

whether to recuse himself or herself from a case. The Committee believes that with the various disclosure practices in the federal courts and with the development of technology, more comprehensive disclosure may be desirable and feasible.

Rule 12.4(b)(1) indicates that the time for filing the disclosure statement is at the point when the defendant enters an initial appearance under Rule 5. Although there may be other instances where an earlier appearance of a party in a civil proceeding would raise concerns about whether the presiding judicial officer should be notified of a possible grounds for recusal, the Committee believed that in criminal cases, the most likely time for that to occur is at the initial appearance and that it was important to set a uniform triggering event for disclosures under this rule.

Finally, Rule 12.4(b)(2) requires the parties to file supplemental statements with the court if there are any changes in the information required in the statement.

Rule 13. Joint Trial of Separate Cases

The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

This rule is substantially a restatement of existing law, 18 U.S.C. [former] 557 (Indictments and presentments; joinder of charges); *Logan v. United States*, 144 U.S. 263, 296; *Showalter v. United States*, 260 F. 719 (C.C.A. 4th)—cert. den., 250 U.S. 672; *Hostetter v. United States*, 16 F.2d 921 (C.C.A. 8th); *Capone v. United States*, 51 F.2d 609, 619-620 (C.C.A. 7th).

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 13 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 14. Relief from Prejudicial Joinder

(a) **RELIEF.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) **DEFENDANT'S STATEMENTS.** Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

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

NOTES OF ADVISORY COMMITTEE ON RULES—1944

This rule is a restatement of existing law under which severance and other similar relief is entirely in the discretion of the court, 18 U.S.C. [former] 557 (Indictments and presentments; joinder of charges); *Pointer v. United States*, 151 U.S. 396; *Pierce v. United States*, 160 U.S. 355; *United States v. Ball*, 163 U.S. 662, 673; *Stilson v. United States*, 250 U.S. 583.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or con-

fession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice. While the question whether to grant a severance is generally left within the discretion of the trial court, recent Fifth Circuit cases have found sufficient prejudice involved to make denial of a motion for severance reversible error. See *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955); *Barton v. United States*, 263 F.2d 894 (5th Cir. 1959). It has even been suggested that when the confession of the co-defendant comes as a surprise at the trial, it may be error to deny a motion or a mistrial. See *Belvin v. United States*, 273 F.2d 583 (5th Cir. 1960).

The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance. The judge may direct the disclosure of the confessions or statements of the defendants to him for in camera inspection as an aid to determining whether the possible prejudice justifies ordering separate trials. Cf. note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L.J. 551, 565 (1965).

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 14 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.

The reference to a defendant's "confession" in the last sentence of the current rule has been deleted. The Committee believed that the reference to the "defendant's statements" in the amended rule would fairly embrace any confessions or admissions by a defendant.

Rule 15. Depositions

(a) WHEN TAKEN.

(1) *In General.* A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) *Detained Material Witness.* A witness who is detained under 18 U.S.C. §3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) NOTICE.

(1) *In General.* A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) *To the Custodial Officer.* A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) DEFENDANT'S PRESENCE.

(1) *Defendant in Custody.* Except as authorized by Rule 15(c)(3), the officer who has custody of the defendant must produce the de-

defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) *Defendant Not in Custody.* Except as authorized by Rule 15(c)(3), a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant—absent good cause—waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(3) *Taking Depositions Outside the United States Without the Defendant's Presence.* The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(d) **EXPENSES.** If the deposition was requested by the government, the court may—or if the defendant is unable to bear the deposition expenses, the court must—order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) **MANNER OF TAKING.** Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at

