

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**TO: Hon. David F. Levi, Chair  
Standing Committee on Rules of Practice and Procedure**

**FROM: Hon. Susan C. Bucklew, Chair  
Advisory Committee on Federal Rules of Criminal Procedure**

**SUBJECT: Report of the Advisory Committee on Criminal Rules**

**DATE: December 2, 2004**

**I. Introduction**

The Advisory Committee on the Rules of Criminal Procedure met on October 30, 2004, in Santa Fe, New Mexico, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of that meeting are included at Appendix A.

This Report addresses several informational items. The Committee has no items requiring action by the Standing Committee.

**II. Information Item—Proposed Amendments Pending Before the Supreme Court**

**A. Rule 12.2. Notice of Insanity Defense; Mental Examination**

The amendment to Rule 12.2 includes a new provision for sanctions in those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert.

**B. Rules 29, 33, 34 and 46. Proposed Amendments re Rulings by Court**

Rules 29, 33, and 34 require that certain motions be filed within 7 days of the times specified in those rules. In the alternative, the moving party may obtain an extension of time for filing the motions, but the court must grant the extension and fix a new due date within the original 7-day period specified in each rule. The amendments to those three rules address the problem when a motion for an extension of time is filed in a timely fashion, but the court fails to rule on that request within the seven days. Under the proposed amendments, the court could grant the motion for an extension at any time after the seven-day period has expired, as long as the motion is filed within the seven-day period.

The Committee also proposed a conforming amendment to Rule 46 concerning timely filings.

**C. Rule 32. Proposed Amendment Regarding Victim Allocation.**

In June 2004, the Committee approved proposed amendments to Rule 32 that would have expanded victim allocation in all felony offenses, with the understanding that if Congress enacted pending legislation on the same subject, the proposed amendment could be withdrawn from further consideration. In September 2004, the amendment was approved by the Judicial Conference; subsequently, Congress amended Rule 32 to provide for even broader victim allocation. In light of that legislation, the Executive Committee of the Judicial Conference was polled, and the amendment to Rule 32 was withdrawn. The Criminal Rules Committee will continue to study the victim's rights legislation with a view toward possibly amending other rules as well as Rule 32.

**D. Rule 32.1. Revoking or Modifying Probation or Supervised Release**

Currently, there is no provision in Rule 32.1 for the defendant's right to allocation when probation or supervised release is being revoked. The proposed amendment to Rule 32.1 would provide for the right of allocation.

**E. Proposed Rule Regarding Appeal of Rulings by Magistrate Judges**

A proposed new rule, Rule 59, parallels Rule of Civil Procedure 72(a), which addresses what counsel must do to preserve an issue for appeal from a magistrate judge's ruling on nondispositive and dispositive matters.

**III. Rules Published for Public Comment.**

At its June 2004 meeting, the Standing Committee approved publication of proposed amendments to the following rules. The comment period expires on February

15, 2005. The Criminal Rules Committee has scheduled two hearings on those proposed amendments: January 21, 2005 in Tampa, Florida and February 4, 2005 in Washington, D.C.

**A. Rule 5. Initial Appearance.**

The proposed amendment to Rule 5 permits transmission of documents by reliable electronic means. This is one of several amendments to the rules that would permit use of electronic transmission of various documents.

**B. Rule 32.1. Revoking or Modifying Probation or Supervised Release.**

The proposed amendment to Rule 32.1 would permit transmission of documents by reliable electronic means and parallels the amendment to Rule 5, *supra*.

**C. Rule 40. Arrest for Failing to Appear in Another District.**

The proposed amendment to Rule 40 would fill a gap in the rules and authorize a magistrate judge in the district of the arrest to set conditions of release for an arrested person who fails to appear or violates any other condition of release.

**D. Rule 41. Search and Seizure.**

The proposed amendment to Rule 41 permits transmission of documents by reliable electronic means.

**E. Rule 58. Petty Offenses and Other Misdemeanors.**

The amendment to Rule 58 is intended to eliminate a conflict between that rule and Rule 5.1 regarding the right to a preliminary hearing and also clarifies the advice that must be given to a person during an initial appearance.

**IV. Information Item—Rules Under Consideration by Criminal Rules Committee**

At its meeting on October 30, 2004, the Criminal Rules Committee considered proposed amendments to several rules. Those proposals are being actively researched and prepared for further discussion at the Committee's April 2005 meeting.

