EXISTING LOCAL CRIMINAL RULES AND NOTES ON COMMITTEE RECOMMENDATIONS

COMMITTEE NOTE

The Committee recommends the addition of a new Local Criminal Rule 1.1, entitled "Application of Rules." Local criminal Rule 1.1(a) would provide that the Local Criminal Rules apply in criminal proceedings, while Local Criminal Rule 1.1(b) would list the Local Civil Rules that also apply in criminal proceedings. The Local General Rules (which under the Judicial Conference's guidelines must be renumbered as Local Civil or Criminal Rules) would be renumbered as Local Civil Rules 1.2 through 1.10, and would be listed in Local Criminal Rule 1.1(b) as Local Civil Rules that also apply in criminal proceedings.

Rule 1. Notice of Appearance

Attorneys representing defendants named in an information or indictment shall file a notice of appearance in the clerk's office and serve a copy on the United States attorney; or, in cases wherein a complaint has been filed with the United States magistrate judge a notice of appearance shall be filed with the magistrate judge and a copy served on the United States attorney.

COMMITTEE NOTE

The Committee concludes that the requirement of serving and filing a notice of appearance continues to serve a useful function, and that the first paragraph of Local Criminal Rule 1 should be retained and renumbered as Local Criminal Rule 44.1(a). The Committee recommends, however, that the rule be simplified by providing that the notice of appearance shall be filed in all cases in the Clerk's Office. The Committee also recommends that a sentence be added at the end of Local Criminal Rule 44.1(a), stating that after a notice of appearance has been filed, the attorney may not withdraw except upon prior order of the Court pursuant to Local Civil Rule 1.4 (presently Local General Rule 3(c)).

Within twenty (20) days after an attorney first files and serves a notice of appearance in a criminal case following the date of amendment of this Rule, said attorney shall submit to the Clerk of the District Court a certificate of the court for at least one of the states in which the attorney is a member of the bar, which has been issued within thirty (30) days and states that the attorney is a member in good standing of the bar of

that state court. If the Clerk is satisfied that the submitted certificate shows the attorney to be a member in good standing of the bar of a state designated in Rule 2 of the General Rules for these districts, said attorney may file and serve all subsequent notices of appearance without submitting any further certification to the Clerk.

COMMITTEE NOTE

The Committee concludes that this paragraph of Local Criminal Rule 1 is necessary, in light of the potentially serious consequences of having a person not admitted to the bar represent defendants in criminal cases. The Committee suggests several clarifying changes to this paragraph, and recommends that it be renumbered as Local Criminal Rule 44.1(b).

Rule 2. Attendance of Defendants

A defendant in a criminal prosecution admitted to bail shall attend before the court at all times required by the Rules of Criminal Procedure for the United States district courts, and at any time upon notice from the United States attorney.

COMMITTEE NOTE

The Committee recommends that Local Criminal Rule 2 be eliminated as unnecessary, since Federal Rule of Criminal Procedure 43(a) requires the presence of the defendant at critical stages of the proceedings, and the Court retains the power to direct the appearance of the defendant at any time.

Rule 3. Motions

(a) Except as otherwise provided by statute, rule or order of the court, motions in criminal proceedings and motions for remission of forfeiture of bail shall be made upon five (5) days' notice.

COMMITTEE NOTE

The Committee recommends that the substance of Local Criminal Rule 3(a) be retained and renumbered as Local Criminal Rule 12.1, but the Committee recommends that the time periods of Local Criminal Rule 3(a) be recast in line with the Committee's recommended new Local Civil Rule 6.1(a) on the service and filing of substantive civil motions.

The Committee concluded that it would not be useful to differentiate between substantive motions and discovery motions in criminal cases, as is done by Local Civil Rule 3 (and recommended Local Civil Rule 6.1) in civil cases, in large part because substantive and discovery motions are often made simultaneously in criminal cases.

