MINUTES
of
THE ADVISORY COMMITTEE
on
FEDERAL RULES OF CRIMINAL PROCEDURE

October 7-8, 1999
Williamsburg, VA

The Advisory Committee on the Federal Rules of Criminal Procedure met at Williamsburg, Virginia on October 7 and 8, 1999. 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 7, 1999. The following persons were present for all or a part of the Committee's meeting:

Hon. W. Eugene Davis, Chair
Hon. Edward E. Carnes
Hon. David D. Dowd, Jr.
Hon. John M. Roll
Hon. Susan C. Bucklew
Hon. Paul L. Friedman
Hon. Tommy E. Miller
Hon. Daniel E. Wathen
Prof. Kate Stith
Mr. Darryl W. Jackson, Esq.
Mr. Lucien B. Campbell, Esq.
Mr. Roger Pauley, designate of the Asst. Attorney General for the Criminal Division
Professor David A. Schlueter, Reporter

Also present at the meeting were: Hon. Anthony J. Scirica, Chair of the Standing Committee; Mr. Peter McCabe of the Administrative Office of the United States Courts, Mr. John Rabiej and Mr. Mark Shapiro from the Rules Committee Support Office of the Administrative Office of the United States Courts; Ms. Laurel Hooper from the Federal Judicial Center; and Mr. Joseph Spaniol, consultant to the Standing Committee. Professor Stephen A. Saltzburg, consultant to the Style Subcommittee of the Standing Committee, participated by telephone conference call.

Judge Davis, the Chair, welcomed the attendees and on behalf of the Committee acknowledged the dedicated work of Judge Brooks Smith and Mr. Henry Martin, the two outgoing members of the Committee, who were not able to attend the meeting. He also

welcomed the two new members, Judge Paul Friedman, United States District Court, Washington, D.C. and Mr. Lucien Campbell, Federal Public Defender of the Western District of Texas.

II.APPROVAL OF MINUTES OF JUNE 1999 MEETING

Professor Stith moved that the Minutes of the Committee's June 1999, meeting in Portland, Oregon be approved. Following a second by Judge Miller, the motion carried by a unanimous vote.

III.RULES PENDING BEFORE CONGRESS

The Reporter indicated that the following rules were had been approved by the Supreme Court and were pending before Congress:

1. Rule 6. Grand Jury (Presence of Interpreters; Return of Indictment);
2. Rule 11. Pleas (Acceptance of Pleas and Agreements, etc.);
3. Rule 24(c). Alternate Jurors (Retention During Deliberations);
4. Rule 30. Instructions (Submission of Requests for Instructions);
5. Rule 54. Application and Exception.

IV.RULES PENDING AT THE SUPREME COURT

The Reporter informed the Committee that both the Standing Committee (at its January 1999 meeting) and Judicial Conference (at its Spring 1999 meeting) had approved the following rules, and that they were pending at the Supreme Court:

1. Rule 32.2. Criminal Forfeitures
2. Rule 7. The Indictment and Information (Conforming Amendment);
3. Rule 31. Verdict (Conforming Amendment);
4. Rule 32. Sentence and Judgment (Conforming Amendment); and
5. Rule 38. Stay of Execution (Conforming Amendment).

V.CRIMINAL RULES CURRENTLY UNDER CONSIDERATION BY ADVISORY COMMITTEE

A. Proposed Substantive Amendments to Rules 10 and 43; Video Teleconferencing.

Judge Roll, Chair of the Subcommittee on Video Teleconferencing, reported that the Subcommittee had considered amendments be made to Rules 10 and 43 to permit

video teleconferencing for arraignments. He provided some background information on the Subcommittee's consideration of the issue and noted that the principal impediments to using video teleconferencing had been the current language of Rules 10 and 43. He noted that pilot projects had been implemented in the Eastern District of Pennsylvania and in the District of Puerto Rico, but that those projects had not provided much data on whether video teleconferencing was beneficial. That was due in part to the fact that the not very many defendants in those districts had consented to the procedure. In addition, he noted that the Subcommittee had considered the statutory provisions in a number of state jurisdictions that permit video teleconferencing and that several members had received a briefing from Professor Lederer on "Courtroom 21," a state-of-the-art courtroom at the William and Mary School of Law.

Mr. Rabiej informed the Committee that research had indicated that video teleconferencing was being used in jurisdictions such as Los Angeles and in Hawaii with some success.

