

## **SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

### **Notice of Proposed Amendments to Superior Court Rules of Criminal Procedure**

The District of Columbia Superior Court Rules Committee has recently completed review of proposed new Superior Court Rule of Criminal Procedure 61 and proposed amendments to Superior Court Rules of Criminal Procedure 4, 17, and 60. The Rules Committee will recommend to the Superior Court Board of Judges that the addition and amendments be approved unless, after consideration of comments from the Bar and the general public, the proposed addition and amendments are withdrawn or modified.

Written comments must be submitted by July 12, 2017. Comments may be emailed as a PDF file to [Laura.Wait@dcsc.gov](mailto:Laura.Wait@dcsc.gov) or may be mailed to:

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All comments submitted in respect to this notice will be available to the general public. New language is underlined and deleted language is stricken through.

#### **Rule 4. Arrest Warrant or Summons on a Complaint**

(a) **ISSUANCE.** If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge or magistrate judge must issue a bench warrant. A judge may issue an arrest warrant in lieu of a bench warrant. Except for good cause shown by specific statements appearing in the complaint or in an affidavit filed with the complaint, no warrant shall be issued unless the complaint has been approved by an appropriate prosecutor. If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by law.

(b) **PROBABLE CAUSE.** The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) **FORM.**

(1) *Warrant.* An arrest warrant must:

(A) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(B) describe the offense charged in the complaint;

(C) command that the defendant be arrested and brought without unnecessary delay before the court or other person enumerated in *18 U.S.C. § 3041*;

(D) be signed by a judge;

(E) state or contain the name of the court; and

(F) state or contain the date of the issuance of the warrant.

(2) *Summons.* A summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(d) **EXECUTION OR SERVICE, AND RETURN.**

(1) *By Whom.* Only a law enforcement officer or other authorized officer may execute a warrant. The summons may be served by any person authorized to serve a summons in a civil action in the Superior Court or by any officer authorized to execute an arrest warrant.

(2) *Territorial Limits.* A warrant or summons for a felony under D.C. Code §§ 16-1022 and -1024 (2012 Repl. & 2017~~6~~ Supp.) or for an offense punishable by imprisonment for more than 1 year may be executed or served at any place within the jurisdiction of the United States. A warrant or summons for an offense punishable by imprisonment for not more than 1 year, or by a fine only, or by such imprisonment and a fine, may be executed or served in any place in the District of Columbia.

(3) *Time Limit.* An arrest warrant or summons for an offense punishable by imprisonment for not more than 1 year, or by a fine only, or by such imprisonment and a fine, may not be executed more than 1 year after the date of issuance.

(4) *Manner.*

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the

warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

- (i) by delivering a copy to the defendant personally;
- (ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location; or
- (iii) by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the District of Columbia or to its principal place of business elsewhere in the United States.

(5) *Return.*

(A) After executing a warrant, the officer must return it to the judge, magistrate judge, or other judicial officer before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of an attorney for the government, an unexecuted warrant must be brought back to and cancelled by a judge.

(B) The person to whom a summons was delivered for service must return it on or before the return day.

(C) At the request of an attorney for the government, a judge may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to a law enforcement officer or other authorized person for execution or service.

(e) WARRANT BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS. In accordance with Rule 4.1, a judge may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

### COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2016 federal amendment to section (a). Section (a) now distinguishes between individual and organizational defendants by limiting the issuance of a warrant to individual defendants. The remaining 2016 amendments to the federal rule were rejected as inapplicable to the Superior Court because they addressed service of the summons outside of the United States and/or were inconsistent with D.C. Code §§ 23-562 and -563 (2012 Repl.).

### COMMENT TO 2017 AMENDMENTS

This rule has been amended consistent with the 2011 amendments to the federal rule. Subsection (d)(4)(A) permits an arresting officer to show the arrestee either "the original or a duplicate original warrant." Subsection (d)(5)(A) permits an arresting officer to return the warrant by reliable electronic means. Finally, a new section (e) was added to refer to new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means) and to permit warrants and summonses to be sought and approved by reliable electronic means.

## COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Paragraph (a) takes into account the dictates of D.C. Code § 23-561 (a)(2) (2012 Repl.) which states: “If a person fails to appear in response to a summons, a warrant shall issue for his arrest.” It also retains the language of the former rule requiring approval by an appropriate prosecutor of any complaint before an arrest warrant issues, except where good cause is shown.

Paragraph (b) retains the language of the former rule regarding the use of hearsay to support probable cause. The language was removed from the federal rule as unnecessary, in part because this principle is addressed in *Federal Rule of Evidence 1101*. Because this jurisdiction has not adopted the Federal Rules of Evidence, the Superior Court rule did not follow this change.

Subparagraphs (c)(1)(E) and (F) retain the additional requirement of the former rule that the warrant contain the name of the court and the date of the issuance of the warrant to conform with the requirements of D.C. Code § 23-561 (b)(1) (2012 Repl.).