the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) **ADMISSIBILITY AND USE AS EVIDENCE.** An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) **OBJECTIONS.** A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) **DEPOSITIONS BY AGREEMENT PERMITTED.** The parties may by agreement take and use a deposition with the court's consent.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94-64, §3(15)-(19), July 31, 1975, 89 Stat. 373, 374; Pub. L. 98-473, title II, §209(b), Oct. 12, 1984, 98 Stat. 1986; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 23, 2012, eff. Dec. 1, 2012.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). 1. This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under *dedimus potestatem* and *in perpetuam rei memoriam*, 28 U.S.C. [former] 644. This statute has been generally held applicable to criminal cases, *Clymer v. United States*, 38 F.2d 581 (C.C.A. 10th); *Wong Yim v. United States*, 118 F.2d 667 (C.C.A. 9th)—cert. den., 313 U.S. 589; *United States v. Cameron*, 15 F. 794 (C.C.E.D.Mo.); *United States v. Hofmann*, 24 F.Supp. 847 (S.D.N.Y.). Contra, *Luxenberg v. United States*, 45 F.2d 497 (C.C.A. 4th)—cert. den., 283 U.S. 820. The rule continues the limitation of the statute that the taking of depositions is to be restricted to cases in which they are necessary “in order to prevent a failure of justice.”

2. Unlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court (Rules 26(a) and 30, Federal Rules of Civil Procedure [28 U.S.C., Appendix]), this rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all parties. It was contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the practice heretofore.

3. This rule introduces a new feature in authorizing the taking of the deposition of a witness committed for failure to give bail (see Rule 46(b)). This matter is, however, left to the discretion of the court. The purpose of the rule is to afford a method of relief for such a witness, if the court finds it proper to extend it.

Note to Subdivision (b). This subdivision, as well as subdivisions (d) and (f), sets forth the procedure to be followed in the event that the court grants an order for the taking of a deposition. The procedure prescribed is similar to that in civil cases, Rules 28-31, Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (c). This rule introduces a new feature for the purpose of protecting the rights of an indigent defendant.

Note to Subdivision (d). See *Note to Subdivision (b)*, *supra*.

Note to Subdivision (e). In providing when and for what purpose a deposition may be used at the trial, this rule generally follows the corresponding provisions of the Federal Rules of Civil Procedure, Rule 26(d)(3) [28 U.S.C., Appendix]. The only difference is that in civil cases a deposition may be introduced at the trial if the witness is at a greater distance than 100 miles from the place of trial, while this rule requires that the witness be out of the United States. The distinction results from the fact that a subpoena in a civil case runs only within the district where issued or 100 miles from the place of trial (Rule 45(e)(1), Federal Rules of Civil Procedure), while a subpoena in a criminal case runs throughout the United States (see Rule 17(e)(1), *infra*).

Note to Subdivision (f). See Note to Subdivision (b), *supra*.

NOTES OF ADVISORY COMMITTEE ON RULES—1974
AMENDMENT

Rule 15 authorizes the taking of depositions by the government. Under former rule 15 only a defendant was authorized to take a deposition.

The revision is similar to Title VI of the Organized Crime Control Act of 1970. The principal difference is that Title VI (18 U.S.C. §3503) limits the authority of the government to take depositions to cases in which the Attorney General certifies that the "proceeding is against a person who is believed to have participated in an organized criminal activity." This limitation is not contained in rule 15.

Dealing with the issue of government depositions so soon after the enactment of 18 U.S.C. §3503 is not inconsistent with the congressional purpose. On the floor of the House, Congressman Poff, a principal spokesman for the proposal, said that the House version was not designed to "limit the Judicial Conference of the United States in the exercise of its rulemaking authority . . . from addressing itself to other problems in this area or from adopting a broader approach." 116 Cong.Rec. 35293 (1970).

The recently enacted Title VI of the Organized Crime Control Act of 1970 (18 U.S.C. §3503) is based upon earlier efforts of the Advisory Committee on Criminal Rules which has over the past twenty-five years submitted several proposals authorizing government depositions.

The earlier drafts of the Federal Rules of Criminal Procedure proposed that the government be allowed to take depositions. Orfield, *The Federal Rules of Criminal Procedure*, 33 Calif.L.Rev. 543, 559 (1945). The Fifth Draft of what became rule 15 (then rule 20) dated June 1942, was submitted to the Supreme Court for comment. The court had a number of unfavorable comments about allowing government depositions. These comments were not published. The only reference to the fact that the court made comments is in 2 Orfield, *Criminal Procedure under the Federal Rules* §15:1 (1966); and Orfield, *Depositions in Federal Criminal Procedure*, 9 S.C.L.Q. 376, 380-381 (1957).

