

MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 30, 2004
Santa Fe, New Mexico

The Advisory Committee on the Federal Rules of Criminal Procedure met at Santa Fe, New Mexico on October 30, 2004. These minutes reflect the discussion and actions taken at that meeting.

I. CALL TO ORDER & ANNOUNCEMENTS

Judge Bucklew, Chair of the Committee, called the meeting to order at 8:00 a.m. on Saturday, October 30, 2004. The following persons were present for all or a part of the Committee's meeting:

Hon. Susan C. Bucklew, Chair
Hon. Richard C. Tallman
Hon. Paul L. Friedman
Hon. David G. Trager
Hon. Harvey Bartle, III
Hon. James P. Jones
Hon. Anthony J. Battaglia
Prof. Nancy J. King
Mr. Donald J. Goldberg
Mr. Lucien B. Campbell
Ms. Deborah J. Rhodes, designate of the Asst. Attorney General for the Criminal
Division, Department of Justice
Prof. David A. Schlueter, Reporter

Mr. Robert Fiske participated by telephone conference call. Also present at the meeting were: Hon. David Levi, chair of the Standing Committee, Hon. Mark R. Kravitz, member of the Standing Committee and liaison to the Criminal Rules Committee; Professor Daniel Coquillette, Reporter to the Standing Committee, Mr. Peter McCabe and Mr. James Ishida 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 Dan Capra, Reporter to the Evidence Rules Committee; Hon. Edward E. Carnes, past chair of the Criminal Rules Committee; Mr. Jonathan Wroblewski of the Department of Justice; Professor Sara Sun Beale, Duke University School of Law, and Ms. Brooke Coleman, law clerk to Judge Levi.

Judge Bucklew welcomed a new member, Judge Tallman, who will replace Judge Edward Carnes. She praised Judge Carnes for his service as chairman and hard work during the restyling project and presented a resolution to him for his years of productive work on the Committee. Judge Carnes responded by noting that serving on the Committee had been a high honor and privilege. Judge Bucklew noted that Judge Reta Struhbar, who had retired, had resigned from the Committee but that no replacement had been selected.

II. APPROVAL OF MINUTES

Judge Battaglia moved that the minutes of the Committee's meeting in Monterey, California in May 2004 be approved. The motion was seconded by Judge Trager and, following corrections to the Minutes, carried by a unanimous vote.

III. STATUS OF PROPOSED AMENDMENTS TO RULES PENDING BEFORE THE SUPREME COURT

A. Rule Amendments Approved by the Supreme Court and Pending Before Congress

Mr. Rabiej informed the Committee that the package of amendments submitted to, and approved by the Judicial Conference in September 2003 (Rules Governing § 2254 Proceedings, Rules Governing § 2255 Proceedings, and the Official Forms Accompanying those Rules, and Rule 35), had been approved by the Supreme Court in May 2004 and were currently pending before Congress.

B. Proposed Amendments Approved by Standing Committee and Judicial Conference and Now Pending Before the Supreme Court.

Mr. Rabiej also reported that amendments to the following rules had been approved by the Standing Committee (at its June 2004 meeting) and the Judicial Conference, and that they had been forwarded to the Supreme Court with the understanding that if Congress enacted pending legislation regarding Rule 32 the amendment to that rule would be withdrawn. He noted that after the rules were forwarded to the Court, Congress had amended Rule 32 to expand victim allocution, and that following a poll of the executive committee of the Judicial Conference, the Committee's proposed amendment to Rule 32 was withdrawn:

1. Rule 12.2. Notice of Insanity Defense; Mental Examination. Proposed Amendment Regarding Sanction for Defense Failure To Disclose Information.
2. Rules 29, 33 and 34; Proposed Amendments Re Rulings By Court

On Motions to Extend Time for Filing Motions Under Those Rules.

3. Rule 32, Sentencing; Proposed Amendment Re Allocation Rights of Victims of Non-Violent and Non-Sexual Abuse Felonies.
4. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed Amendments to Rule Concerning Defendant's Right of Allocution.
5. Rule 59; Proposed New Rule Concerning Rulings By Magistrate Judges.

