

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 1, 12.1, 17, 18, 32, 41(b), 45, 60, and new Rule 61 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and rules (with the exception of a technical amendment to Rule 45) were circulated to the bench and bar for comment in August 2006. The advisory committee held a public hearing on the proposed changes in Washington, D.C. and heard testimony from several witnesses.

The proposed amendments, with the exception of proposed amendments to Rules 41 and 45, implement various provisions in the Crime Victims' Rights Act (18 U.S.C. § 3771). During the public comment period, the proposed amendments were criticized both for going too far and for not going far enough. Those who believed that the proposed amendments went too far raised the concern that they upset the rules' careful procedural framework, tipping the adversarial balance between the prosecution and the defendant and depriving the defense of critical rights. Some asserted that certain of the proposed amendments tipped the balance so far as to be unconstitutional. Others, including Senator Kyl, who was the Act's chief sponsor, asserted that the advisory committee did not fully implement the Act. The committee proposed rule amendments to implement the specific rights recognized in the Act. The committee did not propose a number of other amendments to many rules to provide specific rights in particular

proceedings, not expressly stated in the Act but based on the Act's general right that crime victims be treated fairly and with respect.

As a threshold matter, the advisory committee discussed whether any of the criminal procedural rules should be amended to set out the statutory rights provided in the Crime Victims' Rights Act. Federal procedural rules generally do not repeat statutory provisions. First, it is unnecessary; a rule containing statutory substantive provisions cannot alter or add force to those statutory provisions. The Crime Victims' Rights Act is self-executing. Additionally, there are disadvantages to having the procedural rules repeat statutory provisions. Any future amendment of the underlying statute will make the parallel rule inconsistent and cause confusion until a corresponding change in the rule is promulgated, which is a deliberate and slow process. The inevitable language differences between a statute and a procedural rule create inconsistency and confusion that may generate litigation. The advisory committee recognized these concerns but concluded that carefully drafted rule amendments to implement the specific rights set out in the Act would be appropriate and helpful.

The advisory committee declined, however, to amend the vast majority of rules to include additional rights. The committee carefully reviewed proposals that would have amended a large number of individual rules to provide rights not expressly stated in the Act, based on the crime victims' general right to be treated fairly and with respect. The advisory committee concluded that such proposals would have inserted into the criminal procedural rules substantive rights that are not specifically recognized in the Act – in effect creating new victims' rights not expressly provided for in the Act.

The advisory committee was concerned that such proposals not only could create new substantive rights, they would change the rules in very detailed ways without a sufficient basis to do so. There is as yet little case law or judicial experience interpreting and applying the Act to

specific cases and facts. Basing specific rules amendments on general statutory language, without the customary and important guidance provided by judges interpreting and applying the statute to a developed record, is premature and invites error. The advisory committee was concerned that comprehensive rule changes made now, spelling out how this generally stated statutory right is to be implemented in particular proceedings, would freeze the jurisprudence into rigid requirements. Such requirements could hamper rather than help judges provide additional procedural protections that might be needed in individual cases. To make such sweeping, yet detailed, rules changes in the absence of guidance from experienced district judges around the country would have substituted the premature judgment of the rules committees for that of the judges charged with ensuring that the rights of defendants, the prosecution, and crime victims are protected in every case.

In addition, these proposals would have the potential of micro-managing judges in exercising their judgment in individual cases. To a large extent, the federal procedural rules have functioned effectively because they rely on the practical experience and wisdom of federal judges to carry out their duties without such detailed instructions.

Without a sound empirical basis, without guidance from judges and litigants who have applied the Act to different circumstances, and without guidance from victims and their representatives who have had actual experience in federal court under the Act, the advisory committee decided to defer taking action on these numerous other proposals for rule amendments based on the general statutory language. The committee intends to: (1) gather more information on precisely how the proposals would operate in specific proceedings and what effects they might have; (2) obtain empirical data substantiating the existence and nature of problems that could be addressed by rule; and (3) provide additional time for courts to acquire experience under the Act and to develop case law construing it.