The Committee considered whether to recommend that Local Criminal Rule 12.1 require a notice of motion, affidavits, and a memorandum of law for criminal motions, as Local Civil Rule 6.1 requires for substantive civil motions. In light of the widespread practice of permitting criminal motions to be made in a more informal manner than civil motions, the Committee concluded that it was inadvisable to recommend a uniform local rule on this subject. Individual Judges can, of course, require a more formal procedure for making criminal motions, either by individual rule or by order in a particular case.

(b) Notice of motion and any supporting affidavits must be filed with the clerk at least two (2) days before the return day. No note of issue is required.

COMMITTEE NOTE

The Committee recommends that Local Criminal Rule 3(b) be deleted as unnecessary, since the service and filing of criminal motions will be governed by recommended Local Criminal Rule 12.1.

(c) Motions for correction or reduction of sentence under Rule 35, Federal Rules of Criminal Procedure, or to suspend execution of sentence under 18 U.S.C. § 3651, or in arrest of judgment under Rule 34, Federal Rules of Criminal Procedure, shall be referred to the trial judge. If the trial judge served by designation and assignment under 28 U.S.C. §§ 291-296, and is absent from the district, such motions may be referred to said judge for consideration and disposition.

COMMITTEE NOTE

The Committee recommends that Local Criminal Rule 3(c) be retained and renumbered as Local Criminal Rule 34.1, and that it be generalized to apply to all post-trial motions in criminal cases. The Committee recommends that the citation to 18 U.S.C. § 3651 be deleted in light of its repeal.

(d) Upon any motion, objections or exceptions addressed to a bill of particulars or answers or to discovery and inspection, the moving party shall:

(1) File a copy simultaneously with the filing of the moving papers in all instances in which the demand for a bill of particulars or the answers or the demand for discovery and inspection have not been filed previously; and

(2) Specify and quote verbatim in the moving papers each requested particular or answer and each item as to which discovery and inspection is sought to which objection or exception is taken and immediately following each specification shall set forth the basis of the exception or objection.

COMMITTEE NOTE

The Committee concluded that the provisions of Local Criminal Rule 3(d)(1) and (2) need not be set forth in a local rule, since criminal discovery motions often raise issues that do not depend upon the precise wording of discovery requests and objections, and since as a matter of common sense attorneys making discovery motions in criminal cases can normally be expected to set forth the wording of discovery requests and objections where the wording is material.

No motion described in this subparagraph shall be heard unless counsel for the moving party files with the court simultaneously with the filing of the moving papers an affidavit certifying that said counsel has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issue raised by the motion without the intervention of the court and has been unable to reach such an agreement. Such affidavit shall specify the time when, the place where and the duration of the said conference. If part of the issues raised by motion have been resolved by agreement, the affidavit shall specify the issues so resolved and the issues remaining unresolved.

COMMITTEE NOTE

The Committee concludes that this paragraph of Local Criminal Rule 3(d) serves a useful purpose, and that a local rule is necessary because the Federal Rules of Criminal procedure as yet contain no analogue to Federal Rule of civil Procedure 37(a)(2)(B). Accordingly, the Committee recommends that this paragraph be renumbered as Local criminal Rule 16.1. However, the Committee believes that it is not necessary to require the affidavit to specify the time, place, and duration of any conference between counsel,

or to specify the issues resolved at such a conference (as opposed to the issues that remain unresolved).

Rule 4. Bail Pending Appeal

Application for bail pending appeal shall be made orally upon the clerk's or stenographer's minutes to the trial judge, upon notice. The action taken and the reasons for such action shall be recorded. The judge may direct that the application be made upon notice and written petition setting forth briefly the question to be reviewed by the appellate court.

COMMITTEE NOTE

The Committee recommends that Local Criminal Rule 4 be eliminated as unnecessary in light of Federal Rule of Appellate Procedure 9(a) and 18 U.S.C. § 3143(b).

Rule 5. Approval of Bail Bonds

In cases wherein the amount of bail has been fixed by the judge, the clerk may approve the bond of a corporate surety holding a certificate from the Secretary of Treasury, and may approve the bond of an individual furnishing such bail in cash or government bonds. A party herein may avail itself of Civil Rule 8(c).