Judge Levi commented that Congress had become more active in proposing amendments to the rules and that it was important not to take an adversarial approach in addressing those proposed amendments. Professor Coquillette observed that a 1995 article in the American Law Review had chronicled what can go wrong when the Rules Enabling Act is not followed and Congress directly amends the rules.

Judge Levi also reported that the Criminal Law Committee was studying the impact of the Supreme Court's decision in *Blakely v Washington* on federal sentencing procedures. Judge Friedman added that the American Bar Association had formed a special committee on the same subject, and Ms. Rhodes informed the Committee that the Sentencing Commission was also studying the problem.

C. Proposed Amendments to Rules Which Have Been Published for Public Comment.

Professor Schlueter informed the Committee that the following rules had been published for comment, that the comment period ends on February 15, 2005, and that a public hearing on the proposed amendments had been scheduled for January 21, 2005 in Tampa, Florida.

1. Rule 5. Initial Appearance. Proposed amendment permits transmission of documents by reliable electronic means.
2. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permits transmission of documents by reliable electronic means.
3. Rule 40. Arrest for Failing to Appear in Another District. Proposed Amendment to provide authority to set conditions for release where the person was arrested for violating conditions set in another district.

4. Rule 41. Search and Seizure. Proposed amendment permits transmission of search warrant documents by reliable electronic means.
5. Rule 58. Petty Offenses and Other Misdemeanors. Amendment to make it clear that Rule 5.1 governs when a defendant is entitled to a preliminary hearing.

IV. PROPOSED AMENDMENTS TO RULES UNDER ACTIVE CONSIDERATION

A. Proposed Amendments to Criminal Rules to Implement E-Government Act.

Judge Bucklew stated that three members of the Committee had served on a Subcommittee for the E-Government Act (Judges Bartle and Struhbar, and Ms. Rhodes). Ms. Rhodes represented the Criminal Rules Committee at the same subcommittee meeting.

Judge Levi (chair of the Standing Committee) had appointed an E-Government Subcommittee with liaisons from each of the Rules Advisory Committees. The Subcommittee had met in June 2004 and had provided comments on a template for a standard rule for implementing Congress' directive that the courts develop rules for maintaining privacy in electronic filings.

Professor Dan Capra, Reporter to the Evidence Rules Committee and Reporter for the E-Government Subcommittee, provided background information on the work of the Subcommittee and expressed the hope that each of the various committees would adopt uniform language for their rules that would accomplish Congress' intent. He reported that after the Subcommittee meeting in June, he had prepared yet another version of the standard template language, which in turn had been provided to the Criminal Rules Committee. In doing so, he added that the Subcommittee had identified several areas where the Criminal Rules Committee might wish to modify or delete certain provisions. He noted that the Subcommittee recognized that each of the Committees would have to tailor the standard language of the template to meet the purposes and needs of a particular area of practice. In particular, he noted that the Bankruptcy rules presented particular problems that would not necessarily be faced by the Criminal Rules Committee.

He also stated that the Civil Rules Committee had provided some suggested style changes to the template language. They had also added a special provision for court orders and recommended that language be added to the template Committee Note that would state that the list of items exempted from inclusion in the filings was only a "baseline" provision and that other material might be included in that list.

Professor Capra stated that the Subcommittee hopes that the various Committees will be able to finalize the language for their individual rules by their Spring meetings, with the view toward publishing them for public comment in August 2005.

Professor Schlueter pointed out that he has used Professor Capra's template and attempted to tailor it for criminal practice. He noted that the Criminal Rules Committee would have to address certain questions about the draft.

The Committee then considered proposed Rule 49.1(a), which provides that if a filing (whether paper or electronic) includes listed identifiers, only certain information may be disclosed. First, the Committee addressed the question of whether information about a person's home address should be limited to city and state. Following a brief discussion, the Committee approved the proposed language limiting a home address to city and state. As part of that discussion, a question was raised about whether a person's driver license number or alien registration number should be exempted from redaction. Judge Friedman commented that the overall purpose of Congress' intent was to make as much information public as possible. The Committee ultimately decided not to include those items in the list.