The Reporter provided additional background information, noting that the Committee had discussed the issue off and on for the past seven years. In 1993 the Committee published a proposed amendment that would have permitted video teleconferencing for arraignments, if the defendant waived personal appearance. That particular proposal had been driven in large part by the Bureau of Prisons which was interested in reducing the costs and security risks posed by transporting prisoners long distances for what in many instances was a very brief and pro forma appearance before the court. The Reporter added that that proposal was tabled in 1994 when it learned that at least two FJC pilot projects were being planned—the same programs mentioned by Judge Roll.

Judge Friedman questioned whether a proposed amendment should address the question of the location of the defense counsel. He noted that while some state statutes seem to address the issue, others do not. In his opinion, there would be value in requiring that the defendant and counsel meet together. Judge Miller observed that one statute provides that a secured communications link must be made between the defendant and the defense counsel. Mr. Campbell indicated that the defendant and counsel should stand together and that the proposal would result in shifting the costs from the Executive Branch to the Judiciary. He also stated that it would send the wrong message to have the defense counsel in court, but the defendant at some remote location.

Judge Miller indicated that if the Committee was inclined to adopt video teleconferencing for arraignments, that Rule 5 could be amended to provide for the same procedures for initial appearances. Mr. Campbell replied that in Texas some sentencing had been done by teleconferencing and that it did not provide the same quality of justice. Judge Bucklew added that Florida has been using teleconferencing.

Judge Roll indicated that the Subcommittee had not reached a consensus to change the rule, in particular the Subcommittee had not been able to agree on whether an accused could be arraigned by teleconferencing, even over his or her objection.

Judge Wathen indicated that the courts in Maine had participated in a pilot program using video teleconferencing which had not been very successful and that the courts were now opposed to it.

Judge Dowd commented that the issue was currently before the Committee because some courts could make good use of teleconferencing and that he thought the proposed amendment would be beneficial. Professor Stith indicated that she favored the method used in Hawaii. But Mr. Campbell expressed concern that permitting teleconferencing was another sign of what he called "creeping waiverism." Mr. Pauley reminded the Committee of the background of the original proposal in the early 1990's and that those concerns still existed.

Judge Roll moved to amend Rules 5, 10, and 43 to permit video teleconferencing for initial appearances and arraignments, tracking the earlier language published by the Committee in 1993. Judge Miller seconded the motion, which carried by a vote of 9 to 2.

B. Proposed Substantive Amendment to Rule 41. Search and Seizure.

Mr. Pauley explained that the Department of Justice had given lengthy consideration to a proposal that would amend Rule 41 to address specifically so-called "covert" warrants. In particular, he noted that there are several types of searches that would require delayed notice to the owner of property that a search has occurred. First, he noted, searches involving video surveillance might require a delay in notice, and second, in recent years the Department has found covert entries helpful in the area of drug investigations. Finally, he stated that tracking device warrants might also require some delay. He noted that there is an absence of clear caselaw on these types of searches and whether delay is permitted and that the circuits have not been uniform in the way they approach these types of searches. Mr. Pauley indicated that while there was no urgency to this substantive amendment, it would be helpful to consider it now, in light of the fact that Rule 41 would be reviewed as part of the restyling effort.

Professor Stith agreed that the issue was worthy of attention and that there was a gap in the law. Judge Dowd agreed with that assessment. Judge Miller indicated that he had polled some magistrate judges and that there was positive interest in pursuing the issue insofar as it might address the "sneak and peak" warrants, which might be helpful, for example, in environmental crimes cases. On the other hand, there was less interest in addressing the issue of tracking device warrants.

Judge Davis appointed a subcommittee consisting of Judge Miller (Chair), Professor Stith, Mr. Pauley, and Mr. Campbell to study the issue and make any recommendations to the Committee.

C. Proposed Substantive Amendments to Rule 12.2. Notice of Insanity Defense.

Judge Carnes indicated that a subcommittee consisting of himself, Mr. Pauley, and Mr. Campbell had studied proposed changes to Rule 12.2, that had been discussed at the last several meetings of the Committee. He indicated that the subcommittee had resolved several issues and was prepared to offer suggested changes to the rule. The Subcommittee had agreed that the results of a compelled sanity examination should be sealed, a procedure already used in some federal courts. Second, the Committee decided to limit the Government's use of an accused's statements made during an examination; under the amendment, the government would not be able to introduce those statements until the defendant has introduced expert evidence.

