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OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

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**TO: Hon. Anthony J. Scirica, Chair**  
**Standing Committee on Rules of Practice and Procedure**

**FROM: W. Eugene Davis, Chair**  
**Advisory Committee on Federal Rules of Criminal Procedure**

**SUBJECT: Report of the Advisory Committee on Criminal Rules**

**DATE: May 8, 2000**

**I. Introduction**

The Advisory Committee on the Rules of Criminal Procedure met on January 10-11, 2000 in Orlando, Florida and on April 25-26 in New York City and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Minutes of those meetings are included at Appendix E.

**II. Action Items — Summary and Recommendations**

This report includes three action items:

- Approval for publication of Criminal Rules 1 to 60 in two separate packages;

- Approval for publication of proposed changes to the Rules Governing § 2254 and § 2255 Proceedings (Habeas Rules); and
- Approval of new Rule 12.4 (financial disclosure statements) for publication and comment.

**A. Publication of Restyled Criminal Rules 1-60 — Summary**

The Committee has been working on restyling the Rules of Criminal Procedure since 1999. Those discussions have taken place at five full Committee meetings and at a series of subcommittee meetings. In January 2000, the Standing Committee approved the publication of Criminal Rules 1 to 31, subject to some suggested editing and revisions.

This report addresses the proposed changes to Rules 32 through 60. The rules and the accompanying Committee Notes are at Appendix A. The Committee requests that the amendments to those rules be approved for public comment. The "style" package is appended as Appendix A.

**B. Separate Publication of Amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43 — Summary**

A number of proposed amendments were under active consideration by the Criminal Rules Committee before the restyling project was begun. In addition, during the restyling effort, the Committee identified several amendments that might be considered controversial or significant changes in current practice. The Committee believes that it would be appropriate to publish these rules — which also contain the style changes — as a separate package in order to highlight those proposed changes for the bench and the bar. Those amendments are attached as Appendix B.

**C. Publication of Proposed Amendments to Rules Governing §§ 2254 and 2255 Proceedings — Summary**

The Committee conducted a review of the Rules Governing §§ 2254 and 2255 Proceedings to determine if any changes were required as a result of the passage of the Antiterrorism and Effective Death Penalty Act, which amended a number of applicable federal statutes. As a result, the Committee has proposed a number of amendments to those

rules and recommends that they be published separately for public comment. Those proposed amendments are attached at Appendix C.

**D. Publication of Proposed New Rule 12.4, Disclosure Statement**

The Criminal Rules Committee has proposed a new Rule 12.4 to mirror similar amendments to Appellate Rule of Procedure 26.1 and Civil Rule of Procedure 7.1, with some modifications. A copy of the proposed rule and accompanying committee note are attached at Appendix D.

**III. Restyling Project**

**A. Rules 1 to 60 — In General**

In 1998, the Committee was informed that following successful completion of the restyling of the Appellate Rules, the Style Subcommittee of the Standing Committee would prepare an initial draft of proposed style changes to the Criminal Rules, with the first installment being presented in late 1998. The Advisory Committee was formed into two separate subcommittees to review the rules as they were completed by the Style Subcommittee. In April, June, and October 1999, the Committee considered style revisions to Rules 1 through 31 and presented those rules to the Standing Committee at its January 2000 meeting in Miami.

At meetings in January and April 2000, the Advisory Committee considered the Standing Committee's proposed revisions to Rules 1-31 and proposed style changes to Rules 32-60.

In conducting the restyling project, the Committee has focused on several key points. First, the Committee has attempted to standardize key terms and phrases that appear throughout the rules.

Second, the Committee has attempted to avoid any unforeseen substantive changes and has attempted in the Committee Notes to clearly state where the Committee is making what it considers to be a change in practice.

Third, in several rules, the Committee has deleted provisions that it believed were no longer necessary or required, usually because the caselaw has evolved since the rule was initially promulgated (or last amended). Whether those constitute changes in practice is not

always clear. *See* Rule 4, where the Committee has deleted the reference to whether hearsay may be used to establish probable cause.

Fourth, during the restyling effort, several rules have been completely reorganized to make them easier to read and apply. *See, e.g.*, Rules 11, 16, 32, and 32.1. In several others, sections from one rule have been transferred to another rule. *See, e.g.*, Rules 4, 9, and 40.