Subparagraph (c)(2) differs from subparagraph (b)(2) of the federal rule by substituting “the court” for “Magistrate Judge.”

Subparagraphs (d)(2) and (3) include territorial and time limits not found in the federal rule. See D.C. Code § 23-563 (a)–(b) (2012 Repl.) (dealing with warrants or summons issued by the Superior Court); D.C. Code §§ 16-1022, -1024 (2012 Repl.) (defining the crime and punishment for parental kidnapping, which, although a felony, is punishable by a fine of not more than \$1000 and/or imprisonment for not more than six months). The time limit in subparagraph (d)(3) is not intended to apply to bench warrants issued as to any offense.

Subparagraphs (d)(2) and (5) recognize the possibility of arrests on Superior Court warrants within or outside the District of Columbia. Accordingly, subparagraph (d)(5) provides for a return to the appropriate judge, magistrate judge, or other appropriate federal, state or local judicial officer.

Subparagraph (d)(4) is substantially identical to subparagraph (c)(3) of the federal rule, with changes in the manner of serving a summons to reflect D.C. Code § 23-562 (a)(2) (2012 Repl.).

Subparagraph (d)(5) is substantially identical to subparagraph (c)(4) of the federal rule, with minor changes to reflect local practice.

## Rule 17. Subpoena

(a) ~~Content~~CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena--signed and sealed--to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) ~~Defendant Unable to Pay~~DEFENDANT UNABLE TO PAY.

(1) *Defendant Appointed Counsel Under D.C. Code § 11-2601 (2012 Repl.)*.

(A) *Application*. For a defendant represented either by counsel appointed under the District of Columbia Criminal Justice Act, by attorneys of the Public Defender Service, or by law students admitted under Rule 44-1, an application may be made to the clerk for a witness subpoena where the witness involved will be served within 25 miles of the place of the hearing or trial specified in the subpoena. In the case of a defendant represented by a law student, the application must be signed by the law student's supervising lawyer.

(B) *Issuance*. The clerk must issue the subpoena to defense counsel in blank, signed, sealed and designated in forma pauperis, but not otherwise filled in. Filling in a subpoena issued in blank shall constitute a certificate by defense counsel that, in the defense counsel's opinion, the presence of the witness is necessary to an adequate defense.

(C) *Service*. No subpoena issued in blank may be served outside a radius of 25 miles from the place of the hearing or trial. Where the witness to be subpoenaed will be served outside a radius of 25 miles from the place of the hearing or trial, an application for the issuance of the subpoena must be made to the judge to whom the case is assigned and must follow the procedure required by Rule 17(b)(2).

(2) *Other Defendants*. For a defendant represented by counsel other than counsel listed in Rule 17(b)(1), upon an ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense.

(3) *Payment of Costs and Fees*. For any subpoena issued under this paragraph, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) ~~Producing Documents and Objects~~PRODUCING DOCUMENTS AND OBJECTS.

(1) *In General*. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

(d) ~~Service~~SERVICE. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the prosecuting authority or a defendant unable to pay has requested the subpoena.

(e) ~~Place of Service~~PLACE OF SERVICE.

(1) *In General*. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the District of Columbia or at any place outside of the District of Columbia that is within 25 miles of the place of the hearing or trial.

(2) *Exception*. A subpoena directed to a witness in a case in which a felony is charged may be served at any place within the United States upon order of a judge or magistrate judge.

(f) ~~Issuing a Deposition Subpoena~~ISSUING A DEPOSITION SUBPOENA.

(1) *Issuance*. A court order to take a deposition authorizes the clerk of the Superior Court to issue a subpoena for the person named or described in the order.

(2) *Place*. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) ~~Contempt~~CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court.

(h) ~~Information Not Subject to a Subpoena~~INFORMATION NOT SUBJECT TO A SUBPOENA. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

## COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2008 amendment to *Federal Rule of Criminal Procedure 17(c)(3)*. The phrase “personal or confidential information” will continue to be developed through case law. See, e.g., *Brown v. United States*, 567 A.2d 426 (D.C. 1989). Also, as explained in the Federal Advisory Committee Note to the 2008 amendment:

The rule recognizes [ ] that there may be exceptional circumstances in which th[e] procedure may not be appropriate. Such exceptional circumstances would include evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

Finally, while the Federal Advisory Committee Note to the 2008 amendment specifically indicates that subsection (c)(3) does not apply to grand jury subpoenas, the question of whether the subsection applies to certain grand jury subpoenas in the District of Columbia is still unanswered. See, e.g., *Brown*, 567 A.2d at 428-429

(cautioning that the court could “think of no rational basis upon which to distinguish subpoenas issued at the behest of a grand jury from [its] holding” that judicial authorization was required prior to issuance of a subpoena for medical records).

## COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Paragraph (b) provides the local procedures, retained from the former rule, by which defendants who have previously qualified for Criminal Justice Act representation may obtain subpoenas issued in blank without having to file an ex parte application for waiver of the witness fee. This procedure is available only when the witness to be subpoenaed is within a 25-mile radius of the place of the hearing or trial. This paragraph has been restyled to make it more easily understood. No substantive changes are intended.

