MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

June 21-22, 1999

Portland, Oregon

The Advisory Committee on the Federal Rules of Criminal Procedure met at Portland, Oregon on June 21 and 22, 1999 to discuss style changes to the Rules of Procedure. 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 Monday, June 21, 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
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: Mr. Roger Pauley, Jr. of the Department of Justice, Mr. Peter McCabe and Mr. John Rabiej from the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; Judge Davis, the Chair, welcomed the attendees.

II.APPROVAL OF MINUTES OF APRIL 1999 MEETING

After several corrections were made to the minutes of the April 1999, the Committee voted unanimously to approve those minutes.

III.CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

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

Procedure (Second Draft)

The Reporter discussed a status report/chart on the restyling project. That chart will provide an updated reference on the status of each of the restyled rules and will highlight significant changes to each rule. He noted that in reviewing Rules 1 through 9 there were a significant number of changes that might be considered by some to be "substantive" amendments, even though in effect, many are clarifying changes.

The Reporter also noted that he had prepared draft Committee Notes for Rules 1 through 9 and that he

had bracketed issues or language that should be further discussed by the Committee.

Judge Smith, Chair of Subcommittee A, indicated that after the full Committee meeting in April in Washington, D.C., the subcommittee had reviewed the proposed style changes and had conducted a conference call to review those changes and resolve a number of issues that had been raised at the April meeting.

1. Rule 1. Scope.

Judge Smith explained that the Subcommittee had addressed the unresolved issue of defining terms such as "court," "magistrate," and "federal judge." Professor Stith had conducted an analysis of the first nine rules and had proposed uniform changes to the rules regarding use of those terms. Judge Miller also noted that an increasing number of courts were using magistrate judges to take guilty pleas and that it might be appropriate for the rules to reflect the actual practice in those courts. On the other hand, some members of the Committee expressed concern about whether the rules should expressly authorize justices of the Supreme Court or judges of the appellate courts to act on particular matters. In the end, the Subcommittee recommended that a provision be added to Rule 1 that would explicitly recognize that if a particular rule authorizes a United States magistrate judge to act, a justice or judge of the United States could also act. That change was approved by the Committee.

Regarding the draft Committee Note for Rule 1, several suggestions were made regarding the inclusion of standard language that would inform the reader of the purpose of the restyling effort. In addition, there was discussion concerning use of the word "unnecessary" with regard to the omission of definitions formerly located in Rule 54(c). The Committee indicated a preference for describing terms such as "demurrer," as being antiquated or anachronistic.

2. Rule 2. Purpose and Construction.

No additional changes were made to restyled Rule 2 or the accompanying note.

3. Rule 3. The Complaint.

In discussing the proposed Committee Note to Rule 3, several members of the Committee offered suggested language for the first paragraph, that could be used to describe the global style changes to the Rules.

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

Discussion regarding Rule 4 focused on language in Rule 4(d)(3) concerning the issue of whether the arresting officer must have a copy of the warrant at the time of the arrest. An earlier restyled version of the rule had omitted any reference to whether the officer must have a copy. Following additional discussion, however, the Committee decided to restore language in the current rule to the effect that the officer need not have a copy but upon the defendant's request, must show the warrant as soon as possible.

The Committee suggested that the Committee Note include some discussion about use of the word "judge" in the Rule to make it clear that that term refers to the judicial officer referenced in Rule 3. Finally, several members suggested that the discussion in the Note regarding the deletion of current Rule (b)--which notes that hearsay evidence may be used to establish probable cause --should be expanded.

5. Rule 5. Initial Appearance.

The Committee discussed proposed language in Rule 5(b)(4), dealing with initial appearances in felony cases, and agreed to include language that reflects current practice, that a defendant may not be called to enter a plea before arraignment. The Committee also indicated that the accompanying Note should include a reference to the fact that the term "judge" in the Rule refers to a United States magistrate judge or a state or local officer.

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

The Reporter indicated that the proposed Note reflected an issue addressed earlier by the Committee--whether a magistrate judge should be permitted to grant a continuance in a preliminary hearing where the defendant objects. Under the current rule only a district judge may do so. However, acting on suggestion from the Standing Committee, the Committee had decided to amend the rule to permit the magistrate judge to do so; that amendment however, would conflict with 18 USC § 3060. Thus, the Committee indicated that the Note should include reference to the Rules Enabling Act and the Supercession Clause.