Finally, the Committee discussed whether some provision could be made for requiring reciprocal discovery for any defense-generated sanity reports and decided to amend the rule. Such defense disclosure would be mandatory if the defendant intends to introduce expert evidence relating to the defense examination.

Following additional discussion, the Committee voted unanimously to approve the amendments to Rule 12.2.

D. Restyling Project: In General.

Judge Davis asked the Committee to comment on proposed schedules for completing the restyling project. He noted that Mr. Rabiej and the Reporter had addressed the issue in separate memos. Under one proposal, the Committee would complete its initial review of the rules in Spring 2000 and publish them for public comment in Summer 2000. Under another plan, the Committee would complete its work later in 2000 or possibly in 2001 and then publish the rules for public comment in 2001.

He pointed out that Judge Scirica had asked that the Advisory Committee present its proposed revisions to the Standing Committee in at least two installments. The current plan was to present Rules 1-31 to the Standing Committee at its January 2000 meeting in Coral Gables, Florida. If the Committee was inclined to move ahead, the second and final installment (Rules 32-60) would be presented to the Standing Committee at its June 2000 meeting.

Mr. Rabiej and the Reporter added that although that schedule would mean additional meetings and place an increased administrative load on the Rules Committee Support Office that it would be possible to stay with the shorter schedule. Under that plan, the subcommittees would meet in November to review the first draft of Rules 32-60 and present those to the full Committee at the special full committee meeting in Orlando, Florida in January 2000. They noted, however, that additional subcommittee meetings

might be required in the Spring, however, before the Committee's regularly scheduled April 2000 meeting.

Following additional discussion, there was a consensus among the members that the Committee should attempt to present Rules 1 to 31 to the Standing Committee at its January 2000 meeting and the remainder of the Rules at the Standing Committee's June 2000 meeting.

E. Proposed Style Amendments to Rules 1-9, Rules of Criminal Procedure

The Committee discussed a number of style changes to Rules 1 to 9. Regarding Rule 1, Mr. Spaniol suggested that the Rules make no reference to Supreme Court. He believed that the reference was no longer necessary in light of the appellate rules and because the Criminal Rules, for all practical purposes, would not be used by the Supreme Court. Following discussion, the Committee voted 9 to 1 to leave the reference in the Rules.

Mr. Pauley stated that he had conducted further research on the question of whether the references to "government attorney" should be used. He noted that a number of statutes use the term "attorney for the government", the term currently used in the Rules and was concerned that changing the term in the Rules would make them inconsistent with those statutes. Following additional discussion, the Committee voted unanimously to use the term, "attorney for the government" in the restyled rules.

The Committee also included a new provision in Rule 1 that was intended to include within the definition of "Federal Judge," any federal judicial officer who is empowered by statute to act as a federal judge, e.g., certain Article 1 federal judges.

The Reporter encouraged the Committee to provide its comments and suggestions on any changes or corrections to the Notes for Rules 1 to 9. Several members suggested changes to the first paragraph of each note, that is intended to briefly explain the style changes to the Rules. The Reporter responded that he would continue to work on standardized language. Several members also indicated that it would be helpful if the Notes more clearly highlighted "substantive" changes to the Rules.

F. Proposed Style Amendments to Rules 10-21, Rules of Criminal Procedure.

The Committee also discussed proposed style changes to Rule 10 to 21 and the proposed Committee Notes. Following discussion, the Committee voted 9 to 1, with one abstention, to use the term "no contendere" instead of "no contest" in the Rules.

The Committee also voted unanimously to remove a provision in redrafted Rule 11 that would have required the judge to place a defendant under oath in every plea colloquy. Following a report from the Reporter on his research on the issue, the Committee voted by a margin of 9 to 1 to delete a provision from the redrafted Rule 11 that would have required the parties to disclose to the court the existence of a plea agreement prior to trial.

G. Proposed Style Amendments to Rules 22-31, Rules of Criminal Procedure.

The Committee discussed proposed style amendments to Rules 22 to 31. With regard to Rule 24, there was some discussion about whether the Rule should explicitly address the issue of permitting a pro se defendant to conduct voir dire. As restyled, Rule 24(a) refers to "attorneys for the parties." The Committee determined that the language was adequate and suggested that the Committee Note emphasize that the new language was not intended to change current practice of permitting pro se defendants to participate.

