

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2000
New York City, New York

The Advisory Committee on the Federal Rules of Criminal Procedure met at New York City, New York on April 25 and 26, 2000. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Tuesday April 25, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. David D. Dowd, Jr.
Hon. Edward E. Carnes
Hon. Paul E. Friedman
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg
Mr. Darryl W. Jackson
Mr. Lucien B. Campbell, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal
Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee, Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Joseph Kimble and Mr. Joseph Spaniol, consultants to the Standing Committee, Hon. James Parker, former member of the Standing Committee and past-chair of that Committee's Subcommittee on Style, Ms. Lynn Rzonca, briefing attorney for Judge Scirica, and Ms. Laurel Hooper, of the Federal Judicial Center.

Judge Davis, the Chair, welcomed the attendees and noted the presence and assistance of Judges Parker and Tashima, and the new consultant on style to the Standing Committee, Professor Joe Kimble.

II. APPROVAL OF MINUTES

Mr. Jackson moved that the minutes of the Committee's special style meeting in Orlando, Florida in January 2000, be approved. The motion was seconded by Justice Wathen and carried by a unanimous vote.

III. STATUS OF PENDING AMENDMENTS BEFORE THE SUPREME COURT

Mr. Rabiej informed the Committee that the Supreme Court had approved the amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 on April 17, 2000 and had forwarded them to Congress. Barring any additional action by Congress, those changes will go into effect on December 1, 2000.

IV. REPORT ON STATUS OF RESTYLING PROJECT: PROPOSED PUBLICATION OF TWO PACKAGES OF RULES

Judge Scirica informed the Committee that he and Professor Coquillette had met with the Chief Justice and provided a status report on the criminal rules restyling project. Judge Davis added that as a result of discussions between Judge Scirica, Professor Coquillette, Mr. Rabiej, and the Reporter, that it was decided that it would be best to publish the proposed rules changes in two packages. That process was further explained by the Reporter who informed the Committee that the first package would be referred to as the "Style" package and would consist of all of the criminal rules. That package would include changes in style and any other changes resulting from conforming the rules to practice or clarifying ambiguous provisions in the existing rules. He added that a "Reporter's Note" would accompany a number of the rules that would be published separately in a second package. The second package for publication, he continued, would be referred to as the "Substantive" package. He noted that that package would consist of approximately 10 rules that included substantive amendments that had been under consideration by the Committee apart from the restyling project. It could also include, he stated, any rules that involved major or controversial changes. The secondary purpose of this package would be to draw the public's attention to those rules containing significant changes in current practice.

Mr. Pauley questioned whether certain rules, such as the proposed amendment to Rule 35 would have to be included in the substantive package. The Reporter responded that that particular rule had been included because the amendment to that rule had been under consideration for some time, before the restyling project began. Again, each of the rules in

the substantive package would be a restyled version of the rule and would be accompanied by a Committee Note and Reporter's Note that would explain that two versions of the rule were being published separately but simultaneously.

Mr. Rabiej added that a letter of explanation would be included in the publication packages to set out the purposes for duplicate sets of rules.

Judge Dowd moved that the Committee approve the format of using two separate packages for publication, with the understanding that a rule might be added, or removed, from the substantive package. The motion was seconded by Judge Miller and carried by a unanimous vote.

V. UNRESOLVED OR NEW ISSUES IN RULES 1-60*

Judge Davis indicated that the priority for the meeting would be to review any unresolved, or new, issues that remained in Rules 1 to 60, following the subcommittee meetings in February and March.

A. Rule 5. Initial Appearance.

Mr. Pauley pointed out that the restyled Rule 5 included a gap for extraterritorial jurisdiction. The revised rule sets out where officers are to take defendants who have been arrested within a district and outside a district. But the rule does not address what is to happen if a defendant is arrested outside the United States. Judge Miller added that in his district the courts handle a number of initial appearances involving arrests occurring outside the United States. Following additional discussion, Mr. Pauley moved that Rule 5(a)(1)(B) be amended. Judge Miller seconded the motion, which carried by a unanimous vote.

B. Rule 5.1. Preliminary Hearing in a Felony Case.

Mr. Pauley also pointed out that two sentences in Rule 5.1(e) were out of place. Following some discussion, Mr. Campbell moved that the rule be amended. Judge Carnes seconded the motion, which carried by a unanimous vote.

C. Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition.

Several committee members noted that in restyling Rule 12.2 a reference to mental examinations had been inadvertently omitted from the revised rule. The Reporter later

* The discussion concerning the rules follows their numerical order rather than the order they were discussed at the meeting.

informed the Committee that Mr. Pauley, Mr. Campbell and the Reporter had drafted some appropriate language--for both the restyled version of Rule 12.2 and the "substantive" version of Rule 12.2.

D. Rule 26.

Judge Carnes reported that in reviewing the proposed changes to new Rule 26(b)(3), which provides for remote transmission of live testimony, the Subcommittee had initially referred to unavailability provisions in Federal Rule of Evidence 804(a)(1) to (4) in an attempt to avoid a possible conflict with Rule 804(a)(5)'s requirement that a proponent must first show a reasonable attempt to obtain a witness's actual presence in court before offering prior testimony under Rule 804(b)(1). He noted however that for purposes of Rule 26, the only reasonable grounds for unavailability are those listed in Rule 804(a)(4) and (5). The Committee discussed the matter and ultimately agreed to the change, with the recognition that the Evidence Committee might wish to visit the issue.

E. Rule 32. Sentencing and Judgment.

Judge Dowd, the chair of Subcommittee B, informed the Committee that the Subcommittee had addressed the provision in Rule 32(h)(3) concerning whether the sentencing judge must decide all unresolved objections to the presentence report. He noted that on one hand, the Subcommittee recognized that the accuracy of the presentence report was often of assistance to the Bureau of Prisons in deciding administrative disposition of a defendant in the prison system. On the other hand, he noted, the Subcommittee was concerned that requiring a judge to rule on every unresolved objection could be time consuming and inefficient if in fact the factor in question was not material to a sentencing decision. Finally, he stated that Mr. Pauley had suggested an amendment to the rule that would address the problem.

Mr. Campbell added that his research indicated that the Bureau of Prisons depends on the presentence reports in making certain administrative decisions. He noted that the report might actually affect the length of the sentence to be served. Judge Friedman stated that the rule may not go far enough and that perhaps the rule should set out what constitutes "material" information in the report. Judge Carnes observed that trial judges should not be called upon to do the work of the Bureau of Prisons; the role of the trial judge is to determine the sentence. Mr. Pauley stated that the rule, which seemingly requires the judge to resolve all objections, even if they will not affect the sentence, does not reflect current practice in all courts. He explained that in his view, a material matter in a presentence report would be where the defendant has admitted drug addiction in hopes that he or she would be eligible for certain rehabilitation programs while in prison. In that instance, it would be important for the judge to resolve any disputes about whether the defendant in fact was addicted to drugs.

Following additional discussion, Judge Dowd ultimately moved that the Committee adopt Mr. Pauley's suggested change to Rule 32(h)(3), which would require the sentencing judge to decide unresolved objections to material matters. Judge Roll seconded the motion, which carried by a vote of 6 to 4. Members of the Committee suggested that the Note indicate the purpose of the change and that counsel should be prepared to take a greater role in insuring that the Bureau of Prisons was presented with accurate information.

Several members suggested that in light of the substantive change to Rule 32, it should be included in the "substantive" package of amendments. The Committee ultimately voted to do so.

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

Judge Dowd noted that he had identified a potential problem in the wording of Rule 32.1 and the accompanying note, that might be read to preclude magistrate judges from preparing reports and recommendations on whether to revoke or modify probation or supervised release. Mr. Campbell responded that he had done some additional research on the issue and proposed language for both the rule and the note to address the issued raised by Judge Dowd. The Committee agreed to the changes suggested by Mr. Campbell.

Mr. Pauley expressed concern about language in Rule 32.1(b)(2)(C) that might be interpreted to provide an absolute right to a person to examine adverse witnesses in connection with a revocation hearing. Following additional discussion, Mr. Pauley moved, and Judge Miller seconded, a motion to make minor changes in the language of the rule that reflects that the right to cross-examination exists unless the court determines that the interests of justice do not require the witness to appear at the hearing. The Committee approved the amendment by a vote of 9 to 0 with 1 abstention.

G. Rule 38. Stay of Execution.

Judge Dowd noted that at the Committee's meeting in Orlando, a question was raised about Rule 38(e)(2)(D) and whether the term "surety bond" could be substituted for the term "performance bond." He indicated that after further consideration he recommended that the reference to "bond" in the restyled version be retained, and so moved. Judge Roll seconded his motion. The motion carried by a unanimous vote.

