

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

April 25-26, 2001
Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met at Washington, D.C. on April 25 and 26, 2001. 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 Wednesday, April 25, 2001. 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. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Tommy E. Miller
Hon. Reta M. Strubhar
Prof. Kate Stith
Mr. Robert B. Fiske, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. Roger A. Pauley, 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. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of 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; Ms. Laurel Hooper, of the Federal Judicial Center; and Mr. Christopher Jennings, briefing attorney for Judge Scirica.

Judge Davis, the Chair, welcomed the attendees and noted the presence of new members of the Committee, Judges Trager and Strubhar, and Mr. Fiske.

II. HEARING ON PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee held a public hearing on the proposed amendments to the Federal Rules of Criminal Procedures and heard the testimony of five witnesses:

- Honorable Paul D. Borman
United States District Court, Detroit Michigan
- Professor Richard D. Friedman
University of Michigan School of Law
- Mr. Peter Goldberger & Mr. Gregory Smith
(On behalf of National Association of Criminal Defense Lawyers)
- Professor Elizabeth Phillips Marsh
Quinnipiac University School of Law
(On behalf of Criminal Justice Section, American Bar Association)
- Ms. Shelley Stark
Federal Public Defender, W.D., Pa
(On behalf of Federal Public and Community Defenders)

III. APPROVAL OF MINUTES

Judge Miller moved that the minutes of the Committee's meeting in San Diego, California in October 2000 be approved. The motion was seconded by Mr. Goldberg and following a minor correction, carried by a unanimous vote.

IV. RECENT AMENDMENTS TO CRIMINAL RULES

Professor Schlueter informed the Committee that amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 (approved by the Supreme Court on April 17, 2000) had been become effective on December 1, 2000.

V. CRIMINAL RULES UNDER CONSIDERATION

A. Introductory Comments by Judge Davis, Chair

Judge Davis pointed out that the two subcommittees had met in March to discuss possible changes to the proposed rules, based in part on the public comments received on the amendments. He proposed that the Committee take each rule, in order and discuss both the style and substantive changes, in order. He also noted that the Style Subcommittee had submitted additional suggested style changes, following the subcommittee's meetings.

B. Rule by Rule Consideration of Proposed Changes.

1. Rule 1. Scope; Definitions:

The Reporter noted that the Committee had agreed to restore a reference in (F) to 28 U.S.C. § 1784.

2. Rule 2. Interpretation

Judge Carnes informed the Committee that Subcommittee A had no additional changes to Rule 2.

3. Rule 3. The Complaint

Judge Bucklew noted that no changes had been made to Rule 3

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

Judge Bucklew reported that Subcommittee A had recommended that Rule 4(c)(2) be amended 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. The Committee agreed to that change

5. Rule 5. Initial Appearance

a. Substantive Amendment: Video Conferencing.

Judge Miller reported that Subcommittee A had considered a number of style changes to the rule. Judge Davis suggested that the Committee consider the major substantive amendments to Rule 5, regarding the use of video conferencing for initial appearances. Judge Carnes observed that given the public comments on the proposed changes that the

Committee was probably obligated to send the amendment forward. Judge Miller moved that the Committee forward the version of Rule 5 that would permit the court to use teleconferencing without the consent of the defendant. Judge Roll seconded the motion. The Committee engaged in an extensive discussion of the motion. The Reporter provided a brief overview of the history of similar amendments that had been considered by the Committee in 1994 that led to a pilot program..

One member questioned whether there might be a way to accommodate those districts that would really use the technology, because of security concerns or extremely heavy dockets, without adopting a national rule. Mr. Campbell reminded the Committee that if video teleconferencing was used, that the costs saved by the court and marshals in not having to transport defendants to the courthouse would be shifted to the offices of the public defenders that might have to travel to the defendant's location. Several members also noted concerns expressed by members of the public that video teleconferencing is being used in state courts and that the quality of those proceedings may fall short.