Fifth, in some rules, major substantive changes have been made. Some of those changes have been under discussion for some time but were deferred pending the restyling projects. Still others were identified and included during the project. As noted below, the Committee proposes that those Rules be published separately; one version containing proposed style and controversial amendments and the other including only the proposed style changes.

## **B. Proposed Separate Publication of Rules**

The Committee recommends that the Standing Committee approve publication of the changes to Rules 1 to 60 in two separate packages. The purpose of separating these two packages — although somewhat duplicative — is to make it clear to the public that there are some rules that deserve special attention.

The first package — referred to as the "restyle" package — includes Rules 1 to 60. For those rules where the Committee is proposing significant substantive changes (Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43), the language containing those major changes has been deleted from the "style" package. A proposed "Reporter's Note" explains to the public that additional substantive changes for that particular rule are being published simultaneously in a separate package.

The second package — referred to as the "substantive" package — consists of Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43, which all provide for significant changes in practice. This version of the package includes not only the restyled version of the rules but also the language that would effect the changes in practice. The Committee Notes reflect those changes and again, a proposed Reporter's Note explains that another version of each of these rules (which includes only style changes) is being published simultaneously in a separate package. Rules, such as Rule 11, that have been completely reorganized were not included because they did not appear to include what could be considered significant changes in substance or practice.

#### **IV. ACTION ITEM — Restyling Project — Publication of Rules for Comment**

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

##### **A. Proposed Amendments to Rules 1 to 31**

###### **1. In General**

Following the Standing Committee Meeting in January, the Advisory Committee considered suggested revisions made by members of the Standing Committee, both at the meeting and in later communications. Most of those changes were accepted and incorporated into Rules 1 to 31.

The following discussion briefly addresses significant, nonstyle, changes that were made in Rules 1 to 31 following the Standing Committee meeting.

###### **2. Rule 5. Initial Appearance**

During the process of reviewing Rules 32-60, 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. A subcommittee was formed and ultimately recommended 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. The Rule now also deals with transfers to another district.

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##### **B. Proposed Amendments to Rules 32 to 60**

The Advisory Committee discussed proposed style changes to Rules 32 to 60 at a special meeting in January 2000, at two subcommittee meetings, and finally, at its regularly scheduled meeting in April 2000, in New York City.

The following discussion focuses on the Rules that include one or more substantive changes, or changes, which the Committee believes are likely to generate some debate.

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**2. Rule 32.1. Revoking or Modifying Probation or Supervised Release**

Although Rule 32.1 has been completely reorganized and expanded, the Committee intends to make no significant changes in practice. In particular, Rule 32.1(a)(5) now includes guidance on dealing with cases where the person is arrested in a district that does not have jurisdiction to conduct a revocation proceeding.

**3. Rule 35. Correcting or Reducing a Sentence**

The Committee decided to delete current rule 35(a) in its entirety. Rule 35(a)(1) was considered unnecessary. Rule 35(a)(2) was also 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.

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**4. Rule 40. Transfer to Another District**

As noted supra, as the Committee reviewed Rules 32 to 60, it came to the conclusion that some of the material in Rule 40 should be included in Rule 5. A subcommittee considered the issue and recommended major amendments in Rules 5, 32.1, and 40. Much of Rule 40 is now located in Rule 5. Although those three rules have been completely reorganized, the Committee anticipates no great controversy over the amendments.

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**6. Rule 42. Criminal Contempt**

Rule 42 includes an amendment regarding the appointment of a prosecutor for contempt proceedings. The proposed language mirrors language in *Klayminic v. United States ex rel Vuitton*, 481 U.S. 787 (1987). In that case, the Supreme Court observed that ordinarily the court should request that an attorney for the government prosecute the contempt; only if that request is denied, should the court appoint a private prosecutor. The revised rule also includes a reference to the fact that notwithstanding Rule 32, the court may summarily punish a person found in contempt in the presence of the judge. The Committee expects no controversy regarding these amendments.