VI.RULES GOVERNING HABEAS CORPUS PROCEEDINGS

Judge Miller reported that although the Committee had considered a number of amendments to the Rules Governing § 2254 Proceedings and Rules Governing § 2255 Proceedings at the Fall 1998 meeting, the Habeas Rules subcommittee (Judge Miller, chair, Judge Carnes, Mr. Jackson and Mr. Pauley), believed that several additional amendments were in order. First, he suggested that the term "petitioner" in Rule 2(b), Rules Governing § 2255 Proceedings be changed to "movant." Second, the subcommittee had recommended that the term "Magistrate" be changed to "Magistrate Judge" in Rules 8(b) and 10 of both the § 2254 and § 2255 Rules. The proposals were adopted by the Committee by a unanimous vote.

Finally, he noted that in the amendments approved by the Committee, Rule 1(b) of the § 2255 Rules would be amended to also govern proceedings filed under 28 U.S.C. § 2241 by a federal prisoner or detainee. After conducting a word-by-word study of both sets of rules, he believed that § 2241 proceedings are more similar to § 2254 proceedings. He recommended that for now the change should be published for comment as is.

VII.RULES AND PROJECTS PENDING BEFORE THE STANDING COMMITTEE

A. Rules Governing Attorney Conduct.

Judge Scirica informed the Committee of recent developments concerning the adoption of a rule or rules that might govern attorney conduct in federal courts. He provided a brief background on the local rules project that had begun in the 1980's to determine whether, and to what extent, local court rules might be in conflict with the national rules and even state rules. As the initial phase of the project came to a conclusion, Professor Dan Cocquillette continued with studying the conflicts in the local and state rules governing attorney conduct, particularly in light of the Department of Justice's position at one point that federal prosecutors were not subject to sanction by state courts or agencies. The Standing Committee had appointed a special subcommittee to study the problem and as a result there had been a number of meetings and consultations on possible solutions. In the meantime, he reported, Congress had passed the McDade amendment which provided that government attorneys were subject to state disciplinary rules. Now, Congress is considering possible changes to that law.

Judge Scirica indicated that the process is at a cross-roads. Although the Standing Committee will continue to study the issue, there was no intent to interpose the judicial branch between the Department of Justice and Congress. But, if Congress delegates the issue to the judiciary, the Standing Committee is prepared to deal with it. He also noted that at present there seems to be some consensus that if a rule is to be drafted, it would be a single rule, applicable to all federal proceedings, trial and appellate.

Judge Davis called for a sense of the Committee as to whether anyone wished to offer a different perspective or objection. No member voiced objection.

B. Rules Governing Financial Disclosure.

Judge Scirica also informed the Committee that a continuing issue facing the Standing Committee is an issue raised at the Judicial Conference meeting in September 1999—the issue of financial disclosure. There is a growing interest in devising a rule that insures that a judge does inadvertently sit on a case where he or she has a financial interest. He noted that the Code of Conduct Committee was addressing the issue and that the current plan is to circulate a proposed Appellate Rule 26.1 as a possible model.

Mr. Rabiej provided additional background information on the various issues involved. During the discussion by the Committee, Professor Stith raised the question of whether a judge might be disqualified in a criminal case if he or she has a financial interest in a business entity that is the victim in the case. Following additional discussion on that point, Judge Carnes moved that the Committee recommend to the appropriate committees address the problem of financial disclosure vis a vis victims in criminal cases. Judge Dowd seconded the motion, which carried by a unanimous vote.

C. Rules Governing Electronic Filing.

Mr. Rabiej reported that the Civil Rules Committee had taken the lead in proposing several amendments to Civil Rules 5, 6, and 77 that would govern electronic filing of papers and pleadings. He noted that the proposed amendments had been published on August 15, 1999. The Reporter added that Criminal Rule 49 simply cross-references the Civil Rules, it would be helpful to first see what, if any, comments are received on the proposed Civil Rules. Following additional discussion, the Committee agreed that no further action was required at this point on potential amendments to the Criminal Rules.

VIII.DESIGNATION OF TIME AND PLACE OF NEXT MEETINGS

Judge Davis announced that the next meeting would be held on January 10-11, 2000 in Orlando, Florida. The Spring 2000 meeting was tentatively set for San Antonio, Texas in April, subject to availability of meeting locations and dates.

Respectfully submitted

David A. Schlueter
Reporter, Criminal Rules Committee