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How Rules Are Made: A Brief Review

BY DAVID A. SCHLUETER

Under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, amendments to the Federal Rules of Procedure and Evidence are initially considered by the respective advisory committees that 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 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 1st. That process—from initial drafting by the Advisory Committee to effective date—typically takes three years.

Rules Effective December 1, 2009

The following amendments were published for public comment in August 2007. They were approved by the Judicial Conference in September 2008 and by the Supreme Court in 2009. They were forwarded to Congress, which took no action to revise them. Thus, they became effective on December 1, 2009. The amendments may be viewed at <http://www.uscourts.gov>.

Criminal Rule 7. The Indictment and the Information. The change to Rule 7 deleted subdivision (c)(2), which required that the indictment include notice that the defendant has an interest in forfeitable property, because it was covered in Rule 32.2(a).

Criminal Rule 32. Sentencing and Judgment. Rule 32(d)(2) now provides that the presentence report state whether the government is seeking forfeiture of property. The amendment was made



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to promote timely consideration of forfeiture issues during sentencing.

Criminal Rule 32.2. Criminal Forfeiture. There were a number of proposed changes to this rule. First, Rule 32.2(a) now provides that general notice of forfeiture is sufficient; the government need not identify the specific money judgment or property subject to forfeiture. Second, Rule 32.2(b)(1) clarifies the court's ability to consider additional evidence in making its forfeiture determination; the court must hold a hearing, if requested. Third, Rule 32.2(b)(2) requires the court to enter its preliminary forfeiture order in advance of sentencing; the changed rules also authorizes the court to enter a general forfeiture order. Fourth, Rules 32.2(b)(3) and (4) clarify when the forfeiture order becomes final as to the defendant and what the district court must do at sentencing. Fifth, Rule 32.2(b)(5) requires the government to submit a special verdict form. Finally, Rules 32.2(b)(6) and (7) address technical changes modifying the notice, publication, and interlocutory sale of forfeitable property.

Criminal Rule 41. Search and Seizure. Amended Rule 41 creates a two-stepped process for seizing and reviewing electronic storage media. The rule now provides that any inventory of that data may be limited to a description of the physical storage media.

Rules Governing § 2254 Proceedings, Rule 11. Certificate of Appealability. This is a new rule that makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in this rule. The new rule also requires the district judge to grant or deny the certificate when a final order is issued.

Rules Governing § 2254 Proceedings, Rule 12. Applicability of the Federal Rules of Civil Procedure. This rule, which was formerly Rule 11, has been renumbered, to account for the new Rule 11, above.

Rules Governing § 2255 Proceedings, Rule 11. Certificate of Appealability; Time to Appeal. Like new Rule 11 for § 2254 Proceedings, above, this new rule makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in a single rule. The new rule requires the district judge to grant or deny the certificate when a final order is issued.

Time Computation Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. Effective December 1, 2009, a number of rules of procedure were amended to adopt

uniform time computations. The amendments resulted from a report by a special subcommittee that was originally tasked to study the issue in 2005. According to the report of the subcommittee in 2007, the study was “launched in response to frequent complaints by practitioners about the time, energy and nervous anxiety expended in calculating time periods, and to comments by judges about the anomalous results of the current computation system.” (Report of Subcommittee, Time-Computation Project, June 29, 2007, *available at* <http://www.uscourts.gov/rules>.) Each of the advisory committees used a template recommended by the subcommittee. That template used what the subcommittee referred to as a “days-are-days” approach to counting all time periods, including short periods, and sets out standard provisions for determining issues such as when to start and end the counting. In the case of the Criminal Rules of Procedure, Rule 45(a) has been completely revised to now reflect that template. The amendments were intended to clarify how time periods are calculated. A brief summary of the changes in times is noted parenthetically for each rule:

- **Rule 5.1.** Preliminary Hearing (7- and 10-day limits increased to 14 days; 20-day limit increased to 21 days);
- **Rule 7.** The Indictment and the Information (time increased from 10 to 14 days for filing bill of particulars);
- **Rule 12.1.** Notice of an Alibi Defense (10-day limits increased to 14 days);
- **Rule 12.3.** Notice of a Public-Authority

Defense (10-day limits increased to 14 days; 20-day limit extended to 21 days);

- **Rule 29.** Motion for a Judgment of Acquittal (time for filing motion increased from 7 to 14 days);
- **Rule 33.** New Trial (time for filing motion increased from 7 to 14 days);
- **Rule 34.** Arresting Judgment (time for filing increased from 7 to 14 days);
- **Rule 35.** Correcting or Reducing a Sentence (time increased from 7 to 14 days);
- **Rule 41.** Search and Seizure (time for executing warrant increased from 7 to 14 days);
- **Rule 45.** Computing and Extending Time (completely revised);
- **Rule 47.** Motions and Supporting Affidavits (time of motion increased from 5 to 7 days);
- **Rule 58.** Petty Offenses and Other Misdemeanors (10-day periods increased to 14 days);
- **Rule 59.** Matters Before a Magistrate Judge (10-day periods increased to 14 days);
- **§ 2254 Rule 8.** Evidentiary Hearing (10-day period increased to 14 days);
- **§ 2255 Rule 8.** Evidentiary Hearing (10-day period increased to 14 days).

In January 2009, Congress enacted the “Statutory Time-Periods Technical Amendments Act of 2009,” which amended a number of federal statutes to conform to the new time limits. Those statutory amendments also became effective on December 1, 2009. ■

SCIENTIFIC EVIDENCE (CONTINUED FROM PAGE 63)

SCIENCES, THE EVALUATION OF FORENSIC DNA EVIDENCE 85 (1996).) Similarly, the ABA Standards on DNA Evidence contain a provision on bias. ABA Standards for Criminal Justice, DNA Evidence (3d ed. 2007), Standard 16-3.1(a)(v) urges laboratories to “follow procedures designed to minimize bias when interpreting test results.” (See also ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE 67 (3d ed. 2007) (“Cognitive bias (e.g., observer effects) occurs because people tend to see what they *expect* to see, and this typically affects their decision in cases of ambiguity.”).)

Conclusion

Cognitive bias is most likely a far greater danger than motivational bias precisely because it is a subconscious influence. (See REDMAYNE, *supra*, at 14 (“Cognitive biases are potentially more problematic, for these result from unconscious reasoning strategies that can lead us to unwarranted conclusions.”); Risinger et al., *supra*, at 11 (finding cognitive bias “far more pervasive but generally unnoticed” and “a problem in some respects more troublesome and troubling than the intentional misconduct”).)

Forensic techniques that have a substantial subjective component should be a special concern—e.g., fingerprint identifications, firearms (ballistics) identifications, and handwriting comparisons. ■