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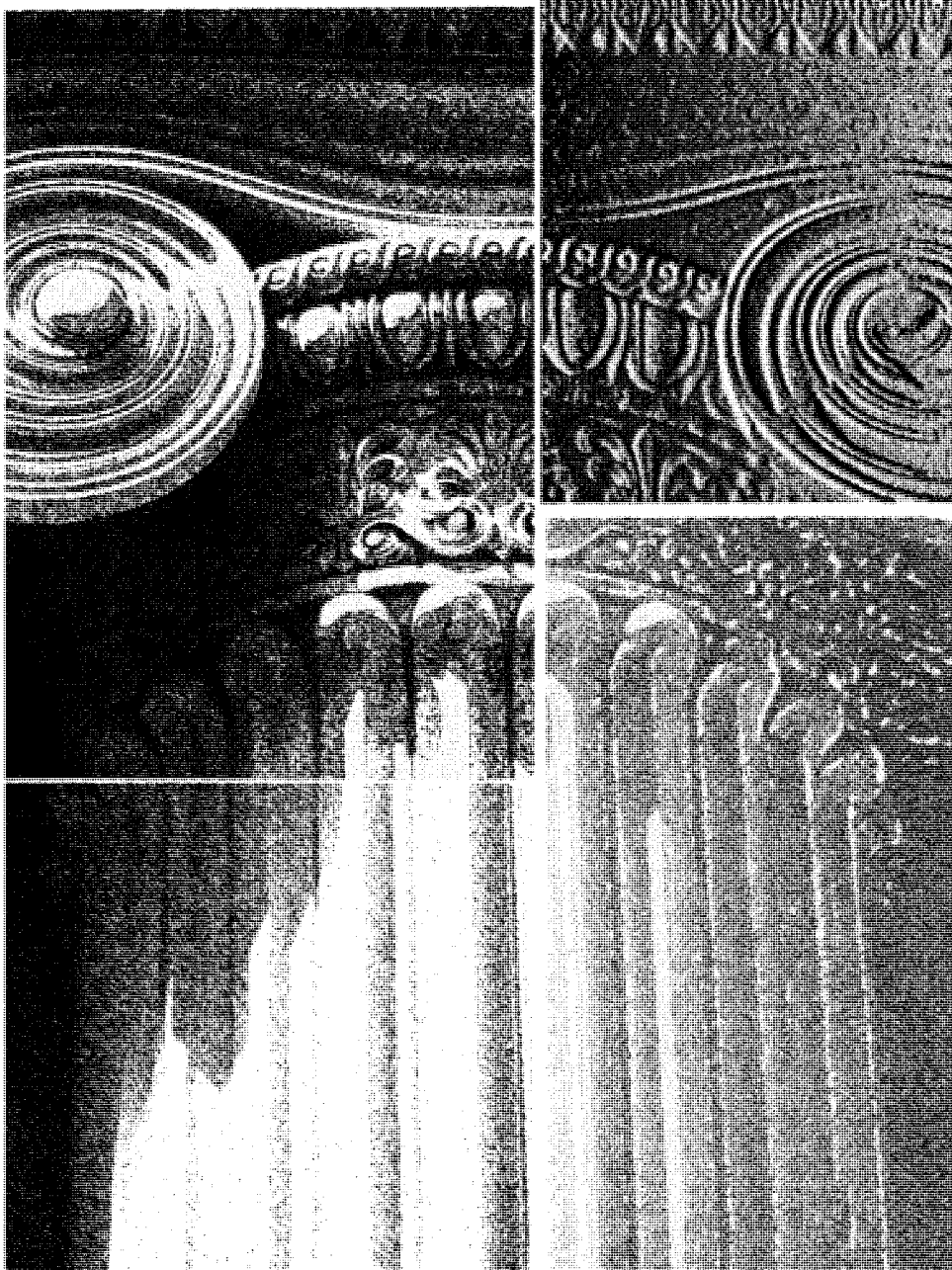
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A CALL FOR COMMENT

Restyling and Amending the Federal Rules of Criminal Procedure

By David A. Schlueter



In August 2000, the Judicial Conference's Committee on Rules of Practice and Procedure published—for public comment—proposed amendments to the entire set of Federal Rules of Criminal Procedure. The proposals mark the culmination of a two-year project to “restyle” the rules—to modernize and reorganize and to make them internally consistent in format and style. Not since the rules were first promulgated in 1946 has there been such a significant change in the structure, format, and substance. This article first addresses the rule-making process for the Federal Rules of Criminal Procedure, and then examines the restyling process. Finally, it notes several of the amendments that could result in significant changes to the practice of criminal law.