Bail bonds of individual sureties shall be approved by one of the officers specified in 18 U.S.C. § 3041.

COMMITTEE NOTE

The Committee recommends that Local Criminal Rule 5 be deleted as unnecessary, since its subject matter is covered by 18 U.S.C. § 3041 and proposed Local Civil Rule 67.1 (derived from existing Local Civil Rule 8(c)), which is not limited to civil cases (see recommended Local Criminal Rule 1.1(b)) .

Rule 6. Sentence; Sentencing Guidelines; Notification of Rights on Appeal

(a) The Role of Counsel

(1) Defense Counsel

Defense Counsel shall:

(i) Prior to entry of plea or commencement of plea agreement discussions, if any, assure himself or herself that the defendant understands the nature and consequences of the plea, sentencing proceedings, and any sentencing alternatives.

(ii) On prompt request, be entitled to be present to protect defendant's rights whenever the defendant is interviewed by probation officers regarding a presentence report to the court.

(iii) Timely familiarize himself or herself with the contents of the presentence report, including the evaluative summary, and any special medical and psychiatric reports pertaining to the client, and shall freely make sentence recommendations to the judge.

(2) The United States Attorney

At the defendant's request, the prosecutor shall inform the judge, on the record or in writing, of any cooperation rendered by the defendant to the government; this writing may be submitted by the agency to which cooperation was furnished. The prosecutor shall make specific sentence recommendations to the judge when requested.

(b) The Role of the Probation Officer

In addition to the normal functions in connection with the preparation of the presentence report, the probation officer shall:

(1) Attend presentence and sentencing hearings when requested by the judge;

(2) Consult with the judge regarding any queries which the latter may have;

(3) Make specific sentence recommendations to the judge when requested by the court, and

(4) Notify counsel that the presentence report has been completed and transmitted to the judge.

(c) Notification of Rights on Appeal

(1) After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his or her right to appeal and other rights in that connection as set forth in and required by Rule 32(a)(2), Federal Rules of Criminal Procedure. If the defendant at that time indicates to the court that he or she desires to appeal the judgment of conviction, the court shall direct trial counsel for defendant or the clerk of the court to file a timely notice of appeal on defendant's behalf. The court at that time shall also entertain either or both of the following applications:

(i) application of defendant to appeal *in forma pauperis*;

(ii) application for transcription of all or portions of the trial record at public expense.

Alternatively, the court may direct that such applications be made at a later date in writing. The court shall also advise defendant and trial counsel that the latter is not relieved from representation of defendant until the Court of Appeals so directs.

(2) In connection with the foregoing proceedings, the court in appropriate circumstances may direct the clerk to furnish defendant with a notice of appeal form, together with a form for application for leave to appeal *in forma pauperis* and for a transcript of all or a part of the trial proceedings at public expense.

COMMITTEE NOTE

The Committee recommends that Local Criminal Rule 6 be eliminated as unnecessary and to some extent obsolete, in light of the provisions of the Sentencing Guidelines (especially Policy Statement 5K1.1) and Federal Rule of Criminal Procedure 32.

Rule 7. Free Press-Fair Trial Directives

(a) It is the duty of the lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which a lawyer or a law firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice. With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers or otherwise to aid in the investigation.

COMMITTEE NOTE

The Committee believes that Local Criminal Rule 7 serves an important purpose in the administration of criminal justice, and that it should be retained (with certain amendments, as recommended below) and renumbered as Local Criminal Rule 23.1. For ease of use and reference, the Committee recommends that each paragraph of the rule be separately lettered, and that the first two sentences of the rule be made into separate paragraphs.

With the aid of the very helpful May 28, 1996 Report by the Federal Bar Council Committee on Second Circuit Courts on Local Rules Limiting Attorney Speech in Criminal Proceedings (hereinafter "Federal Bar Council Report"), the Committee has identified a number of issues raised by the first paragraph of Local Criminal Rule 7, and has arrived at the following recommendations with respect to these issues.

