

pleted its post-conviction investigation to locate the forfeitable property by the time of sentencing. In that case the court is authorized to issue a forfeiture order describing the property in “general” terms, which order may be amended pursuant to Rule 32.2(e)(1) when additional specific property is identified.

The authority to issue a general forfeiture order should be used only in unusual circumstances and not as a matter of course. For cases in which a general order was properly employed, see *United States v. BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 36 (D.D.C. 1999) (ordering forfeiture of all of a large, complex corporation’s assets in the United States, permitting the government to continue discovery necessary to identify and trace those assets); *United States v. Saccoccia*, 898 F. Supp. 53 (D.R.I. 1995) (ordering forfeiture of up to a specified amount of laundered drug proceeds so that the government could continue investigation which led to the discovery and forfeiture of gold bars buried by the defendant in his mother’s back yard).

*Subdivisions (b)(3) and (4).* The amendment moves the language explaining when the forfeiture order becomes final as to the defendant to new subparagraph (b)(4)(A), where it is coupled with new language explaining that the order is not final as to third parties until the completion of the ancillary proceedings provided for in Rule 32.2(c).

New subparagraphs (B) and (C) are intended to clarify what the district court is required to do at sentencing, and to respond to conflicting decisions in the courts regarding the application of Rule 36 to correct clerical errors. The new subparagraphs add considerable detail regarding the oral announcement of the forfeiture at sentencing, the reference to the forfeiture order in the judgment and commitment order, the availability of Rule 36 to correct the failure to include the forfeiture order in the judgment and commitment order, and the time to appeal.

New subparagraph (C) clarifies the time for appeals concerning forfeiture by the defendant or government from two kinds of orders: the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. This provision does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c).

*Subdivision (b)(5)(A).* The amendment clarifies the procedure for requesting a jury determination of forfeiture. The goal is to avoid an inadvertent waiver of the right to a jury determination, while also providing timely notice to the court and to the jurors themselves if they will be asked to make the forfeiture determination. The amendment requires that the court determine whether either party requests a jury determination of forfeiture in cases where the government has given notice that it is seeking forfeiture and a jury has been empaneled to determine guilt or innocence. The rule requires the court to make this determination before the jury retires. Jurors who know that they may face an additional task after they return their verdict will be more accepting of the additional responsibility in the forfeiture proceeding, and the court will be better able to plan as well.

Although the rule permits a party to make this request just before the jury retires, it is desirable, when possible, to make the request earlier, at the time when the jury is empaneled. This allows the court to plan, and also allows the court to tell potential jurors what to expect in terms of their service.

*Subdivision (b)(5)(B)* explains that “the government must submit a proposed Special Verdict Form listing each property subject to forfeiture.” Use of such a form is desirable, and the government is in the best position to draft the form.

*Subdivisions (b)(6) and (7).* These provisions are based upon the civil forfeiture provisions in Supplemental Rule G of the Federal Rules of Civil Procedure, which are also incorporated by cross reference. The amendment governs such mechanical and technical issues as the manner of publishing notice of forfeiture to third

parties and the interlocutory sale of property, bringing practice under the Criminal Rules into conformity with the Civil Rules.

*Changes Made to Proposed Amendment Released for Public Comment.* The proposed amendment to Rule 32.2 was modified to use the term “property” throughout. As published, the proposed amendment used the terms property and asset(s) interchangeably. No difference in meaning was intended, and in order to avoid confusion, a single term was used consistently throughout. The term “forfeiture order” was substituted, where possible, for the wordier “order of forfeiture.” Other small stylistic changes (such as the insertion of “the” in subpart titles) were also made to conform to the style conventions.

In new subpart (b)(4)(C), dealing with the time for appeals, the words “the defendant or the government” were substituted for the phrase “a party.” This portion of the rule addresses only appeals from the original judgment of conviction and later orders amending or refusing to amend the judgment under Rule 32.2(e) to add additional property. Only the defendant and the government are parties at this stage of the proceedings. This portion of the rule does not address appeals by the government or a third party from orders in ancillary proceedings under Rule 32.2(c). This point was also clarified in the Committee note.

Additionally, two other changes were made to the Committee Note: a reference to the use of the ECF system to aid the court and parties in tracking the status of forfeiture allegations, and an additional illustrative case.

#### REFERENCES IN TEXT

The Supplemental Rules of the Federal Rules of Civil Procedure, referred to in subd. (b)(6)(C), (D), (7), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Civil Procedure, referred to in subd. (c)(1)(B), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

### Rule 33. New Trial

(a) **DEFENDANT’S MOTION.** Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) **TIME TO FILE.**

(1) *Newly Discovered Evidence.* Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

(2) *Other Grounds.* Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009.)