How a rule becomes a rule

The Federal Rules of Criminal Procedure operate under the 1988 Rules Enabling Act, 28 U.S.C. §§ 2072–2074. Before the 1988 act, the Supreme Court held the authority to amend the rules under 18 U.S.C. § 3771. Currently, the primary task of amending the Federal Rules of Criminal Procedure falls upon the shoulders of the United States Judicial Conference, which in turn has created advisory committees on the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. The Chief Justice appoints the members of those committees; their term of office is for three years, subject to reappointment for an additional three years. Typically, the Advisory Committee on the Criminal Rules consists of federal district and courts of appeals judges, a representative from the Department of Justice (DOJ), a federal public defender, several private practitioners who specialize in criminal law, and a law professor. Finally, the Chief Justice appoints a reporter (a law professor) to assist the committee in preparing an agenda, researching and drafting the proposed amendments and the accompanying “Committee Notes”, and preparing the minutes for each meeting.

The advisory committee considers amendments proposed by the public, the DOJ, organizations (such as the ABA), or by the committee members themselves. Once an amendment has been considered, debated, and approved by the committee, it is forwarded to the Judicial Conference's Standing Committee on Rules of Practice and Procedure, with a recommendation to publish the amendment for public comment.

Following the public comment period (typically six months), the advisory committee again reviews the amendment, makes any appropriate changes, and once again forwards it to the standing committee for approval and transmittal to the Judicial Conference for its consideration. Amendments approved by the Judicial Conference are forwarded to the Supreme Court, which in turn adopts and forwards them to Congress. If no action is taken by Congress to modify or reject the amendment, it becomes effective on December 1st of the year in which Congress received it. Approval of the rules by Congress supersedes any existing, inconsistent federal statutes. The rulemaking process can be slow—amendments typically become effective three years after the advisory committee initially considers them.

Restyling project: why the changes?

The process for amending the rules generally works well. It's deliberate, informed, and open to the public. Yet it suffers from shortcomings that are inherent in any long-term writing project. Over the last five decades styles can change with each amendment by committee and reporter as well as Congress, which often demonstrated distinct drafting styles and preferences in both the rules and the committee notes. That in turn, can lead to incon-

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sistencies in word usage and even meaning of a particular phrase or term. As a result, several rules have become wordy and unwieldy in language and form. (*See, e.g.*, Fed. R. Crim. P. 40.)

In 1998, the restyled appellate rules went into effect after approval by the Advisory Committee on the Federal Rules of Appellate Procedure. In June 2000, the Standing Committee on Rules of Practice and Procedure approved for public comment the publication of the restyling and amendments to all of the criminal rules.

In restyling the rules, the advisory committee focused on several key points. First, there was an attempt to standardize key terms and phrases that appear throughout the rules. The committee believed it was important to be as consistent as possible and, at the same time, recognize that variations will necessarily occur.

Second, the committee used its committee notes to clearly identify where it made "substantive" changes. If there was a question as to whether or not a proposed change was substantive, the committee erred on the side of caution and identified it as such.

Third, the advisory committee deleted provisions in several rules that it believed were no longer necessary—usually because the case law has evolved since the rule was initially promulgated. For example, in Rules 4, 5.1, and 41 the committee deleted language that indicated that probable cause may be based, in whole or part, on hearsay evidence. When that language was originally added, there was some question about whether hearsay could serve as a basis for probable cause; now the rule is perfectly clear.

Finally, during the restyling effort, several rules were completely reorganized to make them easier to read and apply, such as Rules 5, 11, and 32. In several other rules, sections from one rule were transferred to another rule.