(1) The Federal Bar Council Committee recommends that language be added to make clear that the requirements of Local Criminal Rule 7 apply not only to lawyers and law firms associated with a criminal litigation, but also to non-lawyers employed by or subject to the supervision of such lawyers, and to government agents and police officers (Federal Bar Council Report at 23). The Committee concurs in this recommendation. The Committee has modified the language suggested by the Federal

Bar Council Committee to apply to government agents and police officers regardless of whether or not they are supervised by government lawyers.

(2) The Federal Bar Council Committee recommends that the local rule be amended to require a "substantial probability," rather than a "reasonable probability," that an extrajudicial statement will interfere with a fair trial or otherwise prejudice the administration of justice (Federal Bar Council Report at 20-22). While the Joint committee was not able to reach a full consensus on this subject, a majority of our Committee agrees with the Federal Bar Council Committee on this point. Among the factors influencing the Committee in reaching this conclusion are (1) the fact that the rule whose facial constitutionality was upheld by the United States Supreme Court in Gentile v. state Bar of Nevada, 501 U.S. 1030, 1036-37 (1981), spoke in terms of a substantial likelihood of material prejudice, and (2) the fact that the Committee has recommended in connection with Local General Rules 2 and 4 that the United States District Courts for the Southern and Eastern Districts of New York generally adopt the ethical standards of the New York State Lawyer's Code of Professional Responsibility, and DR 7-107(A) of that Code has adopted the "substantial likelihood" test. The Committee does not intend this change to result, and does not anticipate that it will result, in an appreciable change in the volume of publicity in criminal cases in the Southern and Eastern Districts of New York. In this connection, the Committee notes that the list of statements that are ordinarily likely to result in substantial prejudice under DR 7-107(B) of the New York State Lawyer's Code of Professional Responsibility is very similar to the list of presumptively prohibited statements in recommended Local Criminal Rule 23.1(d), which is largely drawn from the list of prohibited statements in existing Local Criminal Rule 7.

(3) The Federal Bar Council Committee recommends that it be made clear that, during a period of pre-indictment investigation of a criminal matter, the prohibitions of Local Criminal Rule 7 apply only to government personnel (Federal Bar Council Report at 22-23). The Joint Committee does not concur in this recommendation. If there is a substantial likelihood of prejudicing a fair trial, the Committee believes that publicity should be barred during the pre-indictment period regardless of whether such publicity emanates from government lawyers or from lawyers for a target, witness, or third party. The Committee has added language to recommended Local Criminal Rule 23.1(b) which is designed to make the rule clearer in this regard.

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information or indictment, in any criminal matter until the commencement of trial or disposition without trial, a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation and family status; and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in the accused's apprehension or to warn the public of any dangers the accused may present;

(2) The existence or contents of any confession, admission or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of his, her, or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit and use of weapons), the identity of the investigating and arresting officer or agency and the length of investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement,

which is limited to a description of the evidence seized; from disclosing the nature, substance or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges.

COMMITTEE NOTE

The Federal Bar Council Committee recommended the deletion of the lists of permissible and impermissible subjects in Local Criminal Rule 7, on the ground that the Second Circuit held in United States v. Cutler, 58 F.3d 825, 835-36 (2d Cir. 1995), that even where speech falls within one of the impermissible categories specified in the local rule, it must also be shown that is reasonably likely to interfere with a fair trial or the administration of justice.

Our Committee does not concur in this recommendation. The Second Circuit's holding in Cutler can be accommodated by providing in the local rule that the permissible and impermissible categories specified in the rule are presumptive only. Indeed, the Second Circuit stated in Cutler that "there is a strong, albeit rebuttable, presumption that speech falling within the six [impermissible] categories violates Local Rule 7…" 58 F.3d at 836.

