

In rejecting the substitution-of-juror alternative, the Committee's judgment is in accord with that of most commentators and many courts.

There have been proposals that the rule should be amended to permit an alternate to be substituted if a regular juror becomes unable to perform his duties after the case has been submitted to the jury. An early draft of the original Criminal Rules had contained such a provision, but it was withdrawn when the Supreme Court itself indicated to the Advisory Committee on Criminal Rules doubts as to the desirability and constitutionality of such a procedure. These doubts are as forceful now as they were a quarter century ago. To permit substitution of an alternate after deliberations have begun would require either that the alternate participate though he has missed part of the jury discussion, or that he sit in with the jury in every case on the chance he might be needed. Either course is subject to practical difficulty and to strong constitutional objection.

Wright, *Federal Practice and Procedure*, §388 (1969). See also Moore, *Federal Practice* par. 24.05 (2d ed. Cipes 1980) ("The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature guilty verdict"); 3 *ABA Standards for Criminal Justice* §15-2.7, commentary (2d ed. 1980) ("It is not desirable to allow a juror who is unfamiliar with the prior deliberations to suddenly join the group and participate in the voting without the benefit of earlier group discussion"); *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975); *People v. Ryan*, 19 N.Y.2d 100, 224 N.E.2d 710 (1966). Compare *People v. Collins*, 17 Cal.3d 687, 131 Cal.Rptr. 782, 522 P.2d 742 (1976); *Johnson v. State*, 267 Ind. 256, 396 N.E.2d 623 (1977).

The central difficulty with substitution, whether viewed only as a practical problem or a question of constitutional dimensions (procedural due process under the Fifth Amendment or jury trial under the Sixth Amendment), is that there does not appear to be any way to nullify the impact of what has occurred without the participation of the new juror. Even were it required that the jury "review" with the new juror their prior deliberations or that the jury upon substitution start deliberations anew, it still seems likely that the continuing jurors would be influenced by the earlier deliberations and that the new juror would be somewhat intimidated by the others by virtue of being a newcomer to the deliberations. As for the possibility of sending in the alternates at the very beginning with instructions to listen but not to participate until substituted, this scheme is likewise attended by practical difficulties and offends "the cardinal principle that the deliberations of the jury shall remain private and secret in every case." *United States v. Virginia Election Corp.*, 335 F.2d 868 (4th Cir. 1964).

The amendment provides that if a juror is excused after the jury has retired to consider its verdict, it is within the discretion of the court whether to declare a mistrial or to permit deliberations to continue with 11 jurors. If the trial has been brief and not much would be lost by retrial, the court might well conclude that the unusual step of allowing a jury verdict by less than 12 jurors absent stipulation should not be taken. On the other hand, if the trial has been protracted the court is much more likely to opt for continuing with the remaining 11 jurors.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 23 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

In current Rule 23(b), the term "just cause" has been replaced with the more familiar term "good cause," that appears in other rules. No change in substance is intended.

#### EFFECTIVE DATE OF 1977 AMENDMENT

Amendment of this rule by order of the United States Supreme Court on Apr. 26, 1976, approved by Pub. L. 95-78, effective Oct. 1, 1977, see section 4 of Pub. L. 95-78, set out as an Effective Date of Pub. L. 95-78 note under section 2074 of Title 28, Judiciary and Judicial Procedure.

#### Rule 24. Trial Jurors

##### (a) EXAMINATION.

(1) *In General*. The court may examine prospective jurors or may permit the attorneys for the parties to do so.

(2) *Court Examination*. If the court examines the jurors, it must permit the attorneys for the parties to:

(A) ask further questions that the court considers proper; or

(B) submit further questions that the court may ask if it considers them proper.

(b) *PEREMPTORY CHALLENGES*. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) *Capital Case*. Each side has 20 peremptory challenges when the government seeks the death penalty.

(2) *Other Felony Case*. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.

(3) *Misdemeanor Case*. Each side has 3 peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

##### (c) ALTERNATE JURORS.

(1) *In General*. The court may impanel up to 6 alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

##### (2) Procedure.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other juror.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) *Retaining Alternate Jurors*. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) *Peremptory Challenges*. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) *One or Two Alternates*. One additional peremptory challenge is permitted when one or two alternates are impaneled.

(B) *Three or Four Alternates.* Two additional peremptory challenges are permitted when three or four alternates are impaneled.

(C) *Five or Six Alternates.* Three additional peremptory challenges are permitted when five or six alternates are impaneled.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1944

*Note to Subdivision (a).* This rule is similar to Rule 47(a) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix] and also embodies the practice now followed by many Federal courts in criminal cases. Uniform procedure in civil and criminal cases on this point seems desirable.