Mr. Pauley spoke in favor of the motion, noting that a rule requiring consent would not really add anything because some federal courts are already using video teleconferencing procedures with the consent of the defendant; he reiterated that virtually every rule can be waived by the defendant. Judge Trager questioned whether it might be advisable to amend the rule to impose a mileage limit before a court could use video teleconferencing. Judge Roll observed that whatever system was used the court should take steps to maintain the dignity of the proceedings. And Professor Stith indicated that a court should take steps to put the defendant and the defense counsel in the same location.

Following additional discussion, the Committee rejected the motion by a vote of 5 to 6.

Judge Carnes moved that Rule 5 be amended to permit video teleconferencing with the consent of the defendant. Judge Roll seconded the motion. Following additional discussion, the Committee voted 7 to 4 to forward the amendment to the Standing Committee. (The Committee also voted at this point, by a vote of 8 to 3, to permit the court to use video teleconferencing for arraignments, with the consent of the accused).

b. Proposed Style Changes

Turning to proposed style changes to Rule 5, the Reporter indicated that Subcommittee A had recommended that Rule 5(a)(1)(B) be amended to reflect the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488).

Judge Miller also pointed out that the rule was inconsistent in its use of the terms "where the offense was allegedly committed" and "where the prosecution is pending." Following brief discussion, the Committee decided to use the former reference, for clarity and consistency.

Judge Miller also noted that there was a potential gap relating to preliminary hearings vis a vis proceedings before a magistrate. Following brief discussion, Mr. Campbell, Mr. Pauley, and Judge Miller proposed language to address the issue.

6. Rule 5.1. Preliminary Hearing in a Felony Case

The Committee briefly discussed Subcommittee A's minor style changes to Rule 5.1, and approved them. The Committee also discussed briefly the proposed substantive change to Rule 5.1 that would permit magistrate judges to grant a continuance, over the objection of the defendant. Judge Miller moved that the Committee approve and forward the proposed substantive amendment. Judge Carnes seconded the motion, which carried by a unanimous vote.

7. Rule 6. The Grand Jury

Professor Stith lead the discussion on the proposed style changes to Rule 6 and that Subcommittee A had recommended that a new subdivision (iii) be added 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 approved the change.

8. Rule 7. The Indictment and the Information

Professor Stith also reported that Subcommittee A had recommended a change to Rule 7 (inserting a parenthetical) that would clarify that the rule does not apply in criminal contempt proceedings. The Committee agreed to the change.

9. Rule 8. Joinder of Offenses or Defendants

Judge Friedman reported that Subcommittee A had recommended only minor style changes to Rule 8, which were accepted by the Committee.

10. Rule 9. Warrant or Summons Upon Indictment or Information

Judge Friedman also reported that Subcommittee A recommended minor style changes; the Committee agreed to those changes.

11. Rule 10. Arraignment

The Committee discussed the proposed substantive amendment to Rule 10, which would permit the defendant to waive his or her appearance at the arraignment. Following a brief discussion, Judge Miller moved that the amendment be approved and forwarded to the Standing Committee. Judge Roll seconded the motion, which carried by a unanimous

vote. (The Committee had previously discussed and voted to go forward with the proposed substantive amendment that would permit use of video conferencing for arraignments).

12. Rule 11. Pleas

Mr. Campbell pointed out that Subcommittee B had recommended some style changes to Rule 11, including a change to Rule 11(b)(1)(A) to clarify the government's use of statements made by a defendant. He also noted that in Rule 11(e), Subcommittee B recommended that the reference to 28 U.S.C. § 2255 be changed to "collateral attack" to recognize that a plea may be set aside during some other form of collateral attack and not just under § 2255, as noted in *United States v. Jeffers*, 234 F3d 277 (5th Cir. 2000). Mr. Campbell also pointed out that the Subcommittee recommended that Rule 11(f) be revised to simply state that "The admissibility or inadmissibility of a plea, plea discussion, and any related statement is governed by Federal Rule of Evidence 410." That will avoid the possible drafting problems of restyling that provision, which was originally intended to mirror Rule of Evidence 410.

Mr. Pauley questioned whether Rule 11(b)(1) could be clarified to more accurately distinguish between the judge's advice to the defendant concerning maximum and mandatory minimum sentences. In particular, he noted that the current restyled version included the punishment of forfeiture in the section dealing with maximum sentences when in fact, he believed, that punishment should be listed in the subsection dealing with mandatory minimum sentences. Following some additional discussion, Mr. Campbell offered a possible amendment that was accepted by the Committee.

