2011

# Federal Rules Update: Rules Amended as of December 2010

David A. Schlueter

# Rules Amended as of December 2010

BY DAVID A. SCHLUETER

Under the Rules Enabling Act, 28 U.S.C. §§ 2071–77, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees, who draft the rules, circulate them for public comment, and forward the rules for approval to the Judicial Conference's Standing Committee on the Rules. If the rules are approved by the Judicial Conference of the United States they are forwarded to the US Supreme Court, which reviews the rules, makes any appropriate changes, and in turn forwards them to Congress. If Congress makes no further changes to the rules, they become effective on December 1. That process—from initial drafting by the advisory committee to effective date—typically takes three years.

In 2008, the Standing Committee on the Rules authorized publication for comment on proposed amendments to Rules 5 (Initial Appearance), 12.3 (Notice of Public Authority Defense), 15 (Depositions), 21 (Transfer for Trial), and 32.1 (Revoking or Modifying Probation or Supervised Release). Normally, all of those amendments would have become effective in December 2010. But the proposed amendments to Rules 5 and 15 were not submitted to Congress under the procedures outlined above. The proposed amendment to Rule 5 would have included a requirement that in deciding whether to release or detain a defendant, the court must consider the "right of any victim to be reasonably protected from the defendant." As the Advisory Committee Note for the proposed amendment explained, the amendment reflected the requirements of the Bail Reform Act, 18 U.S.C. § 3142(g)(4) and the Crime Victims' Act, 18 U.S.C. § 3771(a)(1). Following the comment period, however, the Advisory Committee decided not to proceed any further with that amendment. It concluded that the proposed amendment was redundant with those statutory provisions.

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The proposed amendment to Rule 15, dealing with depositions would have permitted the parties to take a deposition outside the United States without the defendant being present. The amendment was approved by the Judicial Conference, but the Supreme Court sent the amendment back to the Advisory Committee, without comment, for further consideration.

The remaining amendments, originally proposed in 2008, went into effect on December 1, 2010.

**Criminal Rule 12.3. Notice of Public Authority Defense.** Rule 12.3 requires the government to provide notice that it intends to rely on the public authority defense and provide information about the witnesses it intends to call at trial. The amendment to the rule reflects the Crime Victims' Act, which recognizes that victims have a right to be reasonably protected from the defendant. (18 U.S.C. §§ 3771(a)(1) and (8).) Rule 12.3 now states that the name, address, and phone number of the victim should not be automatically disclosed to the defense. Instead, if the defense shows a need for that information, the court has some discretion in ordering disclosure and in fashioning an appropriate means of providing necessary information to the defense.

**Criminal Rule 21. Transfer for Trial.** Before the 2010 amendment, Rule 21(b) permitted a court to transfer a case to another district for the convenience of the parties, the witnesses, and in the interest of justice. The rule now permits the judge to also transfer the case for the convenience of "any victim."

**Criminal Rule 32.1. Revoking or Modifying Probation or Supervised Release.** The amendment to Rule 32.1 clarifies the application of 18 U.S.C. § 3143(a) to a court's decision to revoke or modify probation or supervised release. The amendment was prompted by recognition that there was some confusion about the use of that statute; several of the subsections of are not suited to the decisions involved in Rule 32.1. The amended rule makes clear that only 18 U.S.C. § 3143(a)(1) is applicable. Finally, the amended rule incorporates case law that has held that the standard of "clear and convincing" evidence applies to Rule 32.1 rulings. (*See* United States v. Loya, 23 F.3d 1529 (9th Cir.

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Governmental Affairs Office.

Something that I have learned both from my students and from the State Policy Implementation Project is that I am not the only one who has much to learn. We all do. One reason is that the available, reliable social science teachings about the relationship between public safety and sentencing and correction policy are incomplete and/or not easily accessible. For example, how much do you know, based on data rather than anecdote or intuition, about the effect of incarceration on crime, the role of the war on drugs on prison growth and crime, and the effect of firearm laws on incarceration and crime? Realizing how little I know about these questions, I recently launched what may be my last initiative as chair, having persuaded my Fordham colleague John Pfaff to assemble a group of social scientists to prepare an objective evaluation of the social science literature relevant to state criminal justice reform. They will aim to prepare a comprehensible evaluation, designed to be understandable by, and of value to, our Section and other policy makers as well as the state legislators whom we are working to assist.

Soon, I will hand over the reins to our chair-elect, Janet Levine, who I know will provide extraordinary leadership. But my education is far from over. While I plan to stay out from underfoot, I also plan to remain active in our Section. If I have learned anything from my bar association work, it is that, happily, I will always get much more out of it than I put in. ■

## FEDERAL RULES ALERT (CONTINUED FROM PAGE 65)

1994); United States v. Giannetta, 695 F. Supp. 1254 (D. Me. 1988).)

**Federal Rule of Evidence 804. Hearsay Exceptions: Declarant Unavailable.** Federal Rule of Evidence 804(b)(3) provides that a declarant's hearsay statements against penal interest are admissible, if the declarant is unavailable. The 2010 amendment to that rule now extends the requirement of corroborating circumstances to all statements against penal interest offered in a criminal case—whether offered by the defense or the prosecution. As the rule was originally written, if the statement was offered to exculpate an accused it was not admissible unless there were corroborating circumstances that "clearly indicate the trustworthiness of the statement." Although the rule placed that burden on the defense, a similar burden did not exist if the prosecution offers a statement against penal interest against an accused. Given the view that nontestimonial statements are not covered by the confrontation clause, *Whorton v. Bockting*, 549 U.S. 406 (2007), the Advisory Committee on the Rules of Evidence was concerned that the current rule might permit the prosecution to present unreliable hearsay against an accused. ■

## FEDERAL SENTENCING (CONTINUED FROM PAGE 61)

the public to know of their support for an unpopular client. It is our experience that people are able to relax, are more trusting and forthcoming telling their stories and expressing emotion if they know that it the video is meant for the judge and will not be played in public. In all of our cases where videos were used, the videos were submitted to the court as an attachment to the sentencing memorandum.

Another important factor to consider is that attaching it to the memorandum allows the judge to view the DVD in chambers and he or she can review it prior to sentencing when he or she is considering the appropriate sentence, not at the time of sentencing when many other factors are at play, or after the judge has already decided on a sentence.

**Length of video?** The video must be compelling so as not to lose the judge's interest. An appropriate goal is to keep the video under 25 minutes. Editing the information is time-consuming. After interviewing eight to 10 people—with a total interview time running 12 to 15 hours—some stories are eliminated and others are greatly condensed. However, choosing the stories with the most relevance to your goal and desired impact is an equally important part of the process.

There is a concern is that the use of video will become commonplace so as to lose its impact. It is important to select cases carefully and choose only those cases whose mitigating circumstances are extraordinary or unique. ■