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The New Local Criminal Rules for
The Northern District of Illinois

Terence F. MacCarthy*
Kevin M. Forde**

The Judges of the United States District Court for the Northern Dis-
trict of Illinois recently directed a review of that court's Local Rules
of Criminal Procedure. The review was to encompass, where neces-
sary, revision of the then current rules to reflect changes in the Fed-
eral Rules of Criminal Procedure,1 the Criminal Justice Act of 19642
and the many decisions of the Supreme Court and the lower courts
which have affected criminal procedure. To this end the Judges com-
missioned a Special Committee to recommend a revision of the Rules.
Similarly conceived Committees, under the able chairmanship and di-
rection of Judges Richard B. Austin and Hubert L. Will, redrafted and
updated the court's General and Bankruptcy Rules respectively. The
authors were honored to serve on the Committee to Draft Proposed
Local Criminal Rules along with Richard G. Schultz, Chief of the Crim-
inal Division of the United States Attorney's office, and Elbert A. Wag-
ner, Jr., Clerk of the Court. The make-up of the Committee included
and sought to represent both sides of the practicing bar in the criminal
field as well as the interests of the court.

As the Committee conceived its responsibilities, it was to draft and
submit to the Court for its consideration up-to-date local criminal rules
which would both promote simplicity in procedure and assure fairness
in the criminal process.

Accepting this responsibility and guided by this design, the Committee
initially acquired and reviewed the local criminal rules of every multi-
judge federal district in the country. To our disappointment, we found
these local criminal rules, not unlike our own, to be generally unordered,

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* Mr. MacCarthy, the Director of the Court's Federal Defender Program, served
as Chairman of the Committee to Draft Proposed Local Criminal Rules.
** Mr. Forde, Legal Assistant to Chief Judge of the Northern District of Illinois
Clarence Campbell, served as a member of the Committee.
unuseful and totally unresponsive to the needs of an orderly practice of criminal law. Many of the districts, in fact, had no local criminal rules; necessarily then, the general rules or the civil rules of the court applied to criminal cases.

On the other hand, the Committee was very successful in its solicitations of suggestions and recommendations from the U.S. Commissioner, the U.S. Attorney and his assistants, the Court’s practicing criminal bar and the personnel of the Clerk’s office. Thanks in a large measure to their cooperation and willingness to offer suggestions and observations, the Committee was in a position to distill what it considered to be the most desirable and meaningful concepts in the area of criminal procedure.

Based in the main upon the individual research of the Committee members, necessarily assisted and in part directed by the comments and suggestions of those mentioned in the preceding paragraph, the Committee, after months of sincere debate and discussion, prepared and, on February 5, 1969, submitted to the Court its “Proposed Local Criminal Rules”. In presenting the results of the Committee’s work we expressed to the Court our overriding desire to avoid the formulation of rules and practices solely on the basis of past practice or the existence of prior rules. However, where existing practices have proved both fair and efficient, and thus consistent with recent changes and advances in criminal procedure and judicial administration, the Committee has suggested their retention.

In addition to and accompanying each proposed Rule, the Committee submitted its “Committee Comment” and, in a few instances, its “Minority Comment”. To a large extent the Comments reflect the rationale supporting the Rule. Necessarily, however, the Comments reflected the personal opinions of the individual members of the Committee. Accordingly and understandably, these Comments were in no way officially adopted by the court. We feel, however, that the general contents of these Comments will be of interest to the bar in working with the new Rules in our district and, possibly, in considering rules for other districts. For that reason, taking literary license where we deem appropriate, we present here many of the thoughts expressed in the Committee Comments, though in a somewhat revised form.

We respectfully submit that the United States District Court for the Northern District of Illinois now has the most complete and substantial,
as well as the most far-sighted, local criminal rules of any district in
the country. Procedural simplicity and effectiveness are intended and
obtained. The respective powers and attendant responsibilities of the
Court, the United States Attorney's office and criminal defense attorneys
are clearly defined. In sum the Rules reflect an appreciation of the fact
that criminal matters cannot be judicially administered by rules primar-
ily intended to apply to civil cases.

The Judges of the Court are to be commended for the alacrity with
which they accepted the innovations present in the Rules. This willing-
ness to accept change and to adopt a pragmatic approach to the ad-
ministration of criminal justice is another indication of the continuing
leadership of the District Court for the Northern District of Illinois in
the area of criminal practice.

1.01

ADOPTION OF RULES

(a) Pursuant to Rule 57, Federal Rules of Criminal Pro-
cedure, the following Rules of Criminal Procedure for the United
States District Court, Northern District of Illinois, will hereafter
control the conduct of criminal proceedings in this Court.

(b) These Rules may be cited and referred to as “Local Crim-
inal Rules” or abbreviated as “Local Crim. R.”

(c) Unless otherwise indicated, reference in these Rules to
the United States Attorney shall also mean the Assistant United
States Attorneys and Assistant Attorneys General assigned to a
case.

(d) Reference in these Rules to defendant's attorney is in no
way intended to preclude a defendant from proceeding pro se, in
which case a reference to defendant's attorney applies to defendant.

(e) Upon promulgation of these Rules by the Chief Judge of
this Court he shall furnish the same to the Administrative Office
of the U.S. Courts and direct the Clerk to make copies thereof
available to the public.

Comment

Although seldom if ever acknowledged in Local Rules, none of which
contain a similar provision, Rule 57, Federal Rules of Criminal Pro-
cedure, in addition to authorizing the preparation and promulgation of
local rules governing the conduct of criminal cases, requires the local
rules be: 1) "... furnished to the Administrative Office of the United States" and 2) copied and made available to the public.

1.02

APPLICABILITY OF GENERAL RULES

In all criminal proceedings, the General Rules of this Court shall be followed insofar as they are applicable.

Comment

The Court's General Rules contain a number of provisions which apply to criminal as well as civil cases. For example, the General Rules establish sessions of court, the keeping of records, the form of papers to be filed, the numbering and assignment of cases, the summoning and assignment of jurors and prohibitions against the use of photographing and broadcasting equipment in and around the courthouse. The General Rules also authorize participation in court matters by authorized law students proceeding under the immediate supervision of an attorney, i.e., the internship program of the Federal Defender Program.

Specific reference to the Local Rules being subject to the Federal Rules of Criminal Procedure and Acts of Congress, a provision ofttimes appearing in Local Criminal Rules, is both obvious and unnecessary. Further, Rule 1.01(a) (Adoption of Rules) specifically states that these Rules are adopted pursuant to Rule 57, Federal Rules of Criminal Procedure, which in turn provides that Local Rules "... shall not be inconsistent with ..." the Federal Rules of Criminal Procedure.

1.03

THE UNITED STATES COMMISSIONER OR MAGISTRATE

The office hours of the United States Commissioner or Magistrate for the Northern District of Illinois, in Chicago, shall be from 10:00 A.M. to 4:30 P.M. on Mondays through Fridays, and from 10:00 A.M. to 12:00 noon on Saturdays, except official Court holidays. All persons, including government agents and prosecutors having matters properly coming before the Commissioner or Magistrate shall be in his office ready to transact business before 4:00 P.M. on weekdays, and before 11:30 A.M. on Saturdays.