13. Rule 12. Pleadings and Motions Before Trial; Defenses and Objections

Judge Roll informed the Committee that Subcommittee B had proposed additional, minor, style changes to Rule 12. The Committee accepted those changes.

14. Rule 12.1. Notice of Alibi Defense

Judge Roll also stated that Subcommittee B had proposed some style changes to Rule 12.1. The Committee also discussed the question of whether the rules should use the word "intention" or "intent" in Rules 12.1, 12.2, etc. It ultimately agreed to accept the recommendations of the Subcommittees, which had recommended using the term "intent."

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

The Committee discussed the style changes proposed by Subcommittee B and the proposed substantive amendment. Mr. Pauley moved, and Judge Roll seconded, a motion

to approve and forward that substantive amendment. The motion carried by a unanimous vote.

16. Rule 12.3. Notice of Public Authority Defense

In discussing Rule 12.3, Judge Roll pointed out that Subcommittee B had recommended some additional minor style changes. The Committee accepted those changes.

17. Rule 12.4. Disclosure Statement (New Rule)

Turning to new Rule 12.4, in the substantive package of amendments, Judge Roll informed the Committee that Subcommittee B had recommended several changes. offer several recommended changes. First, regarding Rule 12.4(a)(2), the subcommittee recommended adding the words, “to the extent it can be obtained through due diligence” at the end of that section. Second, he pointed out that the language in Rule 12.4(b)(1) was intended to track similar language in the Civil Rules counterpart to this rule but creates problems in applying the requirements to a criminal proceeding. Thus, the subcommittee recommended modifying Rule 12.4(b)(1) to indicate that the disclosure requirements are triggered with the defendant’s initial appearance. The Committee accepted those proposed changes.

Second, Judge Scirica pointed out that in discussing the issue with the other Advisory Committees, there was a consensus that the reference to the Judicial Conference in Rule 12.4, should probably be deleted and conformed to the other rules. The Committee agreed, with the understanding that the Standing Committee would probably offer conforming changes to Rule 12.4.

18. Rule 13. Joint Trial of Separate Cases

Judge Roll reported that Subcommittee B had no additional changes to Rule 13, which was approved by the Committee.

19. Rule 14. Relief from Prejudicial Joinder

The Committee made only a minor style correction to Rule 14.

20. Rule 15. Depositions

Mr. Campbell noted that Subcommittee B had recommended a number of minor stylist changes to Rule 15, following brief discussion, the proposed changes were accepted by the Committee.

21. Rule 16. Discovery and Inspection

Mr. Campbell also reported that Subcommittee B recommended additional style changes to Rule 16. The changes were adopted by the Committee, following discussion.

22. Rule 17. Subpoena

In discussing proposed style changes to Rule 17, Mr. Pauley noted that Subcommittee B had recommended a change to Rule 17(g) concerning the ability of magistrate judges to find a person in contempt. The Committee accepted the proposed changes.

23. Rule 17.1. Pretrial Conference

Mr. Pauley reported that Subcommittee B recommended only a minor style change to Rule 17, which was accepted by the Committee.

24. Rule 18. Place of Prosecution and Trial

Mr. Pauley also informed the Committee that Subcommittee B had recommended only a minor style change to Rule 18, which was accepted by the Committee.

25. Rule 19. Rescinded or Reserved.

The Reporter informed the Committee that Rule 19, which had been listed as a “rescinded” rule would carry the designation as “reserved.” He noted that the rule was rescinded years ago and appears in the published versions of the rules as “rescinded.” He noted, however, that using the word “rescinded” might give the reader the incorrect impression that it was rescinded by the style project amendments. The Committee accepted the change.

26. Rule 20. Transfer for Plea and Sentence

Mr. Pauley stated that Subcommittee B had recommended several style changes to Rule 20, which were accepted by the Committee.

27. Rule 21. Transfer for Trial

Mr. Pauley next informed the Committee that Subcommittee B had offered several minor corrections to Rule 21. Those changes were accepted by the Committee.

