MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 19-20, 2000
San Diego, California

The Advisory Committee on the Federal Rules of Criminal Procedure met at San Diego, California on October 10 and 20, 2000. These minutes reflect the discussion and actions taken at that meeting.

I.CALL TO ORDER & ANNOUNCEMENTS

Judge Davis, Chair of the Committee, called the meeting to order at 8:30 a.m. on Thursday October 19, 2000. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. David D. Dowd, Jr.
Hon. Edward E. Carnes
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Tommy E. Miller
Prof. Kate Stith
Mr. Darryl W. Jackson, Esq.
Mr. Donald J. Goldberg, Esq.
Mr. Lucien B. Campbell
Mr. Laird Kirkpatrick, designate of the Asst. Attorney General for the Criminal Division, Department of Justice
Prof. David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee, Hon. A. Wallace Tashima, member of the Standing Committee and liaison to the Criminal Rules Committee; Mr. Roger Pauley of the Department of Justice; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Professor Joseph Kimble and Mr. Joseph Spaniol, consultants to the Standing Committee.

Judge Davis, the Chair, welcomed the attendees and noted the presence of a new member of the Committee, Mr. Donald Goldberg.

[Later in the meeting, Judge Davis acknowledged the dedicated efforts and contributions of Judge Dowd and Mr. Jackson as members of the Committee. He noted, with gratitude their service to the Committee and that they would be missed.]

II.APPROVAL OF MINUTES

Mr. Jackson moved that the minutes of the Committee's meeting in New York City in April 2000 be approved. The motion was seconded by Judge Miller and carried by a unanimous vote.

III.STATUS OF PENDING AMENDMENTS BEFORE THE SUPREME COURT

Professor Schlueter informed the Committee that amendments to Rules 6, 7, 11, 24(c), 32.2, and 54 (approved by the Supreme Court on April 17, 2000) had been forwarded to Congress. Barring any additional action by Congress, those changes will go into effect on December 1, 2000.

IV.CRIMINAL RULES UNDER CONSIDERATION

A. Report on Status of Restyling Project—Rules Approved for Publication

Professor Schlueter reported that the Standing Committee at its June 2000 meeting in Washington had approved the Committee's recommendation to publish two separate packages of rules for public comment. The first package, known as the "style" package contains the proposed style changes to the criminal rules. The second package contains ten rules, and is known as the substantive package. Those amendments include not only the style changes proposed but also major changes in practice. Both packages contain "Reporters Notes" that explain that the reader should be aware that there are two separate packages.

He also noted that dates and places had been set for public hearings on the proposed amendments.

B. Review of Suggested Changes from the Style Subcommittee

Judge Davis noted that the Standing Committee's Style Subcommittee had reviewed the style package and had made a number of suggested changes to the published rules. He

also noted that Professor Schlueter had prepared a memorandum addressing the proposed changes, with a view toward assisting the Committee in deciding whether to make the changes. Judge Davis continued by stating that the plan was for the two subcommittees to review the proposed changes and report their recommendations to the full Committee for action.

Professor Schlueter indicated that he had reviewed the proposed changes and had identified a number of proposals that seemed to be global in nature and that it might be helpful to resolve some of those questions before each subcommittee reviewed its assigned rules.

Judge Dowd, the out-going chair of Subcommittee A indicated that the subcommittee had met briefly in an attempt to determine the best way to proceed with reviewing the Style Subcommittee's proposed changes. He noted, for example, that the Subcommittee had proposed a complete redraft of Rule 11(f), which created a potential problem because the current language tracks the language selected by Congress in amending Federal Rule of Evidence 410. He noted that some of the proposed changes might result in a substantive change.

The Committee engaged in a lengthy discussion regarding whether the changes were necessary. Several members expressed concern that the proposed changes reflected a question of preference and were not critical to producing a good work product. Others noted that if the language could be improved, and time permitted, it would be appropriate to give full consideration to the proposed changes. Others noted that several proposed changes might result in substantive changes to the rules.

Judge Davis noted that as a starting point, the Committee could consider Professor Schlueter's list of potential global changes. The two subcommittees could then focus on the proposed changes for their particular rules, at specially called meetings in the spring.

