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Federal Rules Update: Who Makes the Rules?

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Note: Litigators and judges know the feeling of discovering—sometimes after the fact—that a particular rule of procedure or evidence has been changed. In order to assist our readers in staying abreast of recent or pending amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, *Criminal Justice* is adding a new column—“Federal Rules Alert.”

Who Makes the Rules?

The purpose of this column is to provide helpful updates on pending or recent amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. Although the focus is primarily on federal practice, it should also assist those working in the state systems of criminal justice, given that many state evidence and procedural rules find their genesis in federal practice.

Before examining the pending amendments to the Federal Rules of Criminal Procedure and Evidence, it might be helpful to briefly review the rules-making process for the federal rules.

Under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, Congress has authorized the federal judiciary to propose amendments to the Federal Rules of Procedure and Evidence. The federal judiciary acts through the Judicial Conference, which in turn relies upon the Committee on Rules of Practice and Procedure, which is referred to as the “Standing Committee.” (28 U.S.C. § 2073(b).) That committee considers proposed amendments from five advisory committees (appellate, bankruptcy, civil, criminal, and evidence) and reviews and coordinates the recommendations of those advisory committees.

The Standing Committee and the advisory committees are composed of federal judges, representatives from the Department of Justice, lawyers, law professors, and chief justices of state courts. Each

committee has a reporter who coordinates the agenda and drafts appropriate amendments and committee notes. The meetings of the committees (usually two a year) are open to the public and widely announced.

The process of amending the rules of procedure and evidence can take as long as three years. Amendments to the Federal Rules of Criminal Procedure are proposed in the first instance by the Advisory Committee, sometimes at the suggestion of a member of the bar, a legal commentator, a court, or an organization, such as the American Bar Association. Typically, the Advisory Committee will spend at least two meetings discussing and refining an amendment. If it appears that an amendment may require some additional study or be a controversial amendment, the committee chair may appoint a subcommittee to consider the amendment and, with the assistance of the reporter, prepare a draft for the full committee’s consideration.

Once approved by the Advisory Committee, the amendment is forwarded to the Standing Committee with a recommendation to publish for public comment. Amendments are typically published in a variety of forums in August of each year. The comment period usually runs for six months, but may be shortened in those instances when a timely amendment is critical or extended when it appears that there may be heightened public interest in a particular amendment. During that comment period, public hearings are scheduled for any person or organization to comment on the proposed amendment. At the end of the comment period, the Advisory Committee considers any testimony and written public comments, makes any appropriate changes, and forwards the proposed amendment to the Standing Committee for approval and forwarding to the Judicial Conference. In transmitting proposed amendments to the Judicial Conference, the Standing Committee highlights any controversial amendments, noting the respective positions for and against such amendments. If the Judicial Conference approves the amendment (usually at its fall meeting), it forwards the rule to the U.S. Supreme Court. The Court is authorized to prescribe the federal rules and amendments, subject to a statutory waiting period set out at 28 U.S.C. §§ 2072, 2075. The Court must send any



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proposed amendments to Congress by May 1 of the year in which the amendment is to take effect.

Finally, Congress has a statutory period of at least seven months to act on any rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the amendments, they take effect as a matter of law on December 1. (*See* 28 U.S.C. §§ 2074, 2075.)

Amendments as of 2005:

The following amendments were drafted and approved under the procedures outlined above and will become effective, absent any congressional changes or deferral, on December 1, 2005:

- **Criminal Rule 12.2. Notice of an Insanity Defense; Mental Examination.**

The amendment to Rule 12.2 permits the court to exclude evidence on a defendant's mental condition if the defense failed to timely disclose the evidence or if the defendant failed to submit to a mental examination. Rule 12.2 was amended several years ago, but created an unintended gap. Although Rule 12.2 contains a sanctions provision for failing to comply with most of the rule's requirements, there is no mention of a possible sanction if the defendant does not comply with Rule 12.2(c)(3)—which requires the defendant to disclose the results and reports of the defendant's expert examination to the prosecution. As noted in the committee note accompanying the amendment, the court has some flexibility in crafting the appropriate sanctions against the defendant.