The Advisory Committee, in the 1940's, continued to recommend the adoption of a provision authorizing government depositions. The final draft submitted to the Supreme Court contained a section providing:

The following additional requirements shall apply if the deposition is taken at the instance of the government or of a witness. The officer having custody of a defendant shall be notified of the time and place set for examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall be given notice and shall have the right to be present at the examination. The government shall pay in advance to the defendant's attorney and a defendant not in custody expenses of travel and subsistence for attendance at the examination.

See 2 Orfield, *Criminal Procedure under the Federal Rules* §15:3, pp. 447-448 (1966); Orfield, *Depositions in Federal Criminal Procedure*, 9 S.C.L.Q. 376, 383 (1957).

The Supreme Court rejected this section in its entirety, thus eliminating the provision for depositions by the government. These changes were made without comment.

The proposal to allow government depositions was renewed in the amendments to the Federal Rules of Criminal Procedure in the early 1960's. The Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts (December 1962) proposed to amend rule 15 by eliminating the words "of a defendant" from the first sentence of subdivision (a) and adding a subdivision (g) which was practically identical to the subdivision rejected by the Supreme Court in the original draft of the rules.

The Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United

States District Courts (March 1964) continued to propose allowing governments depositions. Subdivision (g) was substantially modified, however.

The following additional requirements shall apply if the deposition is taken at the instance of the government or a witness. Both the defendant and his attorney shall be given reasonable advance notice of the time and place set for the examination. The officer having custody of a defendant shall be notified of the time and place set for the examination, and shall produce him at the examination and keep him in the presence of the witness during the examination. A defendant not in custody shall have the right to be present at the examination but his failure to appear after notice and tender of expenses shall constitute a waiver of that right. The government shall pay to the defendant's attorney and to a defendant not in custody expenses of travel and subsistence for attendance at the examination. The government shall make available to the defendant for his examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and which the government would be required to make available to the defendant if the witness were testifying at the trial.

The proposal to authorize government depositions was rejected by the Standing Committee on Rules of Practice and Procedure, C. Wright, *Federal Practice and Procedure* §241 at 477 (1969). 4 Barron, *Federal Practice and Procedure* (Supp. 1967). The Report of the Judicial Conference, submitted to the Supreme Court for approval late in 1965, contained no proposal for an amendment to rule 15. See 39 F.R.D. 69, 168-211 (1966).

When the Organized Crime Control Act of 1970 was originally introduced in the Senate (S. 30) it contained a government deposition provision which was similar to the 1964 proposal of the Criminal Rules Advisory Committee, except that the original bill (S. 30) failed to provide standards to control the use of depositions at the trial. For an explanation and defense of the original proposal see McClellan, *The Organized Crime Act* (S. 30) or *Its Critics: Which Threatens Civil Liberties?*, 46 *Notre Dame Lawyer* 55, 100-108 (1970). This omission was remedied, prior to passage, with the addition of what is now 18 U.S.C. §3503(f) which prescribes the circumstances in which a deposition can be used. The standards are the same as those in former rule 15(e) with the addition of language allowing the use of the deposition when "the witness refuses in the trial or hearing to testify concerning the subject of the deposition or the part offered."

Before the Organized Crime Control Act of 1970 was enacted an additional amendment was added providing that the right of the government to take a deposition is limited to cases in which the Attorney General certifies that the defendant is "believed to have participated in an organized criminal activity" [18 U.S.C. §3503(a)]. The argument in favor of the amendment was that the whole purpose of the act was to deal with organized crime and therefore its provisions, including that providing for government depositions, should be limited to organized crime type cases.

There is another aspect of Advisory Committee history which is relevant. In January 1970, the Advisory Committee circulated proposed changes in rule 16, one of which gives the government, when it has disclosed the identity of its witnesses, the right to take a deposition and use it "in the event the witness has become unavailable without the fault of the government or if the witness has changed his testimony." [See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts, rule 16(a)(1)(vi) (January 1970).] This provision is now incorporated within rule 16(a)(1)(v).

