

**TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and
Procedure**

**FROM: W. Eugene Davis, Chair
Advisory Committee on Federal Rules of Criminal
Procedure**

**SUBJECT: Report of the Advisory Committee on Criminal
Rules**

DATE: May 10, 2001

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure met on April 25-26 in Washington, D.C. and acted on the proposed restyling of the Rules of Criminal Procedure and on proposed substantive amendments to some of those rules. The Minutes of that meeting are included at Appendix E.

II. Action Items—Summary and Recommendations.

This report contains two action items:

- Approval and forwarding to the Judicial Conference of restyled Criminal Rules 1 through 60 (Appendix A); and
- Approval and forwarding to the Judicial Conference of substantive amendments to eight rules—Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 (Appendix B).

III. ACTION ITEM—Approval and Forwarding to Judicial Conference of Restyled Criminal Rules 1-60 (Appendix A)

A. Restyling Project—An Overview

In 1998, the Committee was informed that following successful completion of the restyling of the Appellate Rules, the Style Subcommittee of the Standing Committee would prepare an initial draft of proposed style changes to the Criminal Rules, with the first installment being presented in late 1998. The Advisory Committee was formed into two separate subcommittees to review the rules as they were completed by the Style Subcommittee. In April, June, and October 1999, the Committee considered style revisions to Rules 1 through 31 and presented those rules to the Standing Committee at its January 2000 meeting in Miami. The Committee considered style changes to Rules 32 to 60 in the Spring of 2000, and presented those rules to the Standing Committee at its June 2000 meeting. Rules 1-60 were subsequently published for public comment, along with a separate package of "substantive" amendments to ten of those rules.

Following the public comment period, the two subcommittees met and considered the written comments submitted on the proposed amendments and offered a number of suggested additional style changes. In April 2001, the Advisory Committee considered those proposals and approved the style package—Rules 1-60 (Appendix A).

In conducting the restyling project, the Committee focused on several key points. First, the Committee has attempted to standardize key terms and phrases that appear throughout the rules.

Second, the Committee attempted to avoid any unforeseen substantive changes and attempted in the Committee Notes to clearly state when the Committee was making a change in practice.

Third, in several rules, the Committee deleted provisions that it believed were no longer necessary, usually because the caselaw has evolved since the rule was initially promulgated (or last amended).

Fourth, during the restyling effort, several rules were completely reorganized to make them easier to read and apply. *See, e.g.*, Rules 11, 16, 32, and 32.1. In several others, sections from one rule have been transferred to another rule. *See, e.g.*, Rules 4, 9, and 40.

Fifth, in some rules, significant substantive changes were made. Some of those changes had been under discussion but were deferred pending the restyling projects. Still others were identified and included during the project. As noted, below, those proposed amendments were published in a separate pamphlet for public comment.

B. Publication of Style and Substantive Packages for Public Comment

In June 2000, the Standing Committee authorized publication for public comment of two packages of amendments. The purpose of presenting the proposed amendments in two separate pamphlets was to highlight for the public that in addition to the "style" changes in Rules 1 to 60, a number of significant (perhaps controversial) amendments were also being proposed.

1. The "Style" Package

The first package (Appendix A)—referred to as the "style" package, included Rules 1 to 60. For those rules where the Committee was proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 35, 41,* and 43), the language containing those changes was deleted from the "style" package. A "Reporter's Note" explained to the public that additional substantive changes for that particular rule were being published simultaneously in a separate package.

2. The "Substantive" Package

The second package (Appendix B)—referred to as the "substantive" package, consisted of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41,* and 43, which all provide for significant changes in practice. This version of the package included not only the restyled version of

* The Advisory Committee on Criminal Rules withdrew the proposed "substantive" amendments to Rule 41 for further consideration.

the rule but also the language that would effect the change in practice. The Committee Notes reflect those changes and again, a "Reporter's Note" explained that another version of each of these rules (which included only style changes) was being published simultaneously in a separate package.

C. Post-Publication Changes to the "Style" Package

1. Suggested Style Changes—Style Subcommittee

During the public comment period, Professor Kimble and Mr. Spaniol reviewed the style package several times and offered a number of suggestions. Those proposed changes were considered first by the two subcommittees and then by the full Advisory Committee.

2. Suggested Style Changes From the Public (Appendices C & D)

The Committee received approximately 80 comments from the public. Those comments, which focused on the substantive amendments to the rules, are summarized at Appendix C. In addition, the Administrative Office sorted out those public comments that appeared to focus only on the style package. Those are summarized at Appendix D. Finally, the Committee considered the testimony of five witnesses at the beginning of its meeting on April 25, 2001.

3. Changes Resulting from Intervening Legislation

In addition to the suggested changes from the Style Subcommittee and the public commentators, several changes were required because of intervening legislation, for example, the recently

enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488).