The Committee also indicated that the Note should include additional discussion on the deletion of the reference to relying upon hearsay for probable cause.

7. Rule 6. The Grand Jury.

Judge Smith indicated that Subcommittee A had studied further the question of whether the reference in current Rule 6(e)(2) to contempt should be extended to any violation of Rule 6. He reported that Professor Stith had researched the issue and that the Subcommittee had recommended that the rule remain as it is, with the reference to contempt remaining in Rule 6(e)(7).

Addressing Rule 6(e)(3), Judge Roll raised the question whether under 6(e)(3)(C)(ii), a defendant must articulate a particularized need for the grand jury information. Following discussion, a consensus emerged that an amendment to rule was not necessary, Judge Roll indicated that he would draft suggested language to include in the Committee Note.

8. Rule 7. The Indictment and the Information.

Judge Smith indicated that after further study of the issue, the Subcommittee had recommended that the reference to "hard labor" should be eliminated. Also, additional research had led the Subcommittee to conclude that no amendment should be made to rule regarding amendments to indictments. The rule is well-settled that an indictment may not be amended unless it is resubmitted to the grand jury.

9. Rule 8. Joinder of Offenses or Defendants.

No additional changes were made to Rule 8 or the accompanying Note.

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

Judge Smith indicated that some changes had been made to Rule 9 to conform it to similar changes in Rules 4 and 5. The Reporter noted that as with other rules, the term "court" had been bracketed pending further discussion on whether that term should be further defined or whether the term "judge" could be used instead.

B. Proposed Style Amendments to Rules 10-22, Rules of Criminal Procedure (First Draft)

The Chair asked Judge Dowd, Chair of Subcommittee B, to lead the discussion on the Style Subcommittee's proposed changes to Rules 10 through 22. Judge Dowd indicated that the Subcommittee had met in Washington, D.C. on May 25th to discuss the changes.

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

Judge Dowd noted that Rule 10 is currently being reviewed by a Subcommittee to determine whether any amendment should be made concerning arraignment by teleconferencing; nonetheless, several minor style changes were considered by the Committee.

2. Rule 11. Pleas

Judge Dowd noted that after the Subcommittee's meeting in May, that the Reporter had drafted a complete revision of Rule 11 to conform it structure and flow with actual practice in taking pleas and considering plea agreements. Following discussion on whether to continue to use the term "nolo contendere," the Committee voted (4-3-2) to change that term to "no contest."

The Committee also discussed the issue of whether to include within the rule specific guidance on what should be covered by the judge in addressing a defendant desiring to plead guilty or no contest. The Committee ultimately decided set out the specific elements of the court's advice. In particular, it decided to include in revised Rule 11(b) the requirement that the defendant be placed under oath before conducting any inquiry concerning the factual basis for the plea. Several members noted that currently, many judges place the defendant under oath and that it tends to impress upon the defendant the need to be truthful in his or her answers to the court.

There was some discussion on whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule indicates that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permit other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. Following discussion, the Committee decided to leave the Rule as it is, including continued use of the term "court." The Committee also asked that the Reporter include a reference in the Committee Note to the effect that it intended to make no change in existing law interpreting that provision.

In addressing proposed Rule 11(c)(2) (former Rule 11(e)) regarding disclosure of a plea agreement, Mr. Josefsberg raised the question regarding whether there might be cases where either the government or the defense might have a legitimate need or desire not to disclose the existence of a plea agreement to the court. Following discussion, the Committee decided to leave the language as drafted, with a recommendation that the Note address Mr. Josefsberg's point.

The Committee discussed the proposed modifications to Rule 11(c)(3) to (5) concerning consideration, acceptance, and rejection of a plea agreement. Following discussion concerning the structure and flow of the subdivisions, the Committee decided to address those topics individually. The Committee further indicated that the Note accompanying Rule 11(d) (Withdrawing a Plea) should address the fact that the Rule deals separately with rejection of pleas and rejection of plea agreements.

The Committee considered a proposal by Judge Sedwick (Alaska) to amend Rule 11 to add a third exception to current (e)(6)(D). That exception would have permitted use of any government offer of a conditional plea where such was relevant at sentencing to a defendant's claim after trial that he or she was entitled to acceptance of responsibility under the Sentencing Guidelines. Following discussion of the issue, the Committee concluded that the issue does not arise with great frequency and decided not to include the new exception in the rule.