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## **8. Rule 46. Release from Custody**

Revised Rule 46(i), currently Rule 46(h), includes language originally included by Congress. Following several discussions about that provision, the Committee decided to restyle the language and retain the essence of the original language. Revised Rule 46(i) addresses the ability of a court to order forfeiture of property where a defendant has failed to appear as required by the court. Under this provision, the court may only forfeit property as permitted under 18 U.S.C. §§ 3146(d) and 3142(c)(1)(B)(xi). The term "appropriate sentence" means a sentence that is consistent with the Sentencing Guidelines.

## **9. Rule 48. Dismissal**

In reviewing Rule 48(b), which deals with the authority of the court to dismiss an indictment for delays, the Committee questioned whether there was still need for any provision in the rule that seemed to be already covered by the Speedy Trial Act. The original provision predated that Act, and some members of the Committee were concerned that re-promulgating Rule 48(b) might be viewed as superseding the Speedy Trial Act. The Committee ultimately decided to retain Rule 48(b) and make it clear in the Committee Note that it views the rule and the Act to operate independently and that there is no intent to supersede any provision in the Act.

## **10. Rule 49. Serving and Filing of Papers**

The Committee has proposed an amendment to Rule 49 to reflect proposed changes in the Civil Rules of Procedure 5(b) and 77(d) that permit, but do not require, a court to provide notice of its orders and judgments through electronic means. Rule 49(c) now parallels a similar extant provision in Rule 49(b), regarding service of papers.

## **11. Rule 51. Preserving Claimed Error**

The Committee has added a sentence at the end of the Rule to clarify that any rulings regarding evidence would be governed by Federal Rule of Evidence 103. The sentence was added because of concerns about the Supersession Clause and the belief that an argument might have been made that Congressional approval of this rule would supercede that Rule of Evidence.

**12. Rule 53. Courtroom Photographing and Broadcasting Prohibited**

Rule 53 has been amended by deleting the word "radio." Further, the rule has been amended to reference the fact that other rules, such as the proposed amendments to Rules 5 and 10 regarding video teleconferencing of certain proceedings, might provide for exceptions to the general prohibition against broadcasting.

*Recommendation—The Committee recommends that restyled Criminal Rules 1 to 60 be approved and separately published for public comment.*

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I. SCOPE, PURPOSE, AND CONSTRUCTION	TITLE I. APPLICABILITY OF RULES
	Rule 1. Scope; Definitions
<p><b>Rule 1. Scope</b></p> <p>These rules govern the procedure in all criminal proceedings in the courts of the United States, as provided in Rule 54(a); and, whenever specifically provided in one of the rules, to preliminary, supplementary, and special proceedings before United States magistrate judges and at proceedings before state and local judicial officers.</p> <p><b>Rule 54. Application and Exception</b></p> <p>(a) <b>Courts.</b> These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); and in the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.</p>	<p>(a) <b>Scope.</b></p> <p>(1) <b><i>In General.</i></b> These rules govern the procedure in all criminal proceedings in the United States district courts, United States courts of appeals, and the Supreme Court of the United States.</p> <p>(2) <b><i>State or Local Judicial Officer.</i></b> When a rule so states, it applies to a proceeding before a state or local judicial officer.</p> <p>(3) <b><i>Territorial Courts.</i></b> These rules also govern the procedure in criminal proceedings in the following courts:</p> <p>(A) the district court of Guam;</p> <p>(B) the district court for the Northern Mariana Islands, except as otherwise provided by law; and</p> <p>(C) the district court of the Virgin Islands, except that the prosecution of offenses in that court must be by indictment or information as otherwise provided by law.</p>

