 804(b)(2)–(4). Similarly, if the proposed amendment to Rule 15 were adopted, a court might hold that the government "procure[d]" the resulting deposition "testimony" even if it were ruled inadmissible at trial for Confrontation Clause, poor quality recording, or any other reason. This interpretation would likely be of greatest

concern in connection with declarations against interest. Dying declaration declarants are unlikely to be deposeable, and pedigree statements rarely come up.

We have found no cases in which this interpretation has been considered, and there is reason to think that courts would limit Rule 804(a)(5)'s preclusive effect to admissible testimony. As the Committee Note to 804(b) states: "The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of a specified quality, is preferred over complete loss of the evidence of the declarant." If the rule is construed to implement those policy preferences, inadmissible testimony would certainly not be preferred, so it provides no basis for blocking the admission of quality hearsay. Thus Rule 804(b)'s second policy preference comes into play, and the rule should be interpreted to avoid "the complete loss of the evidence of the declarant."

The history of Rule 804 indicates that the drafters were aware of the possibility that civil and criminal depositions might be taken that would not be admissible,[1] and there is no indication that the

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[1]Congress added the parenthetical to Rule 804(a)(5). As explained in MUELLER AND KIRKPATRICK ON FEDERAL EVIDENCE, 3d ed., § 8:108, 10–12 (footnotes omitted and emphasis added):

> On the definition of unavailability, Congress added the parenthetical qualification in Fed. R. Evid. 804(a)(5). The added language keeps the proponent invoking the dying statement, against-interest, or family history exceptions from claiming the speaker is unavailable because of unavoidable absence unless that proponent took reasonable steps to secure the speaker's testimony, *and the clear intent was to make the party who would invoke those exceptions try to depose the declarant or show why it couldn't be done.* The change originated in the House, and drew some comment and support. It also drew the opposition of the Advisory Committee, which defended the original version of Fed. R. Evid. 804(a)(5):
>
> > . . . None of them [dying declarations, declarations against interest, and declarations of pedigree] warrants this needless, impractical and highly restrictive complication. . . .
> >
> > Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. *No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule 32(a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible*, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

Committee thought a deposition, once taken but ruled inadmissible, would block a finding of unavailability. To the contrary, since the language in question was added to force parties to try to take depositions, courts might be reluctant to adopt an interpretation that would penalize parties from taking depositions when possible and seeking to introduce them.

Although the proposed amendment does not create the ambiguity in Rule 804, it would provide one more circumstance in which these arguments might foreseeably arise if depositions taken under the rule were deemed inadmissible. Alternatively, if the proposed amendment were to increase the number of admissible depositions, that would have a different impact on the Evidence Rules: it would create situations in which declarations against interest—admissible before the amendment—would be barred because of the availability of a preferred form of evidence.

Because the proposal to amend Rule 15 came from the Department of Justice, we consulted with Jonathan Wroblewski and Kathleen Felton about this issue. This memorandum reflects their view of the law, and the Department continues to support the amendment to Rule 15.

We obviously hope that the issue addressed in this memo will not dissuade the Standing Committee from approving Rule 15 and sending it on to the Judicial Conference in the Fall. But I thought alerting you in advance of the June meeting would be helpful.

This argument persuaded the Senate, which tried to delete the parenthetical phrase, but in the end it was restored by the Conference Committee and enacted into law.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 5. Initial Appearance

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(c) Place of Initial Appearance; Transfer to Another District.

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(4) ***Procedure for Persons Extradited to the United States.*** If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

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*New material is underlined; matter to be omitted is lined through. The Supreme Court recommitted proposed amendments to Rules 5(d) and 58 of the Federal Rules of Criminal Procedure to the Advisory Committee for further consideration.

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

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Rule 15. Depositions

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(c) Defendant's Presence.

(1) ***Defendant in Custody.*** Except as authorized by Rule 15(c)(3), the ~~The~~ officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) ***Defendant Not in Custody.*** Except as authorized by Rule 15(c)(3), a ~~A~~ defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant — absent good cause — waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) ***Taking Depositions Outside the United States Without the Defendant's Presence.*** The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

* * * * *

(f) **Admissibility and Use as Evidence.** An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

* * * * *

Committee Note

Subdivisions (c)(3) and (f). This amendment provides a mechanism for taking depositions in cases in which important witnesses — government and defense witnesses both — live in, or

have fled to, countries where they cannot be reached by the court's subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition.

While a party invokes Rule 15 in order to preserve testimony for trial, the rule does not determine whether the resulting deposition will be admissible, in whole or in part. Subdivision (f) provides that in the case of all depositions, questions of admissibility of the evidence obtained are left to the courts to resolve on a case by case basis. Under Rule 15(f), the courts make this determination applying the Federal Rules of Evidence, which state that relevant evidence is admissible except as otherwise provided by the Constitution, statutes, the Rules of Evidence, and other rules prescribed by the Supreme Court. Fed. R. Evid. 402.

Rule 15(c) as amended imposes significant procedural limitations on taking certain depositions in criminal cases. The amended rule authorizes a deposition outside a defendant's physical presence only in very limited circumstances after the trial court makes case-specific findings. Amended Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant's presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — on the elements that must be shown. The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved.

This amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's

physical presence in certain cases involving child victims and witnesses, or any other provision of law.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The limiting phrase "in the United States" was deleted from Rule 15(c)(1) and (2) and replaced with the phrase "Except as authorized by Rule 15(c)(3)." The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant's presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive. In subdivision (c)(3)(D) the introductory phrase was revised to the simpler "because."

In order to restrict foreign depositions outside of the defendant's presence to situations where the deposition serves an important public interest, the limiting phrase "in a felony prosecution" was added to subdivision (c)(3)(A).

The text of subdivision (f) and the Committee Note were revised to state more clearly the limited purpose and effect of the amendment, which is providing assistance in pretrial discovery. Compliance with the procedural requirements for the taking of the foreign testimony does not predetermine admissibility at trial, which

is determined on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Other changes were also made in the Committee Note. In conformity with the style conventions governing the rules, citations to cases were deleted, and other changes were made to improve clarity.

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Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) **Notice to the Court of Appeals.** The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered

and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made in the amendment as published.

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