4. Consideration of Possible Global Style Changes

During the public comment period, the Committee—at the suggestion of the Style Subcommittee—considered whether to make a number of post-publication global changes to the style package. The Committee adopted several of the proposed changes but rejected several others.

□ *Numbering.* The Committee originally decided on a method for using Arabic numerals for any number less than 10 (ten) unless the number was "1." It seemed awkward to write the number 1 in those instances. The Style Subcommittee proposed a different system. The Advisory Committee adopted yet another system: Any number other than 1 or a number appearing at the beginning of a sentence or section, will be represented by the Arabic numerals—in order to make the rules more user-friendly.

□ *Internal Cross-referencing.* The Committee addressed the issue whether to specifically identify any cross-references to other provisions within each rule, or whether simply to refer to "this rule." The Committee decided to address this issue on a rule-by-rule basis.

□ *Titles of Rules and Subdivisions.* The Style Subcommittee recommended a number of additions and changes to the titles of subdivisions and paragraphs; in particular they note the preference for using the "ing" form of the word. The Committee adopted most of those recommended changes on a rule-by-rule basis.

□ *Designating Deleted Rules.* A number of rules have been deleted over the years, and several were eliminated as a result of the current restyling effort. At one point during the project the Committee decided to keep the rule numbers in place and indicate in brackets that the rule has been abrogated. The Committee decided to use the designation "[Reserved]" for those rules that were abrogated a number of years ago. The designations "[Transferred]" or "[Deleted]" are used to designate the Committee's actions in this round of amendments.

□ *Use of the Terms "Unable" and "Cannot."* In a number of rules the Style Subcommittee has recommended that the word "cannot" be substituted for the word "unable." In the current rules both terms are used. The Committee decided to consider this proposal on a case-by-case basis.

□ *"Law Enforcement Officer."* The current rules do not hyphenate this term and for the most part neither do the cases or commentators. Although the style subcommittee recommended that the term be hyphenated, the Committee decided otherwise.

5. Rule-by-Rule Summary of Changes Made to Style Package Following Publication

The following discussion identifies those rules where a change—other than a minor stylistic change—was made following publication. The changes are incorporated in the copy of the Rules, and the accompanying Committee Notes, at Appendix A.

a. Rule 1. Scope; Definitions

The Committee amended Rule 1(a)(5) by adding another subparagraph (F) that addresses proceedings against a witness in a foreign country under 28 U.S.C. § 1784. That provision had been inadvertently omitted from an early draft of the restyled Rule.

b. Rule 4. Arrest Warrant or Summons on a Complaint

Rule 4(c)(2) was changed to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488). That act now recognizes that arrest warrants may be executed outside the United States.

c. Rule 5. Initial Appearance

The Committee added Rule 5(a)(1)(B) to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488). The Committee was concerned that if the amendment is not made, an argument could be made that the restyled rule would supersede the Act.

In addition, the Committee adopted a redrafted and restructured Rule 5(c)(2) to expand the options for a case when the accused is arrested in a district other than the district where the offense was allegedly committed. New Rule 5(c)(2) provides that the initial appearance should occur in the district where the prosecution is pending if that district is adjacent to the district of arrest and the appearance will occur on the day of the arrest.

The Committee also changed Rule 5 to refer to "where the offense was allegedly committed" rather than "where the prosecution is pending" for clarity and consistency.

d. Rule 5.1. Preliminary Hearing

The Committee redrafted Rule 5.1(a) to fill a possible gap as to the right to preliminary hearings for persons who are charged with misdemeanors and consent to be tried by a magistrate judge.

e. Rule 6. The Grand Jury

The Committee amended Rule 6(e)(3)(A) by adding a new item (iii) that would provide an exception for disclosures authorized under 18 U.S.C. § 3322 (authorizing disclosures for civil forfeiture and civil banking laws, etc.). The Committee also redrafted Rule 6(a)(2) concerning the selection of alternate grand jurors—to parallel a similar provision for petit jurors in Rule 24.

f. Rule 7. The Indictment and the Information

The introductory language of Rule 7(a)(1) was changed by referencing an exception for criminal contempt proceedings.

g. Rule 11. Pleas

In Rule 11(e), the Committee changed the reference to "28 U.S.C. § 2255" to "collateral attack" to recognize that a plea may be set aside during some other form of collateral attack and not just under § 2255. *See, e.g., United States v. Jeffers*, 234 F.3d 277 (5th Cir. 2000) (noting that petition under § 2241 may be used where relief under § 2255 is inadequate).