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

This rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence, from 60 days to two years; and for motions for new trial on other grounds from three to five days. Otherwise, it substantially continues existing practice. See Rule II of the Criminal Appeals Rules of 1933, 292 U.S. 661. *Cf.* Rule 59(a) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

NOTES OF ADVISORY COMMITTEE ON RULES—1966  
AMENDMENT

The amendments to the first two sentences make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant. Problems of double jeopardy arise when the court acts on its own motion. See *United States v. Smith*, 331 U.S. 469 (1947). These amendments do not, of course, change the power which the court has in certain circumstances, prior to verdict or finding of guilty, to declare a mistrial and order a new trial on its own motion. See e.g., *Gori v. United States*, 367 U.S. 364 (1961); *Downum v. United States*, 372 U.S. 734 (1963); *United States v. Tateo*, 377 U.S. 463 (1964). The amendment to the last sentence changes the time in which the motion may be made to 7 days. See the Advisory Committee's Note to Rule 29.

NOTES OF ADVISORY COMMITTEE ON RULES—1987  
AMENDMENT

The amendments are technical. No substantive change is intended.

## COMMITTEE NOTES ON RULES—1998 AMENDMENT

As currently written, the time for filing a motion for new trial on the ground of newly discovered evidence runs from the “final judgment.” The courts, in interpreting that language, have uniformly concluded that that language refers to the action of the Court of Appeals. See, e.g., *United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (citing cases). It is less clear whether that action is the appellate court's judgment or the issuance of its mandate. In *Reyes*, the court concluded that it was the latter event. In either case, it is clear that the present approach of using the appellate court's final judgment as the triggering event can cause great disparity in the amount of time available to a defendant to file timely a motion for new trial. This would be especially true if, as noted by the Court in *Reyes*, *supra* at 67, an appellate court stayed its mandate pending review by the Supreme Court. See also *Herrera v. Collins*, 506 U.S. 390, 410–412 (1993) (noting divergent treatment by States of time for filing motions for new trial).

It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.

Finally, the time to file a motion for new trial based upon newly discovered evidence is increased to three years to compensate for what would have otherwise resulted in less time than that currently contemplated in the rule for filing such motions.

*Changes Made to Rule 33 After Publication (“GAP Report”).* The Advisory Committee changed the proposed amendment to require that any motions for new trials based upon newly discovered evidence must be filed within *three* years, instead of two years, from the date of the verdict. The Committee also incorporated changes offered by the Style Subcommittee.

## COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 33 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.

## COMMITTEE NOTES ON RULES—2005 AMENDMENT

Rule 33(b)(2) has been amended to remove the requirement that the court must act within seven days after a verdict or finding of guilty if it sets another time for filing a motion for a new trial. This amendment parallels similar changes to Rules 29 and 34. Further, a conforming amendment has been made to Rule 45(b)(2).

Currently, Rule 33(b)(2) requires the defendant to move for a new trial within seven days after the verdict

or the finding of guilty verdict, or within some other time set by the court in an order issued during that same seven-day period. Similar provisions exist in Rules 29 and 34. Courts have held that the seven-day rule is jurisdictional. Thus, if a defendant files a request for an extension of time to file a motion for a new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request within the seven days, it loses jurisdiction to act on the underlying substantive motion. See, e.g., *United States v. Smith*, 331 U.S. 469, 473–474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27–28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that “district court forfeited the power to act when it failed to . . . fix a new time for a filing a motion for new trial [sic] within seven days of the verdict”).

Assuming that the current rule was intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, so long as it does so within the seven-day period. Thus, the Committee believed that the rule should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to act on a motion to extend the time for filing within a particular period of time or lose jurisdiction to do so.

Accordingly, the amendment deletes the language regarding the court's acting within seven days to set the time for filing. Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

*Changes Made After Publication and Comment.* The Committee made no substantive changes to Rule 33 following publication.

## COMMITTEE NOTES ON RULES—2009 AMENDMENT

Former Rules 29, 33, and 34 adopted 7-day periods for their respective motions. This period has been expanded to 14 days. Experience has proved that in many cases it is not possible to prepare a satisfactory motion in 7 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays. This led to frequent requests for continuances, and the filing of bare bones motions that required later supplementation. The 14-day period—including intermediate Saturdays, Sundays, and legal holidays as provided by Rule 45(a)—sets a more realistic time for the filing of these motions.

**Rule 34. Arresting Judgment**

(a) IN GENERAL. Upon the defendant's motion or on its own, the court must arrest judgment if:

- (1) the indictment or information does not charge an offense; or
- (2) the court does not have jurisdiction of the charged offense.

(b) TIME TO FILE. The defendant must move to arrest judgment within 14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009.)