<p><b>(b) PROCEEDINGS (Rule 54 continued)</b></p> <p><b>(1) Removed Proceedings.</b> These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.</p> <p><b>(2) Offenses Outside a District or State.</b> These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by 18 U.S.C. § 3238.</p> <p><b>(3) Peace Bonds.</b> These rules do not alter the power of judges of the United States or of United States magistrate judges to hold security of the peace and for good behavior under Revised Statutes, § 4069, 50 U.S.C. § 23, but in such cases the procedure shall conform to these rules so far as they are applicable.</p> <p><b>(4) Proceedings Before United States Magistrate Judges.</b> Proceedings involving misdemeanors and other petty offenses are governed by Rule 58.</p>	<p><b>(4) <i>Removed Proceedings.</i></b> Although these rules govern all proceedings after removal from a state court, state law governs a dismissal by the prosecution.</p>
<p><b>(5) Other Proceedings.</b> These rules are not applicable to extradition and rendition of fugitives; civil forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. Except as provided in Rule 20(d) they do not apply to proceedings under 18 U.S.C. Chapter 403 — Juvenile Delinquency — so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statutes §§ 4300-4305, 33 U.S.C. §§ 391-396, or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U.S.C. §§ 256-258, or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U.S.C. §§ 772-772i, or to proceedings against a witness in a foreign country under 28 U.S.C. § 1784.</p>	<p><b>(5) <i>Excluded Proceedings.</i></b> Proceedings not governed by these rules include:</p> <ul style="list-style-type: none"> <li>(A) the extradition and rendition of a fugitive;</li> <li>(B) a civil property forfeiture for the violation of a federal statute;</li> <li>(C) the collection of a fine or penalty;</li> <li>(D) a proceeding under a statute governing juvenile delinquency to the extent the procedure is inconsistent with the statute, unless Rule 20(d) provides otherwise; and</li> <li>(E) a dispute between seamen under 22 U.S.C. §§ 256-258.</li> </ul>

**(c) Application of Terms. (Rule 54 continued)** As used in these rules the following terms have the designated meanings.

"Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in Puerto Rico, in a territory or in any insular possession.

"Attorney for the government" means the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, when applicable to cases arising under the laws of Guam the Attorney General of Guam or such other person or persons as may be authorized by the laws of Guam to act therein, and when applicable to cases arising under the laws of the Northern Mariana Islands the Attorney General of the Northern Mariana Islands or any other person or persons as may be authorized by the laws of the Northern Marianas to act therein.

"Civil action" refers to a civil action in a district court.

The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"District court" includes all district courts named in subdivision (a) of this rule.

**(b) Definitions.** The following definitions apply to these rules:

**(1) "Attorney for the government" means:**

- (A) the Attorney General, or an authorized assistant;
- (B) a United States attorney, or an authorized assistant;
- (C) when applicable to cases arising under Guam law, the Guam Attorney General or other person whom Guam law authorizes to act in the matter; and
- (D) any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.

"Federal magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates.

"Judge of the United States" includes a judge of the district court, court of appeals, or the Supreme Court.

"Law" includes statutes and judicial decisions.

"Magistrate judge" includes a United States magistrate judge as defined in 28 U.S.C. §§ 631-639, a judge of the United States, another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule relates, and a state or local judicial officer, authorized by 18 U.S.C. § 3041 to perform the functions prescribed in Rules 3, 4, and 5.

- (2) "Court" means a federal judge performing functions authorized by law.
- (3) "Federal judge" means:
  - (A) a justice or judge of the United States as these terms are defined in 28 U.S.C. § 451;
  - (B) a magistrate judge; or
  - (C) a judge confirmed by the United States Senate and empowered by statute in any commonwealth, territory, or possession to perform a function to which a particular rule relates.
- (4) "Judge" means a federal judge or a state or local judicial officer.
- (5) "Magistrate judge" means a United States magistrate judge as defined in 28 U.S.C. §§ 631-639.

<p>"Oath" includes affirmations.</p> <p>"Petty offense" is defined in 18 U.S.C. § 19.</p> <p>"State" includes District of Columbia, Puerto Rico, territory and insular possession.</p> <p>"United States magistrate judge" means the officer authorized by 28 U.S.C. §§ 631-639.</p>	<p>(6) "Oath" includes an affirmation.</p> <p>(7) "Organization" is defined in 18 U.S.C. § 18.</p> <p>(8) "Petty offense" is defined in 18 U.S.C. § 19.</p> <p>(9) "State" includes the District of Columbia, and any commonwealth, territory, or possession of the United States.</p> <p>(10) "State or local judicial officer" means:</p> <p>(A) a state or local officer authorized to act under 18 U.S.C. § 3041; and</p> <p>(B) a judicial officer specifically empowered by statute in force in the District of Columbia or in any commonwealth, territory, or possession, to perform a function to which a particular rule relates.</p> <p>(c) <b>Authority of Justices and Judges of the United States.</b> When these rules authorize a magistrate judge to act, any other federal judge may also act.</p>
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#### COMMITTEE NOTE

Rule 1 is entirely revised and expanded to incorporate Rule 54, which deals with the application of the rules. Consistent with the title of the existing rule, the Committee believed that a statement of the scope of the rules should be placed at the beginning to show readers which proceedings are governed by these rules. The Committee also revised the rule to incorporate the definitions found in Rule 54(c) as a new Rule 1(b).

