

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. Anthony J. Scirica, Chair  
Standing Committee on Rules of Practice and Procedure

**FROM:** Edward E. Carnes, Chair  
Advisory Committee on Federal Rules of Criminal Procedure

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

**DATE:** December 11, 2002

**I. Introduction**

The Advisory Committee on the Rules of Criminal Procedure met on September 26-27, 2002, in Cape Elizabeth, Maine 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—Approval of Style and Substantive Changes to Rules of Criminal Procedure**

On December 1, 2002, the restyled Rules of Criminal Procedure went into affect, without any amendments by Congress. Congress did enact legislation amending Rule 16, to replace the language inadvertently deleted in the restyling project.

**III. Information Item—Comment Period on Proposed Amendments to Rule 41. Search Warrants.**

At its June 2002 meeting in Washington, the Standing Committee approved for comment several proposed amendments to Rule 41. Those amendments would cover tracking device warrants and authority to delay the giving of notice. The comment period on these proposed amendments ends on February 15, 2003. To date, very few comments have been received on them. The Committee anticipates presenting these amendments to the Standing Committee at its June 2003 meeting.

**IV. Information Item—Comment Period on Proposed Substantive and Restyling Amendments to Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings and Accompanying Forms.**

In addition to approving for publication proposed amendments to Rule 41, the Standing Committee at its June 2002 meeting also approved for publication the restyled Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings and the forms accompanying those rules. In addition to changes related to the restyling effort, the Advisory Committee had proposed several substantive changes to those rules. The comment period for these proposed amendments ends on February 15, 2003, and the Committee anticipates presenting these amendments to the Standing Committee at its June 2003 meeting.

**V. Information Items—Consideration of Proposed Amendments to Rules**

**A. Rule 35. Correcting or Reducing a Sentence.**

Prior to the restyling efforts for the Rules of Criminal Procedure, Rule 35(c) permitted the court to correct an error in the sentence within 7 days of the “imposition of sentence.” In August 2000, as part of the restyling project, Rule 35(c) was moved to Rule 35(a) and the term “sentencing” was substituted for “imposition of sentence.” That revision, which was not intended to make any change in practice, took effect on December 1, 2002. While the rule was out for public comment, as part of the comprehensive style package, the Committee gave further consideration to that amendment, at the urging of the Appellate Rules Committee which was concerned because the triggering event for appeal purposes was the entry of the judgment.

In June 2001, the Standing Committee approved publication of a proposed amendment to Rule 35. In that amendment, proposed new Rule 35(a) includes a definition of “sentencing”—only for purposes of Rule 35. Under that rule, sentencing means “entry of the judgment.” The Comment period for that proposed amendment ended on February 15, 2002. The Committee received only seven written comments.

The Circuits are split on the question of what the term "sentencing" means in relation to the 7-day rule in Rule 35. The majority view (six circuits) is that the 7-day period is triggered by the oral pronouncement of the sentence. The minority view (one circuit), and the one adopted in the proposed amendment, is that the period commences with the entry of the judgment. The Committee opted for the latter position in order to make the rule more consistent with Appellate Rule 4 and any other rules that might specify when the right to appeal is triggered.

At its April 2002 meeting the Committee considered the public comments and the caselaw on the topic and determined that for purposes of Rule 35, the term sentencing should mean "oral announcement of the sentence," which is the position of the majority of the circuits. Rather than including a special definition for sentencing in the Rule itself, the Committee decided to substitute the term "oral announcement of the sentence" whenever the term "sentencing" was used. After the meeting, it became apparent that approach presented drafting problems.

At its September 2002 meeting, the Committee reconsidered its position and voted to continue the "definitional" approach in Rule 35, but to define sentencing for the purposes of that rule as the "oral announcement of the sentence." This amendment will be presented to the Standing Committee at its June 2003 meeting, with a recommendation that it be forwarded to the Judicial Conference.

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

The Committee is considering an amendment to Rule 12.2 concerning sanctions in those cases where the defense fails to disclose the results of a mental examination conducted by the defense expert.

**C. Rules 29, 33, and 34; Proposed Amendments re Rulings by Court**

Rules 29, 33, and 34 require that motions under them 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 Committee is considering circumstances such as the case where the defendant files a request for an extension of time within the 7 days but due to the judge's illness or absence, the court does not, within the 7-day limit, extend the deadline. At least one Circuit had ruled that the 7-day limit is jurisdictional.

**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. The Committee has decided to recommend an amendment to Rule 32.1 to

provide for the right of allocution. An amendment is being drafted and will be on the agenda for the Committee's Spring 2003 meeting.

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

The Committee has decided to proceed with drafting an amendment, or possibly a new rule, that would parallel Rule of Civil Procedure 72(a), which addresses what counsel must do to preserve an issue for appeal from a magistrate judge's rulings on nondispositive and dispositive matters. The Committee is also considering the issue of whether to address explicitly in that rule the question of magistrate judges taking guilty pleas in felony cases. At its September 2002 meeting, the Committee agreed tentatively on some key language, which has been presented to the Committee on the Administration of the Magistrate Judges System for its consideration and comment.

**Attachment:**

**A. Minutes of April 2002 Meeting**