I. Rule 41. Search and Seizure.

Professor Stith informed the Committee of Subcommittee A's proposed revision of Rule 41, in particular the reference in the definitions section, Rule 41(a)(2) to "intangibles." The Committee discussed the issue and concluded that the term was difficult to define; in its place the Committee agreed to substitute the word "information." She also noted that there had been a great deal of discussion about Rule 41(b)(1), which would provide for issuing warrants for covert entries. Mr. Pauley indicated that the courts have already approved such

entries and that the rule could be amended to indicate that such entries are non-continuous, as opposed to entries approved under Title III, which may involve continuous monitoring. Following some additional discussion, Professor Stith moved that the section be amended to note explicitly that these types of intrusions are non-continuous. Judge Friedman seconded the motion, which carried by a vote of 9 to 2 with 1 abstention.

Professor Stith also noted that the subcommittee had discussed the question of whether to include the covert entry provision in the published amendments. Mr. Pauley reiterated that the courts have already approved these intrusions so that the rule is not really creating a new type of fourth amendment intrusion. He added that it would be important that the rule address this investigative technique and establish procedural mechanisms for its implementation.

Judge Friedman responded that this issue was one for Congress to address and that only two circuits have addressed the question of covert searches. In particular he was concerned about the open-ended nature of these intrusions, noting that under proposed Rule 41(f)(5), the government could obtain multiple 30-day extensions of time in which to inform the property owner that a covert entry has occurred. Following additional discussion, the Committee agreed by a vote of 11 to 1 to modify that language to reflect that the court could grant a "reasonable" extension of time to deliver the warrant. By the same margin of approval, additional amendments were made to the rule.

Judge Wathen raised the question of whether even the amended version of Rule 41 should be published for comment. Several members indicated a concern that the amendment was not really procedural in nature and that until there was more caselaw on the subject, the issue of covert searches should not be included in the rule. Judge Wathen moved that the substantive amendments regarding covert searches be removed from the rule. Judge Dowd seconded the motion; it failed by a vote of 6 to 7, with Judge Davis casting the tie-breaking vote.

J. Rule 46. Release from Custody; Supervising Detention.

Judge Carnes informed the Committee that Subcommittee A had discussed the language in Rule 46(i), dealing with forfeiture of property if a defendant fails to appear. He noted that the subcommittee had concluded that the language in that provision had been included by Congress and the subcommittee was initially reluctant to change the language. However, he recommended "restyled" language that would retain the essence of the provision and make it clearer that a court may dispose of a charged offense by ordering forfeiture under 18 U.S.C. § 3146(b), if a fine in the amount of the property's value would be an appropriate sentence. Judge Dowd moved that the suggested language be adopted and Judge Bucklew seconded the motion. The motion carried by a unanimous vote.

K. Rule 48. Dismissal.

Judge Dowd indicated that at the Committee's Orlando meeting, a question had been raised about whether to retain Rule 48(b), which permits a court to dismiss an indictment for delays. It had been pointed out at that meeting that the rule had preceded enactment of the Speedy Trial Act and that there was a risk that re-promulgating the rule might be viewed as an attempt to supersede that Act. The Subcommittee had considered an amendment offered by Mr. Pauley but had ultimately decided not to change the rule because it believed that Rule 48(b) still had utility apart from the Speedy Trial Act. Following some additional discussion the Committee decided to retain Rule 48(b) and suggested some modifications to the accompanying Note that would simply reflect that the Committee had considered the relationship between the Speedy Trial Act and Rule 48 and that it intended to make no change in that relationship.

L. Rule 49. Serving and Filing of Papers.

The Reporter informed the Committee that the Civil Rules Committee had published for comment an amendment to Civil Rule 77 concerning electronic service of a court's orders or judgments. He noted that Criminal Rule 49 currently cross-references the civil rules regarding service of papers and recommended that similar language be adopted regarding notice of a court order in Rule 49(c). Following discussion Judge Miller moved that Rule 49(c) be so amended. Mr. Campbell seconded the motion, which carried by a unanimous vote.