*Note to Subdivision (b).* This rule embodies existing law, 28 U.S.C. 424 [now 1870] (Challenges), with the following modifications. In capital cases the number of challenges is equalized as between the defendant and the United States so that both sides have 20 challenges, which only the defendant has at present. While continuing the existing rule that multiple defendants are deemed a single party for purposes of challenges, the rule vests in the court discretion to allow additional peremptory challenges to multiple defendants and to permit such challenges to be exercised separately or jointly. Experience with cases involving numerous defendants indicates the desirability of this modification.

*Note to Subdivision (c).* This rule embodies existing law, 28 U.S.C. [former] 417a (Alternate jurors), as well as the practice prescribed for civil cases by Rule 47(b) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix], except that the number of possible alternate jurors that may be impaneled is increased from two to four, with a corresponding adjustment of challenges.

#### NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Experience has demonstrated that four alternate jurors may not be enough for some lengthy criminal trials. See e.g., *United States v. Bentvena*, 288 F.2d 442 (2d Cir. 1961); Reports of the Proceedings of the Judicial Conference of the United States, 1961, p. 104. The amendment to the first sentence increases the number authorized from four to six. The fourth sentence is amended to provide an additional peremptory challenge where a fifth or sixth alternate juror is used.

The words “or are found to be” are added to the second sentence to make clear that an alternate juror may be called in the situation where it is first discovered during the trial that a juror was unable or disqualified to perform his duties at the time he was sworn. See *United States v. Goldberg*, 330 F.2d 30 (3rd Cir. 1964), cert. den. 377 U.S. 953 (1964).

#### CONGRESSIONAL DISAPPROVAL OF PROPOSED 1977 AMENDMENT

Pub. L. 95-78, §2(c), July 30, 1977, 91 Stat. 320, effective Oct. 1, 1977, provided that: “The amendment proposed by the Supreme Court [in its order of Apr. 26, 1977] to rule 24 of such Rules of Criminal Procedure is disapproved and shall not take effect.”

#### NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

#### COMMITTEE NOTES ON RULES—1999 AMENDMENT

As currently written, Rule 24(c) explicitly requires the court to discharge all of the alternate jurors—who have not been selected to replace other jurors—when the jury retires to deliberate. That requirement is grounded on the concern that after the case has been submitted to the jury, its deliberations must be private

and inviolate. *United States v. Houlihan*, 92 F.3d 1271, 1285 (1st Cir. 1996), citing *United States v. Virginia Election Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

Rule 23(b) provides that in some circumstances a verdict may be returned by eleven jurors. In addition, there may be cases where it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury. That might be especially appropriate in a long, costly, and complicated case. To that end the Committee believed that the court should have the discretion to decide whether to retain or discharge the alternates at the time the jury retires to deliberate and to use Rule 23(b) to proceed with eleven jurors or to substitute a juror or jurors with alternate jurors who have not been discharged.

In order to protect the sanctity of the deliberative process, the rule requires the court to take appropriate steps to insulate the alternate jurors. That may be done, for example, by separating the alternates from the deliberating jurors and instructing the alternate jurors not to discuss the case with any other person until they replace a regular juror. See, e.g., *United States v. Olano*, 507 U.S. 725 (1993) (not plain error to permit alternate jurors to sit in during deliberations); *United States v. Houlihan*, 92 F.3d 1271, 1286-88 (1st Cir. 1996) (harmless error to retain alternate jurors in violation of Rule 24(c); in finding harmless error the court cited the steps taken by the trial judge to insulate the alternates). If alternates are used, the jurors must be instructed that they must begin their deliberations anew.

Finally, subsection (c) has been reorganized and restyled.

**GAP Report—Rule 24(c).** The final sentence of Rule 24(c) was moved from the committee note to the rule to emphasize that if an alternate replaces a juror during deliberations, the court shall instruct the jury to begin its deliberations anew.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 24 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

In restyling Rule 24(a), the Committee deleted the language that authorized the defendant to conduct voir dire of prospective jurors. The Committee believed that the current language was potentially ambiguous and could lead one incorrectly to conclude that a defendant, represented by counsel, could personally conduct voir dire or additional voir dire. The Committee believed that the intent of the current provision was to permit a defendant to participate personally in voir dire only if the defendant was acting pro se. Amended Rule 24(a) refers only to attorneys for the parties, i.e., the defense counsel and the attorney for the government, with the understanding that if the defendant is not represented by counsel, the court may still, in its discretion, permit the defendant to participate in voir dire. In summary, the Committee intends no change in practice.

Finally, the rule authorizes the court in multi-defendant cases to grant additional peremptory challenges to the defendants. If the court does so, the prosecution may request additional challenges in a multi-defendant case, not to exceed the total number available to the defendants jointly. The court, however, is not required to equalize the number of challenges where additional challenges are granted to the defendant.

#### Rule 25. Judge’s Disability

(a) DURING TRIAL. Any judge regularly sitting in or assigned to the court may complete a jury trial if: