Amendments to the Federal Rules of Criminal Procedure You'll Want to Know About

By Daniel E. Monnat and Anne L. Ethen

The Federal Rules of Criminal Procedure have recently undergone a major revision. The rules received a "general restyling…to make them more easily understood and to make style and terminology consistent throughout the rules,"[1] effective December 1, 2002. As a part of this restyling, many of the rules have been broken down into new subdivisions, and various provisions of the rules have been moved and rearranged.

For example, the provisions of Rule 40, governing the procedures to be followed after the arrest of a person on charges pending in another district, have been moved, primarily to Rules 5 and 5.1. Since many subsection designations have also been changed, it would be a good idea to check any standard motions you may use and update the citations.

Amid the stylistic changes, it could be easy to overlook several substantive amendments which also took effect December 1, 2002. This article will outline some of the amendments to the rules that affect the practice of criminal law in federal court. In this article, the authors will refer to the pre-December 1, 2002, Rules as the "prior" or "former" rules. The authors will refer to the post-December 1, 2002, Rules as the "amended" or "restyled" rules.

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I. When the Defendant Chooses Not to Appear

A. Failure to respond to a summons, Rules 4 & 9

Occasionally, a defendant fails to respond to a criminal summons to appear in federal court. When this happens, the judge is no longer required to issue an arrest warrant.[2] The court must issue a warrant, however, when requested by the government.[3]

B. Appearance by video teleconference, Rules 5 & 10

The rules have been amended to authorize initial appearances and arraignments to be conducted by video teleconferencing. New Rule 5(f) permits initial appearance by video teleconferencing if the defendant consents.[4] Arraignment also may be held by video teleconferencing if the defendant waives the right to be arraigned in person.[5]

C. Waiver of appearance at arraignment, Rule 10

The court may hold an arraignment in the defendant's absence when the defendant has waived the right to be present and the court approves.[6] This change to the rule eliminates the need for a defendant to return to federal court, a long trip for many clients, for what is usually a perfunctory appearance.

The waiver of appearance for arraignment must be in writing and must be signed by the defendant and the defendant's attorney. The waiver must affirm that the defendant has received a copy of the charging instrument and that the plea is not guilty.[7] The court may accept or reject the waiver.[8]

The defendant may waive appearance at arraignment only when charged by indictment or by misdemeanor information.[9] The defendant may not waive appearance when charged by a felony information. When the case is proceeding on a felony information, Rule 7 requires the defendant to be present in court to waive indictment.[10] The defendant also may not waive appearance at arraignment when the defendant is entering a conditional plea, a nolo contendere plea or a guilty plea, or is standing mute.[11] The defendant may not waive the arraignment itself.

II. Do You Want to Know a Secret: The continuing erosion of grand jury secrecy

Rule 6(e) continues to set forth the general rule of secrecy of grand jury proceedings. However, more exceptions to the secrecy rule have been added. Rule 6 now allows disclosure of grand jury information to officials of Indian tribes for the purpose of enforcing federal, state or tribal criminal law.[12] Disclosure of grand jury matters also may be made to an attorney for the government or to banking regulators for use in a civil forfeiture or for enforcement of banking laws, in accordance with 18 U.S.C. § 3322.[13] Disclosure of grand jury information may be made to armed forces personnel when the disclosure is for the purpose of enforcing military criminal law.[14]

Congress attempted to further increase the disclosure of grand jury matters in the Homeland Security Act of 2002.[15] The amendments were keyed, however, to the language of the former version of Rule 6, and those amendments make no sense when applied to the amended Rule 6 previously approved by Congress.[16] The amendments would have allowed disclosure of grand jury matters upon the request by an attorney for the United States government when sought by a foreign court or prosecutor for use in an official criminal investigation.[17] Further, when grand jury matters involve a threat of actual or potential attack, sabotage, terrorism or clandestine intelligence-gathering activities, disclosure would have been allowed to appropriate federal, state, local, or foreign government officials for the purposes of preventing or responding to the threat.[18] It is anticipated that the Rule 6 provisions of the Homeland Security Act will have to be amended.

III. The Changing Rules of Discovery & Disclosure

A. Disclosure of witnesses' phone numbers, Rules 12.1 & 12.3

Counsel must now provide phone numbers of the defendant's alibi witnesses and the government's alibi rebuttal witnesses.[19] Similarly, the parties must provide phone numbers for any witnesses disclosed pursuant to a notice of public authority defense.[20]

B. Disclosure statements for corporate parties, Rule 12.4

New Rule 12.4 requires a disclosure statement from any nongovernmental corporate party[21] or organizational victim.[22] The rule is designed to assist judges in determining whether recusal is necessary due to a financial interest, such as ownership of stock in a parent corporation.[23]

The government is responsible for filing the disclosure statement for any organizational victims.[24] All disclosure statements are to be filed at the defendant's initial appearance and supplemented as necessary.[25]