The first proposed change centered on whether to use the word "attorney" or "counsel" or both terms throughout the rules. The style subcommittee had recommended that one or the other, but not both, should be used. Following additional discussion, Judge Davis called for a straw poll that indicated that the Committee was not inclined to accept the subcommittee's suggestion that the term "attorney" be substituted for "counsel" in all of the rules. The subcommittees will review each rule for possible changes in using those terms. Mr. Pauley suggested the Subcommittees be sensitive to using the terms "*an* attorney for the government" and "*the* attorney for the government." He observed that in several rules, the original intent was to avoid limiting operation of the rule to only one assigned attorney who might be representing the government.

Mr. Pauley also raised the issue of whether a proposed change in Rule 32.1(a)(3)(D) concerning whether a probationer should be advised of the right to remain silent during his

or her initial appearance. The discussion focused on whether the privilege against self-incrimination applies at revocation proceedings, and whether the proposed provision might result in a change of a probationer's substantive rights. This issue will be researched for the next Committee meeting.

Professor Schlueter noted that another potential global change was whether internal cross-references to another provision within a rule should specifically cite the cross-referenced section, subsection, or paragraph. He noted that the style subcommittee had identified inconsistent use of that practice. The Committee decided to address that issue on a rule-by-rule basis.

He also noted that the Style Subcommittee had recommended changes in a number of titles and subtitles of rules in an effort to use gerunds. Several members noted that the titles and subtitles adopted by the Committee in the published rules often reflected deliberate of particular terms to capture, as one member noted, a bundle of ideas. Following additional discussion, the Committee agreed that proposed changes in titles should be considered on a rule-by-rule basis.

Professor Schlueter indicated that the Subcommittee had recommended deleting any use of the term "abrogated" in those rules that had been deleted and instead using the word "reserved" in all instances. The Committee discussed use of those terms and settled on use of the terms "deleted" or "transferred" to more accurately indicate (at least for now) what had happened to rules that once existed. It recognized that there may be other terms that could be used in a particular rule.

Several members questioned whether em-dashes should be used in the rules, rather than commas. Other members pointed out that in the original draft submitted by the Style Subcommittee, em-dashes had been inserted for purposes of emphasis.

Professor Schlueter suggested that with regard to the Subcommittee's suggestion that Rule 11(f) (admissibility of statements during plea discussions) it might be prudent to simply cross-reference Federal Rule of Evidence 410, rather than attempt to restyle language that had been initially approved by Congress. The subcommittee responsible for that rule will address that recommendation.

Mr. Rabiej raised the question about possible meeting dates for Subcommittee A and Subcommittee B. Following additional discussion, the Committee agreed that it would be best to hold those meetings in March. That would permit some time to compile and organize any public comments on a particular rule (after the public comment period closes on February 15, 2001) and yet provide ample time to circulate work of the two subcommittees to the full Committee in preparation for the Spring meeting.

C. Other Rules Pending Before the Committee

1. Rule 1. Restoring Reference to 28 USC 1784 to Rule 1(a)(5).

Mr. Pauley noted that in the style project, a reference to 28 U.S.C. § 1784, may have been inadvertently omitted from Rule 1(a)(5), which lists proceedings that are not governed by the rules of criminal procedure. He explained that that statute is a special contempt provision that applies to persons residing abroad who fail to respond to a subpoena. He noted that although there is some question about whether Rule 43 (contempt proceedings) actually applies to contempts under § 1784, he believed that the most prudent course would be to retain the reference to § 1784 in Rule 1. Without taking a formal vote, the Committee agreed with that recommendation.

2. Rules 29, 33 and 34. Whether Rules Should be Amended to Change Time for Filing Motions.

Professor Schlueter informed the Committee that Judge Friedman had written a memo to the Committee raising the question whether additional consideration should be given to the 7-day deadlines set out in Rules 29, 33, and 34. He was concerned that a defendant might be prejudiced where the judge is absent or dilatory. Because Judge Friedman was not able to attend the meeting and present his views, Judge Davis deferred the matter to the next Committee meeting.