4. Rule 41, General Rules, United States District Court for the Northern District of Illinois. [Hereinafter cited as General Rules.]
Comment

In substance this Rule incorporates the directives of the Court heretofore contained in a General Order of the Court dated June 13, 1960.

In this, as in all subsequent Rules, all references to the United States Commissioner also refer, in contemplation of the recently passed but as yet unimplemented Federal Magistrates Act, to the United States Magistrate.

1.04

THE GRAND JURY

(a) Chief Judge to have charge of Grand Jury. The Chief Judge shall have supervision and charge of the Grand Jury. He, or in his absence the Acting Chief Judge, shall empanel and charge each Grand Jury at the commencement of its term, provide whatever services it may require including a convenient place for its deliberations, enter all appropriate orders it requests and discharge it upon completion of its deliberations or at the end of its term.

(b) Deputy Clerk to assist Grand Jury. The Clerk of the Court shall designate a deputy to serve as Clerk to the Grand Jury. Such Deputy Clerk shall keep a Docket and appropriate records relating to Grand Jury proceedings and assist in providing whatever services the Grand Jury may require.

(c) Official Reporter to attend sessions of the Grand Jury. An Official Reporter of this Court shall attend and record all testimony of witnesses appearing before every Grand Jury. Such record shall be filed with the Clerk of the Court and transcribed and released to the Court upon order or to the United States Attorney upon request and payment of the appropriate fees to the Official Reporter.

Comment

Subsections (a) and (b) of this Rule, though basically a reiteration of present practice, more clearly define the power and responsibility of the court in connection with the Grand Jury. While the power of the Grand Jury is original and complete, its proceedings are judicial in nature and subject to the direction and supervision of the court. The court

6. See In re April 1956 Grand Jury, 239 F.2d 263 (7th Cir. 1956); In re August
should, therefore, provide for its administrative needs and whatever other assistance it requires. Certain of these services are presently provided by the Department of Justice. This Rule directs the court to undertake these responsibilities.

Subsection (c) is certainly one of the most significant and one of the most advanced provisions of the Rules. It requires all testimony before the Grand Jury be recorded. Recognizing the Grand Jury's status as a judicial proceeding, recordation of its proceedings is understandable. Like the great majority of districts throughout the country, this was not the practice in this district. The past practice was supported by numerous decisions holding that Grand Jury proceedings need not be recorded. Even under the 1966 Amendment to Federal Rule 16 which authorized disclosures of defendant's own Grand Jury testimony, disclosure is required only where the statement has been recorded and hence can be transcribed. The majority of the Committee saw a movement away from the prior cases and, after considerable discussion and over the vigorous objection of the United States Attorney's office, recommended adoption of this Rule. The court agreed with the majority of the Committee and adopted the proposal.

The conclusion of the court is legally sound and philosophically progressive. Since the Supreme Court's decision in Dennis v. United States, which, depending upon your own interpretation, either more liberally defines or altogether does away with the "particularized need" prerequisite to obtaining discovery of Grand Jury testimony, courts have ordered its disclosure in an ever growing number of cases. It would be anomalous indeed if the government could avoid production by refusing to record the testimony it does not desire to disclose. A frequently cited decision by the Court of Appeals for the Second Circuit, United States v. Youngblood, indicates that Grand Jury proceedings are now regularly transcribed in the Second Circuit. Significantly, the Seventh Circuit Court of Appeals has cited Youngblood with approval and expressly adopted, for prospective application, the Youngblood procedure of giving the defense access as of right to a witness' testimony.

7. United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967); Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967); McCaffrey v. United States, 372 F.2d 482 (10th Cir. 1967); United States v. Cianchetti, 315 F.2d 584 (2d Cir. 1963).
10. See particularly United States v. Amabile, 395 F.2d 47 (7th Cir. 1968).
11. See note 7, supra.
Grand Jury testimony on the subjects about which he testified at trial absent a government showing that access should be denied. This right, assured by the Court of Appeals, would be hollow indeed unless the testimony were recorded.

The Rule anticipates a simple procedure for production of Grand Jury testimony. Upon order of court, either *sua sponte* or more generally as a result of a defendant's motion, the Clerk shall turn over the relevant transcript of proceedings. If the recorded testimony has not been transcribed, the Official Reporter who recorded the testimony shall transcribe it for and at the direction of the court.

The United States Attorney may obtain copies of any transcript without the necessity of a court order by the simple expedient of a request to the Clerk. If the recorded testimony has not been transcribed, the United States Attorney may direct his request directly to the Official Reporter who recorded the testimony. The Reporter shall then transcribe and produce the requested proceedings upon payment of the appropriate fee by the United States Attorney.

1.05

**PROCEEDINGS IN REMOVAL CASES**

In all cases in which a defendant has been brought before the United States Commissioner or Magistrate on a warrant originating in another federal jurisdiction and the defendant has been ordered held to this Court for removal to the originating jurisdiction pursuant to Rule 40(b), Federal Rules of Criminal Procedure, the petition for removal by the United States Attorney shall be presented to the emergency judge then designated and sitting, and the petition and any order or warrant of removal ordered by the Court may be by minute order. In the case of a defendant not in custody, the defendant shall be given a copy of the order of removal, which copy shall specify the date and place of his required appearance in the prosecuting jurisdiction.

*Comment*

This Rule eliminates the prior procedure whereby the United States Attorney filed a formal Petition for Removal as a new criminal case with the Clerk of the Court. Under this new Rule, once a defendant
against whom a warrant is outstanding in another federal jurisdiction
has been bound over to the District Court for the Northern District of
Illinois by the United States Commissioner, the United States Attorney
may immediately file a motion slip with the emergency judge moving
the court to order the defendant’s removal. On the basis of this motion
slip and the oral presentation of the United States Attorney, the emer-
gency judge may order the defendant removed to the district where a
warrant for his arrest is outstanding.

The purpose of this Rule is to obviate the necessity of a formal peti-
tion being filed before a person can be ordered removed. In the past,
this procedure has resulted in unnecessary delay in returning a defendant
to another district. Significantly, however, nothing in the Rule will
prevent a defendant from asserting legal objections to the entry of an
order of removal.

1.06

DISCHARGE BY UNITED STATES COMMISSIONER
OR MAGISTRATE

On Motion of the United States Attorney, the United States Com-
mmissioner or Magistrate may discharge the defendant in any pro-
ceedings brought under Title 18, United States Code, Sections
1073, 1074, i.e., unlawful flight to avoid prosecution or confine-
ment.

Comment

This Rule is merely a formal expression of the present, uniformly
followed practice. The purpose is to explicitly affirm that the district
court need not be bothered with what is essentially an automatic pro-
cedure.