Style and substantive packages

The advisory committee first considered a number of substantive amendments to the rules, but chose to delay publication in order to present both the substantive and restyling changes at the

same time. During the restyling process, the committee identified several areas where significant changes might be required. Ultimately, the standing committee adopted the advisory committee's proposal that two separate packages of amendments be published for public comment. Although the packages are somewhat duplicative, it makes it clear to the public that some changes may be controversial and deserve special attention.

The first package, which is referred to as the "style" package, includes Rules 1 to 60. It highlights the restyling done to all of the Federal Rules of Criminal Procedure. Each rule is potentially a freestanding compilation of proposed changes. However, when the change in language is substantive, it is omitted from the style package. A "Reporter's Note" explains to the public that additional, substantive changes for that particular rule are proposed in a separate package.

The style package is published in a side-by-side format, showing the current rule and what the proposed restyled rule would provide.

The "substantive" package consists of Rules 5, 5.1, 10, 12.2, 12.4 (a new rule), 26, 30, 32, 35, 41, and 43. The committee believes the modifications to these rules will make significant changes in the practice of criminal law. The substantive package includes not only the restyled version of the rule, but also the proposed changes to language that would have an impact on the practice. The committee notes reflect those changes, and an accompanying reporter's note alerts the public to the separate styles package.

These rules are published in the traditional format used by the administrative office and appear with proposed amendments to the Appellate, Bankruptcy, and Civil Rules. That package also includes proposed amendments to the rules governing section 2254 proceedings and section 2255 proceedings.

Proposed rule changes

Having identified a number of rule changes that may significantly alter trial practices in criminal cases in federal courts, what follows is a brief discus-

sion and summary of the advisory committee's work.

Rule 5. Initial Appearance: Several changes were made in Rule 5(a), governing initial appearances by an arrested defendant before a magistrate judge. The first is a clarifying change that may be viewed as substantive. Revised Rule 5(a)(1) provides that a person making the arrest must bring the defendant "promptly" before a magistrate judge, instead of the current reference to "nearest available" magistrate. This language parallels a proposed amendment in Rule 4 and reflects the view that time is of the essence. The substantive change in the amended rule reflects the stated preference (as in other provisions throughout the rules) that the defendant be brought before a federal judicial officer. Only if a magistrate judge is not available should the defendant be taken before a state or local officer.

The final substantive change is in new Rule 5(d), which permits video teleconferencing for an appearance under this rule. One version of the proposed rule requires the defendant's consent. The committee, however, has published an alternate version that does not require the defendant's consent. This change reflects the growing practice among state courts to use video teleconferencing to conduct initial proceedings. The committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. It believed, however, that in appropriate cases the court should have the option of video teleconferencing. The question of when it would be appropriate for a defendant to consent is not spelled out in the rule. That is left to the court to decide case by case. Nor does the rule specify any particular technical requirements for the video conferencing system.

During the process of reviewing the rules in the restyling effort, the committee concluded that portions of Rule 32.1 (revoking or modifying probation or supervised release) and Rule 40 (commitment to another district)

would be better suited for Rule 5. The advisory committee ultimately proposed that Rule 5 be expanded to cover all initial appearances—including those cases where the person has been arrested for failing to appear in another district, or for violating a term of probation or supervised release. Rule 5 now also deals with transfers to another district.

Rule 5.1. Preliminary Hearing in a Felony Case: Authority of Magistrate Judge to Grant Continuance: Rule 5.1(c) contains a substantive change that creates a conflict between the rule and federal statute 18 U.S.C. § 3060(c). Under the current version of Rule 5(c), which tracks section 3060(c), a magistrate judge during an initial appearance is not authorized to grant a continuance over an objection by the defendant—that authority rests only with a federal district judge. The revised rule's language expands the authority of U.S. magistrate judges to grant a continuance for a preliminary hearing conducted under the rule. The committee viewed the restriction in the current rule as an anomaly and believed that the change will promote judicial economy and that it is entirely appropriate to seek this change to the rule through the Rules Enabling Act procedures. (*See* 28 U.S.C. § 2072(b).) Under the act, approval by Congress of this rule change would supersede the parallel existing provisions in 18 U.S.C. § 3060.

