

and post-trial. This amendment extends the requirement of producing a witness' statement to preliminary examinations conducted under Rule 5.1.

Subdivision (g)(1) has been amended to reflect changes to Rule 32.

*Changes Made to Rule 26.2 After Publication ("GAP Report").* The Committee made no changes to the published draft.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 26.2 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.

Current Rule 26.2(c) states that if the court withholds a portion of a statement, over the defendant's objection, "the attorney for the government" must preserve the statement. The Committee believed that the better rule would be for the court to simply seal the entire statement as a part of the record, in the event that there is an appeal.

Also, the terminology in Rule 26.2(c) has been changed. The rule now speaks in terms of a "redacted" statement instead of an "excised" statement. No change in practice is intended.

Finally, the list of proceedings in Rule 26.2(g) has been placed in rule-number order.

#### REFERENCES IN TEXT

The Rules Governing Proceedings under 28 U.S.C. §2255, referred to in subd. (g)(5), are set out under section 2255 of Title 28, Judiciary and Judicial Procedure.

#### EFFECTIVE DATE OF RULE

This rule added by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96-42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

#### Rule 26.3. Mistrial

Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

(Added Apr. 22, 1993, eff. Dec. 1, 1993; amended Apr. 29, 2002, eff. Dec. 1, 2002.)

#### NOTES OF ADVISORY COMMITTEE ON RULES—1993

Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences. The Rule is not designed to change the substantive law governing mistrials. Instead it is directed at providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order.

Several cases have held that retrial of a defendant was barred by the Double Jeopardy Clause of the Constitution because the trial court had abused its discretion in declaring a mistrial. See *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990); *United States v. Bates*, 917 F.2d 388 (9th Cir. 1990). In both cases the appellate courts concluded that the trial court had acted precipitately and had failed to solicit the parties' views on the necessity of a mistrial and the feasibility of any alternative action. The new Rule is designed to remedy that situation.

The Committee regards the Rule as a balanced and modest procedural device that could benefit both the prosecution and the defense. While the *Dixon* and *Bates* decisions adversely affected the government's interest in prosecuting serious crimes, the new Rule could also

benefit defendants. The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial.

#### COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 26.3 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 27. Proving an Official Record

A party may prove an official record, an entry in such a record, or the lack of a record or entry in the same manner as in a civil action.

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

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

This rule incorporates by reference Rule 44 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, which provided a simple and uniform method of proving public records and entry or lack of entry therein. The rule does not supersede statutes regulating modes of proof in respect to specific official records. In such cases parties have the option of following the general rule or the pertinent statute. Among the many statutes are:

U.S.C., Title 28:

- Section 661 [now 1733] (Copies of department or corporation records and papers; admissibility; seal)
- Section 662 [now 1733] (Same; in office of General Counsel of the Treasury)
- Section 663 [now 1733] (Instruments and papers of Comptroller of Currency; admissibility)
- Section 664 [now 1733] (Organization certificates of national banks; admissibility)
- Section 665 [now 1733] (Transcripts from books of Treasury in suits against delinquents; admissibility)
- Section 666 [now 1733] (Same; certificate by Secretary or Assistant Secretary)
- Section 668 [now 18 U.S.C. 3497] (Same; indictments for embezzlement of public moneys)
- Section 669 [former] (Copies of returns in returns office admissible)
- Section 670 [now 1743] (Admissibility of copies of statements of demands by Post Office Department)
- Section 671 [now 1733] (Admissibility of copies of post office records and statement of accounts)
- Section 672 [see 1733] (Admissibility of copies of records in General Land Office)
- Section 673 [now 1744] (Admissibility of copies of records, and so forth, of Patent Office)
- Section 674 [now 1745] (Copies of foreign letters patent as prima facie evidence)
- Section 675 [former] (Copies of specifications and drawings of patents admissible)
- Section 676 [now 1736] (Extracts from Journals of Congress admissible when injunction of secrecy removed)
- Section 677 [now 1740] (Copies of records in offices of United States consuls admissible)
- Section 678 [former] (Books and papers in certain district courts)
- Section 679 [former] (Records in clerks' offices, western district of North Carolina)
- Section 680 [former] (Records in clerks' offices of former district of California)
- Section 681 [now 1734] (Original records lost or destroyed; certified copy admissible)
- Section 682 [now 1734] (Same; when certified copy not obtainable)