1.07

PUBLIC DISCUSSION BY ATTORNEYS OF PENDING OR
IMMINENT CRIMINAL LITIGATION

(a) It is the duty of the lawyer not to release or authorize the
release of information or opinion for dissemination by any means
of public communication, in connection with pending or imminent
criminal litigation with which he is associated, if there is a reason-
able likelihood that such dissemination will interfere with a fair
trial or otherwise prejudice the due administration of justice.
(b) With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(c) From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

1. The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

2. The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

3. The performance of any examination or tests or the accused's refusal or failure to submit to an examination or test;

4. The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

5. The possibility of a plea of guilty to the offense charged or a lesser offense;

6. Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the facts and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or
agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(d) During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

(e) After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Comment

The Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, adopted by the Judicial Conference of the United States on September 19, 1968, recommended that all district courts adopt this Rule. The reason for the Rule is aptly stated in the Report:

One of the chief sources of prejudicial publicity in a criminal case is the prosecution or defense attorney who releases to the news media information about the defendant and the trial. Unquestionably the courts have the power to regulate this particular source of information, and there now seems to be general agreement that they have the duty to do so.  

Similarly, in Sheppard v. Maxwell, the Supreme Court noted:

14. Id. at 26.
The fact that many of the prejudicial news items can be traced to the prosecution, as well as to the defense, aggravates the judge's failure to take any action. . . . Effective control of these sources—concededly within the court's power—might well have prevented that divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment.16

In adopting the Report, the Judicial Conference of the United States made it clear, as the Supreme Court did in Sheppard, that a district court may punish attorneys for infractions of this Rule by disciplinary proceedings or by contempt.

1.08

RELEASE OF INFORMATION BY COURTHOUSE PERSONNEL

All courtroom and courthouse personnel, including, but not limited to, marshals, deputy marshals, court clerks, minute clerks, court reporters, probation officers and other office personnel, shall not disclose to any person, without authorization by the Court, information relating to a pending criminal case that is not part of the public records of the Court. Particularly, all such personnel shall not divulge any information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

Comment

This Rule, similar to prior Rule 1.07, was adopted on the recommendation of the Judicial Conference of the United States through that body's adoption of the Report on the "Free Press-Fair Trial" Issue.17 That Report, like prior reports on the subject, recognized that courthouse personnel may often be the source of potentially prejudicial information. In Parker v. Gladden,18 the Supreme Court ordered the reversal of a conviction on the ground that the jurors had overheard a statement of the court bailiff suggesting the guilt of the accused. Similarly, in Sheppard, the Supreme Court all but directed lower courts to take steps to prevent such prejudicial release of information, saying:

More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official, which divulged prejudicial matters. . . .19

16. Id. at 361.
19. See note 15, supra at 361.
and, further:

The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its functions.\(^{20}\)

1.09

**SPECIAL ORDERS IN WIDELY PUBLICIZED CASES**

In a widely publicized case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order.

*Comment*

Again, like the preceding rules relating to publicity, this Rule was adopted pursuant to the directions of the Judicial Conference of the United States.\(^{21}\) The Rule unequivocally states the inherent power and tremendous responsibility of a court to control or eliminate prejudicial influences from the trial. As the Supreme Court has stated: "The carnival atmosphere at trial could easily have been avoided since the courtroom and the courthouse premises are subject to the control of the court."\(^{22}\) The trial judge has the responsibility to preserve decorum in and around the courtroom and to preserve the integrity of the proceedings. This Rule authorizes specific directives regarding the clearing of entrances to hallways in the courthouse and the management of the jury during trial to avoid their mingling with the public, attorneys or the press. It also authorizes the district judge, although he undoubtedly would have had the inherent authority without the Rule, to take special precautions to see that the proceedings are not disrupted. The court may reasonably limit the number of public spectators permitted to witness the proceedings, insist on proper dress and attire, require public

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20. *Id.* at 363.
21. RULE 1.09 has as its source the Report on the "Free Press—Free Trial" Issue.
spectators to submit to a search of their person before being admitted
and, in general, take whatever steps necessary to preserve good order
and decorum. The Rule further authorizes the trial judge in his discre-
tion and on his own motion to order sequestration of the jury.

1.10

BAIL BOND PROCEDURE

(a) Except in cases where the release of the defendant is or-
dered upon his own recognizance, bail bonds shall be secured by
the deposit of cash (equal to 10% of the bond) or obligations of the
United States in the full amount of the bond, or the undertaking or
guaranty of a corporate surety holding a certificate of authority
from the Secretary of the Treasury, or the undertaking or guaranty
of two individual residents of the Northern District of Illinois.

Bail bonds of individual sureties shall comply with Rule 26(c)
of the General Rules of this Court and shall be submitted to the
United States Attorney for his approval.

(b) Where the Court is reasonably satisfied that the defendant
will appear as required, the Court should release the defendant on
his own recognizance.

(c) When the amount of bail has been fixed by the judge, a
bond, whether secured in one of the ways set forth in paragraph
(a) above, or an own recognizance bond, may be approved by the
Clerk of the Court, a United States Commissioner, a United States
Magistrate, or one of the officers specified in Title 18, United States
Code, Section 3041, provided that only a judge may admit to bail
or otherwise release a person charged with an offense punishable
by death.

(d) A defendant who has obtained his release by depositing
a sum of money equal to 10% of the bond as provided by Title 18,
United States Code, Section 3146, shall be entitled to a refund
thereof when the conditions of the bond have been performed and
the defendant has been discharged from all obligations thereon.
The Clerk shall return the sum to the defendant, or to his attorney
of record for delivery to the defendant. However, where a de-
fendant has been sentenced to pay a fine or a fine and costs, the
sentence shall constitute a lien in favor of the United States on the
bail deposit, which can be removed only by order of Court.
Subsection (a) is in effect a restatement of the General Rules of the Court which provide that “... every bond or similar undertaking must be secured . . . .”

A former Rule pertaining to bail bonds required, “All bail bonds . . . be submitted to the United States Attorney for his approval . . . .” It was the feeling of the Committee that there was no good reason to require the U.S. Attorney to give prior approval to bail bonds other than those secured by individual sureties. Certainly a Personal Recognizance bond contains nothing which merits the attention of the United States Attorney. The information concerning the qualification of a corporate surety is of record in the office of the Clerk of the Court. The deposit of cash equal to 10% of the bond, or obligations of the United States in the full amount of the bond, calls for the exercise of no discretion by the United States Attorney.

Under the prior rule of court, the Clerk could not approve a bond with individual sureties even if it bore the prior approval of the United States Attorney. This rule seemed ill-advised since, by statute, Mayors of cities, State Court Magistrates and even Justices of Peace had such power. There seems to be no reason to withhold from the Clerk power so granted to local officials. Paragraph (c) removes that limitation.

Subsection (d) will save substantial time and effort on the part of the government which has had in the past great difficulty collecting fines, both large and small, imposed in criminal cases. It is anticipated, however, that the court may and will exercise its discretion to release deposited funds where the interests of justice so require, i.e., where the funds are necessary to permit defendant to financially maintain an appeal.

2.01

FILING APPEARANCES OF ATTORNEYS

An attorney representing a defendant in any criminal proceeding pending in this Court or before the United States Commissioner or Magistrate shall file an appearance. This appearance must be filed prior to or simultaneously with the filing of any motion, brief or other document with the Court, or initial Court appearance,

23. Rule 26(b), General Rules.
24. Former Rule 5(b).
whichever occurs first. A copy of the appearance shall be served on the United States Attorney.