Because neither the court nor the standing committee gave reasons for rejecting the government deposition proposal, it is not possible to know why they were not approved. To the extent that the rejection was based upon doubts as to the constitutionality of such a proposal, those doubts now seem resolved by *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

On the merits, the proposal to allow the government to take depositions is consistent with the revision of rule 16 and with section 804(b)(1) of the Rules of Evidence for the United States Courts and Magistrates (November 1971) which provides that the following is not excluded by the hearsay rule if the declarant is unavailable:

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

Subdivision (a) is revised to provide that the government as well as the defendant is entitled to take a deposition. The phrase "whenever due to special circumstances of the case it is in the interest of justice," is intended to make clear that the decision by the court as to whether to order the taking of a deposition shall be made in the context of the circumstances of the particular case. The principal objective is the preservation of evidence for use at trial. It is not to provide a method of pretrial discovery nor primarily for the purpose of obtaining a basis for later cross-examination of an adverse witness. Discovery is a matter dealt with in rule 16. An obviously important factor is whether a deposition will expedite, rather than delay, the administration of criminal justice. Also important is the presence or absence of factors which determine the use of a deposition at the trial, such as the agreement of the parties to use of the deposition; the possible unavailability of the witness; or the possibility that coercion may be used upon the witness to induce him to change his testimony or not to testify. See rule 16(a)(1)(v).

Subdivision (a) also makes explicit that only the "testimony of a prospective witness of a party" can be taken. This means the party's own witness and does not authorize a discovery deposition of an adverse witness. The language "for use at trial" is intended to give further emphasis to the importance of the criteria for use specified in subdivision (e).

In subdivision (b) reference is made to the defendant in custody. If he is in state custody, a writ of habeas corpus ad testificandum (to produce the prisoner for purposes of testimony) may be required to accomplish his presence.

In subdivision (d) the language "except as otherwise provided in these rules" is meant to make clear that the subpoena provisions of rule 17 control rather than the provisions of the civil rules.

The use of the phrase "and manner" in subdivision (d)(2) is intended to emphasize that the authorization is not to conduct an adverse examination of an opposing witness.

In subdivision (e) the phrase "as substantive evidence" is added to make clear that the deposition can be used as evidence in chief as well as for purposes of impeachment.

Subdivision (e) also makes clear that the deposition can be used as affirmative evidence whenever the witness is available but gives testimony inconsistent with that given in the deposition. A California statute which contained a similar provision was held constitutional in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). This is also consistent with section 801(d)(1) of the Rules of Evidence for United States Courts and Magistrates (Nov. 1971).

Subdivision (f) is intended to insure that a record of objections and the grounds for the objections is made at the time the deposition is taken when the witness is available so that the witness can be examined further, if necessary, on the point of the objection so that there will be an adequate record for the court's later ruling upon the objection.

Subdivision (g) uses the "unavailability" definition of the Rules of Evidence for the United States Courts and Magistrates, 804(a) (Nov. 1971).

Subdivision (h) is intended to make clear that the court always has authority to order the taking of a

deposition, or to allow the use of a deposition, where there is an agreement of the parties to the taking or to the use.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE
REPORT NO. 94-247; 1975 AMENDMENT

A. Amendments Proposed by the Supreme Court. Rule 15 of the Federal Rules of Criminal Procedure provides for the taking of depositions. The present rule permits only the defendant to move that a deposition of a prospective witness be taken. The court may grant the motion if it appears that (a) the prospective witness will be unable to attend or be prevented from attending the trial, (b) the prospective witness' testimony is material, and (c) the prospective witness' testimony is necessary to prevent a failure of justice.

The Supreme Court promulgated several amendments to Rule 15. The more significant amendments are described below.

Subdivision (a) as proposed to be amended permits either party to move the court for the taking of a deposition of a witness. However, a party may only move to take the deposition of one of its own witnesses, not one of the adversary party's witnesses.

Subdivision (c) as proposed to be amended provides that whenever a deposition is taken at the instance of the government or of an indigent defendant, the expenses of the taking of the deposition must be paid by the government.

Subdivision (e) as proposed to be amended provides that part or all of the deposition may be used at trial as substantive evidence if the witness is "unavailable" or if the witness gives testimony inconsistent with his deposition.

