MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 22-23, 1999

Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. on April 22 and 23, 1999. 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 Thursday, April 22, 1999. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. D. Brooks Smith
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Robert C. Josefsberg, Esq.
Mr. Darryl W. Jackson, Esq.
Mr. Henry A. Martin, Esq.
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. James A. Parker, member of the Standing Committee and Chair of that Committee's Style Subcommittee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Roger Pauley, Jr. of the Department of Justice, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; Ms. Nancy Miller, Judicial Fellow at the Administrative Office; Mr. Joseph Spaniol, consultant to the Standing Committee, and Professor Stephen A. Saltzburg, consultant to the Style Subcommittee of the Standing Committee,. Judge Davis, the Chair, welcomed the attendees.

II.APPROVAL OF MINUTES OF OCTOBER 1998 MEETING

Chief Justice Wathen moved that the Minutes of the Committee's October 1998 meeting in Cape Elizabeth, Maine be approved. Following a second by Mr. Josefsberg, the motion carried by a unanimous vote.

III. RULES PENDING BEFORE SUPREME COURT

The Reporter indicated that the following rules were pending before the Supreme Court:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment);

2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.);

3. Rule 24(c). Alternate Jurors (Retention During Deliberations);

4. Rule 30. Instructions (Submission of Requests for Instructions);

5. Rule 54. Application and Exception.

IV.RULES APPROVED BY STANDING COMMITTEE AND JUDICIAL CONFERENCE

The Reporter informed the Committee that both the Standing Committee (at its January 1999 meeting) and Judicial Conference (at its Spring 1999 meeting) had approved the following rules:

1. Rule 32.2. Criminal Forfeitures

2. Rule 7. The Indictment and Information (Conforming

Amendment);

3. Rule 31. Verdict (Conforming Amendment);

4. Rule 32. Sentence and Judgment (Conforming Amendment); and

5. Rule 38. Stay of Execution (Conforming Amendment).

RULES AMENDMENTS EFFECTIVE DECEMBER 1, 1998

The Reporter also informed the Committee that amendments to the following Rules had become effective on December 1, 1998:

1. Rule 5.1 (Preliminary Examination; Production of Witness Statements);
2. Rule 26.2 (Production of Witness Statements; Applicability to Rule 5.1 Proceedings);
3. Rule 31 (Verdict; Individual Polling of Jurors);
4. Rule 33 (New Trial; Time for Filing Motion);
5. Rule 35(b) (Correction or Reduction of Sentence; Changed Circumstances); and
6. Rule 43 (Presence of Defendant; Presence at Reduction or Correction of Sentence).

V. CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Style Amendments to Rules 1-9, Rules of Criminal Procedure

Judge Davis opened the discussion by noting that in addressing the proposed style changes --as originally drafted and then reviewed by Subcommittee A --the Committee would inevitably have to address the issue of whether to make an substantive changes as well. He also suggested that there be a preference for removing or addressing any ambiguities in the rules that have arisen since the rules were adopted; the Committee generally agreed with that approach. Finally, Judge Davis noted that it would be important to be alert to style changes that might inadvertently amount to changes in the substance of the Rule or create any unintended ambiguities. Other members agreed with that observation and Judge Parker noted that in addressing the style changes to the Appellate Rules, the Appellate Rules Committee had decided to make substantive changes as well.

Judge Smith, Chair of Subcommittee A, indicated that the subcommittee had reviewed the proposed style changes and had met for a one-day meeting to review the proposed changes. Each member of that subcommittee

had been assigned one or more rules and was prepared to discuss the changes.

1. Rule 1. Scope. Judge Carnes explained that the proposed changes to Rule 1 included what is currently in Rule 60 (Title of Rules) and Rule 54 (Application and Exception). Following discussion, the Committee agreed by a vote of 8 to 2 to delete subdivision (a) in the redrafted rule (current Rule 60) because there was no need to indicate in the Rules themselves what the Rules will be called. (All remaining subdivisions in the restyled Rule 1 were renumbered). Judge Carnes further explained that the language in current Rule 54(2) (Offenses Outside a District or State), (3) (Peace bonds), and (4) (Proceedings Before United States Magistrate Judges) had not been incorporated into restyled Rule 1 because they were not needed.

He also pointed out that language in Rule 54(b)(5) relating to proceedings involving fishery offenses and proceedings against a witness in a foreign country had been deleted as being obsolete. Following discussion, the Committee decided by a vote of 10 to 0 to delete the language currently in Rule 54(c) relating to the definition of the words "demurrer," " motion to quash," "plea in abatement," "plea in bar," and "special plea in bar" because those terms are obsolete and there is no need to cross-reference Rule 12, which addresses the topic of motions.