The filing of an appearance with the United States Commissioner or Magistrate does not relieve an attorney from filing an additional appearance with the Court if and when the case is brought before the Court, and again serving a copy on the United States Attorney.

The appearance shall include the attorney’s name, local address, city (including zip code), and local telephone number.

Comment

Semantically the Rule refers to the actual filing of the appearance as distinct from the filing of a “notice of appearance”.

The Rule specifically requires distinct and separate appearances be filed with the United States Commissioner and with the court. Thus the filing of an appearance before the United States Commissioner does not relieve an attorney from filing another appearance in the court.

The Rule unequivocally requires appearances be filed prior to or simultaneous with an attorney’s initial pleading or court appearance.

Ofttimes criminal practitioners are remiss, either inadvertently or purposely (where fee considerations are involved), about filing appearances. Although the court was and is sympathetic to the plight of unpaid attorneys, it could not condone this practice of withholding the filing of appearances.

Implicit in the Rule is the strong recommendation that the United States Commissioner and Magistrate and all minute clerks maintain and tender to the attorneys, at arraignments or the attorney’s initial court appearance, at least two appearance forms for immediate completion, signing and filing. The additional copy can and should, in compliance with the Rule, be delivered to the United States Attorney.

It is now specifically required that appearances include, in addition to the attorney’s name, his office address, city, zip code and telephone number. This is the common, although not universally accepted, practice.

Nothing in this Rule precludes the accepted, and at certain times necessary, practice of having associate attorneys appear in addition to, or in lieu of, the attorney(s) of record. Such attorneys, absent the filing of an appearance, do not in these circumstances appear of record. However, this comment should not be read as relieving an attorney of record of the responsibility of being in court when his presence is necessary,
nor does it in any way relieve him of the responsibility for assuring that his associate attorney is acquainted with the case and intelligently prepared to participate in the matter at which he attends.

2.02

**NOTICE OF ARRAIGNMENT AND PLEA**

When an indictment is based upon substantially the same facts as formed the basis for an earlier complaint before the United States Commissioner or Magistrate, the United States Attorney shall send notice of the arraignment and plea to the defendant and a copy of said notice to the attorney, if any, who appeared on the defendant’s behalf before the Commissioner or Magistrate.

Similarly, notice of a motion to dismiss a United States Commissioner’s or United States Magistrate’s complaint shall be served on defendant’s attorney.

*Comment*

Previously, the defense attorney who represented the defendant before the Commissioner received little or no advance notice of an arraignment. As a result, the court was, in the absence of counsel, unable to arraign the defendant without continuing the case.

This Rule will serve to alert the defense attorney to the status of the case so that he may be prepared to intelligently proceed with and answer the charges at the time of arraignment.

Also, in appointed or Criminal Justice Act cases, this Rule will assure continuity of representation by the same attorney who initially represented the defendant before the United States Commissioner.

Notice to defendant’s attorney of motions to dismiss a United States Commissioner’s or United States Magistrate’s complaint, usually brought before the emergency judge, is necessary to assure the proper administration of Criminal Justice Act appointments. Federal Defender Panel Attorneys have understandably, though unnecessarily, refrained from promptly filing vouchers on cases which, unknown to them, have been terminated.

2.03

**COPY OF COMMISSIONER’S OR MAGISTRATE’S COMPLAINT**

Upon arraignment of a defendant before the United States
Commissioner or Magistrate, a copy of the complaint shall be presented to the defendant’s attorney by the United States Attorney.

Comment

It is the usual practice for the United States Attorney’s office to prepare the Commissioner’s or Magistrate’s complaint. It will require little effort to prepare an additional copy for the defendant’s use, thus obviating the delay otherwise necessitated by defense attorney’s long-hand copying of the complaint.

2.04 PRETRIAL DISCOVERY AND INSPECTION

(a) Within five (5) days after the arraignment the United States Attorney and the defendant’s attorney shall confer and, upon request, the government shall:

(1) Permit defendant’s attorney to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(2) Permit defendant’s attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(3) Permit defendant’s attorney to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(4) Permit defendant’s attorney to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which is the property of the defendant and which are within the possession, custody or control of the government;

(5) Permit defendant’s attorney to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant’s prior criminal record;

(6) Permit defendant’s attorney to inspect, copy or photograph any evidence favorable to the defendant;

(b) If, in the judgment of the United States Attorney, it would not be in the interests of justice to make any one or more disclosures set forth in paragraph (a) and requested by defendant’s
counsel, disclosure may be declined. A declination of any requested disclosure shall be in writing, directed to defendant's counsel, and signed personally by the United States Attorney or the First Assistant United States Attorney, and shall specify the types of disclosures that are declined. If the defendant seeks to challenge the declination, he shall proceed pursuant to subsection (c) below;

(c) Additional discovery or inspection. If additional discovery or inspection is sought, defendant's attorney shall confer with the appropriate Assistant United States Attorney within ten (10) days of the arraignment (or such later time as may be set by the Court for the filing of pre-trial motions) with a view to satisfying these requests in a cooperative atmosphere without recourse to the Court. The request may be oral or written and the United States Attorney shall respond in like manner.

(d) In the event defendant thereafter moves for additional discovery or inspection, his motion shall be filed within the time set by the Court for the filing of pre-trial motions. It shall contain:

(1) the statement that the prescribed conference was held;
(2) the date of said conference;
(3) the name of the Assistant United States Attorney with whom conference was held; and
(4) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of defendant's motion.

(e) Any duty of disclosure and discovery set forth in this Rule is a continuing one and the United States Attorney shall produce any additional information gained by the government.

(f) Any disclosure granted by the government pursuant to this Rule of material within the purview of Rules 16(a)(2) and 16(b), Federal Rules of Criminal Procedure, shall be considered as relief sought by the defendant and granted by the Court.

Comment

This Rule, by removing from the court's consideration matters which are not generally in dispute, is designed to afford some relief to the court and counsel from the plethora of stock criminal motions presently plaguing the court. The Rule was recently cited in the Bench Book26

26. Bench Book for the United States District Judges prepared under the auspices of the Federal Judicial Center, § 4.01.2. For a discussion of the Omnibus Hearing, see: Miller, The Omnibus Hearing—An Experiment in Federal Criminal Discovery,
prepared for United States District Judges as an alternative procedure to the Omnibus Hearing procedure recently adopted in a number of districts. The Bench Book points out that the procedure of Rule 2.04 involves little or no judge time. At present, a large majority of the cases upon which indictments are returned result in pleas of guilty. In most cases a defendant's attorney is not in a position to immediately and intelligently make a recommendation on the advisability of entering a guilty plea without the benefit of initial discovery and related legal and factual research. This Rule will require diligence in obtaining the necessary information but, at the same time, will relieve a defendant's attorney from the necessity of filing standard motions otherwise required to protect the record in the case. The necessary filing of these standard motions in turn requires response by the government and ruling by the court—all of which tend to delay rather than expedite otherwise guilty plea cases.