Subparagraph (c)(1) adds “data” to the list of matters that may be subpoenaed, consistent with the federal rule.

Paragraph (d) retains the phrase “the prosecuting authority” from the former Superior Court rule. It also retains the phrase “a defendant unable to pay” to reflect the requirements of D.C. Code § 23-106 (2012 Repl.).

Subparagraph (e)(2) substitutes “judge or magistrate judge” for “judge of the court.”

Paragraph (g) retains the language of the former Superior Court rule. The federal rule draws distinctions based on federal law and practice that are not locally applicable.

## **Rule 60. ~~Title~~ Victim's Rights**

—These rules may be known and cited as the Superior Court Rules of Criminal Procedure.

### (a) IN GENERAL.

(1) *Notice of a Proceeding.* The government must use its best efforts to give the victim reasonable, accurate, and timely notice of any public court proceeding involving the crime.

(2) *Attending the Proceeding.* The court must not exclude a victim from a public court proceeding involving the crime, unless the court determines by clear and convincing evidence that the victim's testimony would be materially altered if the victim heard other testimony at that proceeding. In determining whether to exclude a victim, the court must make every effort to permit the fullest attendance possible by the victim and must consider reasonable alternatives to exclusion. The reasons for any exclusion must be clearly stated on the record.

(3) *Appropriate Safeguards.* Before, during, and immediately after any court proceeding, the court must provide appropriate safeguards to minimize the contact that may occur between the victim or the victim's family and the accused, the accused's family, or defense witnesses.

(4) *Right to Be Heard on Release, a Plea, or Sentencing.* The court must permit a victim to be reasonably heard at any public proceeding concerning release, plea, or sentencing involving the crime.

(5) *Right to Submit Community Impact Statement.* The court must permit a community representative to submit a community impact statement prior to the imposition of sentence. The statement must be submitted in accordance with procedures established by the Chief Judge.

(6) *Right to Make a Statement at Criminal Record-Sealing Hearing.* The court must permit a victim to make a statement at any criminal record-sealing hearing.

(7) *Case Involving a Child.* On its own or on motion by the attorney for the government or the victim's lawful representative, the court may designate a case in which a child will testify as a case of special public importance.

(A) *Scheduling.* A case designated as being of special public importance must be expedited and given scheduling precedence over other proceedings.

(B) *Continuances.* When deciding whether to grant a continuance, the court must take into consideration the age of the child and the potential adverse impact the delay may have on the child's well-being. The court must make written findings of fact and conclusions of law when granting a continuance in cases involving a child witness.

### (b) ENFORCEMENT AND LIMITATIONS.

(1) *Time for Deciding a Motion.* The court must promptly decide any motion asserting a victim's rights described in these rules.

(2) *Who May Assert the Rights.* A victim's rights described in these rules may be asserted by the victim, the victim's lawful representative, the attorney for the government, or any other person as authorized by 18 U.S.C. § 3771(d) and (e) or D.C. Code §§ 23-1901 to -1906 (2012 Repl. & 2017 Supp.).

(3) *Multiple Victims.* If the court finds that the number of victims makes it impracticable to accord all of the rights described in 18 U.S.C. § 3771, the court must fashion a



reasonable procedure that gives effect to these rights without unduly complicating or prolonging the proceedings.

(4) [Omitted].

(5) *Limitations on Relief.* A victim may move to reopen a plea or sentence only if:

(A) the victim asked to be heard before or during the proceeding at issue, and the request was denied;

(B) the victim petitions the District of Columbia Court of Appeals for a writ of mandamus within 14 days after the denial, and the writ is granted; and

(C) in the case of a plea, the accused has not pleaded to the highest offense charged.

(6) *No New Trial.* A failure to afford a victim any right described in these rules is not grounds for a new trial.

#### COMMENT TO 2017 AMENDMENTS

This rule is substantially similar to *Federal Rule of Criminal Procedure 60*, which was added to the federal rules in 2008 and which implements the federal Crime Victims' Rights Act (18 U.S.C. § 3771). However, the Superior Court rule has been modified to include provisions from both the federal Crime Victims' Rights Act and the District of Columbia Crime Victims' Rights Act (D.C. Code §§ 23-1901 to -1906 (2012 Repl. & 2017 Supp.)).

Additional provisions regarding victim impact statements and a victim's right to speak at sentencing can be found in Rule 32.

**Rule 61. Title**

These rules may be known and cited as the Superior Court Rules of Criminal Procedure or as “Super. Ct. Crim. R. .”

**COMMENT TO 2017 AMENDMENTS**

Consistent with the renumbering of the federal rules, the substance of Rule 60 has been moved to Rule 61.

The citation format for the Superior Court Rules of Criminal Procedure has also been updated to conform to the District of Columbia Court of Appeals Citation and Style Guide.