The Committee discussed use of the term "government attorney" as contrasted to the current term used in the Rules, "attorney for the government" in Rule 54(c). Following discussion, the Committee decided to add to the definition those attorneys authorized by law to conduct proceedings under the criminal rules in the capacity of prosecutor. That change was intended to cover such attorneys as those in the Office of Independent Counsel or Special Counsel.

In addressing the definition of the term "Magistrate Judge," the Committee decided to include the following language: "When these rules authorize a magistrate judge to act, a United States judge as defined in 28 U.S.C. **§** 451 may act."

The Committee also added a definition for "organization" as defined in 18 U.S.C. **§** 18. Finally, the Committee voted unanimously to arrange the definition of terms in restyled Rule 1(c) alphabetically. During the discussion, other minor stylistic changes were made to the rule.

2. Rule 2. Purpose and Construction.

Following a brief discussion concerning the title of the Rule, the Committee made a minor change to the text of Rule 2 to indicate that the "rules are to be interpreted to provide.." as opposed to the current language, "are intended to provide..."

3. Rule 3. The Complaint.

The Committee briefly addressed the issue of whether a complainant must personally appear before a judicial officer in swearing to a complaint. Professor Saltzburg reported that his research had shown that there is no such requirement. Following brief discussion concerning the relationship between Rules 3, 4, and 5 the Committee decided to tentatively approve Rule 3 pending research and possible redrafting to make those three rules consistent.

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

In discussing the proposed changes to Rule 4(a), the Committee decided to include an element of discretion in those instances where the defendant fails to respond to a summons. The redrafted rule provides that the judge may issue a warrant, but must do so in those cases where the government requests that a warrant be issued. The Committee also clarified language concerning the ability of the judge to issue more than one warrant or summons on the same complaint.

Rule 4(b), which simply notes that hearsay evidence may be used to establish probable cause, was deleted as being unnecessary; the caselaw now clearly recognizes that principle. In discussing proposed Rule 4(c), the Committee addressed the issue of whether the current language "nearest available magistrate" was the most appropriate standard. There was also some discussion on the question of whether some preference should be stated for requiring that a defendant be brought before a federal judge, rather than a state officer. After discussing the issue, the Committee decided to change the rule to require that a warrant must command that "the defendant be arrested and brought promptly before a federal judge or, if none is reasonably available, before a state or local officer;" The consensus was that this language would more accurately reflect the thrust of the original rule --that time is of the essence and the necessity of bringing a defendant before a judicial officer with some dispatch, regardless of the location of that officer --and to state a preference for using federal judicial officers rather than state officers.

In discussing Rule 4(d)(3) (Manner of executing warrant), Mr. Josefsberg and Mr. Martin raised the question of whether the defendant must request to see the warrant before an officer is obliged to show it to the defendant. Following discussion of the issue the Committee voted unanimously to approve the language as drafted.

During the discussion on Rule 4, other minor stylistic changes were made to the rule.

5. Rule 5. Initial Appearance.

In Rule 5(a), the Committee again discussed the issue of timely appearance of a defendant before a magistrate and decided to change the Rule to require that officers "promptly" bring a defendant to a judicial officer, and not necessarily the nearest officer.

There was some discussion concerning the need for Rules to distinguish between appearances that follow the filing of a complaint and those that follow the return of an indictment or information.

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

In considering the proposed style changes to Rule 5.1, the Committee addressed the issue of providing transcripts and recordings of the hearing to a defendant. Following extended discussion, the Committee decided to provide in the Rule that a judge could provide copies of the recordings to either party, upon request. And a copy of the transcript could be made available to either party upon request and payment and in accordance with any Judicial Conference guidelines.

7. Rule 6. The Grand Jury.

Professor Stith explained the proposed changes to Rule 6. In particular she focused first on the language in Rule 6(b)(1) that deals with objections to the qualifications of the grand jurors before they take their oath. She pointed out that although there might be a remote possibility that a defendant would even know who the grand jurors are going to be, the language seems to have no real value, a view previously expressed by Professor Saltzburg in reviewing an earlier draft of the rule. Following discussion, the Committee voted 11-1 to remove the sentence in Rule 6(b)(1) that indicates that any challenges to the grand jurors must be made before they take their oath.