Subsection (a) requires the United States Attorney to provide certain information upon request and without formal motion. The information requested under this subsection is rather routinely provided in the great majority of cases. By requiring the United States Attorney to provide information upon request, the court is relieved of the necessity of considering these motions, and counsel is relieved of the duty of filing written motions and supporting memoranda. Sub-paragraphs (1) through (3) are taken verbatim from Rule 16 of the Federal Rules of Criminal Procedure. The Federal Rules, and accordingly our Local Rules, entitle a defendant to his own statements, mental or scientific reports made in connection with the case, and his own testimony before the Grand Jury. Although Rule 16(a) of the Federal Rules semantically conditions such request upon a test of “relevancy”, this test has properly been eliminated by the Local Rules except where, as spelled out in 2.04(b) and contemplated by subsection (c) of Federal Rule 16, the United States Attorney has cause to object to such discovery. Appreciating the rarity of the instances in which the government will properly oppose a request, the validity of government opposition and not the “relevancy” condition was made the test.

Interestingly, since the enactment of the Rules the Seventh Circuit Court of Appeals has held, consistent with the requirement of Rule 2.04, that notwithstanding the Federal Rule 16(a) use of the term “may”, the court must grant a defendant's Rule 16(a) motion for discovery unless

5 SAN DIEGO L. REV. 293 (1968); Report on Recommended Procedures in Criminal Pretrials, 37 F.R.D. 95 (1965).
the government interposes and establishes a Rule 16(e) claim for a protective order. Specifically the court held:

In our view, this subdivision clearly reveals that any showing authorizing the court to deny, restrict or defer discovery or inspection must be made by the government. It is only upon such a showing that there is lodged in a court the discretion to allow or deny a defendant's motion under (a)(1). More bluntly stated, a defendant has the right to an order permitting him to inspect his own written or recorded statements or confessions in the custody of the government, absent a showing by the government under Subdivision (e). It is then that the court is vested with discretion to allow or reject defendant's motion.

Local Rule 2.04, consistent with the requirement of the Isa decision, automatically requires production of Rule 16(a) material by the government, unless, and as is seldom the circumstance, the government justifies the entry of a protective order. Not only is Isa followed but the implementation of the Isa holding and Rule 16(a) is had without the necessity of a form or "boiler plate" motion.

The production requirement of 2.04(a)(4), directing disclosure of property of the defendant in the custody of the government, was a concession to attorneys who continue to utilize form motions derived from the language of Federal Rule 16 prior to its amendment in 1966. The former Rule spoke in terms of discovery and inspection of property "... obtained from or belonging to the defendant ...." This request was, and is, uniformly granted; accordingly, although the specific language is no longer found in the amended Federal Rule 16, an attempt has been made to eliminate the necessity of its formal request. Parenthetically, the right of a defendant to such discovery is incorporated into the much broader language of amended Rule 16.

Sub-paragraph (5), which permits defense counsel discovery of his client's own criminal record, is intended to assist defense counsel in obtaining more accurate information concerning the defendant's arrest and conviction record, so that he need not rely solely upon the memory of his client. The government is to supply a copy of the F.B.I. Identification Sheet which the Assistant United States Attorney generally has in his file. The government is not precluded from using additional convictions not appearing on the identification sheet for purposes of impeachment of the defendant at trial; however, defense counsel should be immediately advised when such additional convictions come to the atten-

27. United States v. Isa, 413 F.2d 244 (7th Cir. 1969).
28. Id. at 248.
Sub-paragraph (6) simply facilitates compliance with the teachings of *Brady v. Maryland*\(^\text{29}\) and its progeny, which require the government to advise an accused of any evidence it may have favorable to his cause and relating to the issues of guilt, innocence or punishment.

In situations where granting the routine discovery set forth above would not be in the interest of justice, the United States Attorney may refuse disclosure. To assure that declination is the exception rather than the rule, and also to assure that there are substantial reasons for refusal to submit to discovery, any declination must be in writing and signed by the United States Attorney or his First Assistant. Where the United States Attorney does so decline to voluntarily turn over the information, the defendant may proceed by motion as shall be described below.\(^\text{30}\) It is respectfully suggested that the issues will then turn on the propriety of the government’s claim for a protective order as contemplated in Federal Rule 16(e).

As to matters not the subject of “automatic” discovery,\(^\text{31}\) the defendant must, as required by Local Rule 2.04(c), within ten days of the arraignment, request, either orally or in writing, the desired information at a conference with the Assistant United States Attorney assigned to the case. This conference should result in a further limitation of the issues ultimately subject to court consideration. The conference provision was presaged in former Local Rule 9, known locally as the “Marovitz Conference Rule”, named after its imaginative author Judge Abraham L. Marovitz. The Marovitz Rule had worked well and was generally applauded by both prosecution and defense attorneys. Specifically, the new Rule provides that within 10 days after arraignment, or such later time as may be set by the court, defendant’s attorney and the appropriate Assistant United States Attorney shall confer with a “view toward satisfying these requests (for additional discovery) in a cooperative atmosphere without recourse to the Court.”

To protect the record, defense counsel may, as already observed, request the information in writing—a procedure not unlike interrogatories in a civil case. He may also request a written stipulation to accurately record the results of the conference.\(^\text{32}\) This can be done by letter, to be filed of record in the case, to the United States setting forth

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30. *Local Rule 2.04(c)*, discussed *infra*.
31. *E.g.*, discovery requests under *Fed. Rule 16(b)* or motions requesting a bill of particulars.
32. Filing of a stipulation was mandatory under former *Rule 9*.
the results of the conference.

After the conference and/or after the United States Attorney has filed a declination as to voluntary disclosure, the limited matters in dispute should be presented to the court by written motion for "additional discovery". Such motions must be supported by written memoranda and should follow the filing and notice procedures as set forth in Local Rule 2.05. Unless otherwise indicated by the court, defendant's motions requesting discovery denied by the government in conference or by declination must be filed within twenty days of the arraignment.

One question and resulting problem arises. Assuming the defense attorney within ten days of arraignment properly confers with the Assistant United States Attorney and makes the contemplated discovery requests, what further obligation does he have where the government is unable or otherwise fails to respond to his subsection (c) additional discovery requests? Must defendant's attorney file his formal motion with the court as required by 2.05(a) within twenty days of the arraignment notwithstanding the possibility that the government might accede to certain if not all of his requests?

In light of the overriding purpose of the Local Rule—to avoid presentation to the court of issues which are possibly moot or easily resolvable by the parties themselves—forcing the defendant to file motions, while at the same time permitting the government by inaction to ignore the Rule, would disserve the spirit of the Rule. Accordingly, it would seem implicit in the Rule that the government be required to respond "forthwith" to defendant's requests for additional discovery, thus permitting defendant's attorney sufficient time to file formal motions with the court where necessary.

An awareness of the excessive demands upon the time of Assistant United States Attorneys, particularly where they are involved in a trial, might indicate that the time limits set forth may hinder application of the Rule. For this reason it is suggested that at the time of arraignment both prosecutor and defense attorney join in a request that motions for discovery under Local Rule 2.04 be filed within ten days after the government's response to defendant's requests for additional discovery. In fairness to the court's control over its calendar, however, a final date for filing such motion, e.g. thirty days after arraignment, and a date for ruling on such motion should be set.