C. Insanity defense & pretrial disclosure of expert testimony, Rule 12.2

Prior to amendment, Rule 12.2 did not address the procedures to be followed when the defense intended to raise the issue of the defendant's mental condition during the sentencing phase of a capital case. Prior Rule 12.2(b) required a defendant to provide pretrial notice of an intent to offer expert testimony on the issue of the defendant's mental condition on the question of guilt. The rule did not require notice to be given of an intent to rely on mental condition during capital sentencing proceedings. Under amended Rule 12.2, the defendant is required to give notice of intent to present expert evidence of the defendant's mental condition during a capital sentencing proceeding.[26]

Amended Rule 12.2(c)(1) clarifies the authority of the court to order a mental examination of a defendant. When the defendant is not relying on an insanity defense but intends to offer expert testimony on the issue of mental condition, either on the merits or at capital sentencing, amended Rule 12.2 specifically authorizes the court to order a mental examination of the defendant.[27]

When the defendant has given notice of intent to rely on expert evidence of mental condition only on the issue of capital sentencing, and the court has ordered an examination of the defendant on the government's motion, the results and reports of the examination are sealed. If the defendant is found guilty of one or more capital offenses and confirms an intent to offer expert evidence on mental condition during the sentencing phase, the results and reports of the government's examination may then be disclosed to the prosecutor and the defendant.[28]

Upon disclosure of the results and reports of the government's examination, the defendant must disclose the results and reports of the defendant's expert examination, if the defendant intends to introduce expert evidence relating to the examination.[29]

The defendant's statements made during the course of an examination are not admissible until the defendant offers expert evidence in a capital sentencing proceeding.[30]

Prior Rule 12.2(d) authorized the court to exclude the testimony of any expert witness offered by the defendant on the issue of guilt, if the defendant failed to give notice or submit to an examination when ordered. The exclusionary sanction for failure to comply with the rule's notice requirements or for a defendant's refusal to submit to a court-ordered examination have been extended by the revised rule to the sentencing phase of a capital case.[31]

D. Defendant's duty of disclosure, Rule 16

One substantive amendment has been made to the defendant's duty of disclosure under Rule 16. Former Rule 16(a)(1)(D) required the government to provide discovery of the results or reports of any examinations or tests

which the government intended to use as evidence in chief at trial. However, the defendant's duty of disclosure was slightly different. Former Rule 16(b)(1)(B) required the defendant to provide discovery of any results or reports of physical or mental examinations and of scientific tests or experiments "which the defendant intends to *introduce* as evidence in chief at the trial…."

The rule now requires the defendant to allow the government to inspect and copy any results or reports of physical or mental examinations and of scientific tests or experiments if "the defendant intends to *use* the item in the defendant's case-in-chief at trial…."[32] The amendment was designed to equalize the defendant's and the government's duties of disclosure.[33]

Congress restored two provisions of Rule 16 that had inadvertently been omitted from the amendments transmitted by the Rules Committee. The provisions impose reciprocal discovery obligations on the government and the defendant, requiring each side to provide a written summary of its expert witness testimony on the defendant's mental condition.[34]

IV. Miscellaneous Other Changes

A. Better late than never: Cooperation deals under Rule 35

Prior Rule 35 authorized the government to file a motion, normally within one year of sentencing, to reduce the defendant's sentence for substantial assistance in the investigation or prosecution of another person. The government could file such a motion after more than one year had passed, if the government could show that the defendant's substantial assistance involved information or evidence not known by the defendant until more than one year after sentencing.

Amended Rule 35 extends the time frame for a substantial assistance motion in two other situations. The rule authorizes a sentence reduction motion when the defendant provided information within one year of sentencing but that information did not become useful to the government until more than one year after sentencing.[35] The government may also file a motion for sentence reduction when a defendant, who was in possession of information but was unaware it was helpful until more than one year following sentencing, provides the information to the government promptly upon learning its usefulness.[36]

B. The Times They Are A-Changin': Filing by e-mail, Rule 49

The filing and serving of papers in a criminal case must be done in the manner provided for in a civil action.[37] In civil actions, filing of papers includes filing by electronic means when allowed by local rule.[38] Serving of papers includes service by electronic means with the consent of the person served.[39] The familiar rule allowing three extra days following service by mail now applies when service is made by electronic means.[40]

Notice of a court order in a criminal case must be provided in a manner provided for in a civil action.[41] In a civil action, the court may provide notice of its orders or judgments by electronic means.[42]

These new rules will affect the federal practitioner soon. Electronic filing of documents is being implemented in the District of Kansas this year,[43] so brush up on your computer skills.

C. Submission of proposed jury instructions, Rule 30

Prior Rule 30 authorized the court to order the parties to submit proposed jury instructions only *during* trial. Amended Rule 30 specifically authorizes the court to order the submission of requested jury instructions *before* trial.[44] This amendment was not intended to change the practice of allowing the parties to submit supplemental requests after the trial has started.[45]

D. Preliminary hearings, Rule 5.1

The preliminary examination is now called the preliminary hearing.[46] A "significant change in practice" was included in the amendments to Rule 5.1.[47] The magistrate judge is now authorized to grant a continuance of the preliminary hearing over the objection of the defendant. As amended, the rule conflicts with 18 U.S.C. § 3060(c), which authorizes only the district judge to continue the preliminary hearing when the defendant objects. With Congressional approval of the amendments, the advisory committee opines that Rule 5.1 will supersede the provisions of 18 U.S.C. § 3060.[48] In order to continue the preliminary hearing over the defendant's objection, the magistrate judge must find that "extraordinary circumstances exist and justice requires the delay."[49]

V. Conclusion

Although other changes have been made to the Federal Rules of Criminal Procedure, this article focuses on the changes most likely to affect the daily practice of criminal law in the federal courts.