There was also some discussion regarding interchangeable use of the words "court" and "judge" throughout the rules. This matter was later referred to Judge Smith for further study.

Judge Stith also raised the question of whether the current language in Rule 6(e) concerning contempt for violations of the rule applied to any violations or only those involving a breach of the secrecy provisions in 6(e). After a short discussion, the Committee asked that the matter be research further.

Addressing Rule 6(e)(3), Judge Roll raised the question whether under 6(e)(3)(D)(ii), a defendant must articulate a particularized need for the grand jury information. That matter was also designated as one for further study. The Committee also added a new provision in 6(e)(3)(D) for addressing disclosure of grand jury information to lawyers of the armed forces. Other minor stylistic changes were also made to the rule.

8. Rule 7. The Indictment and the Information.

Discussion for Rule 7 focused on several areas. First, the Committee addressed the issue of whether Rule 7(a) needed to contain any reference to "hard labor." Following some discussion, it was decided that that issue needed additional research. Second, a question was raised about 7(b) vis a vis the ability of a defendant to waive an indictment and whether that must be done in open court. Following discussion, the Committee decided to leave the language as presented, which requires that the waiver be in open court. Third, the Committee discussed the need, if any, for including a reference to harmless error in Rule 7(c)(2), in light of Rule 52. The Committee ultimately decided to change the title of that subdivision to "Citation Error" which more accurately reflects the essence of the provision. Finally, in discussing Rule 7(e), which permits amendments to an information, the Committee decided to conduct more research on the issue of whether an indictment could ever be amended.

9. Rule 8. Joinder of Offenses or Defendants.

The Committee discussed Rule 8 only briefly, making one minor stylistic change to the proposed revision.

10 Rule 9. Arrest Warrant or Summons on an Indictment or

Information.

Discussion regarding Rule 9 focused primarily on the current provision in Rule 9(b)(1) that "the court may fix the amount of bail and endorse it on the warrant." Mr. Jackson reported that he had completed research on that language and had concluded that as written it probably was inconsistent with the Bail Reform Act. There was a question, however, whether the Committee should simply change the language to indicate that a magistrate could recommend the amount of bail, if any. Following a discussion on the issue, the Committee voted unanimously to remove the last sentence of 9(b)(1). The Committee also discussed the question of whether Rule 9 should be redrafted to make it more consistent with other Rules, such as Rules 4, 5, and 5.1 deal with the same general subject matter. The Committee also made several other minor stylistic changes to the Rule.

B. Proposed Amendments to Rules of Criminal Procedure

Before addressing several proposed amendments to the Rules, the Reporter raised the issue of whether any approved amendments should be published for comment. He noted that unless there was some compelling need to publish the proposed changes, it would be better to wait until the affected rules were "restyled" and published as an entire package in the next year or so. He added that to start what would amount to a dual track system of publication and comment could be confusing to the bench and the bar. Mr. Pauley responded that several of the proposed amendments were important because they addressed sometimes conflicting court decisions and should be published without delay. To do so might simply invite additional litigation. Mr. Rabiej pointed out that there is some sentiment for not routinely publishing rules changes every year and that the Supreme Court had expressed some concern about the number of amendments. The Committee ultimately voted 6 to 4 to decide on a case-by-case basis whether any substantive amendments should be published before the restyling package was ready for publication.

1. Rule 10. Arraignment & Rule 43. Presence of Defendant.

The Reporter provided some background information on the proposed amendments to Rules 10 and 43 that would permit the defendant to waive his or her appearance at the arraignment. He noted that at a prior meeting Judge Miller and Mr. Martin had agreed on some proposed language in a new (c)(i) that would make it clear that the defendant's ability to waive an appearance is available only where he or she is entering a plea of not guilty and that a waiver may not be used where the defendant, under Rule 7(b), must appear in open court to waive an indictment where he has been charged with a criminal information in a felony case. He continued by noting that at the October 1998 meeting the Committee had asked him to draft the appropriate amendment.

Judge Roll indicated that he had submitted a memo to the Committee that summarized the existing practice in both federal and state courts. He noted that some of the states that use teleconferencing do not require the defendant's consent to that procedure.

Chief Justice Wathen added that Maine had used teleconferencing and had ultimately rejected its use. Judge Bucklew noted that that is the case in Florida state courts. Judge Miller observed that some judges in Hawaii were in favor of a video conferencing procedure because many federal prisoners are housed on the mainland. It is time consuming and expensive to transport the defendants for brief court appearances.