Rule 10. Arraignment: Proposed amendments to Rule 10 create two exceptions to the requirement that the defendant must be personally present in court for an arraignment. The first exception provides that the court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present in writing and the court consents to that waiver. The second exception would permit the court to hold arraignments by video teleconferencing. The committee was aware of the usual objections to permitting a defendant to waive a personal appearance, but believed that in appropriate circumstances the court, and the defendant, should have the option of conducting

the arraignment in the defendant's absence. It is a procedure currently used in some state courts. The rule does not indicate when a waiver would be appropriate; that is left to the court and the defendant.

The amendment would not permit waiver of an appearance when the defendant is charged with a felony information. In those cases, the defendant is required by Rule 7(b) to be present in court to waive the indictment. Nor would the amendment permit a waiver of appearance when the defendant is standing mute, or entering a conditional plea, a nolo contendere plea, or a guilty plea. In those instances the committee believed that it was more appropriate for the defendant to appear personally before the court. It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

The second substantive change in Rule 10 rests in subdivision (c), which would permit the court to conduct arraignments through video teleconferencing. Although the practice is now used in state courts and in some federal courts, Rules 10 and 43 have generally prevented federal courts from using that method for arraignments in criminal cases. (*See, e.g., Valenzuela-Gonzales v. United States*, 915 F.2d 1276, 1280 (9th Cir. 1990).) The committee proposed a similar amendment in 1993 and published it for public comment. The amendment was later withdrawn from consideration in order to view the results of several pilot programs that were planned for civil cases. Upon further consideration, the committee believed that the benefits of using video teleconferencing outweighed the costs. This amendment mirrors a proposed change in Rule 5, noted above, that would permit initial appearances to be conducted by video teleconferencing. Here, as with Rule 5, the committee has published alternate proposals—one that would require the defendant to consent to the video teleconferencing, and a version that would not.

As stated in the committee note, the

committee was persuaded to adopt the amendment, in part, by the fact that some districts deal with a very high volume of arraignments for defendants in custody. Because of the distances involved, the defendants must be moved long distances, presenting security risks to law enforcement and court personnel. The amendment gives the courts the discretion to decide whether to permit video arraignments, and if so, what the procedures should be. The committee was convinced that the technology has developed to the point where video conferencing can satisfactorily address the concerns raised in the past about the ability of the court and the defendant to see each other and for the defendant and counsel to be in contact with each other.

Rule 12.2. Notice of Insanity Defense; Mental Examination:

Several significant amendments have been proposed for Rule 12.2, which addresses the notice requirements for presenting an insanity defense or evidence of mental condition on the merits. The amendment addresses the issue of defendants presenting evidence of their mental condition at a capital sentencing proceeding.

Under the existing version of Rule 12.2(b), a defendant who intends to offer expert testimony on the issue of his or her mental condition on the question of guilt must provide a pretrial notice of that intent. The proposed amendment extends that notice requirement to a defendant who intends to offer expert evidence, testimonial or otherwise, on his or her mental condition during a capital sentencing proceeding. As pointed out in the committee note, the amendment adopts the view, as several courts have recognized, that the better practice is to require pretrial notice of that intent so that any mental examinations can be conducted without unnecessarily delaying capital sentencing proceedings.

A change to Rule 12.2(c) is intended to clarify the authority of the court to order mental examinations for a defendant. As currently written, the subdivision suggests that the trial court has discretion to grant a government motion for a mental examination of a

defendant who has indicated under Rule 12.2(a) an intent to raise the defense of insanity. But the corresponding statute, 18 U.S.C. § 4242, requires the court to order an examination if the defendant has provided notice of an intent to raise that defense and the government moves for the examination; the amendment makes Rule 12.2(c) conform to the statute. Any examination would be conducted in accordance with the procedures set out in the statutory provision. The committee recognized that the court's authority under Rule 12.2 to order an examination of a defendant who intends only to present expert testimony on his or her mental condition on the issue of guilt is not as clear. Some courts have concluded that a court may order such an examination. In *United States v. Davis*, 93 F.3d 1286 (6th Cir. 1996), however, the court held that the district court lacked the authority under the rule to order a mental examination of a defendant who had provided notice of an intent to offer evidence on a defense of diminished capacity. Nonetheless, the

court of appeals concluded that the trial court had the inherent authority to order such an examination. The amendment clarifies that the authority of a court to order a mental examination under Rule 12.2(c) extends to those cases when the defendant has provided notice, under Rule 12.2(b), of an intent to present expert testimony on the defendant's mental condition, either on the merits or at capital sentencing. (See, e.g., *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), cert. denied, 119 S. Ct. 1767 (1999).)