28. Rule 22. Time to File Motion to Transfer [Transferred]

Finally, Mr. Pauley noted that Subcommittee B recommended that because the substance of this rule was transferred to Rule 21, the rule should carry the designation of “transferred” and explained in the Committee Note.

29. Rule 23. Jury or Nonjury Trial

Judge Carnes informed the Committee that Subcommittee A had no additional changes or corrections to Rule 23.

30 Rule 24. Trial Jurors

Regarding Rule 24, Judge Miller reported that Subcommittee A had proposed only several minor changes to the Rule.

31. Rule 25. Judge’s Disability

Judge Friedman indicated that Subcommittee A had offered only several minor changes to Rule 25. Those changes were accepted by the Committee.

32. Rule 26. Taking Testimony

a. Substantive Amendments: Remote Transmission of Live Testimony

The Reporter noted that the style version of Rule 26 includes the word “orally,” which is technically a substantive change and that change is reflected in the substantive package version of Rule 26. Subcommittee A had recommended that the term “orally” be deleted from the restyled version as well and that the Committee Note be amended to reflect the purpose of that amendment. He also noted that Subcommittee A had recommended that the term “two-way” be inserted in line 13 of Rule 26 and that he had drafted additional language for Committee Note to address some of the concerns raised in the public comments, e.g., insuring the integrity of testimony and the quality of the transmission. The Committee accepted those changes.

Judge Carnes raised several questions about the possible Confrontation Clause issues presented in the proposed substantive amendments to Rule 26, i.e., permitting remote transmission of testimony. He recommended that the term “compelling circumstances” be changed to “exceptional circumstances” to more closely following the standard for taking depositions under Rule 15. The Reporter concurred, noting that the term “exceptional circumstances” had been used in at least one Supreme Court decision and that originally, the term “compelling circumstances” had been used to parallel a similar rule in the Rules of

Civil Procedure. The Committee also discussed whether to retain the reference to Federal Rule of Evidence 804, and after some discussion on the matter, decided to retain the reference in lieu of drafting new language that might, or might not, capture the essence of that rule.

Judge Carnes moved that the substantive change to Rule 26 be approved and forwarded to the Standing Committee. Judge Miller seconded the motion, which carried by a unanimous vote. The Committee also discussed suggested language for the Committee Note.

b. Style Changes.

The Committee also discussed and approved several style changes to Rule 26.

33. Rule 26.1. Foreign Law Determination

Judge Friedman reported that Subcommittee A had made no changes to Rule 26.1

34. Rule 26.2. Producing a Witness's Statement

Turning to Rule 26.2, Judge Friedman indicated that Subcommittee A had recommended several style changes to Rule 26.2, which were accepted by the Committee.

35. Rule 26.3. Mistrial

The Committee made no changes to Rule 26.3

36. Rule 27. Proof of Official Record

Judge Friedman indicated that Subcommittee A recommended only one minor style change to Rule 27. The Committee accepted the change.

37. Rule 28. Interpreters.

Judge Friedman also reported that Subcommittee A had recommended a minor style change to Rule 28, which was accepted by the Committee.

38. Rule 29. Motions for Judgment of Acquittal

Judge Bucklew stated that Subcommittee A recommended a number of style changes to Rule 29. Following brief discussion, the Committee accepted the changes.

39. Rule 29.1. Closing Argument

The Committee made no changes were made to Rule 29.1.

40. Rule 30. Jury Instructions

Regarding proposed amendments to Rule 30, Professor Stith indicated that Subcommittee A had unanimously voted to recommend that the Committee defer any further action of the substantive amendment to Rule 30 that would permit the court to request the parties to submit their requested jury instructions before trial. The Subcommittee had expressed concern, as pointed out in some of the public comments, that requiring the defense to reveal the theory of its case before trial might pose problems. Judge Miller moved that the substantive amendment be deferred. The motion, which was seconded by Mr. Campbell, was defeated by a vote of 6 to 7 (the chair cast the tie-breaking vote).

