NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Peter Goldberger
CO-CHAIR, COMMITTEE ON
FEDERAL RULES OF PROCEDURE

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Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to the Federal Rules of Criminal Procedure
Published for Comment in August 2009

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Criminal Procedure. NACDL's comments on the proposed rewording of the Evidence Rules have been submitted separately. Our organization has more than 11,000 members; in addition, NACDL's 79 state and local affiliates, in all 50 states, comprise a combined membership of more than 28,000 private and public defenders. NACDL, which recently celebrated its 50th Anniversary, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

In the following pages, we address the August 2009 proposed amendments to the Federal Rules of Criminal Procedure.

NACDL endorses most of the proposed "technology amendments." We have a few comments and suggestions, however.

RULE 4.1 - WARRANTS, ETC.

In the new proposed Rule 4.1 ("Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means"), in subdivision (b)(6) ("Modification"), the Committee should add: "If the judge directs the applicant verbally to modify the proposed complaint, warrant or summons, the judge

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must make and keep a written record of any modification that was verbally directed." In subdivision (b)(7), the Rule should specify that the judge, in addition to directing the applicant to sign the judge's name on the duplicate original, must also direct that the date and time be noted. Thus, the words "and enter the date and time" should be inserted after "sign the judge's name." These suggestions are designed to ensure a full and accurate record of the warrant issuing process for potential review and evaluation at any later hearing.

The provision proposed to be codified in Rule 4.1(c), purporting to limit the application of the exclusionary rule, which was originally added in 2002 to Rule 41(d)(3) by the USA PATRIOT Act, and which the Committee's draft would relocate to Rule 4, should instead be omitted. By directing this provision to be added to the Rules, Congress expressed its view that the matter was procedural, and thus properly within the purview of the Rules Committee. The Committee should now recognize the inappropriateness of codifying particular applications of (or exceptions to) the Constitutionally-based, judge-defined exclusionary rule in the Rules of Criminal Procedure. In any event, this provision is problematic at best. First, the rule demands a "finding of bad faith"; that is a substantive, not a procedural requirement, and is thus disallowed by 28 U.S.C. § 2072(b). Moreover, a showing of "bad faith" is not what the Supreme Court requires to overcome the specific and limited "good faith" exception created in United States v. Leon, 468 U.S. 897 (1984). This ill-advised provision, which is out of keeping with the rest of the Rules and of doubtful constitutionality under the Fourth Amendment, should simply be repealed.

Finally, in the Advisory Committee Note for new Rule 4.1(a) we suggest a clarification in the proposed wording, which now states that the telephonic warrant power is "limited to 'magistrate judges,'." Under Rule 1(c), this really means that authority is conferred on all federal judges but not on state judges. The present wording of the Note could readily lead someone not familiar with the definitional provision to miss the point. The Note should either use to words "federal judges" or insert an explanatory cross-reference to Rule 1(c).

RULE 32.1 - REVOCATION HEARINGS

The terms of proposed amended Rule 32.1 ("Revoking or Modifying Probation or Supervised Release"), would permit the defendant to participate by video-conference only if the defendant made a "request" to do so. Other similar provisions (such as Rule 40 hearings) permit video-conferencing with the defendant's "consent." We understand the difference to be that a revocation hearing could be conducted via video-conference only on the initiative of the defense. The proceeding could not be conducted remotely at the suggestion of the court, the probation officer or the prosecutor, even if the defendant subsequently consented. This restriction wisely protects the defendant from pressure to yield to others' sense of expediency.

