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Recommended Citation

David A. Schlueter, Federal Rules Update: How Rules Are Made: A Brief Review, 23 *Crim. Just.* 56 (2008).

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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 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 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.

Rules of Criminal Procedure Pending Public Comment

In January 2008 and June 2008, the Standing Committee on the Rules authorized publication for comment on a number of rules of criminal procedure. The comment period for these proposed amendments ends February 17, 2009. More information about filing those comments is available at <http://www.uscourts.gov/rules>.

Criminal Rule 5. Initial Appearance. The proposed amendment to Rule 5 would include 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 Committee Note for the proposed amendment explains, the amendment reflects 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). This proposed



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amendment is part of a series of amendments to Rules 12.3 and 21, which address the rights of crime victims.

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 proposed amendment 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).) The proposed amendment states that the name and address 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 15. Depositions. In 2002, the Advisory Committee on the Criminal Rules drafted a proposed amendment to Rule 26, which governs the method of presenting testimony at trial that would have permitted remote transmission of live testimony of an unavailable witness under limited circumstances. The Supreme Court declined to forward the proposed amendment to Congress. In a concurring opinion, Justice Scalia wrote that the proposed amendment was not consistent with *Maryland v. Craig*, 497 U.S. 836 (1990) because it did not limit the use of such testimony to those instances where doing so would further an important public policy. The proposed amendment to Rule 15 revisits that issue, to some extent, by permitting the parties to take a deposition outside of the United States, without the presence of the defendant. The amendment requires, however, that the court make case-specific findings of a number of factors listed in the rule. The Committee Note accompanying the proposed amendment addresses the history of the proposed amendment to Rule 26 and the confrontation rights of the defendant. The note explains that there are an increasing number of cases where both prosecution and defense witnesses are outside the United States, and beyond the reach of the courts' subpoena powers. The amendment reflects several rulings in the courts of appeals, which have approved such depositions—in limited circumstances. (See, e.g., *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988); *United States v. Gifford*, 892 F.2d 263 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006 (1990).) In

its report to the Standing Committee on Rules of Practice and Procedure, May 12, 2008, the Advisory Committee stated: “[a]lthough the [committee] recognized that approval by the Supreme Court is by no means certain even with [the limitations stated in the rule], the Committee strongly supported the proposal and voted unanimously in favor of recommending it for publication.”

Criminal Rule 21. Transfer for Trial. Rule 21(b) currently permits a court to transfer a case to another district for the convenience of the parties and the witnesses, and in the interest of justice. The proposed amendment to Rule 21 would permit the judge to also transfer the case for the convenience of “any victim.”

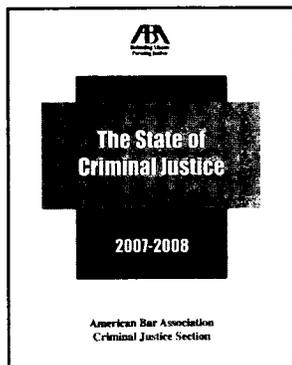
Criminal Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment to Rule 32.1 is designed to clarify the application of 18 U.S.C. § 3143(a) to a court’s decision to revoke or modify probation or supervised release. The confusion about the use of that provision arises apparently from the fact that several of the subsections of that statute are not suited to the decisions involved in Rule 32.1, so that amendment now makes clear that only 18 U.S.C. § 3143(a)1) is applicable. In addition, the proposed amendment 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. 1994); United States v. Giannetta, 695 F. Supp. 1254 (D. Me. 1988).)

Federal Rules of Evidence Pending Public Comment

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. If the statement, however, is offered to exculpate an accused, it is not admissible unless there are corroborating circumstances that “clearly indicate the trustworthiness of the statement.” Although the rule places that burden on the defense, a similar burden does not exist if the prosecution offers a statement against penal interest against an accused. Given the current view that nontestimonial statements are not covered by the Confrontation Clause, *Whorton v. Bocking*, 127 S. Ct. 1173 (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. The proposed amendment 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. ■

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