3. Rule 35. Whether the Term "Sentencing" Should be Defined and Whether Rule 35(b) Should be Amended.

Judge Davis presented an overview of the Standing Committee's concerns about the proposed amendments to Rule 35. First, he noted that several members had questioned the purpose and meaning of the proposed change in Rule 35(b) (motion to reduce sentence) and whether the amended language would actually adopt the decision in *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998). In particular, Judge Kravitch (who was on the panel that decided *Orozco*) believed that the amendment was broader than the court's decision. Judge Davis added that he and Professor Schlueter had consulted with Judge Kravitch after the meeting and that as a result of that meeting, Judge Carnes, Mr. Pauley, and Mr. Campbell had conferred on modifying the language for publication and had drafted a change to the rule before it was published in August. Thus, the version currently before the public is narrower than the version originally presented to the Standing Committee.

Mr. Pauley argued for a broader application of the rule. That is, a defendant who knows about information that is helpful to the government but does not realize its importance until more than one year has elapsed, should be able to move for sentence relief. The Committee engaged in an extended discussion on this point. Several members indicated that

there were good reasons for requiring the defendant to provide the helpful information within one year and the need for finality. A broader reading, they argued, would potentially leave the door open indefinitely for a defendant to come forward several years later, arguing that he had known about the helpful information but had not provided it earlier because he had only recently realized its importance to the government. Others believed that there were other safeguards in place for assessing the credibility of a defendant's averments and integrity of the process

Following additional discussion, the Committee informally agreed to consider broader language in the rule. Mr. Pauley agreed to work on that draft.

Turning to Rule 35(a), concerning the time for correcting technical errors, etc. in announcing the sentence, Judge Davis reported that the Appellate Rules Committee had questioned whether the Committee might wish to amend the rule to state with more particularity what constitutes "sentencing" for purposes of triggering the 7-day period in that rule. He noted that an argument could be made that in the interests of consistency that time should commence with the entry of the written judgment, and not the oral announcement of the sentence.

Professor Schlueter recounted the genesis of the rule in 1991 and that the Committee at that time was concerned about correcting incorrectly announced sentences within the 10-day period for filing a notice of appeal. He noted, however, that the Appellate Rule 4 had been subsequently amended to avoid any potential jurisdictional problem with making such corrections.

Mr. Pauley stated that of the courts that addressed the rule, the majority position was that the 7-day period for correcting a sentence runs from the oral announcement of the sentence. Following additional discussion, the Committee voted by a margin of 6 to 2 to amend the rule to read "oral announcement of the sentence."

4. Rule 41. Proposed Amendments on Installation and Monitoring of Tracking Devices.

Judge Davis opened the discussion on the topic of issuing warrants for tracking devices by noting that the Committee had briefly discussed the issue at its Spring 2000 meeting in New York and that he had asked the Rule 41 subcommittee to determine if any amendment should be made to address that issue. In particular, he had asked Judge Miller to poll the magistrate judges to learn whether this is an issue that posed any special problems beyond the normal warrant requirements in Rule 41.

Judge Miller reported that he had polled other magistrate judges and that there was a wide variety of sample warrants—because there were not uniform standards or procedures

to issuing tracking device warrants. He identified three issues that ought to be addressed. First, he recommended that there should be a uniform procedure for such warrants? Second, he believed that the current language in the published version of Rule 41 provided a good starting point for drafting the appropriate language. Third, he noted that he and other members of the subcommittee had drafted proposed language to effect the changes. And finally, the subcommittee had incorporated language from the wiretap statute to permit (or require) private persons to be involved in executing the tracking device warrant.

He continued by noting that the proposed draft would permit only federal judges to issue tracking device warrants. Mr. Pauley provided additional comments on the subcommittee's draft. He noted, for example, that he thought more time should be provided in a warrant for tracking the object of the search and that the Committee would eventually have to address that issue.

Other members of the Committee questioned why it would be necessary to address the issue in Rule 41 and that perhaps the issue should be left to the courts. Still other members noted that a void exists in this area and that there is no guidance from the courts, or the rules, as to what standard or procedure should apply for tracking device warrants. Mr. Pauley noted in particular that the Supreme Court has left open the question of what standards and timing requirements should apply.

Following additional discussion, there was a consensus that the Committee might gain additional insights from the public comments on the proposed changes to Rule 41 and that the subcommittee should continue its work on the tracking device warrants.