33. Local Rule 2.04(a).
34. Local Rule 2.04(c).
35. To be discussed, infra.
The time schedule contemplated by the Local Rules is longer than that granted in the Federal Rules, but it is believed necessary for two reasons. First, the initial ten day period within which the conference is held is necessary if defendant's attorney is to: (1) have adequate time to evaluate the material discovered within five days of the arraignment, (2) confer with the defendant, and (3) prepare the topics of discussion for the conference to be held with the Assistant United States Attorney. Second, one purpose of this Rule is to avoid the submission of stock motions particularly in cases where a plea of guilty will be entered. By allowing additional time after conference in which to file motions, sufficient time is permitted for evaluation of the case and contact between the defendant and his attorney. Without adequate time, particularly when the defendant is incarcerated, motions would be filed in cases that might otherwise conclude with pleas of guilty. The additional time provided by this Rule should in no way delay the scheduling of trials by the court.

The Rule also makes explicit that the government should not be proscribed from presenting a motion for reciprocal discovery, available under Rule 16(c) of the Federal Rules of Criminal Procedure, simply because it made disclosures to the defendant pursuant to the requirement or suggestion of the Local Rules. Federal Rule 16(c) authorizes the court to condition a grant of defendant's discovery motion under Rule 16(a) and (b) upon a grant of reciprocal discovery to the government. The government's voluntary compliance with the Local Rule related to discovery thus fulfills the Federal Rule's condition precedent for mutual discovery.

Parenthetically, the mood of the Committee was that there should be more reciprocal discovery under Rule 16(a). There has been very little thus far in this or any other district.

Finally, any duty of disclosure set forth in the Local Rule is a continuing one and additional information is to be turned over to the defendant whenever it is obtained.

Relative to 2.04(a)(2), two members of the Committee would have added the following restrictive language to the Rule:

(2) Permit defendant's attorney to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, and relating to the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government.
The respective Committee Comments are set forth verbatim:

Committee Comment in Favor of Inclusion

THE "AND RELATING TO THE DEFENDANT" QUALIFICATION IN (a)(2); SHOULD IT BE INCLUDED OR OMITTED? THE COMMITTEE IS DIVIDED.

It is the position of two members of the Committee that paragraph (a)(2) of this Rule should relate solely to requests by defense counsel for material in possession of the government relating to the defendant represented by such counsel, and should not relate to material in possession of the government relating to co-defendants. The reason for this objection is as follows.

The underlying purpose of the proposed Rule is to set forth regular procedures for discovery of material which is ordinarily made available to defense counsel by the government, and to avoid the necessity of formal pleadings and motions relating to such matters which are usually uncontested. A reading of the entire Rule as drafted clearly indicates that a distinction is contemplated by the Rule between those matters which are usually uncontested as set forth in paragraph (a) of the Rule, and those matters which are usually contested to some degree as set forth in paragraph (c) of the Rule.

The government almost universally contests requests by defendants for production of material relating to co-defendants. Consequently, defense counsel desiring such material will inevitably have to prepare a formal motion requesting such material after the preliminary conference. Therefore, no additional burden on defense counsel is imposed by excluding such material from the first part of the Rule, and no purpose would be served by including such material in the first part of the Rule. Rather, exclusion of such material from the first part of the Rule will be consistent with the general purpose and policy behind the promulgation of such Rule, which is to relieve the necessity of the filing of formal written pleadings with respect to those discovery matters which are regularly uncontested.

Committee Comment in Opposition to Inclusion

The Rule as written save for the suggested inclusion of the following terms "and relating to the defendant" follows verbatim the language of Rule 16, Federal Rules of Criminal Procedure. Two members of the Committee see no reason to deviate from the exact terminology of
the Rule—for that matter we respectfully suggest that the proposed deviation from the exact words and requirements of Rule 16 would substantially reduce the effect and avoid the purpose of this Local Rule.

Legally and semantically speaking there is no support for the suggestion that the discovery provision of Rule 16(a)(2)—i.e., examination reports and scientific tests—is or should be limited to those which relate to “the defendant” as distinct from those which relate to “a particular case”. Rule 16(a) of the Federal Rules of Criminal Procedure provides for three areas of discovery. Subsection (1) concerns statements or confessions; subsection (2), as indicated above, concerns examination reports and scientific tests; and subsection (3) relates to grand jury testimony. All of these matters were and are equally subject to being limited to those related to “the defendant”. The Rule, however, saw fit to place this limitation—and did so specifically—only on subsections (1) and (3). On the other hand, the drafters of the Rule specifically omitted the restriction as to subsection (2) and in so doing broadened its scope to permit discovery related not only to “the defendant”, but rather to “the particular case”.

So also, the Committee Comments, nor for that matter, judicial authority, failed to support or give approbation to a restriction and qualification, by implication, of Rule 16(a)(2).

On the practical side, restricting Local Rule 16(a)(2) discovery by the use of qualifying language specifically not included in the corresponding Federal Rule of Criminal Procedure, will and can only result in defense attorneys being required to move for production in the exact language of the Rule. The necessity and filing of such motions is the very thing sought to be avoided by implementation of this Local Rule.

2.05

MOTION PRACTICE

(a) Pretrial Motions. All pretrial motions and supporting briefs shall be filed within the time fixed by the Court for this purpose. If the Court does not specify a time period, pretrial motions shall be filed within twenty days from the date of arraignment and plea.

(b) Notice and Presentation of Motions. All motions, except as provided in subsection (a) of this Rule and subsections 1) and 2) below, shall be presented and heard upon proof of written notice thereof served not later than two (2) days (excluding Satur-
days, Sundays and legal holidays) before the date specified for the
hearing. Such a motion shall conclude with a Notice of Filing
addressed to all parties and Proof of Service. Copies of the Notice
and Motion shall be served upon all parties and the minute clerk
of the judge to whom the case is assigned. The original, signed
motion shall be presented to the Court at the time specified for the
hearing.

1) A Notice of Motion and appearance in Court for the purpose
of presenting or filing pretrial motions as provided for in Rule 2.04
of these Rules and subsection (a) above, are unnecessary. It is
only required that such motions be filed with the Clerk of the
Court. Copies of such Motions shall also be served upon the
minute clerk of the judge to whom the case is assigned and all
parties of record.

2) A motion which may be heard ex parte, or is presented on
stipulation, may be presented without notice, but a copy shall be
presented to the minute clerk of the judge to whom the case is
assigned by 4:30 P.M. of the day before the motion is presented if
the business address of moving counsel (or the residence of a de-
fendant not represented by counsel) is in Chicago; otherwise, the
moving party shall telephone the minute clerk by the same time.
The original, signed motion shall be presented to the Court at the
hearing. Copies of stipulated motions shall be served on all parties
as soon thereafter as practicable.