In addressing the proposed amendment, several members of the Committee expressed the view that one of the problems with the plain language of the rule was that it did not appear to accommodate those situations where counsel may wish to supplement their requested instructions during the trial. On that point, the Committee considered the draft of a proposed amendment to Rule of Civil Procedure 51. Following additional discussion, the Committee agreed that the sense of that draft should be included in the Committee Note to Rule 30, and not in the Rule itself.

Judge Roll moved that the Committee approve and forward both the style and substantive amendments to Rule 30. The motion was seconded by Mr. Fiske and carried by a vote of 9 to 2, with one abstention.

41. Rule 31. Jury Verdict

Mr. Pauley informed the Committee that Subcommittee A had recommended style changes to Rule 31. He also noted that the Subcommittee had considered whether to add the word “federal” before the word “judge,” to avoid the possibility that the rule might be read to permit a state judge to accept the verdict. Following discussion, the Committee decided not add the term.

42. Rule 32. Sentencing and Judgment

a. Substantive Amendment: Ruling on Material Matter

Professor Stith commented that Subcommittee had considered the major substantive amendment to Rule 32 that would require the sentencing judge to rule on any unresolved objections to material matters in the PSR, even if those matters would not otherwise affect the sentence. She noted that the Subcommittee had spoken to representatives from the Bureau of Prisons regarding the role that the PSR may or may not play in decisions regarding the defendant’s incarceration. She noted that the Bureau indicated that potentially everything in the PSR could be considered “material.” The Committee discussion focused on the fact that even assuming there is a problem with objected-to, and possibly incorrect, information

might remain in the PSR, the problem should not be addressed in the rule itself, but instead in the Committee Note.

Following additional discussion, Judge Miller moved that the substantive change in Rule 32(h)(3)(B) be withdrawn. The motion was seconded by Mr. Pauley and carried by a vote of 11 to 1.

Judge Miller moved that the issue of resolving objections to matters that might be considered important for purposes of the BOP not be included in the Committee Note. The motion was seconded by Judge Roll but failed by a vote of 5 to 6. Subsequently, the Committee considered proposed revisions to the Committee Note, pointing out the problem of important, unresolved, information remaining in the PSR that might impact on post-sentencing decisions by the Bureau of Prisons. The Committee ultimately voted 7 to 3 to include the language in the Note.

b. Style Changes.

The Reporter pointed out that Subcommittee B had recommended a number of style changes to Rule 32. First, the Subcommittee recommended a revised version of Rule 32(d), concerning the contents of the presentence report. Second, the subcommittee had recommended a revised version of Rule 32(h) and had designated it as subdivision (h) and redesignated the remaining provisions (Subdivision (h) is now what had been Rule 32(h)(5) in the restyled version published for comment). Third, Rule 32(i) (formerly 32(h) also includes a change in (i)(B) to reflect a recommendation by Mr. Pauley 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. Fourth, Subcommittee B recommended that Rule 32(i)(4)(C) (currently (h)(4)(C) in the published version) include a “good cause” requirement as recommended by Mr. Pauley.

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

Professor Stith noted that Subcommittee B recommended style changes to Rule 32.1. Those style changes were accepted.

Mr. Pauley urged the Committee to delete Rule 32.1(a)(3)(D) that would require the judge to apprise a person of their right to remain silent. He argued that the Constitution does not require the warnings, and that even assuming some judges are currently giving some rights warnings did not necessarily rise to the level of requiring such warnings. He also noted that the change would result in a major change in practice and that the change probably should have been published in the substantive package of amendments. By not doing so, he pointed out, the public may have not had adequate notice of the proposed change. Several Committee members noted that the rule simply captures the procedure already used in Rule 5 initial appearances and that although a person standing before the judge is not necessarily

in a coercive environment, it would be better for the judge to appear to be neutral in considering whatever evidence is presented. Ultimately, Mr. Pauley moved that the rights warnings provision be deleted from the rule. The motion was seconded by Judge Trager and carried on a vote of 8 to 4.

