(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:

(1) the judge before whom the trial began cannot proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies familiarity with the trial record.

(b) AFTER A VERDICT OR FINDING OF GUILTY.

(1) *In General.* After a verdict or finding of guilty, any judge regularly sitting in or assigned to a court may complete the court's duties if the judge who presided at trial cannot perform those duties because of absence, death, sickness, or other disability.

(2) *Granting a New Trial.* The successor judge may grant a new trial if satisfied that:

(A) a judge other than the one who presided at the trial cannot perform the post-trial duties; or

(B) a new trial is necessary for some other reason.

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

NOTES OF ADVISORY COMMITTEE ON RULES—1944

This rule is similar to Rule 63 of the Federal Rules of Civil Procedure [28 U.S.C., Appendix]. See also, 28 U.S.C. [former] 776 (Bill of exceptions; authentication; signing of by judge).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

In September, 1963, the Judicial Conference of the United States approved a recommendation of its Committee on Court Administration that provision be made for substitution of a judge who becomes disabled during trial. The problem has become serious because of the increase in the number of long criminal trials. See 1963 Annual Report of the Director of the Administrative Office of the United States Courts, p. 114, reporting a 25% increase in criminal trials lasting more than one week in fiscal year 1963 over 1962.

Subdivision (a).—The amendment casts the rule into two subdivisions and in subdivision (a) provides for substitution of a judge during a jury trial upon his certification that he has familiarized himself with the record of the trial. For similar provisions see Alaska Rules of Crim. Proc., Rule 25; California Penal Code, §1053.

Subdivision (b).—The words ''from the district'' are deleted to permit the local judge to act in those situations where a judge who has been assigned from within the district to try the case is, at the time for sentence, etc., back at his regular place of holding court which may be several hundred miles from the place of trial. It is not intended, of course, that substitutions shall be made where the judge who tried the case is available within a reasonable distance from the place of trial.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 25 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.

Rule 25(b)(2) addresses the possibility of a new trial when a judge determines that no other judge could perform post-trial duties or when the judge determines that there is some other reason for doing so. The current rule indicates that those reasons must be ''appropriate.'' The Committee, however, believed that a better term would be ''necessary,'' because that term includes notions of manifest necessity. No change in meaning or practice is intended.

Rule 26. Taking Testimony

In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§2072–2077.

(As amended Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. This rule contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal courts. It is based on *Funk v. United States*, 290 U.S. 371, and *Wolfle v. United States*, 291 U.S. 7, which indicated that in the absence of statute the Federal courts in criminal cases are not bound by the State law of evidence, but are guided by common law principles as interpreted by the Federal courts ''in the light of reason and experience.'' The rule does not fetter the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions. See Homer Cummings, 29 A.B.A.Jour. 655; Vanderbilt, 29 A.B.A.Jour. 377; Holtzoff, 12 George Washington L.R. 119, 131–132; Holtzoff, 3 F.R.D. 445, 453; Howard, 51 Yale L.Jour. 763; Medalie, 4 Lawyers Guild R. (3)1, 5–6.

2. This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, Rule 43(a) [28 U.S.C., Appendix]), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law and, therefore, results in a divergence as between various districts. Since in civil actions in which Federal jurisdiction is based on diversity of citizenship, the State substantive law governs the rights of the parties, uniformity of rules of evidence among different districts does not appear necessary. On the other hand, since all Federal crimes are statutory and all criminal prosecutions in the Federal courts are based on acts of Congress, uniform rules of evidence appear desirable if not essential in criminal cases, as otherwise the same facts under differing rules of evidence may lead to a conviction in one district and to an acquittal in another.

3. This rule expressly continues existing statutes governing the admissibility of evidence and the competency and privileges of witnesses. Among such statutes are the following:

U.S.C., Title 8:

Section 138 [see 1326, 1328, 1329] (Importation of aliens for immoral purposes; attempt to re-enter after deportation; penalty)

U.S.C., Title 28:

Section 632 [now 18 U.S.C. 3481] (Competency of witnesses governed by State laws; defendants in criminal cases)

Section 633 [former] (Competency of witnesses governed by State laws; husband or wife of defendant in prosecution for bigamy)

Section 634 [former] (Testimony of witnesses before Congress)

Section 638 [now 1731] (Comparison of handwriting to determine genuineness)

Section 695 [now 1732] (Admissibility)

Section 695a [now 18 U.S.C. 3491] (Foreign documents)

U.S.C., Title 46:

Section 193 (Bills of lading to be issued; contents)

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

The first sentence is retained, with appropriate narrowing of the title, since its subject is not covered in