(c) Briefing of Motions. Contested motions shall be accom-
panied by a short, concise brief in support of the motion, together
with citations of authority. The motion and brief shall be filed
with the minute clerk of the judge to whom the case is assigned and
upon all parties of record. Within ten (10) days after receipt of
said brief the opposing party shall file an answering brief. A reply
brief may be filed by the moving party within five (5) days of
receipt of the answering brief.

Failure to file a supporting or answering brief shall not be deemed
a waiver of the motion or a withdrawal of opposition thereto, but
the Court on its own motion or that of a party may strike or grant
the motion without further hearing. Failure to file a reply brief
within the requisite time shall be deemed a waiver of the right to
file.

The Court may excuse by order the filing of supporting, answer-
ing or reply briefs and may shorten or extend the time fixed by the
Rule for the filing thereof.

Any party may on notice call the motion or matter to the attention of the Court for decision. When requested, oral argument may be allowed in the Court's discretion.

Comment

Generally, this Rule is intended to set out the procedures for the noticing, filing, argument and briefing of all motions in criminal cases. Portions of the Rule are derived from the Federal Rules of Criminal Procedure, the General Rules of the Court and custom. This Rule, though repeating provisions relating to motion practice in other existing Rules, should act, through its consolidation of their most pertinent provisions, to clarify motion practice procedure.

Though Rule 16(f), Federal Rules of Criminal Procedure, provides that pretrial discovery motions may be filed within ten days after arraignment without order of court, time for motions based on other Rules must be set by the court. In conjunction with Rule 2.04 (Pretrial Discovery and Inspection), this Local Rule is intended to achieve a uniform procedure for the setting of time for all pretrial motions.

Rule 2.05(a) first provides that all pretrial motions and supporting briefs shall be filed within the time fixed by the court for this purpose, or, if the court does not specify a time period, within 20 days from the date of arraignment and plea. Though the Federal Rules of Criminal Procedure provide that pretrial discovery motions may be filed within 10 days after arraignment without order of court, that period was considered inadequate for defendants to take full advantage of the discovery made available through Rule 2.04. Furthermore, the Federal Rules relating to pretrial motions other than discovery require that the court set the time for these motions. Under our Local Rule 2.05 it is hoped that the court can achieve a uniform procedure for the setting of time for all pretrial motions.

Subsections (b)(1) and (2) eliminate the requirement of a formal notice of motion and personal appearance in court for the purpose of presenting or filing pretrial motions whether relating to discovery or otherwise. Generally, it is required only that such motions be filed with the Clerk of the Court. The time for the filing of briefs thus commences

36. E.g., Fed. Rule 12 (Motions challenging or pleading defenses to the indictment).
38. E.g., Fed. Rule 12, supra note 36.
automatically and without burden to the court. Copies of such motions should also be served on the Minute Clerk of the judge to whom the case is assigned and, of course, to all parties of record. However, if it is necessary or desirable to present the motion to the court, then notice of motion must be served not later than 2 days (excluding Saturdays, Sundays and Legal holidays) before the date specified for the hearing. Any such motion so presented must conclude with a notice of filing addressed to all parties and proof of service. Copies of the notice of motion shall be served on all parties and the Minute Clerk of the judge to whom the case is assigned. The original signed motion shall be presented to the court at the time set for the hearing.

A motion which may be heard *ex parte* or which is presented on stipulation may be presented without notice; but, a copy must be served on the Minute Clerk of the judge to whom the case is assigned no later than 4:30 P.M. of the day before the motion is presented. Out of town counsel, however, may notify the Minute Clerk by phone. Copies of stipulated motions shall be served on all parties as soon thereafter as practicable.

In setting the time requirement for notice of written motions, the Committee was aware and considered that the Federal Rules of Criminal Procedure specify 5 days notice for written motions. However, a different period may be authorized by order of court, and it has been generally agreed that preparation of argument for the more routine motions in a criminal case does not require the full 5 days. On the other hand, the General Rules of the District Court for this District which would otherwise be applicable require only that notice be served on the opposition by 4:00 p.m. on the day preceding the presentation of the motion. This time limit was regarded as insufficient.

A time schedule for briefing of motions is established in subsection (c) of Rule 2.05 which requires that a “short concise” brief be filed with the initial motion. It has been suggested that this may impose unnecessary work in certain cases since the moving party often does not know whether the motion will be contested until it is filed or otherwise presented. Nevertheless, a brief in support of a motion must be filed with the filing of the motion. Counsel is therefore urged to attempt to informally determine whether a motion will be contested before it is pre-

41. *Id.*
42. *Rule 12, General Rules.*
sented. Upon request, of course, the court may defer the due date for a brief in support. Coincidently, under the General Rules of the Court, which again will not apply in this instance to criminal cases, a brief in support of a contested motion need not be filed until 5 days after the motion is filed.\textsuperscript{43} This hiatus provides the movant with time to determine if the motion will be contested.

As observed above, the motion and brief need not be presented in open court but need only be filed with the Clerk of the Court and a copy filed with the Minute Clerk of the judge to whom the case is assigned. Of course notice must be served on all parties of record. Within 10 days after the receipt of a contested motion and brief in support thereof, the opposing party shall file an answering brief. A reply brief may be filed by the moving party within 5 days of the receipt of the answering brief. Failure to file required briefs is not deemed a waiver of the motion or a withdrawal of opposition thereto, but the court may rule on the motion without further hearing. Likewise, failure to file a reply brief is not deemed a waiver of the motion but only a waiver of the right to file such a reply. The court, of course, may always excuse compliance with the briefing requirements or the related time limitations. As in civil cases, oral arguments may be requested by either party and the court may grant such request or order such argument \textit{sua sponte} in any appropriate case.

2.06

\textit{JURY INSTRUCTIONS}

In all criminal proceedings the jury instructions commonly known as the LaBuy Instructions, contained at 33 Federal Rules Decisions 523 (general instructions) and 36 Federal Rules Decisions 457 (instructions relating to specific offenses) shall be considered by the Court in preparing instructions. In submitting LaBuy Instructions attorneys need only refer to the number designations of the instructions.

\textit{Comment}

\textit{The Manual on Jury Instructions in Federal Criminal Cases}, commonly referred to as the LaBuy Instructions,\textsuperscript{44} was drafted at the direction of then Chief Judge John Hastings of the Court of Appeals of

\textsuperscript{43.} \textit{RULE 13, GENERAL RULES}

\textsuperscript{44.} So referred to in honor of the Honorable Walter J. LaBuy, who served as Chairman of the Seventh Circuit Judicial Conference Committee on Jury Instructions.
the Seventh Circuit. Chief Judge Hastings acted pursuant to a resolution of the Judicial Conference of the Seventh Federal Circuit. These pattern instructions were adopted in the interest of consistency and accuracy and their use is strongly urged, though not required.

Relieving attorneys of the administrative burden and necessity of having individual instructions typed *verbatim* is consistent with the main purpose of these Rules, *i.e.*, the avoidance of unnecessary administrative work. This provision should likewise encourage use of the LaBuy Instructions.