The advisory committee proposed the following amendments to implement the specific rights set out in the Act. The proposed amendment to Rule 1 incorporates the Act's definition of "crime victim" into the rules. The Committee Note to the rule makes clear the court's authority to decide any dispute as to who is a victim in a particular case.

The proposed amendment to Rule 12.1 prevents automatic disclosure to the defense of a crime victim's address and telephone number when an alibi defense is raised and the government intends to rely on the victim's testimony to establish the defendant's presence at the scene of the alleged offense. The amended rule requires the defendant to establish a need to obtain the information. After the need has been established, the amendment authorizes the court to "fashion a reasonable procedure that allows preparation of the defense and also protects the victim's interests."

The proposed amendment to Rule 17 requires for the first time a court order before a subpoena can be issued to a third party to obtain personal or confidential information concerning a victim. The proposed amendment requires that the victim be notified of such a request unless exceptional circumstances are shown to the court. The Committee Note provides examples of exceptional circumstances, including situations where evidence might be lost or destroyed without immediate action, or where providing notice would unfairly prejudice the defense by prematurely disclosing sensitive defense strategy.

Rule 18 would be amended to require a court to consider a victim's convenience, as well as the convenience of the defendant and witnesses, in setting the place of trial.

Several changes are proposed to Rule 32, including adopting the more expansive definition of "crime victim" used in amended Rule 1. The new term applies to all crime victims, not only to a victim of a crime of violence or sexual abuse, as previously defined in the rule. The proposed amendment makes it clear that the presentence investigation should include

information pertinent to restitution whenever the law permits the court to order restitution, not only when it requires restitution. A provision was also added to incorporate the Act's language that a victim has the right "to be reasonably heard" in judicial proceedings regarding sentencing. The Committee Note states that absent unusual circumstances, any victim who is in the courtroom should be allowed a reasonable opportunity to speak directly to the judge.

The last amendment addressed to victims' rights, proposed new Rule 60, gathers in one rule a number of crime victims' rights. Existing Rule 60 would be renumbered as Rule 61, and an entirely new rule focused on crime victims' rights is proposed as a substitute. Proposed new Rule 60 incorporates several provisions of the Act. The new rule provides that: (1) the government must use its best efforts to give victims reasonable, accurate, and timely notice of any public court proceeding involving the crime; (2) the court must not exclude a victim from public court proceedings involving the crime unless there is evidence that the victim's testimony would be changed if allowed to hear the testimony; (3) the victim has the right to be reasonably heard at any public hearing on release, plea, or sentencing; and (4) the court must promptly decide any motion asserting a victim's rights, which may be raised by the victim or the victim's legal representative in accordance with the Act.

The proposed amendment to Rule 41 authorizes a magistrate judge in a district in which activities related to a crime may have occurred, or in the District of Columbia, to issue a search warrant for property located outside any state or federal judicial district but within a United States territory, possession, or commonwealth or within certain premises associated with United States diplomatic and consular missions. The amendment responds to a problem that affects investigations of cases involving corruption in United States embassies and consulates around the world. Under the current rules, magistrate judges are not provided the authority to issue warrants for such locations. The proposed amendment was deliberately limited to specified

locations to avoid thorny international issues, which defeated a broader proposal recommended in 1990.

The Pacific Islands Committee of the Judicial Council of the Ninth Circuit requested the advisory committee to consider deferring application of the rule to American Samoa until the local judiciary could study and comment on the proposal. The advisory committee received no comments on the proposal from the American Samoan judiciary during the six-month public comment period. Meanwhile, the Department of Justice urged the advisory committee to include American Samoa in the rule to facilitate ongoing criminal investigations that the current rules were hampering. The advisory committee decided to include American Samoa in the proposed amendment to Rule 41.

The proposed amendment to Rule 45 corrects a cross-reference to Civil Rule 5, which was renumbered as part of the general restyling of the Civil Rules. The amendment is technical and was not published for comment.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference –

Approve the proposed amendments to Criminal Rules 1, 12.1, 17, 18, 32, 41(b), 45, 60, and new Rule 61, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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