Judge Friedman questioned whether all of the material in Rule 32.1(a), regarding initial appearances for revocation proceedings, should be withdrawn. He pointed out that some districts do not hold initial appearances for those proceedings and that in those districts the judge moves immediately into the revocation hearing itself. Judge Miller responded that early in the style project the Committee had decided to include provision in Rule 32.1 for initial appearances, reflecting the practice in a number of districts. The Reporter added that this amendment reflected the sorts of decisions the Committee had dealt with throughout the Style Project—whether to adopt the current practice in a number of districts as a national rule. He noted that withdrawing Rule 32.1.(a) would require major redrafting of the rule, and perhaps other rules, such as Rule 40. Other members noted that a point could be made in the Committee Note that a court could collapse both the initial appearance and the revocation hearing into one proceeding. That view was ultimately adopted as a consensus of the Committee.

44. Rule 32.2. Criminal Forfeiture

The Reporter indicated that Subcommittee B recommended minor style changes to Rule 32.2, which were accepted by the Committee.

45. Rule 33. New Trial

Mr. Pauley noted that Subcommittee B recommended several style changes to Rule 33. The Committee adopted those changes.

46. Rule 34. Arresting Judgment

Turning to Rule 34, Mr. Pauley reported that Subcommittee B had recommended several style changes. After a brief discussion, the Committee accepted the proposed changes.

47. Rule 35. Correcting or Reducing Sentence.

a. Substantive Amendment: Reduction of Sentence

Mr. Pauley reported that Subcommittee B had recommended new language to the substantive amendments to Rule 35(b), to cover the issue raised in *United States v. Orozco* and the situation where a defendant does not learn of the helpful information until more than one year has elapsed. Mr. Pauley moved that the change be made. Judge Miller seconded the motion, which carried by a unanimous vote. Judge Friedman questioned why the

Committee had decided to change the word “sentencing” in Rule 35(a) to “oral announcement of the sentence.” The Reporter explained that the Appellate Rules Committee had pointed out the ambiguity in the term “sentencing” and had recommended last year that the Committee address the issue. At the Committee’s October 2000, meeting, the Committee voted to change the term to “oral announcement” to reflect the majority view of the circuits that had addressed the meaning of “sentencing” for purposes of triggering the time for correcting clear errors. Some members of the Committee pointed out that the better term might be to refer to the entry of the judgment, which serves as a triggering event for appeals, etc. Following additional discussion, the Committee voted to change Rule 35. Rule 35(a) will be a new definitional provision indicating that sentencing refers to entry of the written judgment. Rule 35(a) will become (b) and Rule 35(b), will become (c).

48. Rule 36. Clerical Mistakes.

Judge Miller reported that Subcommittee B had no additional changes to Rule 36.

49. Rule 37. [Reserved]

The Reporter indicated that because Rule 37 was abrogated in 1968, it should be labeled as “reserved.” The Committee agreed with that recommendation.

50. Rule 38. Staying a Sentence or a Disability

Judge Miller indicated that Subcommittee B had recommended minor style changes to Rule 38. The Committee agreed with those changes.

51. 39. [Reserved]

As with Rule 37, the Reporter indicated that because Rule 39 was abrogated in 1968, it should be labeled as “reserved.” The Committee agreed with that recommendation.

52. Rule 40. Arrest for Failing to Appear in Another District

Judge Miller informed the Committee that Subcommittee B had recommended several minor style changes to Rule 40. Those changes were accepted by the Committee.

53. Rule 41. Search and Seizure

a. Substantive Amendment: Covert Searches

Judge Bucklew pointed out that Subcommittee A discussed questions raised by the public comments on the proposed substantive change to Rule 41 that would govern warrants for covert searches. The subcommittee recommended that the proposed amendment be deferred, and considered further in conjunction with pending proposals governing warrants

for tracking devices. She ultimately moved to defer further action on the covert searches provisions in Rule 41. Judge Miller seconded the motion, which carried by a unanimous vote.

b. Style Changes

Finally, Judge Bucklew reported that Subcommittee A had recommended additional style changes, which were accepted by the Committee.

54. Rule 42. Criminal Contempt

Judge Bucklew reported that Subcommittee A recommended style changes to Rule 42 and an amendment to Rule 42(b) to reflect the authority of magistrate judges to hold contempt proceedings—per the recent Federal Courts Improvement Act. The Committee accepted the proposed changes.