A word of caution: that rule book you carry with you to court may not be completely up to date. When Congress adopted the restyled rules, Congress amended Rule 16. The unofficial published version of the rules often carried to court by these authors does not contain the final version of Rule 16. You will find the rules containing the Congressional amendments to Rule 16 on the United States Courts Website.[50] The changes to Rule 6 await further Congressional action.[51] ❖

Endnotes

[1] Fed. R. Crim. P. 2 advisory committee's note to 2002 amendments.
[2] Fed. R. Crim. P. 4(a), 9(a).
[3] Fed. R. Crim. P. 4(a), 9(a).
[4] Fed. R. Crim. P. 5(f).
[5] Fed. R. Crim. P. 10(c).
[6] Fed. R. Crim. P. 10(b).
[7] Fed. R. Crim. P. 10(b)(2).
[8] Fed. R. Crim. P. 10(b)(3).
[9] Fed. R. Crim. P. 10(b)(1).
[10] Fed. R. Crim. P. 7(b).
[11] *See* Fed. R. Crim. P. 11(a)(1)-(4).
[12] Fed. R. Crim. P. 6(e)(3)(A)(ii), 6(e)(3)(E)(iii).
[13] Fed. R. Crim. P. 6(e)(3)(A)(iii).
[14] Fed. R. Crim. P. 6(e)(3)(E)(iv).
[15] Pub. L. No. 107-296, Sec. 895, 116 Stat. 2135 (Nov. 25, 2002).
[16] The entire package of rules amendments was approved by Congress in the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, Sec. 11019(a), 116 Stat. 1758, were approved on November 2, 2002, to take effect December 1, 2002. ***Id.*** Sec. 11019(c). The Rule 6 amendments contained in the Homeland Security Act were approved on November 25, 2002, to take effect 60 days thereafter. Pub. L. No. 107-296, Sec. 4.

[17] Homeland Security Act of 2002, Pub. L. No. 107-296, Sec. 895, 116 Stat. 2135 (Nov. 25, 2002), amending former Fed. R. Crim. P. 6(e)(3)(C)(i)(I).
[18] Homeland Security Act of 2002, Pub. L. No. 107-296, Sec. 895, 116 Stat. 2135 (Nov. 25, 2002), amending former Fed. R. Crim. P. 6(e)(3)(C)(i) by adding new subdivision 6(e)(3)(C)(i)(VI).
[19] Fed. R. Crim. P. 12.1(b)(1)(A), 12.1(a)(2)(B).
[20] Fed. R. Crim. P. 12.3(a)(4).
[21] Fed. R. Crim. P. 12.4(a)(1).
[22] Fed. R. Crim. P. 12.4(a)(2).
[23] Fed. R. Crim. P. 12.4 advisory committee's note to 2002 amendments.
[24] Fed. R. Crim. P. 12.4(a)(2).
[25] Fed. R. Crim. P. 12.4(b).
[26]27 Fed. R. Crim. P. 12.2(b)(2).
[28] Fed. R. Crim. P. 12. 2(c)(1)(B).
[29] Fed. R. Crim. P. 12.2(c)(2).
[30] Fed. R. Crim. P. 12.2(c)(3).
[31] Fed. R. Crim. P. 12.2(c)(4).
[32] Fed. R. Crim. P. 12.2(d).
[33] Fed. R. Crim. P. 16(b)(1)(B) (emphasis added).
[34] Fed. R. Crim. P. 16 advisory committee's note to 2002 amendments.
[35] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, Sec. 11019, 116 Stat. 1758 (Nov. 2, 2002).
[36] Fed. R. Crim. P. 35(b)(2)(B).
[37] Fed. R. Crim. P. 35(b)(2)(C).
[38] Fed. R. Crim. P. 49(b), (d).
[39] Fed. R. Civ. P. 5(e).
[40] Fed. R. Civ. P. 5(b)(2)(D).
[41] Fed. R. Crim. P. 45(c) (citing Fed. R. Civ. P. 5(b)(2)(D)).
[42] Fed. R. Crim. P. 49(c).
[43] Fed. R. Civ. P. 5(b), 77(d).
[44] *See* United States District Court for the District of Kansas web site, http://www.ksd.uscourts.gov/cmecf/index.php.
[45] Fed. R. Crim. P. 30(a).
[46] Fed. R. Crim. P. 30 advisory committee's note to 2002 amendments.
[47] Fed. R. Crim. P. 5.1.
[48] Fed. R. Crim. P. 5.1 advisory committee's note to 2002 amendments.
[49] Fed. R. Crim. P. 5.1 advisory committee's note to 2002 amendments.
[50] Fed. R. Crim. P. 5.1(d).
[51] http://www.uscourts.gov/rules.

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