

REPORT OF THE COMMITTEE
ON THE RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Standing Committee on the Rules of Practice and Procedure met in Washington, D. C. on February 28, 1977. All members were present except Attorney General Bell and Mr. Richard E. Kyle, who were unavoidably absent. Also in attendance were the Honorable J. Edward Lumbard, Chairman, and Professor Wayne LaFave, Reporter, of the Advisory Committee on Criminal Rules; the Honorable Bailey Aldrich, Chairman, and Professor Jo Desha Lucas, Reporter, of the Advisory Committee on Appellate Rules; and the Deputy Director of the Administrative Office, William E. Foley.

Appellate Review of Sentences

At the last meeting of the Conference in September 1976, our committee reported that because of the changes which had been made in proposed Rule 35.1 of the Federal Rules of Criminal Procedure since the original draft was circulated to bench and bar, the advisory committee planned to circulate

an amended draft to bench and bar and to hold public hearings thereon. Some 80 replies were received as a result of that circulation. Public hearings were held on January 13 and 14, 1977, at which two appellate judges and representatives of several organizations were heard.

At the public hearing, a representative of the staff of Senator Kennedy submitted a letter from the Senator and a copy of S. 181, which he had introduced on January 11, 1977. That bill, inter alia, would establish a United States Commission on Sentencing; it also includes specific provisions for appellate review of sentences. A representative of the staff of Chairman Rodino, of the House Judiciary Committee, submitted a letter from the Chairman and a copy of H.R. 1182, which is generally similar to S. 181. In his letter the Chairman urged that any proposal of the Judicial Conference for appellate review of sentences be achieved by legislation rather than by the normal rule-making process.

The Advisory Committee on Criminal Rules met on January 27 and 28 and reconsidered proposed Rule 35.1. In light of the comments received, they made a few amendments to the proposed rule. They continue of the opinion that an appeal by the government would have to be by statute and that it is important that a provision for such an appeal be included.

The Advisory Committee on Appellate Rules met on February 11-12, and suggested a number of changes in the proposed rule.

At the meeting of our committee on February 28, the representatives of the two advisory committees participated in the discussion. As a result of the discussion our committee made a few changes in the proposed rule, which, with those changes, appeared to be acceptable to everyone present. A copy of the rule as proposed by the committee, together with an Advisory Committee Note, is attached to this report.

In the normal course, proposed rules are forwarded by the Conference to the Supreme Court for promulgation by the Court. If promulgated, they are forwarded to the Congress and take effect in due course in the absence of a congressional veto. In the present instance, however, there is general agreement that affirmative congressional action is required to provide for a right of appeal by the government. There is also agreement that the details of the procedures are appropriately dealt with by a rule and that review at the instance of either the defendant or the government should be dealt with in integrated fashion in a single rule.

For these reasons we recommend that the proposed Rule 35.1 be approved by the Conference and be forwarded by the Director of the Administrative Office to the Congress for enactment. It should be noted that subsection (j) provides for future amendment of Rule 35.1, if so enacted, by the normal rule-making procedures, those which obtain generally with respect to Federal Rules of Criminal Procedure.

Other Criminal Rules

Pursuant to Public Law 94-349, the effective date of the following proposed amendments to the Criminal Rules 6(e), 23, 24, 40.1, and 41(c)(2), previously approved by the Judicial Conference and promulgated by the Supreme Court on April 26, 1976, was deferred to August 1, 1977. The Subcommittee on Criminal Justice of the House Judiciary Committee held hearings on these proposed rules on February 23 and 24 and March 2, 1977, and they are now under consideration in the subcommittee.

Civil Rules

The Advisory Committee on Civil Rules is considering various problems raised by Rule 23 and the Discovery Rules, by recent decisions affecting the Supplemental Rules for Certain Admiralty and Maritime Claims, and other matters. The committee will meet in May 1977.


Appellate Rules

The Advisory Committee on Appellate Rules has approved for submission to bench and bar a number of amendments to those rules.

Rule-Making Procedures

Recent articles in various publications have raised fundamental questions with respect to the rule-making process. Ms. Holtzman has introduced in the House a bill which would modify the procedure radically. Our committees have established liaison with the committees of the Congress, and the standing committee is planning to review in depth the rule-making procedure in order to be in a position to make recommendations to the Conference if the views of the Conference are sought.

Respectfully submitted,


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