55. Rule 43. Defendant's Presence

Regarding Rule 43, Judge Bucklew reported that Subcommittee A had recommended several minor style changes. Those changes were accepted by the Committee.

56. Rule 44. Right to and Appointment of Counsel

Judge Friedman indicated that there were no suggested changes to Rule 44.

57. Rule 45. Computing and Extending Time

Judge Friedman also indicated that Subcommittee A had recommended style changes to Rule 45, and that the term “President’s Day” has been changed to “Washington’s Birthday” in accordance with the discussion at the October 2000, Committee meeting. The Committee accepted those changes.

58. Rule 46. Release from Custody; Supervising Detention

Judge Carnes reported to the Committee that Subcommittee A had not recommended any additional style changes to Rule 46

59. Rule 47. Motions and Supporting Affidavits

The Committee made a minor style change to Rule 47.

60. Rule 48. Dismissal

Judge Carnes indicated that Subcommittee A had suggested several minor style changes to Rule 48. The Committee accepted those changes.

61. Rule 49. Serving and Filing Papers

Judge Carnes also reported that Subcommittee A recommended minor style changes to Rule 49; the Committee adopted those proposed changes.

62. Rule 50. Prompt Disposition.

No changes were made to Rule 50

63. Rule 51. Preserving Claimed Error.

Mr. Pauley reported that there were no recommended changes to Rule 50.

64. Rule 52. Harmless and Plain Error

Mr. Pauley reported that Subcommittee A had not recommended any style changes. He urged the Committee, however, to clarify an ambiguity in the wording “A plain error or defect...” in Rule 52(b). He pointed out that the Supreme Court has concluded that that wording should be read more simply as meaning “error.” As he noted, the Court has indicated that the use of the disjunctive is misleading. He recommended that the words “or defect” be deleted from the rule. Following discussion, the Committee voted 11 to 1 to delete the words, “or defect.”

65. Rule 53. Courtroom Photographing and Broadcasting Prohibited

No changes were made to Rule 53.

66. Rule 54. [Transferred]

The Reporter informed the Committee that Subcommittee A recommended that because this rule was transferred to Rule 1 it should carry the designation of “transferred” rather than “reserved.” He also indicated that a Committee Note would be prepared for the rule.

67. Rule 55. Records

Judge Friedman indicated that no additional changes had been proposed for Rule 55.

68. Rule 56. When Court is Open

Turning to Rule 56, Judge Friedman reported that Subcommittee A had recommended style changes to Rule 56, to conform it to Rule 45, *supra*.

69. Rule 57. District Court Rules

Judge Friedman pointed out that Subcommittee A had proposed several minor style changes to Rule 57. The Committee accepted the changes.

70. Rule 58. Petty Offenses and Other Misdemeanors

Judge Miller reported that Subcommittee A had suggested a number of proposed changes—several of them to represent recent statutory changes. In addition, the Committee modified Rule 58(b)(2) (rights warnings) to parallel a similar provision in Rule 5(d).

71. Rule 59. [Deleted]

The Reporter stated that because Rule 59 is being deleted as being unnecessary, the reference should be “deleted.” The Committee agreed.

72. Rule 60. Title

Judge Miller suggested that the Committee consider restoring Rule 60, which had been deleted in the early stages of the drafting process. He pointed out that without the rule, there may be a real question as to the “official” designation of the rules. Following brief discussion, the Committee adopted that recommendation.

C. Rules Governing § 2254 and § 2255 Proceedings

Judge Carnes reported that the Subcommittees had recommended deferring any further action on Rules Governing § 2254 and § 2255 Proceedings, pending further research on the substantive questions and consideration of a “restyled” version of the rules. The Committee agreed with that proposal.

Judge Davis reported that Professor Robbins was being retained as a special consultant on the habeas rules, and that the Style Subcommittee had prepared an initial restyled draft of the rules. He indicated that the matter would probably be on the agenda for the Fall 2001 meeting.

VI. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee tentatively agreed to hold its next meeting in October 2001, either at Santa Fe, New Mexico or at San Francisco, California, depending on availability of accommodations.

Respectfully submitted

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