The Committee engaged in an extensive discussion about the E-Government Act in general and in particular the concerns about protecting the privacy of certain information and at the same time providing public access to important information. That discussion in turn led to the question of whether additional items should be added to the list of exemptions in proposed Rule 49.1(d). Following a brief discussion, the Committee agreed to add to the list, "official records of a state court proceeding in an action removed to federal court;" "filings in any court in relation to a criminal matter or investigation...;" arrest warrants; charging documents; and criminal case cover sheets.

Although several members raised questions about the applicability of the rule to criminal forfeiture proceedings, no proposed change or amendment to the rule was offered.

Following a discussion on whether some provision should be made for habeas petitions, Judge Trager moved that the Committee add a provision exempting §§ 2241, 2254, and 2255 petitions. Following a brief discussion, the motion carried by a vote of 7 to 2.

Finally, there was a discussion about how trial exhibits should be treated under the proposed rule. Professor Capra responded that if exhibits are filed, they are subject to the rule. At Judge Friedman's suggestion, Professor Capra stated that some language could be added to the Committee Note that would address that point.

B. Amendment to Criminal Rules Regarding Local Rules for Electronic Filings.

Professor Schlueter informed the Committee that it had been asked to consider whether to amend Rule 49 to provide that courts could require electronic filings. He noted that the Committee on Court Administration and Management had recommended that each of the Committees consider the issue, draft amending language, and publish those rules for public comment on an expedited basis.

Mr. Rabiej provided background information on the proposal, noting that the intent was to provide a means of critical cost-savings for the courts. He noted that the Civil and Bankruptcy Committees had already decided to publish proposed amendments on an expedited basis. Mr. Rabiej and Judge Bucklew noted that some issue had been raised about whether any proposed amendment should exempt pro se filers.

Judge Levi noted that roughly one-half of the courts are already requiring parties to use electronic filing, even though the rules do not explicitly provide for that. He added that the proposed amendments would authorize the courts to require mandatory electronic filing.

Professor Schlueter pointed out that Rule 49(d) already provides that filing in criminal cases is determined by the Civil Rules and that he had drafted a new provision that would explicitly address the ability of courts to require electronic filing. Following a discussion on whether the Criminal Rule should be amended, Professor King moved that the proposed language be amended to provide an exemption for pro se filers. Judge Friedman seconded the motion, which failed by a vote of 4 to 6. Judge Jones then moved that no amendment be made to Rule 49 and that the rule continue to rely on an amendment to the Civil Rules. Judge Battaglia seconded the motion which carried by a vote of 6 to 3.

C. Rule 11; Proposed Amendment to Provide that Judge May Question Defendant Regarding Proposed Plea Agreement.

Judge Bucklew pointed out that Judge David Dowd, a former member of the Committee, had proposed an amendment to Rule 11 that would permit a judge to inquire of the defense counsel and defendant during a plea inquiry as to whether all plea offers from the prosecution had been conveyed to the defendant. She stated that he had offered similar amendments to Rule 11 in the past and that on those occasions, following discussion, the Committee had decided not to amend the rule. Following a brief discussion, a consensus emerged that there was insufficient need to pursue the proposed amendment.

D. Rules 11 & Rule 16; Proposed Amendment Regarding Disclosure of Brady Information; Report of Subcommittee.

Judge Bucklew called on Mr. Goldberg, Chair of the *Brady* Subcommittee to report on the Subcommittee's findings and recommendations. Mr. Goldberg informed

the Committee that the Subcommittee had reviewed the materials included in the agenda book and had reached a consensus that the Committee should proceed with a proposed amendment to the rules that would require the prosecution to disclose to the defense, 14 days prior to trial, information that was favorable to the defense, either because it tended to be exculpatory or because it was impeaching evidence.

Judge Carnes observed that on earlier occasions the Committee had not recommended other amendments to the Criminal Rules because there was insufficient statistical data to support the need for an amendment. That problem, he noted, could also exist with regard to any amendment concerning *Brady* information.

Ms. Rhodes spoke in opposition to proceeding further with an amendment. She pointed out that the amendment would be a tough sell to the Department of Justice because in its view, Rule 16 and *Brady* are working and there is no need to further amend Rule 16. Even assuming there was a problem, she added, the proposed language in the amendment would not fix the problem. Assistant United States Attorneys, she stated, are trained to treat *Brady* material liberally and that in her 20 years of experience at the DOJ, she can say that it is not the culture of the DOJ to withhold important information from the defense. She recognized that in this area of the law, the courts are necessarily required to apply hindsight for purposes of determining whether a violation occurred, and if so, what the remedy should be. But prudent prosecutors, she added, will not push the issue. If prosecutors do violate *Brady*, there are remedies, including the possibility of a new trial, and serious consequences for the prosecutors involved.

She continued by observing that it would be important for the Committee to consider the impact of the amendment on the Courts of Appeals. Furthermore, there has been no showing that a problem exists, and an ABA survey shows that 70% of prosecutors already turn over more than they are required to. She added that according to the statistics, only 1.7 federal cases per year involve a potential *Brady* issue.

Ms. Rhodes acknowledged that in a recent terrorist trial in Detroit, the prosecutor had withheld important information, but pointed out that it was the Department that had come forward, presented the problem to the trial court, and had recommended corrective action. The Department, she said, is committed to recognizing and addressing the problems associated with discovery. In her view, the proposed rule would only reflect the current status of discovery practices in federal criminal courts and it would not fix any particular problem.

Judge Bucklew observed that this is really the flip side of the Rule 29 problem that had been discussed at earlier meetings where there was insufficient data to support an amendment.

Mr. Goldberg stated that every defense counsel would support the proposed rule and that he did not understand why the Department opposes a simple rule that only requires the prosecution to do what the case law already requires. He provided examples

of cases where important information was not disclosed and added that in his view, the amendment was very important for the system.

Mr. Fiske questioned whether the Department could include the proposed requirement in its United States Attorneys' manual.

Judge Battaglia pointed out that 30 districts had developed local rules addressing this very issue and that those rules had taken various approaches in dealing with the *Brady* issue. That in turn, he noted, might lead to a lack of uniformity and provide more reason for an amendment to Rule 16.

Ms. Rhodes indicated that she would attempt to review those rules. Mr. Wroblewski observed that it is a myth that there is a national, uniform, practice in criminal cases and that it is not essential that there be absolute uniformity. In response, Professor Coquillette reminded the Committee that § 1273 requires that the local rules be consistent with the national rules.

Judge Jones observed that if there was a national rule on this issue, the Department would ultimately benefit.

Judge Bartle expressed interest in pursuing discussion of the amendment. If the Department has already addressed the issue, why not adopt a rule to that effect?

Judge Friedman provided extensive comments on the proposed amendment, observing that he believes that prosecutors are acting in good faith, but that a lot of mistakes do not get any attention. He added that there may be a difference between the Department's policy and what is happening in the field. Judge Friedman said that there was some appeal to uniformity.

Judge Tallman stated that in his view the proposed amendment provided for more discovery than *Brady* required. He noted that California has had an open file policy and that it seems to work well. He stated that he believed Congress should address the issue and indicated that he was generally not supportive of the proposal. He added that as an appellate judge, there is a problem in deciding whether the failure to disclose had an impact on the case.

Judge Trager stated that the fact that 30 districts had addressed the problem was not in itself reason to amend Rule 16. He observed, however, that there do not seem to be many complaints from the prosecutors about how the local rules work and that he was not unhappy with the proposal.

Mr. Campbell stated that the Jencks Act and *Brady* could be harmonized but that the cases demonstrate how perilous this area can be for prosecutors. In his view, the matter should be studied further.

In a straw poll on whether to proceed, nine members indicated that they believed that the matter should be considered further. One member voted not to proceed with an amendment and one member abstained.

Judge Kravitz suggested that the Committee consider the possibility of unintended consequences and Ms. Rhodes added that she believed that the real issue in the amendment is the timing requirement.

E. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal.

Judge Bucklew provided background information on the Department of Justice's proposal to amend Rule 29 to require the court to defer any ruling on a motion for a judgment of acquittal until after the jury has returned its verdict; the amendment would protect the government's right to appeal an adverse ruling on the motion. Although the Committee at its Fall 2003 meeting had initially approved the amendment in concept, at the May 2004 meeting the Committee, following extensive discussion, voted to reject the proposed amendment.