3.01

*MOTIONS FOR JUDGMENT OF ACQUITTAL, NEW TRIAL AND ARREST OF JUDGMENT*

Post-trial motions for a judgment of acquittal, new trial or in arrest of judgment pursuant to Rules 29, 33 and 34, Federal Rules of Criminal Procedure, shall be supported by Memoranda filed within ten (10) days of conviction (or such other time as the Court shall allow) unless filing is excused by the Court.

*Comment*

Admittedly this Rule is relatively far reaching, but at the same time suffers the infirmity of being difficult to enforce. Its intended purpose and, if complied with, its result warrant its existence. All too often a complete and detailed review of a trial at the time of its termination will reveal obvious error in the proceedings—in many instances error which might properly and best be corrected immediately. Unfortunately, however, trial judges are denied the opportunity of hindsight review of the proceedings accompanied by a related and detailed memoranda similar in content to briefs later filed with the appellate courts. In requiring the filing of this post-trial memorandum it is hoped that obviously meritorious appeals, confessions of error, and partial remand of cases will substantially be avoided to the benefit of both the trial and appellate courts.

3.02

*CONTACT WITH JURORS*

After the conclusion of a trial, no party, his agent or his attorney shall communicate or attempt to communicate with any members of the petit jury before which the case was tried without first receiving permission of the Court.
Comment

This Rule is intended to protect jurors from annoyance, embarrassment or harassment by parties or attorneys following their decision in a particular case. Federal courts have on several occasions expressed disapproval of post-trial contact and conversation with jurors.45 Similarly, reasoning that post-trial interviews with jurors violate the secrecy of jury-room deliberations, the American Bar Association Committee on Professional Ethics and Grievances has expressed its opinion that such interviews are unethical.46 The court has the inherent power, indeed the responsibility, to protect its jurors against the manifold abuses and evils which all too easily could result from the post-trial conversations and investigations. This Rule is not intended to in any way deny to either the government or the defendant or his attorneys the right, where apparently necessary, to properly question or investigate jurors. On the other hand, in the exercise of its inherent right and responsibility to protect its jurors, a court can and should require that those desirous of examining jurors first advise the court of their intentions and the reasons suggesting the apparent necessity of the inquiry. Consistent with the desire not to inhibit proper investigation, the requirement of first “advising” the court can be complied with in an ex parte and in camera manner.

A minority of the Committee felt the necessity of additional qualifying language which would except from the scope of the Rule “investigations being conducted by federal authorities.” The majority of the Committee, and apparently the Court in excluding this exception, considered it both improper and unnecessary. By granting to the government a unilateral and unfettered right to ignore the Rule,47 it would have become applicable only to defendants and would have thus discriminated against them. Abuse in post-trial juror contact is not, however, limited to defendants.

Moreover, as explained above, inasmuch as the Rule is in no way intended to preclude proper investigations, the requirement of first advising the court—which has control and responsibility over its jurors—seems an insignificant burden when compared with the purpose of the Rule.

45. Miller v. United States, 403 F.2d 77 (2d Cir.), affirming United States v. Miller, 284 F. Supp. 220 (D. Conn. 1968); Rees v. Peyton, 341 F.2d 859 (4th Cir. 1965); Bryson v. United States, 238 F.2d 657 (9th Cir. 1956).
47. Almost any contact and investigation could later be justified as involving a “... possible violation of federal law.”
It is further submitted that the premise upon which the Committee minority supported its desired exception to the Rule is equally applicable to defendants and their attorneys. Given certain circumstances, a defendant has a right and his attorney has an obligation to investigate suspected irregularities in juror contact. However, these rights and obligations must be discharged in accordance with this Rule, i.e., the court must first be “advised”. As stressed before, this Rule cannot and is in no way intended to curtail or inhibit these rights or obligations—it merely requires their exercise to be in accord and consistent with the equally valid and necessary right and obligation of the court to protect its jurors.

The “Minority Comment” to this Rule, offered in support of the additional sentence which, in effect, would except government investigations from the operation of the Rule, read as follows:

Investigative agents of the Executive have the right as well as the obligation to investigate possible violations of Sections 1503 and 1504 of Title 18, and should not be subject to obtaining prior permission of the judiciary before investigating. The effect of requiring the government to seek judicial authorization before initiating an investigation of possible jury tampering would have the effect of extending the Judicial Branch of the government into the responsibility of the Executive Branch. Once the jury is discharged from sitting, the agents should be permitted without restriction to investigate.

3.03

DEPOSIT OF FINES PENDING APPEAL

Unless the District Court or the Court of Appeals enters an order to the contrary, a defendant sentenced to pay a fine or a fine and costs and who files notice of appeal shall, pending appeal and in conformity with Rule 38a(3), Federal Rules of Criminal Procedure, deposit the whole of the fine and costs in the registry of the District Court, or give bond for the payment thereof, or submit to an examination of assets. The defendant shall do this within ten (10) days of the filing of the notice of appeal or at such time as the Court shall set.

Comment

The purpose of this Rule is to make automatic the implementation of certain provisions of Rule 38(a)(3) of the Federal Rules of Criminal Procedure. The prior practice had been for the government to form
ally move that the Rule be implemented in all cases where a fine had been imposed and where the defendant had appealed. Under this Local Rule, Rule 38(a)(3) of the Federal Rules of Criminal Procedure must be complied with within ten days of the filing of a notice of appeal by a defendant who has been fined, unless the defendant moves the Court for some relief. This Rule retains in the Court the discretion to dispense with the requirements of the Rule in appropriate cases if and when the defendant moves the Court to do so.

CONCLUSION

It is the considered judgment of the authors that our court's Local Criminal Rules are the first and most progressive endeavor by a trial court—a court traditionally attuned to progressive administration—to individually and separately consider the practice of criminal law. Optimistically, we offer the prediction that trial courts throughout the country will, of necessity, reconsider the individual and particular problems related to the practice and judicial administration of criminal matters. Generally, the lack of organization and order which all too often presently obtains in the criminal field is the result of two factors: (1) a failure to distinguish procedures in criminal cases from procedures in civil cases, and (2) the subsequent retention of anachronistic procedures held sacrosanct from change solely by virtue of their long existence. Hopefully, other courts will follow the lead of the Federal District Court for the Northern District of Illinois in considering and eliminating these evils.

Fairly stated, the main thrust of the Rules relates to discovery and motion practice. Although one of the authors suggested and urged the Committee's consideration of much more liberal "automatic" discovery procedures, the fact remains that the instant Rules are a significant step forward. Parenthetically, subsequent to the Court's adoption of the Local Rules, the American Bar Association Project on Minimum Standards for Criminal Justice released its Tentative Draft Standards Relating to Discovery and Procedure Before Trial.48 The tacit assumption of our court in adopting its discovery Rules, i.e., to relegate most discovery matters to amiable inter-action between the attorneys without the necessity of court determination, is the salutary goal suggested in the Standards.

We should also add that as participants in the drafting of these Rules,

48. Released in May of 1969.
we are encouraged by the fact that district courts throughout the country have indicated an interest in the initial experiences of our court with these Rules, with a view to adopting similar rules. Based on experience to date, we are convinced that our Rules will prove to be effective and helpful tools for the court in expeditiously handling the criminal case.