**A. Proposed New Rule 49.1 to Implement E-Government Act.**

The Committee is in the process of drafting a proposed new Rule 49.1 that would follow the template rule drafted by Professor Capra, Reporter to the E-Government Subcommittee. The Committee is considering several additional provisions, however, to account for criminal cases.

For example, the Committee added to the exemptions from redaction the following: habeas case filings made under 28 U.S.C. §§ 2241, 2254, and 2255, arrest warrants, any filings made before the filing of a criminal charge, criminal case cover sheets, and charging documents. The Committee will continue to consider these additional exemptions, with a view toward presenting a proposed rule for publication to the Standing Committee at its June 2005 meeting.

**B. Amendment to Criminal Rules Regarding Local Rule for Mandatory Electronic Filings.**

At the request of Judge Levi, the Committee considered whether to propose an amendment to Rule 49 to provide that courts could require electronic filings. That suggestion had originated from the Committee on Court Administration and Management, which recommended that each of the Committees consider the issue, draft amending language, and publish those rules for public comment on an expedited basis.

Currently, Criminal Rule 49(d) provides that “A paper must be filed in a manner provided for in a civil action.” Although there was a proposal to draft a new Rule 49(e) that would have explicitly addressed electronic filings, the Committee ultimately decided not to amend the rule, with the understanding that the proposed (and now published) amendments to Civil Rule 5 will also apply, through Criminal Rule 49(d), to criminal cases as well.

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

For the past several meetings, the Committee has considered a proposal from the American College of Trial Lawyers that the Criminal Rules be amended to address the *Brady* discovery issues. A subcommittee consisting of Mr. Goldberg (chair), Professor King, Mr. Fiske, Mr. Campbell, and Ms. Rhodes has worked on gathering data on the issue and has drafted a preliminary proposal that would amend Rule 16 to require pretrial disclosure of *Brady* material. Following an extensive discussion at the Committee’s last meeting, there was a consensus that the subcommittee should continue its work, with a view toward presenting another draft at the Committee’s Spring 2005 meeting.

**D. Rule 45; Amendment to Provide for Extending Time for Filing.**

The Committee is considering an amendment to Rule 45(c), which would provide for additional time for service 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. The amendment, which will be on the agenda for the Committee's next meeting, would parallel a similar amendment to Civil Rule 6, which would clarify that the three-day period is added *after* the prescribed period in the rules. The Civil Rule 6 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.

**V. Information Item—Other Rules Pending Consideration**

**A. Rule 29. Proposed Amendment Regarding Appeal for Judgments of Acquittal.**

At the Standing Committee's June 2004 meeting, Judge Carnes (the then chair of the Criminal Rules Committee) reported that the Committee had considered a proposal from the Department of Justice to amend Rule 29. The amendment would have required the court to defer any decision on a motion for a judgment of acquittal until after the jury has returned its verdict, in order to protect the government's right to appeal an adverse ruling on the motion. The Committee, following extensive discussion voted to reject the proposal. Judge Carnes 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 like to present the proposal directly to the Standing Committee at its January 2005 meeting. At its October meeting in Santa Fe, the Criminal Rules Committee was informed that the Department feels strongly about the proposal and that it anticipates presenting additional data to the Standing Committee.

If the Standing Committee should decide that it is appropriate for the Criminal Rules Committee to give further consideration to an amendment, the Committee stands ready to do so.

**B. Rule 41, Status of Amendments Concerning Tracking-Device Warrants.**

The Criminal Rules Committee continues to monitor the status of a proposed amendment to Rule 41, which would provide guidance on the issuance of tracking-device warrants.

In June 2003, the Committee presented a proposed amendment to Rule 41 that would, inter alia, address the topic of tracking-device warrants. The proposal was 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. Following the comment period in the Spring 2003, the Committee made several changes to the rule and committee note to address concerns raised by the Department of Justice.

At the Standing Committee meeting in June 2003, the Committee voted to approve and forward the amendment to the Judicial Conference. 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.

To date, there has been no further report from the Department of Justice on the proposed amendment. This matter was discussed at the Committee's meeting in Santa Fe, and Judge Battaglia reported that he had polled magistrate judges and that there was still high interest in the amendment. The Committee subsequently asked Ms. Rhodes, a member of the Committee, to determine the status of the Department's review of the proposed amendment to Rule 41. Although technically the amendment is pending before the Standing Committee, the Criminal Rules Committee continues to have an interest in the amendment.

Attachment:

- A. Minutes of October 2004 Meeting