Subdivision (b)[(g)] as proposed to be amended defines "unavailable." "Unavailable" as a witness includes situations in which the deponent:

- (1) is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition; or
- (2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so; or
- (3) testifies to a lack of memory of the subject matter of his deposition; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his deposition has been unable to procure his attendance by process or other reasonable means. A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the witness from attending or testifying.

B. Committee Action. The Committee narrowed the definition of "unavailability" in subdivision (g). The Committee deleted language from that subdivision that provided that a witness was "unavailable" if the court exempts him from testifying at the trial on the ground of privilege. The Committee does not want to encourage the use of depositions at trial, especially in view of the importance of having live testimony from a witness on the witness stand.

The Committee added a provision to subdivision (b) to parallel the provision of Rule 43(b)(2). This is to make it clear that a disruptive defendant may be removed from the place where a deposition is being taken.

The Committee added language to subdivision (c) to make clear that the government must pay for the cost of the transcript of a deposition when the deposition is taken at the instance of an indigent defendant or of the government. In order to use a deposition at trial, it must be transcribed. The proposed rule did not explicitly provide for payment of the cost of transcribing, and the Committee change rectifies this.

The Committee notes that subdivision (e) permits the use of a deposition when the witness "gives testimony

at the trial or hearing inconsistent with his deposition.” Since subdivision (e) refers to the rules of evidence, the Committee understands that the Federal Rules of Evidence will govern the admissibility and use of the deposition. The Committee, by adopting subdivision (e) as proposed to be amended by the Supreme Court, intends the Federal Rules of Evidence to govern the admissibility and use of the deposition.

The Committee believes that Rule 15 will not encourage trials by deposition. A deposition may be taken only in “exceptional circumstances” when “it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved. * * *” A deposition, once it is taken, is not automatically admissible at trial, however. It may only be used at trial if the witness is unavailable, and the rule narrowly defines unavailability. The procedure established in Rule 15 is similar to the procedure established by the Organized Crime Control Act of 1970 for the taking and use of depositions in organized crime cases. See 18 U.S.C. 3503.

CONFERENCE COMMITTEE NOTES, HOUSE REPORT NO. 94-414; 1975 AMENDMENT

Rule 15 deals with the taking of depositions and the use of depositions at trial. Rule 15(e) permits a deposition to be used if the witness is unavailable. Rule 15(g) defines that term.

The Supreme Court’s proposal defines five circumstances in which the witness will be considered unavailable. The House version of the bill deletes a provision that said a witness is unavailable if he is exempted at trial, on the ground of privilege, from testifying about the subject matter of his deposition. The Senate version of the bill by cross reference to the Federal Rules of Evidence, restores the Supreme Court proposal.

The Conference adopts the Senate provision.

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 15 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 Rule 15(a), the list of materials to be produced has been amended to include the expansive term “data” to reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

The last portion of current Rule 15(b), dealing with the defendant’s presence at a deposition, has been moved to amended Rule 15(c).

Revised Rule 15(d) addresses the payment of expenses incurred by the defendant and the defendant’s attorney. Under the current rule, if the government requests the deposition, or if the defendant requests the deposition and is unable to pay for it, the court *may* direct the government to pay for travel and subsistence expenses for both the defendant and the defendant’s attorney. In either case, the current rule requires the government to pay for the transcript. Under the amended rule, if the government requested the deposition, the court *must* require the government to pay reasonable subsistence and travel expenses and the cost of the deposition transcript. If the defendant is unable to pay the deposition expenses, the court *must* order the government to pay reasonable subsistence and travel expenses and the deposition transcript costs—regardless of who requested the deposition. Although the current rule places no apparent limits on the amount of funds that should be reimbursed, the Committee believed that insertion of the word “reasonable” was consistent with current practice.

Rule 15(f) is intended to more clearly reflect that the admissibility of any deposition taken under the rule is governed not by the rule itself, but instead by the Federal Rules of Evidence.

COMMITTEE NOTES ON RULES—2012 AMENDMENT

Subdivisions (c)(3) and (f). This amendment provides a mechanism for taking depositions in cases in which important witnesses—government and defense witnesses both—live in, or have fled to, countries where they cannot be reached by the court’s subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness’s attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness’s location for a deposition.