VI.VIDEO TELECONFERENCING—RULES 5 & 10

Judge Roll reported that in his circuit there was a great deal of interest in being able to use teleconferencing for initial appearances and arraignments. He also noted, however, that there was also a feeling that if those procedures were dependent upon obtaining the defendant's consent that they would not be used. Following additional discussion, the Committee voted by a margin of 10 to 2 to publish alternate versions of Rule 5—one that would require the defendant to consent to video teleconferencing and one that would not. The Committee also voted by a margin of 11 to 1 to publish similar alternate versions of Rule 10.

VII.ADDITIONAL STYLE CHANGES TO RULES 1 - 60

Judge Davis indicated that additional suggested style changes had been submitted by several parties and that they would be submitted to the Standing Committee's Style Subcommittee, which would be conducting a review of the rules during the public comment period. Any minor, purely mechanical, corrections or changes could be incorporated into the two packages to be sent to the Standing Committee. The Reporter added that if time permitted, any changes or corrections could be considered at the Committee's Fall 2000 meeting, while the rules were still out for public comment.

VIII.FINANCIAL DISCLOSURE RULES

Judge Scirica provided some background information on proposed financial disclosure rules. He indicated that the Judicial Conference was very interested in the topic and that each of the rules committees would hopefully agree on some standard language for their particular rules to be published in August 2000. He noted that there had been considerable discussion about whether these proposed rules were even procedural in nature; some were of the view that this is really a matter of professional ethics and not the rules process. In response, others had noted that the Appellate Rules already included a disclosure provision, that Congress apparently expected the Judicial Conference to address the issue, and finally, the Code of Conduct Committee had requested assistance from the rules committees. Judge Scirica also stated that there had been a good deal of debate over just what should be disclosed. A review of the district and appellate courts had indicated a wide variety of approaches to the problem. For now, he said, there appeared to be a consensus to address the topic in a more limited fashion in the rules themselves but to include a cross-reference to the fact that the Judicial Conference might develop a standard form that could be used; that form in turn might require information beyond the basic financial disclosure envisioned at this time.

Judge Davis indicated that he and the Reporter had discussed the issue and that the Reporter, using Appellate Rule 26.1, had drafted a new Rule 12.4 that would parallel that Rule. The Reporter added that eventually the Reporters of the various rules committees would probably work further to standardize the language.

Following additional discussion regarding disclosure of information concerning organizational victims, the Committee approved the draft.

IX.APPROVAL OF HABEAS RULES FOR PUBLICATION

The Reporter presented copies of proposed amendments and committee notes to the Habeas Corpus Rules (Rules Governing § 2254 and § 2255 Proceedings) to the Committee for its consideration. He noted that the Committee had already approved the substance of the changes at the Fall 1998 and Fall 1999 meetings. Judge Carnes and Judge Miller briefly addressed the purpose of the amendments. Judge Friedman questioned the proposed language in Rules 2 and 3 that would change the current practice of receiving and reviewing habeas actions. In his experience, one judge reviews all of the habeas actions that are received and then decides whether they should actually be filed. Other judges noted that the amendment conforms to Civil Rule 5(e) that indicates that the clerk is to file the papers and then refers them to the court for a determination of whether there are any defects in the papers.

Judge Miller moved that the rules be approved and forwarded with a recommendation that they be published for comment. Mr. Pauley seconded the motion, which carried by a unanimous vote.

X.APPROVAL OF PUBLICATION OF LOCAL RULES ON INTERNET

Mr. Rabiej asked the Committee to consider a proposal to publish all of the local rules on the internet. He noted that some concerns had been raised that publication might lead to unnecessary cross-analysis of some of the rules. Following brief discussion, Judge Dowd moved that the Committee approve publication of the local rules on the internet. Judge Miller seconded the motion, which carried unanimously.

XI.APPROVAL OF RULES 1 - 60 FOR SUBMISSION TO STANDING COMMITTEE FOR PUBLICATION

Judge Miller moved that the Committee forward restyled Rules 1 through 60 the Standing Committee for publication and comment. Judge Wathen seconded the motion, which carried by a unanimous vote. Judge Davis thanked the Committee members for all of their dedicated efforts in the restyling project.

XII.DESIGNATION OF TIME AND LOCATION OF NEXT MEETINGS

Judge Davis recommended that the Committee hold its Fall 2000 meeting in San Diego. The tentative dates for that meeting are October 23 to 24.

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee