

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. Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

From: Hon. Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Subject: Report of the Advisory Committee on Criminal Rules

Date: December 12, 2007

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Committee”) met on October 1-2, 2007, in Park City, Utah, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses three action items; it recommends approval for publication and comment of proposed amendments to Rules 5, 12.3, and 21, relating to crime victims. In addition, the Advisory Committee has several information items to bring to the attention of the Standing Committee, including three matters referred or remanded to it by the Standing Committee: a proposal to appoint a crime victims’ advocate member to the Advisory Committee, and proposed amendments to Criminal Rule 32(h) and Rule 11 of the Rules Governing § 2254 and § 2255 proceedings.

II. Action Items—Recommendations to Publish Amendments to the Rules

The three amendments recommended for publication reflect the Advisory Committee’s continuing focus on the Crime Victims’ Rights Act (CVRA), codified as 18 U.S.C. § 3771. The Committee’s initial package of CVRA amendments to Rules 1, 12.1, 17, 18, 32, 60, and 61 was approved by the Standing Committee in June 2007 and by the Judicial Conference in September 2007. As noted when the initial amendments were under consideration, the Advisory Committee has classified issues relating to crime victims as a continuing agenda item, recognizing that additional amendments might be appropriate. The Advisory Committee now proposes amendments concerning pretrial release, public order defenses, and transfer of trial.

1. ACTION ITEM—Rule 5. Initial Appearance; Proposed Amendment Requiring Consideration of Victim’s Right to be Protected from Defendant in Decision to Retain or Release.

The proposed amendment to Rule 5(d)(3) draws attention to a factor that the courts are now required to consider under both the Bail Reform Act and the Crime Victims’ Rights Act when deciding whether to release or detain a defendant. In determining whether a defendant can be released on personal recognizance, unsecured bond, or conditions, the Bail Reform Act requires the court to consider “the safety of any other person or the community.” See 18 U.S.C. § 3142(b) & (c). In considering proposed conditions of release, 18 U.S.C. § 3142(g)(4) requires the court to consider “the nature and seriousness of the danger to any person in the community that would be posed by the person’s release.” Finally, the Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the “right to be reasonably protected from the accused.” Since Rule 5 now states that the court must detain or release the defendant “as provided by statute” the Committee recognized that it already incorporates these statutory requirements. The Committee concluded, however, that it would be desirable to highlight the victim’s right to reasonable protection in the text of Rule 5.

Recommendation — The Advisory Committee recommends that the proposed amendment to Rule 5(d)(3) be published for public comment.

2. ACTION ITEM—Rule 12.3. Notice of Public-Authority Defense; Proposed Amendment Regarding Victim’s Address and Telephone Number.

The proposed amendment parallels the amendment to Rule 12.1 concerning alibi defenses, which has been approved by the Judicial Conference. Both are intended to implement the CVRA, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for their dignity and privacy. See 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim’s address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense but also protects the victim’s interests.

In the case of victims who will testify concerning a public authority claim, the same procedures and standards apply to both the prosecutor’s initial disclosure and the prosecutor’s continuing duty to disclose under subdivision (b).

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12.3 be published for public comment.

3. ACTION ITEM—Rule 21. Transfer for Trial; Proposed Amendment Requiring Court to Consider Convenience of Victims.

This amendment requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceeding to another district for trial under Rule 21(b). The Committee recognizes that the court has substantial discretion to balance any competing interests in determining the appropriate venue. The amendment does not apply to Rule 21(a), which governs transfers for prejudice.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 21 be published for public comment.

III. Information Items

A. Proposal for Victim’s Advocate Member on Rules Committee

The Chief Justice received a request that he appoint a permanent victims’ advocate member to the Advisory Committee on Criminal Rules. He referred this request to the Standing Committee, which in turn referred the matter to the Advisory Committee. As a preface to its discussion of the issue, the Advisory Committee reviewed the current and ongoing efforts to implement the CVRA. The Federal Judicial Center has undertaken several initiatives to inform judges of the requirements of the CVRA, including the preparation of a pocket guide and a DVD, which should be ready for distribution by the year’s end, as well as incorporation of the CVRA into the curriculum of the FJC’s school for new federal judges. The Committee was also informed of ongoing studies of the CVRA’s implementation being conducted by the Government Accountability Office (GAO) and asked for assistance by commissioning a study to be conducted by the FJC that would better inform the Committee of current practices to recognize the rights of crime victims in the 95 federal districts throughout the country. In addition, Assistant Attorney General Alice Fisher expressed the Department of Justice’s interest in advancing victim interests, and she suggested that the Department could meet regularly with members of the victim community before each meeting of the Advisory Committee to ensure that the Department fully understood their concerns. (Moreover, as noted above, the Advisory Committee has now proposed amendments to Rules 1, 5, 12.1, 12.3, 17, 18, 21, 32, 60, and 61, and it received

substantial commentary from members of the victim community in connection with the amendments it published for public comment.)

After discussion, it was the sense of the Advisory Committee that it would be inadvisable to add a permanent victims advocate to the Committee. The rule-making process functions most effectively by collegial decision-making in which all members seek to focus on improving the administration of justice. It would set an adverse precedent to appoint a member specifically to serve as a partisan advocate for a certain set of interests. Moreover, the appointment of such a designated member is not necessary to ensure that the Committee receives the views of victims and advocates who speak for them: all committee meetings are open to the public, and the public is invited and encouraged to provide comments or testimony during the public comment period on published rules. These procedures insure full access to anyone who wishes to express a view.

B. Rule 32(h)

Rule 32(h) presently requires the court to give notice to the parties if it is contemplating a departure from the Guidelines on a ground that has not been identified in either the presentence report or the parties' pleadings. The Committee's initial package of Booker rules included an amendment intended to apply the same notice requirement to grounds under 18 U.S.C. § 3553(a) that had not been previously identified. The Standing Committee raised concerns about the proposed rule, and it asked the Advisory Committee to study the matter further. The Advisory Committee agreed that the proposal had sufficient merit to warrant further consideration, but it has deferred consideration due to developments in both the Supreme Court and the lower courts. After discussion at the October meeting, the Advisory Committee referred the matter to a subcommittee charged with monitoring the developments in the various courts and gathering additional information about the feasibility of providing notice, given the breadth of the statutory factors under § 3553(a) and the possibility that victims will raise new issues at the sentencing hearing.

C. Proposed Amendments to Rule 11 of the Rules Governing § 2254 and § 2255 Proceedings

At its June meeting, the Standing Committee approved publication of a portion of the Advisory Committee's proposed amendments to Rule 11 dealing with certificates of appealability. It deferred consideration, however, of the other aspects of the proposed amendments that governed the manner and timing of seeking reconsideration of motions under sections 2254 and 2255. The Advisory Committee has referred these aspects of its proposal to a subcommittee for further consideration.

D. Indicative Rulings

With the assistance of Professor Catherine Struve (who participated by telephone) the Advisory Committee concluded that it would be desirable to pursue a criminal rule on indicative rulings. The Committee expects to piggyback on the work of the Advisory Committee on Civil Rules in drafting proposed Civil Rule 62.1, including the public comment on that rule.

E. Other Matters

The Advisory Committee has a variety of other rules under consideration, including the following:

- an amendment to Rule 6 allowing the court, for good cause, to receive the return of an indictment by video conference;
- an amendment to Rule 12 requiring the defendant to assert before trial any claim that the indictment fails to state a claim;
- an amendment to Rule 15 that would permit the deposition of a witness outside the defendant's physical presence where it would be impractical or impossible to depose the witness in the defendant's presence, and
- amendments to Rules 32.1 and 46 expressly authorizing the issuance of an arrest warrant or summons when the government seeks to revoke bail or supervised release.

Attachments

U.S.C. § 3142(g)(4), requires the court to consider “the nature and seriousness of the danger to any person in the community that would be posed by the person’s release.” In addition, the Crime Victims’ Rights Act, 18 U.S.C. § 3771(a)(1), states that victims have the “right to be reasonably protected from the accused.”

Rule 12.3. Notice of a Public-Authority Defense

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(4) *Disclosing Witnesses.*

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(C) *Government’s Reply.* Within 7 days after

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receiving the defendant’s statement, an

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attorney for the government must serve on

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the defendant or the defendant’s attorney a

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written statement of the name, ~~address, and~~

9

~~telephone number~~ of each witness — and the

10

address and telephone number of each

11

witness other than a victim — that the

12 government intends to rely on to oppose the
13 defendant's public-authority defense.

14 **(D)** Victim's Address and Telephone Number. If
15 the government intends to rely on a victim's
16 testimony to oppose the defendant's
17 public-authority defense and the defendant
18 establishes a need for the victim's address and
19 telephone number, the court may:

20 (i) order the government to provide the
21 information in writing to the defendant
22 or the defendant's attorney; or

23 (ii) fashion a reasonable procedure that
24 allows for preparing the defense and
25 also protects the victim's interests.

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27 **(b) Continuing Duty to Disclose.**

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COMMITTEE NOTE

Subdivisions (a) and (b). The amendment implements the Crime Victims' Rights Act, which states that victims have the right to be reasonably protected from the accused, and to be treated with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(a)(1) & (8). The rule provides that a victim's address and telephone number should not automatically be provided to the defense when a public authority defense is raised. If a defendant establishes a need for this information, the court has discretion to order its disclosure or to fashion an alternative procedure that provides the defendant with the information necessary to prepare a defense, but also protects the victim's interests.

In the case of victims who will testify concerning a public authority claim, the same procedures and standards apply to both the prosecutor's initial disclosure and the prosecutor's continuing duty to disclose under subdivision (b).

Rule 21. Transfer for Trial

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(b) For Convenience. Upon the defendant's motion,

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the court may transfer the proceeding, or one or

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more counts, against that defendant to another

6 FEDERAL RULES OF CRIMINAL PROCEDURE

5 district for the convenience of the parties, any
6 victim, and the witnesses, and in the interests of
7 justice.

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COMMITTEE NOTE

Subdivision (b). This amendment requires the court to consider the convenience of victims — as well as the convenience of the parties and witnesses and the interests of justice — in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.