Rule 1(a) contains language from Rule 54(b). But language in current Rule 54(b)(2)-(4) has been deleted for several reasons: First, Rule 54(b)(2) refers to a venue statute that governs an offense committed on the high seas or somewhere outside the jurisdiction of a particular district; it is unnecessary and has been deleted because once venue has been established, the Rules of Criminal Procedure automatically apply. Second, Rule 54(b)(3) currently deals with peace bonds; that provision is inconsistent with the governing statute and has therefore been deleted. Finally, Rule 54(b)(4) references proceedings conducted before United States Magistrate Judges, a topic now covered in Rule 58.

Rule 1(a)(5) consists of material currently located in Rule 54(b)(5), with the exception of the references to the navigation laws, fishery offenses, and to proceedings against a witness in a foreign country. Those provisions were considered obsolete. But if those proceedings were to arise, they would be governed by the Rules of Criminal Procedure.

Rule 1(b) is composed of material currently located in Rule 54(c), with several exceptions. First, the reference to an "Act of Congress" has been replaced with the term "federal statute." Second, the language concerning demurrers, pleas in abatement, etc. has been deleted as being anachronistic. Third, the definitions of "civil action" and "district

court" have been deleted. Fourth, the term "attorney for the government" has been expanded to include reference to those attorneys who may serve as special or independent counsel under applicable federal statutes.

Fifth, the Committee added a definition for the term "court" in Rule 1(b)(2). Although that term originally was almost always synonymous with the term "district judge," the term might be misleading or unduly narrow because it may not cover the many functions performed by magistrate judges. *See generally* 28 U.S.C. §§ 132, 636. Additionally, the term does not cover circuit judges who may be authorized to hold a district court. *See* 28 U.S.C. § 291. The proposed definition continues the traditional view that "court" means district judge, but also reflects the current understanding that magistrate judges act as the "court" in many proceedings. Finally, the Committee intends that the term "court" be used principally to describe a judicial officer, except where a rule uses the term in a spatial sense, such as describing proceedings in "open court."

Sixth, the term "Judge of the United States" has been replaced with the term "Federal judge." That term includes Article III judges and magistrate judges and, as noted in Rule 1(b)(3)(C), federal judges other than Article III judges who may be authorized by statute to perform a particular act specified in the Rules of Criminal Procedure. Seventh, the definition of "Law" has been deleted as being superfluous and possibly misleading because it suggests that administrative regulations are excluded.

Eighth, the current rules include three definitions of "magistrate judge." The term used in amended Rule 1(b)(5) is limited to United States magistrate judges. In the current rules the term magistrate judge includes not only United States magistrate judges, but also district court judges, court of appeals judges, Supreme Court justices, and where authorized, state and local officers. The Committee believed that the rules should reflect current practice, i.e., the wider and almost exclusive use of United States magistrate judges, especially in preliminary matters. The definition, however, is not intended to restrict the use of other federal judicial officers to perform those functions. Thus, Rule 1(c) has been added to make it clear that where the rules authorize a magistrate judge to act, any other federal judge or justice may act.

Finally, the term "organization" has been added to the list of definitions.

The remainder of the rule has been amended as part of the general restyling of the rules to make them more easily understood. In addition to changes made to improve the clarity, the Committee has changed language to make style and terminology consistent throughout the Criminal Rules. These changes are intended to be stylistic only.

<b>Rule 2. Purpose and Construction</b>	<b>Rule 2. Interpretation</b>
<p>These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.</p>	<p>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.</p>

**COMMITTEE NOTE**

The language of Rule 2 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic. No substantive change is intended.

In particular, Rule 2 has been amended to clarify the purpose of the Rules of Criminal Procedure. The words "are intended" have been changed to read "are to be interpreted." The Committee believed that that was the original intent of the drafters and more accurately reflects the purpose of the rules.