- Section 685 [now 1735] (Same; certified copy of official papers)
- Section 687 [now 1738] (Authentication of legislative acts; proof of judicial proceedings of State)
- Section 688 [now 1739] (Proofs of records in offices not pertaining to courts)
- Section 689 [now 1742] (Copies of foreign records relating to land titles)
- Section 695a–695h [now 18 U.S.C. 3491–3496; 22 U.S.C. 1204; 1741] (Foreign documents)
- U.S.C., Title 1:
- Section 30 [now 112] (Statutes at Large; contents; admissibility in evidence)
- Section 30a [now 113] (“Little and Brown’s” edition of laws and treaties competent evidence of Acts of Congress)
- Section 54 [now 204] (Codes and Supplements as establishing prima facie the Laws of United States and District of Columbia, citation of Codes and Supplements)
- Section 55 [now 209] (Copies of Supplements to Code of Laws of United States and of District of Columbia Code and Supplements; conclusive evidence of original)
- U.S.C., Title 5:
- Section 490 [see 28 U.S.C. 1733] (Records of Department of Interior; authenticated copies as evidence)
- U.S.C., Title 8:
- Section 717(b) [see 1435, 1482] (Former citizens of United States excepted from certain requirements; citizenship lost by spouse’s alienage or loss of United States citizenship, or by entering armed forces of foreign state or acquiring its nationality)
- Section 727(g) [see 1443] (Administration of naturalization laws; rules and regulations; instruction in citizenship; forms; oaths; depositions; documents in evidence; photographic studio)
- U.S.C., Title 15:
- Section 127 [see 1057(e)] (Trade-marks; copies of records as evidence)
- U.S.C., Title 20:
- Section 52 (Smithsonian Institution; evidence of title to site and buildings)
- U.S.C., Title 25:
- Section 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)
- U.S.C., Title 31:
- Section 46 [see 704] (Laws governing General Accounting Office; copies of books, records, etc., thereof as evidence)
- U.S.C., Title 38:
- Section 11g [see 302] (Seal of Veterans’ Administration; authentication of copies of records)
- U.S.C., Title 43:
- Section 57 (Authenticated copies or extracts from records as evidence)
- Section 58 (Transcripts from records of Louisiana)
- Section 59 (Official papers in office of surveyor general in California; papers; copies)
- Section 83 (Transcripts of records as evidence)
- U.S.C., Title 44:
- Section 300h [now 2112] (National Archives; seal; reproduction of archives; fee; admissibility in evidence of reproductions)
- Section 307 [now 1507] (Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation)
- U.S.C., Title 47:
- Section 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)

U.S.C., Title 49:

- Section 16 [now 10303] (Orders of Commission and enforcement thereof; forfeitures—(13) copies of schedules, tariffs, contracts, etc., kept as public records; evidence)

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 27 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 28. Interpreters**

The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

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

NOTES OF ADVISORY COMMITTEE ON RULES—1944

The power of the court to call its own witnesses, though rarely invoked, is recognized in the Federal courts, *Young v. United States*, 107 F.2d 490 (C.C.A. 5th); *Litsinger v. United States*, 44 F.2d 45 (C.C.A. 7th). This rule provides a procedure whereby the court may, if it chooses, exercise this power in connection with expert witnesses. The rule is based, in part, on the Uniform Expert Testimony Act, drafted by the Commissioners on Uniform State Laws, *Hand Book of the National Conference of Commissioners on Uniform State Laws* (1937), 337; see, also, Wigmore—*Evidence*, 3d Ed., sec. 563; A.L.I. Code of Criminal Procedure, secs. 307–309; National Commission on Law of Observance and Enforcement—*Report on Criminal Procedure*, 37. Similar provisions are found in the statutes of a number of States: Wisconsin—Wis.Stat. (1941), sec. 357.12; Indiana—Ind.Stat. Ann. (Burns, 1933), sec. 9–1702; California—Cal.Pen.Code (Deering, 1941), sec. 1027.

NOTES OF ADVISORY COMMITTEE ON RULES—1966  
AMENDMENT

Subdivision (a).—The original rule is made a separate subdivision. The amendment permits the court to inform the witness of his duties in writing since it often constitutes an unnecessary inconvenience and expense to require the witness to appear in court for such purpose.

Subdivision (b).—This new subdivision authorizes the court to appoint and provide for the compensation of interpreters. General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel. Interpreters may also be needed where a witness or a defendant is deaf.

NOTES OF ADVISORY COMMITTEE ON RULES—1972  
AMENDMENT

Subdivision (a). This subdivision is stricken, since the subject of court-appointed expert witnesses is covered in Evidence Rule 706 in detail.

Subdivision (b). The provisions of subdivision (b) are retained. Although Evidence Rule 703 specifies the qualifications of interpreters and the form of oath to be administered to them, it does not cover their appointment or compensation.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 28 has been amended as part of the general restyling of the Criminal Rules to make