- **Criminal Rule 29, Motion for a Judgment of Acquittal; Criminal Rule 33, New Trial; and Criminal Rule 34, Arresting Judgment.**

Three rules—29, 33, and 34—all contain an identical provision concerning timing of requests for extensions of time. As currently written, those three rules require the court to rule on any motion for an extension of time within the seven-day period specified for filing the underlying motion. Thus, if a defendant moves for an extension of time to file a motion for a new trial under Rule 33 within the seven-day period, the judge must rule on that extension motion within the same seven-day period. If the court does not act on the motion for extension within the seven days, the court has no jurisdiction to act on the underlying substantive motion for a new trial. (*See, e.g., United States v. Smith*, 331 U.S. 469, 473-74 (1947); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002).) The amendments, which are designed to remedy that problem, remove the requirement that the

court must rule on the request for an extension of time within the seven-day period, as long as the motion for an extension of time itself is filed within the seven-day period. Now, any requests for extensions of time in those three rules is controlled by Rule 45.

- **Criminal Rule 45. Computing and Extending Time.**

The amendment to Rule 45 is simply a conforming amendment required by the amendments to Criminal Rules 29, 33, and 34, discussed above.

- **Criminal Rule 32.1. Revoking or Modifying Probation or Supervised Release.**

The amendment to Rule 32.1 resulted from a suggestion by the court in *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002), where the court observed that there is no provision in current Rule 32.1 providing a right of allocution to a person facing revocation or modification of probation or supervised release. The amendment explicitly addresses that issue.

- **New Criminal Rule 59. Matters Before a Magistrate Judge.**

New Rule 59, which parallels Civil Rule 72, is a response to a suggestion made by the court in *United States v. Abonce-Barerra*, 257 F.3d 959, 969 (9th Cir. 2001). The new rule addresses appeals of decisions by magistrate judges and establishes the procedures for a district court to review a magistrate judge's "dispositive" and "non-dispositive" decisions.

Amendments Published for Public Comment

The following amendments were published for public comment in August 2005. The comment period ends on February 15, 2006. The proposed amendments may be viewed at <http://www.uscourts.gov>.

- **Criminal Rule 11. Pleas.**

The proposed amendment to Rule 11 is designed to conform the rule to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). It would eliminate the requirement that the court advise a defendant during plea colloquy that it must apply the U.S. Sentencing Guidelines.

- **Criminal Rule 32. Sentencing and Judgment.**

As with the amendment to Rule 11, above, the amendment 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). It would also require the court to notify the parties that it is considering imposing a nonguideline sentence. Finally, the amendment would require the court to enter judgment on a special form.

• **Criminal Rule 35. Correcting or Reducing a Sentence.**

The amendment to Rule 35 would conform the rule to the decision in *United States v. Booker* by deleting Rule 35(b)(1)(B) to make it clear that the sentencing guidelines are advisory only.

• **Criminal Rule 45. Computing and Extending Time.**

This amendment would clarify the computation of an additional three days when service is made

by mail, leaving with the clerk of court, or electronic means under Civil Rule 5.

• **Criminal Rule 49.1. Privacy Protection For Filings Made with the Court.**

This is a new rule that parallels similar new Bankruptcy Rule 9037, Civil Rule 5.2, and Criminal Rule 49.1. These rules address security and privacy issues resulting from electronic case filings.

Any comments on the proposed rules should be addressed to: Mr. Peter G. McCabe, secretary, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Washington, D.C. 20544. ■

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4. Other Classes Mailed Through USPS	0	0
C. Total paid and/or requested circulation	7,951	7,344
D. Free distribution by mail, samples, complimentary and other free copies	756	1,704
1. Outside-County Stated on Form 3541.	764	1,371
2. In-County Stated on Form 3541.	0	0
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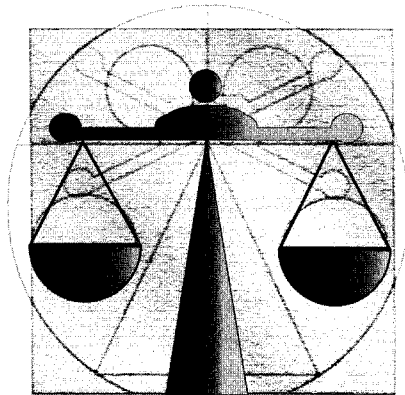
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PLANNING PUBLIC SERVICE