The issue of when the results of an examination ordered under Rule 12.2(b)(2) may, or must, be disclosed are addressed in revised Rule 12.2(c)(2). The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. (*Estelle v. Smith*, 451 U.S. 454 (1981).) But subsequent cases have indicated that the defendant waives the privilege if the defendant introduces expert testimony on his or her mental condition. That view is reflected in

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Rule 12.2(c), which indicates that the statements of the defendant may be used against the defendant only after the defendant has introduced testimony on his or her mental condition. The current rules are silent, however, as to whether and to what extent the prosecution may see the results of the examination that may include the defendant's statements in a situation where evidence of the defendant's mental condition is being presented solely at a capital sentencing proceeding. The proposed amendment in Rule 12.2(c)(2) adopts the procedure used by some courts to seal or otherwise insulate the results of the examination until it is clear that the defendant will introduce expert evidence about his or her mental condition at a capital sentencing hearing; i.e., after a verdict of guilty on one or more capital crimes, and a reaffirmation by the defendant of intent to introduce expert evidence in the sentencing phase. Important to note, the new Rule 12.2(c)(3) indicates that when disclosure of the court-ordered examination takes place, disclosure of the results and reports of the defendant's expert examination is mandatory—if the defendant intends to introduce expert evidence relating to the examination.

Currently, Rule 12.2(c) limits admissibility of the defendant's statements during an examination to an issue respecting mental condition for which the defendant "has introduced testimony"—expert or otherwise. Under the amended rule, admissibility of such evidence in a capital sentencing proceeding would be triggered only by the defendant's introduction of expert evidence. The committee believed that, in this context, it was appropriate to limit the government's ability to use the results of its expert mental examination to instances in which the defendant has first introduced expert evidence on the issue.

Rule 12.4. Disclosure Statement (new rule): Proposed Rule 12.4 is modeled after Federal Rule of Appellate Procedure 26.1; it parallels similar provisions being proposed in new Federal Rule of Civil Procedure 7.1. The purpose of the civil and crim-

inal rule is to assist judges in deciding whether they must recuse themselves because of a "financial interest in the subject matter in controversy." (Code of Judicial Conduct, Canon 3C(1)(c) (1972).) The new rule, which includes a provision for disclosing the identities of any organizational victims to the court, does not, however, address other circumstances that might provide other reasons for disqualification.

Rule 26. Taking Testimony: Remote Transmission of Testimony: Under amendments for Rule 26, a court could receive the video transmission of an absent witness if certain conditions are met. Currently, Rule 26 indicates that normally only testimony given orally in open court will be considered, unless otherwise provided for by the rules, an act of Congress, or any other rule adopted by the Supreme Court. The revision to Rule 26(b) extends the logic underlying the exception for admitting deposition testimony to contemporaneous video testimony of an unavailable witness. It generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The proposed amendment reflects the view that there is a need for the trial court to impose appropriate safeguards and procedures to ensure the accuracy and quality of the transmission; the ability of the jurors to hear and view the testimony; and the ability of the judge, counsel, and the witness to hear and understand each other during questioning. Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The committee recognized that there might be Confrontation Clause problems but believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a) will ensure that those rights are not infringed. (*See United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (remote transmission of unavailable witness's testimony did not violate Confrontation Clause).)

Rule 30. Instructions: The advisory committee has recommended that Rule 30 be amended to permit the trial judge to require the parties to submit their requests for instructions before

trial; the amendment generally follows Federal Rule of Civil Procedure 51. Also, amended Rule 30(d) is intended to clarify what counsel must do to preserve error concerning an instructions error. The rule retains the requirement that the objection be contemporaneous and specific.