Following additional discussion, Judge Davis appointed a subcommittee of Judge Roll (Chair), Judge Bucklew, Judge Miller, Mr. Martin, Mr. Jackson, and a representative from the Department of Justice. He asked that the subcommittee study the issue of whether to add a teleconferencing provision to Rule 10 and possibly other rules and report their findings and recommended amendments at the next meeting..

2. Rule 12.2. Notice of Insanity Defense or Expert Testimony of

Defendant's Mental Condition.

The Reporter provided a brief background on the proposed changes to Rule 12.2, which would make three changes. First, the amendment would require the defendant to provide notice of an intent to introduce expert testimony in a capital case sentencing proceeding. Second, the amendment would authorize the court to order the defendant, who had provided such notice, to undergo a mental examination. And third, the proposed change would place some limits on the ability of the government to see the results of that examination before the penalty phase had begun. Based upon the Committee's discussion at the October 1998 meeting, he had drafted an amendment to the Rule. He also noted that the Judicial Center had been asked to study the practice in states concerning mental examinations and the procedures for disclosing the results to the prosecution and defense. The Chair recognized Ms. Laurel Hooper from the Judicial Center, who had conducted the study.

At the suggestion of Mr. Pauley, a minor stylistic change was made to Rule 12.2(a). During the general discussion which followed, several members noted that there are few federal capital cases from which to draw any meaningful experience. Several members raised the question again about the timing of the disclosure of the report and whether the defense might wish to reconsider whether to give notice of a defense that focuses on the mental condition of the defendant. In addition, Judge Bucklew raised the issue of whether the disclosure of the defendant's statements, as provided in Rule 12.2(c)(3) would be triggered by lay testimony about the defendant's mental condition. The Reporter indicated that that issue could be researched for the next meeting. Further consideration of the amendment was deferred until the next meeting. The Reporter indicated that he would submit the most recent version of the amendment to the Style Subcommittee for its consideration.

3. Rule 26. Taking of Testimony.

The Reporter provided background information on the proposed changes to Rule 26, which had been approved at the October 1998 meeting. He explained that as a result of that meeting he had drafted the amendment to parallel the provisions for using a deposition in a criminal case, i.e., that the court must first find that the witness is unavailable to testify in court. He also pointed out that since the last meeting, the Second Circuit had affirmed the use of such procedures in *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

Following discussion by the Committee regarding that decision and its impact on the proposed amendment, Chief Justice Wathen moved that the amendment be approved with the words "in the interest of justice" being added as a prerequisite for using remote transmissions. Judge Miller seconded the motion which carried by a unanimous vote.

The Reporter indicated that he would make the change and forward the proposed amendment to the Style Committee for its consideration.

4. Rule 35(b). Correction or Reduction of Sentence.

The Reporter pointed out that Judge Carnes had drawn the Committee's attention to *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In that decision the court had addressed a potential gap in the rule, that is whether a court may grant sentence relief to a defendant who has provided information to the government within one year of sentencing but the information is not actually useful to the government until much later. The court had concluded that the plain language of Rule 35(b) prevented any relief being granted to the defendant in that situation and recommended that Congress consider a change to the rule.

Mr. Pauley explained that the Justice Department agreed with the court's conclusion that a gap existed. He indicated that the Department would circulate a letter on the issue and suggest appropriate language for amending the rule.

5. Rule 49. Service and Filing of Papers.

The Reporter informed the Committee that the Technology Subcommittee of the Standing Committee had considered possible amendments to the Rules of Procedure that would permit electronic service of papers. The Civil Rules Committee was actively considering possible amendments to the Civil Rules that would probably form the basis for a uniform rule governing electronic service. Because Criminal Rule 49 incorporates civil practice regarding service of papers, it would be important for the Committee to inform the Civil Rules Committee of any concerns or issues that it thought should be addressed. He added that approximately 10 courts, bankruptcy and district courts (civil) were conducting pilot programs to determine the feasibility of electronic filing. To date, the response has been largely positive.

Several members noted the potential problem of how proof of service would be accomplished, especially where the defendant fails to appear in response to electronic notification. The Reporter indicated that the Committee would have additional opportunities to express its concerns and encouraged the members to continue to consider the issue and note any other potential problems.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee was scheduled for June 21 and 22 in Portland Oregon to consider style changes to the Rules. Judge Davis indicated that he would circulate information about possible dates in October for the Fall 1999 meeting.

Respectfully Submitted,

Respectfully Submitted,

David A. Schlueter
Professor of Law
Reporter, Criminal Rules Committee