(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

the Rules of Evidence. The second sentence is deleted because the Rules of Evidence govern admissibility of evidence, competency of witnesses, and privilege. The language is broadened, however, to take account of the Rules of Evidence and any other rules adopted by the Supreme Court.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 26 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.

Rule 26 is amended, by deleting the word ''orally,'' to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

Rule 26.1. Foreign Law Determination

A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence.

(Added Feb. 28, 1966, eff. July 1, 1966; amended Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1966

The original Federal Rules of Criminal Procedure did not contain a provision explicitly regulating the determination of foreign law. The resolution of issues of foreign law, when relevant in federal criminal proceedings, falls within the general compass of Rule 26 which provides for application of ''the [evidentiary] principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'' See Green, Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts 6–7, 17–18 (1962). Although traditional ''commonlaw'' methods for determining foreign-country law have proved inadequate, the courts have not developed more appropriate practices on the basis of this flexible rule. Cf. Green, op. cit. supra at 26–28. On the inadequacy of common-law procedures for determining foreign law, see, e.g., Nussbaum, Proving the Law of Foreign Countries, 3 Am.J.Comp.L. 60 (1954).

Problems of foreign law that must be resolved in accordance with the Federal Rules of Criminal Procedure are most likely to arise in places such as Washington, D.C., the Canal Zone, Guam, and the Virgin Islands, where the federal courts have general criminal jurisdiction. However, issues of foreign law may also arise in criminal proceedings commenced in other federal districts. For example, in an extradition proceeding, reasonable ground to believe that the person sought to be extradited is charged with, or was convicted of, a crime under the laws of the demanding state must generally be shown. See *Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Fernandez v. Phillips*, 268 U.S. 311 (1925); Bishop International Law: Cases and Materials (2d ed. 1962). Further, foreign law may be invoked to justify non-compliance with a subpoena duces tecum, *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962), and under certain circumstances, as a defense to prosecution. Cf. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). The content of foreign law may also be relevant in proceedings arising under 18 U.S.C. §§1201, 2312–2317.

Rule 26.1 is substantially the same as Civil Rule 44.1. A full explanation of the merits and practicability of the rule appear in the Advisory Committee's Note to Civil Rule 44.1. It is necessary here to add only one comment to the explanations there made. The second sentence of the rule frees the court from the restraints of the ordinary rules of evidence in determining foreign law. This freedom, made necessary by the peculiar nature of the issue of foreign law, should not constitute an unconstitutional deprivation of the defendant's rights to confrontation of witnesses. The issue is essentially one of law rather than of fact. Furthermore, the cases have held that the Sixth Amendment does not serve as a rigid barrier against the development of reasonable and necessary exceptions to the hearsay rule. See *Kay v. United States*, 255 F.2d 476, 480 (4th Cir. 1958), cert. den., 358 U.S. 825 (1958); *Matthews v. United States*, 217 F.2d 409, 418 (5th Cir. 1954); *United States v. Leathers*, 135 F.2d 507 (2d Cir. 1943); and cf., *Painter v. Texas*, 85 S.Ct. 1065 (1965); *Douglas v. Alabama*, 85 S.Ct. 1074 (1965).

NOTES OF ADVISORY COMMITTEE ON RULES—1972 AMENDMENT

Since the purpose is to free the judge, in determining foreign law, from restrictive evidentiary rules, the reference is made to the Rules of Evidence generally.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 26.1 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.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in text, are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF AMENDMENT PROPOSED NOVEMBER 20, 1972

Amendment of this rule embraced by the order entered by the Supreme Court of the United States on November 20, 1972, effective on the 180th day beginning after January 2, 1975, see section 3 of Pub. L. 93–595, Jan. 2, 1975, 88 Stat. 1959, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

Rule 26.2. Producing a Witness's Statement

(a) MOTION TO PRODUCE. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

(b) PRODUCING THE ENTIRE STATEMENT. If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

(c) PRODUCING A REDACTED STATEMENT. If the party who called the witness claims that the statement contains information that is privileged or does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any