Rule 32. Sentencing and Judgment: The sequencing of provisions in Rule 32 has been completely reorganized to make it easier to follow and apply. The proposed rule includes one change that may generate debate. Current Rule 32(c)(1) arguably requires the sentencing court to rule on all unresolved objections to the presentence report, and that may place an unnecessary burden on the court. On the other hand the Bureau of Prisons relies upon the presentence report to make important decisions about postsentencing disposition of defendants. Ultimately, the advisory committee recommended language that would require the sentencing court to rule on all unresolved objections to a "material" matter in the report. For all other unresolved objections the judge may either rule on them or conclude that the objections affect matters that will not be considered in imposing an appropriate sentence. As pointed out in the committee note, the advisory committee envisions that a "material" matter would include those matters that would typically impact on treatment of the defendant in the prison system.

Rule 35. Correcting or Reducing a Sentence: Several changes have been proposed for Rule 35. First, the committee decided to delete current Rule 35(a) in its entirety; Rule 35(a)(1) and Rule 35(a)(2) were considered unnecessary. It should be very clear to a district court that further sentencing proceedings are necessary, following a decision by a court of appeals on the issue of whether the sentence was correct.

Second, Rule 35 includes a substantive change that had been under consideration apart from the restyling project. Rule 35(b) includes new language to the effect that the government may file a late motion to reduce a sentence if it demonstrates that the defendant had presented information, the usefulness

of which could not reasonably be known until more than one year following sentencing. The current rule, however, did not address the issue and the courts were split on the issue. (*Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) with *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases).) Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged the committee to amend the rule to reflect the case where a defendant provides information to the government before the one-year period from sentence imposition expires, but the usefulness of that information is not apparent until afterwards. The amendment to Rule 35(b) makes clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. The proposed amendment would not eliminate the one-year requirement as a generally operative element.

Rule 41. Search and Seizure: Rule 41, which addresses searches and seizures, has been completely reorganized and includes a substantive

amendment that may generate some controversy. The substantive amendment would permit officers to seek a warrant to conduct limited noncontinuous "covert entry" searches, e.g., where officers seek a warrant to examine or monitor activities in a covert manner. Two circuits have approved such searches. (*United States v. Villegas*, *supra*, 899 F.2d at 1334-35 (2d Cir. 1990); *United States v. Freitas*, 856 F.2d 1425 (9th Cir. 1988).)

Such searches might be used, for example, to enter premises being used for a sophisticated drug laboratory to determine the number of persons present and the level of threat that might be posed to officers entering for a full search. The key provision rests in proposed Rule 41(f)(5) that would permit the court to delay the requirement that the owner of the premises be given notice of a covert entry.

Rule 43. Presence of the Defendant: Finally, Rule 43 has been included in the "substantive package." Although the proposed amendments are not in themselves significant, if the proposed changes to Rules 5 and 10 concerning the presence of the defen-

dant in open court for initial appearances are approved, Rule 43 will also have to be amended.

Conclusion

For the first time in over five decades, the Federal Rules of Criminal Procedure have been reviewed from top to bottom in an effort to make them internally consistent, clearer, and easier to read and apply. The risk in doing so is that the amendments will result in unintended consequences or other substantive changes. Hopefully, the six-month publication period for both the style package of amendments and the substantive package of amendments will provide an ample opportunity for the members of the bench and bar to express their views on the proposed amendments. As noted in restyled Rule 2: "These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." It is hoped that the proposed amendments to the Rules will be true to that goal. ■

Review Revisions @ . . .

The proposed amendments to the Federal Rules of Criminal Procedure are available through various legal publications, such as *The Federal Reporter*.

In addition, there are two websites that display the complete proposed changes to the Rules—both the styles and the substantive "packages"—for public review and comment. They are:

- ◆ Proposed Amendments for Comment [.pdf] at www.uscourts.gov/rules/proposed.htm.
- ◆ Federal Rulemaking at www.uscourts.gov/rules/, which has links to the text of the proposed Rules.

Comments and deadlines

Three public hearings are scheduled where members of the public may express their views: **New Orleans, Louisiana, January 24, 2001; San Francisco, California, January 29, 2001; Washington, D.C., February 12, 2001.** Requests to testify at any of these hearings must be submitted at least 30 days before the hearing. Electronic comments may be filed through the websites noted above.

All written comments on the proposed amendments, and requests to testify, should be submitted to: **Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, DC 20544.**

The deadline for comments on the proposed amendments is February 15, 2001.



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