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2008

## Criminal Rules Amendments Effective as of December 2007

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### Recommended Citation

David A. Schlueter, Criminal Rules Amendments Effective as of December 2007, 23 *Crim. Just.* 52 (2008).

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## Criminal Rules Amendments Effective as of December 2007

BY DAVID A. SCHLUETER

*Author's Note: 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 U.S. 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.*

The following amendments were published for public comment in August 2005. They were approved by the U.S. Supreme Court in 2007 and forwarded to Congress, which took no action to revise them. Thus, they became effective on December 1, 2007. The amendments may be viewed at [www.uscourts.gov](http://www.uscourts.gov).

**Criminal Rule 11. Pleas.** The amendment to Rule 11 is one of several amendments that were designed to conform the rule to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker*, the Court held that the sections in the federal sentencing statute that made them mandatory violated the constitutional right to a jury trial, under the Sixth Amendment, and the Fifth Amendment requirement that the prosecution prove a defendant's guilt beyond a reasonable doubt. The amendment eliminated the requirement that the court advise a defendant dur-

ing plea colloquy that it must apply the U.S. Sentencing Guidelines.

**Criminal Rule 32. Sentencing and Judgment.** The amendment to Rule 32, as with the amendment to Rule 11, conforms the rule to *United States v. Booker* by making it clear that the court may require the probation office to include in the presentence report information relevant to factors set out in 18 U.S.C. § 3553(a). The change requires the trial court to notify the parties that it is considering imposing a non-guideline sentence. The amendment also requires the court to enter judgment on a special form.

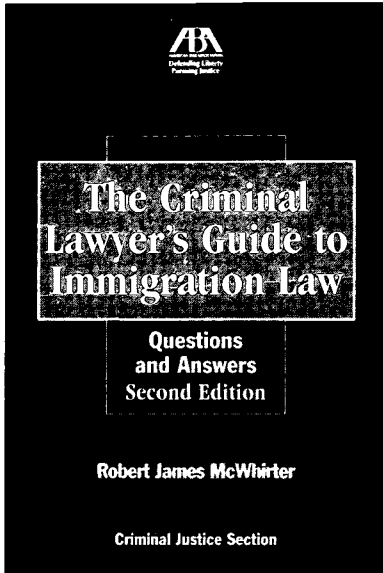
**Criminal Rule 35. Correcting or Reducing a Sentence.** The amendment to Rule 35 conforms the rule to the decision in *United States v. Booker* by deleting Rule 35(b)(1)(B) to make it clear that the U.S. Sentencing Guidelines are advisory only.

**Criminal Rule 45. Computing and Extending Time.** The amendment clarifies the computation of an additional three days when service is made by mail, when it is left with the clerk of court, or where counsel uses electronic means under Civil Rule 5.

**Criminal Rule 49.1. Privacy Protection for Filings Made with the Court.** Rule 49.1 is a new rule that parallels similar new Bankruptcy Rule 9037 and Civil Rule 5.2. These rules implement the E-Government Act, Public Law No. 107-347, which requires in part that the U.S. Supreme Court develop rules to protect the privacy and security concerns relating to electronic filings and availability of those filings to the public. The new rule also reflects the 2001 policy of the Judicial Conference of the United States that electronic case files should be available to the public to the same extent as hard-copy files, as long as personal identifiers are not available to the public. The committee note accompanying the new rule states that the parties should remember that the personal information in the electronic filings, that are not protected by sealing or redaction, will be available over the Internet. Thus, the note continues, "counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court." The note also points out that the clerk of the court is not required to review the filed documents to ensure that they comply with the rule. The responsibility for redacting the protected information rests with counsel. ■



DAVID A. SCHLUETER is the Hardy Professor of Law at St. Mary's University Law School in San Antonio, Texas. He served as the reporter for the Advisory Committee on the Federal Rules of Criminal Procedure from 1988 to 2005. He is an associate editor to *Criminal Justice* magazine.



2006 525 pages 6 x 9 Paper  
ISBN: 1-59031-602-9  
PC 5090100  
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