5. Rules 45 and 56. Proposed Amendment to Change Designation of Presidents' Day to Washington's Birthday.

Professor Schlueter pointed out that in restyling Rules 45 and 56, the Style Subcommittee had proposed changing the designation from "Washington's Birthday" to Presidents' Day, the more commonly used designation for the federal holiday in February. He noted that that was the term used by the Appellate Rules Committee when they restyled the Appellate Rules several years ago. He noted, however, that the Committee had received correspondence from Mr. W. Thomas McGough, Jr. concerning the issue. Mr. McGough, he said, made the case that the correct statutory designation remains listed as "Washington's Birthday" and that it should remain as such in the federal rules of procedure.

Following additional discussion, Judge Carnes moved that Rules 45 and 56 be changed to read "Washington's Birthday." The motion was seconded by Judge Miller and passed by a unanimous vote.

6. Rules Governing § 2254 and § 2255 Proceedings.

Judge Tashima (a member of the Standing Committee and liaison to the Committee) indicated that he had sent a letter to the Committee raising the question whether the Rules Governing § 2254 Proceedings and the Rules Governing § 2255 Proceedings should conform to the new statute of limitations for seeking collateral relief. He also noted that perhaps the issue could be addressed in modifying the forms used for seeking relief.

Judge Carnes, chair of the habeas subcommittee, responded that the subcommittee had not focused on the standard forms and that they had discussed the issue of laches vis a vis the statute of limitations and that he knew of no case where Rule 9 had been applied to a case involving less than a ten-year delay. Judge Miller indicated that he had polled his fellow magistrate judges and that there was a consensus that there would probably be no need to amend the rule. Judge Davis noted that if any change would be made, it could be made in later amendments to the rules.

Judge Miller raised the issue whether the Committee should give some consideration to "restyling" the Habeas Rules. Judge Scirica indicated that the Standing Committee would probably defer to the Advisory Committee on any decision to do so; he agreed that based on comments at the Standing Committee meeting regarding the absence of gender neutral language, and other issues, it might be prudent to consider consideration of style change. He also indicated that it would probably be wise to begin work on the standard forms. Finally, Professor Kimble agreed to start work on restyling the Habeas Rules.

III. OTHER RULES AND ISSUES PENDING BEFORE OTHER ADVISORY COMMITTEES, THE STANDING COMMITTEE, AND THE JUDICIAL CONFERENCE

A. Financial Disclosure Rules.

Professor Schlueter reported that the Standing Committee had approved the Committee's proposed new Rule 12.4 (Disclosure Statement) for publication and comment. He indicated that at the suggestion of the Standing Committee, an effort had been made by the Reporters of the Advisory Committees to use uniform language, where possible, for similarly proposed amendments in the Civil and Appellate Rules. Professor Coquillette added that Appellate Rule 26.1 had been previously adopted and that that rule had provided the general outline for the proposed civil and criminal rules.

B. Rules Governing Attorney Conduct.

Professor Coquillette provided a brief report on the status of the move to adopt standard rules governing attorney conduct. He indicated that the interest persons and organizations were continuing to work on the matter.

C. Status Reports on Pending Legislation Potentially Affecting the Criminal Rules.

Mr. Rabiej reported that attempts by Congress to enact changes in grand jury procedures at this point lacked any real momentum. But, he added, given Congress' continuing interest in grand jury matters, the Criminal Rules Committee would probably become involved in the debate over whether any amendments should be made to the rules.

He also informed the Committee that congressional attempts to amend Rule 41 (HR 2987) had failed. A provision in that bill would have deleted the notice provisions in Rule 41(d) regarding covert entries.

D. Technology Subcommittee of the Standing Committee.

Mr. Rabiej stated that within five years, all federal courts would have the capability of receiving electronic filings and that eventually the Committee might have to address the issue in greater detail. Mr. McCabe added that there is some concern in criminal cases about public access and that currently there is sentiment not to make criminal case files accessible to the general public. At this point, he added, no significant policy decisions have been made on this particular point.

IV.DESIGNATION OF TIME AND PLACE OF NEXT MEETING

The Committee agreed to hold its next regularly scheduled meeting in Washington D.C. on April 26 and 27. [At the suggestion of Judge Davis, the Committee subsequently agreed to add an additional day for that meeting, April 25th.]

Respectfully submitted,

David A. Schlueter
Reporter, Criminal Rules Committee