

PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Criminal Procedure

I. Criminal Rule 60

A. Brief Description

Proposed new Criminal Rule 60 implements several provisions of the Crime Victims' Rights Act (CVRA – 18 U.S.C. § 3771) regarding victims' notice of, and attendance and right to be heard at, various judicial proceedings. Consistent with the CVRA, the proposed new stand-alone rule provides that the government must use its best efforts to give the victim timely notice of any public court proceeding involving the crime; the court must not exclude the victim from attendance absent clear and convincing evidence that the victim's testimony would be materially altered by attendance; and the victim must be reasonably heard at any public proceeding concerning release, plea, or sentencing. The rule also establishes procedures for enforcing these rights. The committees did not adopt the suggestion that the stand-alone rule be expanded and virtually all the criminal rules be amended to add specific rights for victims based on the general CVRA language requiring that victims be treated with "fairness and respect."

B. Arguments in Favor

- Though the CVRA is self-executing, the proposed rule will be helpful to victims, bar, and bench by alerting them to the need to implement victims' rights.
- Consolidating the various CVRA rights into new stand-alone Rule 60 – expressly entitled "victims' rights" – will be more effective than dispersing these rights throughout the rules. Once broken out and distributed, the victims' rights provisions could go unnoticed by victims and lawyers unfamiliar with the criminal rules.

C. Objections

- The rule does not do enough to implement the Act's requirement that victims must be treated with "fairness and respect."
- The victims' rights recognized by the proposed new rule should be broken out and distributed throughout the rules to give them more prominence.

D. Rules Committees' Consideration

The Criminal Rules Committee decided to amend 5 rules and create a new rule to implement the specific victims' rights expressly set out in the CVRA. The Committee was concerned that a wholesale amendment of most of the rules to add specific rights for victims in virtually all criminal proceedings could conflict with the careful balance struck by Congress in the CVRA between a defendant's rights, the discretion afforded to the prosecution, and the rights of victims. In addition to this substantive concern, the Committee concluded that it would be premature to amend most of the rules to create specific rights not expressly set out in the CVRA because: (1) there is little case law applying the CVRA in specific court proceedings or empirical information as to how the CVRA applies to different facts and situations, and amending the rules in the absence of such guidance could lead to significant error; (2) developing comprehensive rule changes that spell out how the generally stated right of victims to be treated fairly and with respect is to be specifically implemented in particular proceedings risks creating a rigid jurisprudence that could hamper judges from providing procedural protections needed in individual cases; (3) the Committee is unaware of a problem with the implementation of victims' rights in federal courts that additional rules amendments are presently needed to remedy; and (4) adding specific victims' rights to the rules, based on the general CVRA statement that victims are to be treated fairly and with respect, may create new substantive rights.

The Criminal Rules Committee will continue to carefully monitor the case law and courts' practices dealing with victims' rights, but decided to defer taking immediate action on amending more rules 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 should be addressed by rule; and (3) provide additional time for courts to acquire experience under the CVRA and to develop case law construing it.

The Criminal Rules Committee also concluded that a stand-alone rule consolidating the specific CVRA rights would be more effective than dispersing the rights throughout the rules. New attorneys and lawyers who regularly practice in state courts are unfamiliar with federal practice and are more likely to notice a stand-alone rule governing victims' rights than related provisions in multiple rules.

II. Criminal Rule 32

A. Brief Description

The proposed amendments to Criminal Rule 32 implement several CVRA provisions affecting sentencing, including a provision that states: "Before imposing sentence, the court must address any victim of the crime who is present at sentencing and

must permit the victim to be reasonably heard.” The current rule provides that the court must permit a victim of violence or sexual abuse *to speak* at the sentencing.

B. Arguments in Favor

- The proposed amendment expands the scope of the current rule to apply to all victims, including victims of nonviolent offenses, and provides that a victim must be reasonably heard at sentencing. The proposed amendment tracks the statutory language, making its application to all victims clear.

C. Objections

- The proposed amendment cuts back, not enhances, the victim’s right to be heard at sentencing, at least for crimes of violence or sexual abuse, by the limit to the right to be reasonably heard rather than to speak.

D. Rules Committees’ Consideration

Amending the rule to provide victims with the right to speak to the court in all instances goes beyond the language of the CVRA. Though the current rule provides victims of violence and sexual abuse the right to speak to the court, the statutory provision provides all victims with the right to be reasonably heard and proposed Rule 32(i)(4)(B) repeats the statutory language verbatim. The CVRA expanded the number of victims entitled to address the court to include all victims, not only victims of violence or sexual abuse, so that amending the rules to follow the statute and establish the same standard is reasonable and consistent with the CVRA. Nonetheless, the proposed Committee Note recognizes current courts’ practices, stating: “[a]bsent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge.”