The Committee also decided to change Rule 11(f). Rather than attempting to restyle language in Rule 11(f), which now tracks language in Federal Rule of Evidence 410—and risk possible inconsistencies—Rule 11(f) now simply cross-references Rule 410.

h. Rule 17. Subpoena

The Committee changed Rule 17(g) to reflect the authority of a magistrate judge to find a person in contempt.

i. Rule 26. Taking Testimony

Originally, the style version, but not the substantive version, of Rule 26 included the word "orally." The Committee decided, however, to delete the term "orally" from the restyled version as well as change the Committee Note to reflect the purpose of that amendment. The Committee was concerned that if the more substantive change to Rule 26, concerning the remote transmission of live testimony were to be rejected, the noncontroversial change in Rule 26 removing the restriction on oral testimony (as opposed to testimony from someone who communicates through signing) would not be approved.

j. Rule 32. Sentencing and Judgment

The Committee revised Rule 32(d) to clarify the provision dealing with the contents of the presentence report.

The Committee also adopted a revised version of Rule 32(h) and have now designated it as subdivision (h) and redesignated the remaining provisions as new subdivisions. Subdivision (h) is now what had been Rule 32(h)(5) in the restyled version published for comment.

Rule 32(i) (formerly 32(h)) also includes a change in (i)(B) to reflect a recommendation that Rule 32(h)(1)(B) be amended to include a requirement that the judge provide the excluded information to the government as well as to the defendant.

Finally, Rule 32(i)(4)(C) (currently (h)(4)(C) in the published version, which addresses in camera hearings) now includes a "good cause" requirement.

k. Rule 32.1. Revoking or Modifying Probation or Supervised Release

The Committee decided to delete Rule 32.1(a)(3) that would have required the magistrate judge to give rights warnings to a person appearing before the magistrate judge for possible revocation of probation proceedings.

l. Rule 35. Correcting or Reducing a Sentence

The published version of Rule 35 uses the term "sentencing" to describe the triggering element for the two "time" requirements in the rule—the seven-day requirement and the one-year requirement. At the suggestion of the Standing Committee, the Advisory Committee discussed the issue of further defining or clarifying the term "sentencing." Although the initial decision was to use the term "oral announcement of sentence"—which reflects the majority view of the courts that have addressed the issue—upon further consideration, the Committee decided to define sentencing as the entry of the judgment.

Even though that may result in the change in practice in some circuits, it is more consistent with describing the triggering event, for example, of an appeal of a sentence.**

m. Rule 42. Criminal Contempt

Rule 42(b) has been modified to reflect the authority of magistrate judges to hold contempt proceedings—per the recent Federal Courts Improvement Act.

n. Rule 45. Computing and Extending Time

The term "President's Day" has been changed back to "Washington's Birthday," which is consistent with the recommendation of the Appellate Rules Committee to make the same change to its rules.

o. Rule 52. Harmless and Plain Error

In Rule 52(b), the Committee has deleted the words "or defect" to clarify an ambiguity in the wording "a plain error or defect...." The Supreme Court has concluded that that wording should be read more simply as meaning "error" and that the use of the disjunctive is

** At the request of the Advisory Committee on Criminal Rules, the Committee on Rules of Practice and Procedure agreed at its June 7-8, 2001, meeting, to withdraw the proposal defining "sentencing" as the entry of the judgment. The Committee also agreed with the advisory committee's recommendation to publish the withdrawn proposal for public comment.

misleading. See *United States v. Olano*, 507 U.S. 725, 732 (1993) (incorrect to read Rule 52(a) in the disjunctive); *United States v. Young*, 470 U.S. 1, 15 n.12 (1985) (use of disjunctive in Rule 52(a) is misleading). No changes were made to Rule 52(a).

p. Rule 58. Petty Offenses and Other Misdemeanors

Rule 58(b)(2)(E)(i) and (b)(3)(A) and (B) were changed to reflect recent statutory changes. The term "Class B misdemeanor motor vehicle offense, Class C misdemeanor, or an infraction" has been changed to read "petty offense."

q. Rule 60. Title

The Committee has restored Rule 60, which was originally deleted from the style package of the rules, as being unnecessary. After further discussion, the Committee believed that removing the official designation of the title of the Criminal Rules might create uncertainty or inconsistency in the designation or citation of the rules.

Recommendation: The Advisory Committee on the Criminal Rules recommends that the "style" package, consisting of Rules 1-60, be approved and transmitted to the Judicial Conference with a recommendation that it be sent to the Supreme Court for approval.

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Appendix A. Style Package—Rules 1 to 60

Appendix B. Substantive Package—Rules 5, 5.1, 10, 12.2, 26, 30, 35,
and 43

Appendix C. Summary of Public Comments on Substantive
Amendments (Not Included)

Appendix D. Summary of Public Comments on Style Package (Not
Included)

Appendix E. Minutes of April 2001 Meeting (Not Included)