While a party invokes Rule 15 in order to preserve testimony for trial, the rule does not determine whether the resulting deposition will be admissible, in whole or in part. Subdivision (f) provides that in the case of all depositions, questions of admissibility of the evidence obtained are left to the courts to resolve on a case by case basis. Under Rule 15(f), the courts make this determination applying the Federal Rules of Evidence, which state that relevant evidence is admissible except as otherwise provided by the Constitution, statutes, the Rules of Evidence, and other rules prescribed by the Supreme Court. Fed.R.Evid. 402.

Rule 15(c) as amended imposes significant procedural limitations on taking certain depositions in criminal cases. The amended rule authorizes a deposition outside a defendant’s physical presence only in very limited circumstances after the trial court makes case-specific findings. Amended Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness outside the defendant’s presence. The party requesting the deposition shoulders the burden of proof—by a preponderance of the evidence—on the elements that must be shown. The amended rule recognizes the important witness confrontation principles and vital law enforcement and other public interests that are involved.

This amendment does not supersede the relevant provisions of 18 U.S.C. §3509, authorizing depositions outside the defendant’s physical presence in certain cases involving child victims and witnesses, or any other provision of law.

Changes Made to Proposed Amendment Released for Public Comment. The limiting phrase “in the United States” was deleted from Rule 15(c)(1) and (2) and replaced with the phrase “Except as authorized by Rule 15(c)(3).” The revised language makes clear that foreign depositions under the authority of (c)(3) are exceptions to the provisions requiring the defendant’s presence, but other depositions outside the United States remain subject to the general requirements of (c)(1) and (2). For example, a defendant may waive his right to be present at a foreign deposition, and a defendant who attends a foreign deposition may be removed from such a deposition if he is disruptive. In subdivision (c)(3)(D) the introductory phrase was revised to the simpler “because.”

In order to restrict foreign depositions outside of the defendant’s presence to situations where the deposition serves an important public interest, the limiting phrase “in a felony prosecution” was added to subdivision (c)(3)(A).

The text of subdivision (f) and the Committee Note were revised to state more clearly the limited purpose and effect of the amendment, which is providing assistance in pretrial discovery. Compliance with the procedural requirements for the taking of the foreign testimony does not predetermine admissibility at trial, which is determined on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Other changes were also made in the Committee Note. In conformity with the style conventions govern-

ing the rules, citations to cases were deleted, and other changes were made to improve clarity.

REFERENCES IN TEXT

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

AMENDMENT BY PUBLIC LAW

1984—Subd. (a). Pub. L. 98-473 substituted “detained pursuant to section 3144 of title 18, United States Code” for “committed for failure to give bail to appear to testify at a trial or hearing”.

1975—Pub. L. 94-64 amended subs. (a), (b), (c), and (e) generally, struck out subd. (g), and redesignated subd. (h) as (g).

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94-64, effective Dec. 1, 1975, see section 2 of Pub. L. 94-64, set out as a note under rule 4 of these rules.

Rule 16. Discovery and Inspection

(a) GOVERNMENT’S DISCLOSURE.

(1) *Information Subject to Disclosure.*

(A) *Defendant’s Oral Statement.* Upon a defendant’s request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant’s Written or Recorded Statement.* Upon a defendant’s request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- statement is within the government’s possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant’s recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant.* Upon a defendant’s request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person’s position as the defendant’s director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and

was legally able to bind the defendant regarding that conduct because of that person’s position as the defendant’s director, officer, employee, or agent.

(D) *Defendant’s Prior Record.* Upon a defendant’s request, the government must furnish the defendant with a copy of the defendant’s prior criminal record that is within the government’s possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects.* Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control and:

- (i) the item is material to preparing the defense;
- (ii) the government intends to use the item in its case-in-chief at trial; or
- (iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests.* Upon a defendant’s request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

- (i) the item is within the government’s possession, custody, or control;
- (ii) the attorney for the government knows—or through due diligence could know—that the item exists; and
- (iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses.* At the defendant’s request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant’s request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant’s mental condition. The summary provided under this subparagraph must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.

(2) *Information Not Subject to Disclosure.* Except as permitted by Rule 16(a)(1)(A)–(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500.