Finally, the Committee added a new subdivision, Rule 11(e) to address the issue of finality of a guilty or no contest plea after the court imposes sentence.

3. Rule 12. Pleadings and Motions Before Trial; Defenses and

Objections

Although the Style Subcommittee had recommended the deletion of Rule 12(a) from the rule, the Committee decided to retain the first sentence and a portion of the second sentence of that subdivision which indicates what documents and pleas constitute "pleadings." Judges Roll and Miller will continue to research this

issue to determine whether there might be other matters within that definition.

The Committee generally agreed with the Style Subcommittee's recommended revision of the Rule, including moving what is currently in Rule 12(b) to new Rule 12(d)(2).

Following discussion on the issue of whether Rule 12(c) should address setting of motions dates, the Committee indicated that the Note should make it abundantly clear that judges should schedule dates for hearings and motions. The reference to local rules was deleted from that subdivision. The Committee further indicated that the Note accompanying new Rule 12(e) (current Rule 12(f)) should reflect that the Committee intends to make no change to the current law regarding waiver of motions or defenses.

4. Rule 12.1. Notice of Alibi

The Committee generally accepted the draft revision submitted by the Restyling Subcommittee. Current Rule 12.1(d) and (e) have been switched in the restyled version. Following discussion, the Committee voted 6 to 1 to include a requirement in the rule that in providing the names and addresses of alibi and any rebuttal witnesses, the parties must also provide the phone numbers of those witnesses.

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

Defendant's Mental Condition

Discussion concerning the restyling of Rule 12.2 was deferred to a later meeting, after pending major substantive changes have been discussed and resolved.

6. Rule 12.3. Notice of Defense Based Upon Public Authority

Judge Dowd noted that there had been some discussion at the Subcommittee meeting concerning the issue of whether (as currently provided in Rule 12.3) a defendant could invoke the defense of public authority on either an actual or believed exercise of public authority. The Subcommittee had concluded that the language suggested by the Style Subcommittee might be read to provide the defendant with a "right" to assert the defense --a matter not within the purview of the Committee under the Rules Enabling Act. Thus, the Subcommittee had decided to retain the current language which recognizes, as a nonsubstantive matter, that if the defendant intends to raise the defense, notice must be given. Following discussion of the matter, the Committee decided not to make any changes in the current rule regarding the availability of the defense. The Committee decided to include in the restyled rule the requirement that the parties provide the telephone numbers of any witnesses disclosed under the rule.

7. Rule 13. Trial Together of Indictments or Informations

Judge Dowd noted that the Subcommittee had made minor changes to the restyled version of Rule 13; the last sentence of the proposed restyled version had been eliminated. That sentence read: "The government must then proceed as though it were prosecuting under a single indictment or information." The Committee concurred.

8. Rule 14. Relief From Prejudicial Joinder

The Committee briefly discussed the proposed restyling changes to Rule 14 and concurred with Subcommittee B's recommendation to adopt those changes.

9. Rule 15. Depositions

Judge Dowd noted that Subcommittee B had redrafted the proposed changes to Rule 15(a), without

making any substantive changes. Instead of referring generally to "unprivileged documents or materials," the Subcommittee recommended that the following be substituted for greater clarity: "any designated book, paper, document, record, recording, data, or other material not privileged." The Committee agreed to the more inclusive language.

He noted further that new Rule 15(b) consisted of the first three sentences of current Rule 15(b). The last sentences of current (b), which address the topic of the defendant's presence at a deposition, are now located in restyled Rule 15(c). The remaining subdivisions have been renumbered.

The Committee discussed the issue of payment of expenses raised in restyled Rule 15(d). Under the current rule, if the government requests the deposition or if the defendant requests the deposition and is unable to pay for it, the court may direct the government to pay for travel and subsistence for both the defendant and his or her attorney. In either case, the current rule requires the government to pay for the transcript. The restyled rule would make some slight changes. If the deposition was requested by the government, the court *may* require the government to pay subsistence and travel expenses and the cost of the deposition transcript. On the other hand, where the defendant is unable to pay the deposition expenses, the court *must* order the government to pay subsistence, travel, and the deposition transcript costs --regardless of who requested the deposition.