In our Committee's view, the lists of permissible and impermissible categories in Local Criminal Rule 7 play a valuable role in giving reasonable notice of the scope of the general prohibition of that rule, as required by Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048-50 (1981). The committee therefore recommends that the lists be retained, but that the rule be modified to make clear that the lists are presumptive only.

In the list of presumptively prohibited statements, the Committee has added a new item (6) which is drawn from DR 7-107(B)(5) of the New York Lawyer's Code of Professional Responsibility. The Committee has also suggested clarifying and balancing changes in items (2), (5), and (7) of the list of presumptively permissible statements.

During a jury trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will

interfere with a fair trial, except that the lawyer or the law firm may quote from or refer without comment to public records of the court in the case.

COMMITTEE NOTE

The Federal Bar Council Committee recommends the deletion of this paragraph (see Federal Bar Council Report at 35). Our Committee believes that the paragraph serves a useful purpose in particularizing the general standards of Local Criminal Rule 7 to the trial setting, and recommends that it be retained (with the term "reasonable likelihood" being changed to "substantial likelihood") and renumbered as Local Criminal Rule 23.1(c).

Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against said lawyer.

(b) All court supporting personnel, including, among others, marshals, deputy marshals, court clerks, bailiffs and court reporters and employees or sub-contractors retained by the court-appointed official reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a pending grand jury proceeding or criminal case that is not part of the public records of the court. The divulgence of information concerning grand jury proceedings, *in camera* arguments and hearings held in chambers or otherwise outside the presence of the public is also forbidden.

COMMITTEE NOTE

The Federal Bar Council Committee would strike the last sentence of this paragraph (see Federal Bar Council Report at 36). Our Committee believes that this sentence is justified and helpful, and recommends that it be retained, but that it be made clear that it is limited to court supporting personnel as defined in the first sentence of the paragraph.

(c) In a widely publicized or sensational case, the court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses and any other matters which the court may deem appropriate for inclusion in such order.

COMMITTEE NOTE

The Federal Bar Council Committee made two recommendations with respect to Local Criminal Rule 7(c):

(1) The Federal Bar Council Committee recommended that the words "[i]n a widely publicized or sensational case" be stricken, so that Local Criminal Rule 7(c) would potentially be available in any criminal case (Federal Bar Council Report at 24-25). On balance, our Committee concurs in this recommendation, because our Committee believes that the recommendation set forth immediately below will help to insure that the rule will be used only in an appropriate case.

(2) The Federal Bar Council Committee recommended that two sentences be added at the end of Local Criminal Rule 7(c) calling attention to the requirement of cases such as In re Application of Dow Jones & Co., 842 F.2d 603, 611 (2d Cir.), cert. denied, 488 U.S. 946 (1988), that alternative remedies be considered before entering an order under Local Criminal Rule 7(c) (Federal Bar Council Report at 25). Our Committee agrees that this would be a helpful addition to the local rule, and recommends certain clarifying changes to the language suggested by the Federal Bar Council Committee.

In addition to the suggestions for changing Local criminal Rule 7 which have been described above, the Federal Bar council Committee made two recommendations for provisions to be added to Local Criminal Rule 7:

(1) The Federal Bar Council Committee recommended the addition of a paragraph providing that attorneys could not be disciplined under other provisions for engaging in speech permissible under Local Criminal Rule 7 (Federal Bar Council Report at 25-26). Our Committee does not support this recommendation. In light of the substantial similarity in content of Local Criminal Rule 7 (as modified by the recommendations set forth above) and DR 7-107 of the New York State Lawyer's Code of Professional Responsibility, our committee believes that the prospect of an attorney being disciplined for engaging in conduct permitted by Local Criminal Rule 7 is so remote that it does not justify the extraordinary step of a federal court purporting by local rule to preempt the application of discipline by other tribunals.

(2) The Federal Bar Council Committee recommended that a paragraph be added providing that a violation of Local Criminal Rule 7 could be the subject of

discipline pursuant to Local General Rule 4 (Federal Bar Council Report at 26). Our Committee concurs in this recommendation.