Ms. Rhodes reported that at the Standing Committee's meeting in June 2004, Judge Carnes had explained the Committee's action on the proposed amendment and pointed out the lack of data showing that an amendment was needed. At the same meeting, the Department informed the Standing Committee that it would present the proposal directly to the Standing Committee at its January 2005 meeting.

Ms. Rhodes indicated that because the Department feels so strongly about the proposal it anticipates presenting additional data to the Standing Committee. But that process, she added, has taken much time because it involves reviewing transcripts in the cases in which the court granted the motion on what the Department believed were impermissible grounds. She said that she expected that the information would be ready for the January meeting of the Standing Committee.

Judge Levi noted that if the Department presented additional data and the Standing Committee believed that it was appropriate to consider the amendment further, that the Standing Committee would be very deferential to the Criminal Rules Committee.

F. Rule 41, Status of Amendments Concerning Tracking Device Warrants.

Judge Levi and Professor Schlueter provided background information on a proposal to amend Rule 41 to provide for tracking-device warrants. Professor Schlueter stated that in June 2003, the Committee presented a proposed amendment to Rule 41 that would, inter alia, address the topic of tracking-device warrants. That proposal had been generated during the restyling project several years ago and was driven in large part by magistrate judges who believed it would be very helpful to have some guidance on

tracking-device warrants. The proposal also included language regarding delayed notice of entry. Following the comment period in the Spring 2003, the Committee made several changes to the rule and committee note to address several concerns raised by the Department of Justice.

At the Standing Committee meeting in June 2003, the Committee initially voted to approve and forward the amendment. After the meeting, however, the Deputy Attorney General (who had abstained on the vote) asked the Committee to defer forwarding the proposal to the Judicial Conference, in order to permit the Department to consider and present its concerns to the Standing Committee. Because there was a belief that the Department had proposed the tracking-device amendments, the proposed amendment was deferred.

Professor Schlueter also pointed out that the Criminal Rules Committee was apprised of these developments at the Fall 2003 meeting in Oregon. But to date, there has been no further report from the Department of Justice on the proposed amendment.

Judge Battaglia reported that he had polled magistrate judges and that there was still high interest in the amendment.

Following additional discussion about the fact that from a technical standpoint, the amendment is still pending before the Standing Committee, Ms. Rhodes was asked to determine the status of the Department's review of the proposed amendment.

G. Rule 45; Amendment to Provide for Extending Time for Filing.

Professor Schlueter pointed out that under Rule 45(c), additional time for service is provided if service is by mail, leaving with the clerk of the court, or by electronic means, under Civil Rule 5(b)(2)(B), (C) or (D) respectively. He informed the Committee that the Civil Rules Committee has proposed an amendment to Civil Rule 6, which would clarify that the three-day period is added *after* the prescribed period in the rules. That amendment has been approved by the Judicial Conference and is pending before the Supreme Court. The Appellate Rules Committee is considering a similar amendment to its rules. He added that Judge Carnes has suggested that the Criminal Rules Committee might wish to consider whether to make a similar amendment to Rule 45.

Mr. Campbell expressed some concern about not using the term "calendar" and Mr. McCabe indicated that the Civil Rules Committee had discussed the issue and had decided not to use the term "calendar" days.

Following brief discussion, the Reporter was asked to draft a proposed amendment to Criminal Rule 45, which would parallel the Civil Rule, and present it to the Committee at its Spring 2005 meeting.

H. Use of Section 2254 and 2255 Official Forms.

Judge Bucklew informed the Committee that Judge Tommy Miller, a former member of the Committee, had recommended in a letter to the Chief Judge in his district that that district should begin using the newly revised and adopted forms for §§ 2254 and 2255 proceedings. Judge Jones recommended that a letter be written to the district courts pointing out that the new forms are available and that the courts be encouraged to use them. Following additional brief discussion, Judge Bucklew determined that the Administrative Office would draft the letter to the district courts.

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

Judge Bucklew asked for suggestions on a location for the Spring 2005 meeting. There was a consensus that the Administrative Office should attempt to secure a location in Charleston, South Carolina. Members were asked to contact Mr. Rabiej concerning available dates.

The meeting adjourned at 2:30 p.m. on Saturday, October 30, 2004

Respectfully submitted

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