With regard to restyled Rule 15(f)(2), the Committee decided to amend the rule to comport with the familiar rule of optional completeness in Federal Rule of Evidence 106. Under that rule, once a party introduces a portion of a piece of evidence, the opponent may require the proponent to introduce other parts of the evidence which ought in fairness be considered. In making this change, the Committee intended to make no substantive change and noted that the revision parallels similar language in Civil Rule 32(a)(4).

10. Rule 16. Discovery and Inspection

Judge Dowd informed the Committee that the Style Subcommittee had reorganized Rule 16 and that Subcommittee B had made minor changes to that draft. The Committee discussed restyled Rule 16(a)(2) and the question of whether the reference to 18 USC 3500 in the last sentence of that provision should be deleted as recommended by the Style Subcommittee. Following discussion of the matter, the Committee indicated that the reference should remain; Mr. Schlueter and the Reporter will continue to review this provision.

Regarding restyled Rule 16(b) (Defendant's Disclosure) the Committee indicated that the language in that provision should track similar language in Rule 16(a)(1). In Rule 16(b)(1)(B)(ii), the Committee changed the current provision which reads: "the defendant intends to *introduce* the item as evidence" to the "defendant intends to *use* the item as evidence…" The Committee recognized that this might constitute a substantive change in the rule but believed that it was a necessary conforming change with a similar provision in 16(a)(1)(E) regarding use of evidence by the government.

In restyled Rule 16(d)(1), the Committee decided to delete the last phrase in the subdivision which refers to a possible appeal of the court's discovery order. In the Committee's view, no substantive change results from that deletion; the language is unnecessary because the court, regardless of whether there is an appeal, will have maintained the record.

11. Rule 17. Subpoena

In discussing Rule 17, members of Subcommittee B observed that in the Style Subcommittee's original draft, the word "oppressive" had been deleted from Rule 17(c)(2). After discussing the issue, the Committee decided to retain the word, so the provision will read: "On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

The Committee discussed the question of who may hold a person in contempt of court for refusing to comply with a subpoena under Rule 17(g). The current rule indicates that "the district court may hold in

contempt [a person who disobeys] a subpoena issued by that court or by a magistrate judge of that district." Professor Schlueter will research this issue further.

12. Rule 17.1 Pretrial Conference

The Reporter noted that current Rule 17.1 prohibits the court from holding a pretrial conference where the defendant is not represented by counsel. The Committee discussed whether to remove that limitation and ultimately decided to change the rule by deleting the last sentence of the rule. Recognizing that this was a major substantive change, the Committee believed that the to leave the limitation in place might unnecessarily restrict the defendant's constitutional right to self-representation. In addition, several members noted that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se.

13. Rule 18. Place of Prosecution and Trial

The Committee discussed the proposed style changes submitted by the Style Subcommittee and following brief discussion changed the phrase "fix the place of trial" to "set the place of trial."

14. Rule 19. [Rescinded]

There was no discussion regarding Rule 19, which has been rescinded.

15. Rule 20. Transfer From the District for Plea and Sentence

The Committee reorganized Rule 20 by blending current subdivisions (a) and (b) into new Rule 20(a). New subdivision (b) addresses the topic of the clerk's duties. After an extensive discussion regarding Rule 20 (d), which deals with trials of juveniles, the Committee decided not to blend that provision in with the other provisions. Instead, the provision remains. But it has been restyled to reflect a list of procedural requirements for prosecuting a juvenile.

16. Rule 21. Transfer From the District for Trial

The Committee discussed and approved the style changes to Rule 21. After discussion concerning Rule 22, which addresses the question of the timing of motions to transfer, the Committee decided to add that rule as subdivision (d) in Rule 21.

17. Rule 22. Time of Motion to Transfer

As noted, supra, the Committee discussed a proposal from the Style Subcommittee that Rule 22 be moved to Rule 21. The Committee agreed with that proposal and redesignated Rule 22 as Rule 21(d).

IV. DESIGNATION OF TIME AND PLACE OF NEXT MEETING.

The next meeting of the Committee is scheduled for October 7 and 8, 1999 in Williamsburg, Virginia.

Respectfully Submitted,

Respectfully Submitted,

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