On this understanding, NACDL supports the proposal. However, and again on the understanding that we have properly apprehended the significance of the chosen wording, two changes need to be made in the proposed Advisory Committee Note. First, the Note misstates the amendment's requirement by referring to "the defendant's consent and the court's approval." (Emphasis added.) In the Note, the term "consent" needs to be changed to "request," to conform to the precise requirement of the Rule. Second, the Note goes on to say, "If this option is exercised, the court should preserve the defendant's opportunity to confer freely and privately with counsel." (Emphasis added.) The word "should" in this sentence needs to be changed to "must." The defendant's right to counsel -- including the effective assistance of counsel -- at any revocation hearing is guaranteed by the Due Process Clause and the Criminal Justice Act (18 U.S.C. § 3006A(a)(1)(C),(E)) and is recognized in Rule 32.1(a)(3)(B) and (b)(2)(D). The Advisory Committee Note should not depreciate the importance of the protection of this right.

RULE 43 - DEFENDANT'S PRESENCE

The proposed change to subdivision (a) of Rule 43 ("Defendant's Presence") would merely add a cross-reference to Rule 32.1. There is no Advisory Committee comment on this change, which while no doubt is intended merely to be conforming, might actually be confusing. A revocation hearing is not a proceeding of a kind listed in Rule 43(a)(1),(2) or (3) as one where the defendant's presence is required, and thus no exception for cases covered by amended Rule 32.1 is necessary in the introductory "unless" clause. If anything, adding the cross-reference opens the Rule to the interpretation that the defendant cannot waive his or her presence at any proceeding (whether or not listed in subsections (a)(1), (2) and (3)) unless mentioned in the introductory "unless" clause -- an interpretation that might also find support in the existence of subsection (c) of the Rule, which discusses waivers.

NACDL believes that interpretation would be unwarranted and unwise. We believe that with the Court's consent and upon the execution of a knowing, intelligent and counseled waiver of the right to be present, the defendant should not be required to attend every day of every listed proceeding. For example, defendants who are to receive a mandatory sentence, who do not care to allocute prior to imposition of that sentence, and who would prefer not to undergo the security procedures necessary to bring them to court, should be allowed to waive their presence at sentencing. It is unclear whether the present rule would allow this, but the addition of the mention of Rule 32.1 to the introductory "unless" clause confuses the picture even further. At the very least, an Advisory Committee Note for the subsection (a) amendment should be drafted to remove the invitation to misinterpretation.

For future study with respect to Rule 43, NACDL suggests the Committee consider whether "uncontested" proceedings in general should be open to knowing and intelligent waiver of the defendant's presence, or to being conducted at the defendant's request by video-conferencing. Fully negotiated guilty pleas, even in felony cases, and many negotiated

sentencings, might fall into that category. In larger districts, allowing such proceedings could be beneficial to all. We are not entirely convinced that this proposal should be adopted, but we do invite the Committee's consideration of it, and offer our cooperation in considering the pros and cons.

RULE 49 - FILING AND SERVICE

The proposed amendment to Rule 49(e) ("Electronic Service and Filing") which expressly allows electronic filing in criminal cases, would eliminate some but not all of the complication and potential for confusion that presently arises from the provision in Rule 49(d) which adopts by reference the filing rules "for a civil action." Few criminal lawyers know the Civil Rules very well, and requiring a cross-reference to the Civil Rules is very unusual -- and inconvenient -- in the Criminal Rules. We suggest that the Rule 49(d) cross-reference be eliminated entirely, and a full elaboration of the filing rules for criminal cases be inserted in Rule 49 instead.

As for the newly proposed Rule 49(e) itself, we would suggest several clarifications for the last sentence. In place of "A paper filed electronically in compliance with a local rule is written or in writing under these rules," we suggest: "A paper filed and served electronically complies with any statute requiring that a paper in a criminal case be filed and served, and is 'written' or 'in writing' under these rules, but only if filed and served in compliance with any applicable local rule." Compliance with the local rule on electronic filing should be a requirement, not merely an option, for acceptance of electronic filing or service, and the ECF option should expressly extend to statutory filings not merely those under the Criminal Rules. Nonprejudicial noncompliance can still be excused, of course, as may be provided in the applicable local rule.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these important and difficult issues. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,

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