MAKING SERVICE PART OF THE WORKPLACE IS GOOD FOR THE PROFESSION AND THE PUBLIC

BY MICHAEL S. GRECO

PRESIDENT, AMERICAN BAR ASSOCIATION



Renaissance of IDEALISM IN THE LEGAL PROFESSION

Most lawyers feel a keen responsibility to the public, which is vividly demonstrated now by the thousands of lawyers who are volunteering to assist victims of this year's hurricanes. Increasingly, however, lawyers today are facing the more rigorous demands of modern practice, which deplete time and energy for pro bono and public service work.

This tension between the law's public interest roots and today's business realities must be addressed for the good of the profession and society.

Caught between an altruistic spirit and the bottom line, some lawyers now feel less fulfilled in their professional work. Worse, the public's need for volunteer legal services remains severe. Facilitating pro bono and public service can be good for a legal employer's business, enriching lawyers' lives and helping communities in need.

I have appointed the Commission on the Renaissance of Idealism in the Legal Profession to help lawyers strike a better balance in their law practices, allowing them to perform public service, volunteer legal assistance to those in need, help improve their communities, and in the process, find greater fulfillment in their legal careers. The commission is led by Honorary Co-chairs U.S. Supreme Court Justice Ruth Bader Ginsburg and Theodore C. Sorensen, special counsel to President John F. Kennedy, and is chaired by Mark D. Agrast of Washington, D.C.

The need for this commission is great. An American Bar Association survey this year, *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers*, brings into relief the strained relationship between our profession's ideals and practices. Of the 86 percent of lawyers who reported doing some form of pro bono work in a year, 70 percent said a "sense of professional duty" and "personal satisfaction" were top motivating factors and 43 percent named "recognition of the needs of the poor" as another. At the same time, 69 percent of these lawyers said "lack of time" and 15 percent said "employer-related issues" were among the top inhibitors to doing more pro bono work. These competing interests must be balanced.

More distressing is the need for greater access to legal services in America, especially in low-income communities. Despite pro bono and legal aid lawyers' best efforts, America's poor cannot obtain the legal assistance they need. The ABA's most recent study on access to

justice showed that 80 percent of the poor's legal needs go unmet each year. *Closing the Justice Gap*, a Legal Services Corporation study this year, yielded a similar result. This is a sad fact in a country with such vast resources.

Devastation wrought by hurricanes this year, the legal reverberations of which will be felt for years to come, has only compounded this severe need for greater access to legal services.

I charged the commission with developing workplace policies and practices that would enable lawyers to do more pro bono and public service and address these pressing professional and national needs. The commission already has developed a product with immense potential: the *Pro Bono and Public Service Best Practices Resource Guide*.

The guide is a free, online clearinghouse of more than 160 successful pro bono and public service programs from all practice areas. Lawyers interested in implementing such initiatives at their workplace may use best practices in the guide as models, drawing on other lawyers' ideas and experiences. The guide can be searched by three categories—initiative type, practice setting, and organizational partnerships—as well as by keyword.

In addition, legal employers who have implemented effective pro bono programs and public service projects are encouraged to submit them online for inclusion in the guide so their ideas may benefit others in the profession and people in need of assistance.

The guide's potential to help the profession and the public will only grow with greater use. As more lawyers submit best practices, the guide will become more valuable, and as more lawyers consult the guide, pro bono and public service activity will increase, adding balance to lawyers' lives and benefiting the countless people needing services only lawyers can provide.

When I took office as president of the ABA, I issued a call to action asking all lawyers to do more pro bono and public service, but I am not asking lawyers to do it alone. I urge you to visit the commission's website, www.abanet.org/renaissance, to learn from the best practices resource guide, and to help others by submitting your own.

It is time for lawyers to balance professional interests with the public interest. The needs of society and the future of our profession depend on it.