

March 1969

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON, D. C. 20544

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ALBERT E. JENNER, JR.
RULES OF EVIDENCE

REPORT

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your standing committee on rules of practice and procedure presents
the following report:

Civil Rules

The Advisory Committee on Civil Rules is scheduled to meet on April 10th and 11th to give further consideration to their draft of revised discovery rules which were published in November 1967 and, hopefully, to present a final draft to our committee to go forward to the Judicial Conference in September.

Criminal Rules

The Advisory Committee on Criminal Rules is continuing to work on those phases of the criminal procedure on which it has not heretofore reported. Following its scheduled meeting in July it may well report to our committee a preliminary draft of proposed rules amendments for publication to the country, including a draft of proposed rules to govern the procedure of United States magistrates under the new Federal Magistrates Act. Having been informed that the Committee appointed to implement that Act is recommending that a few districts be selected by the Conference in which magistrates be appointed at once, the Advisory Committee on Criminal Rules has prepared and our committee is reporting to the Conference a set of Interim Rules to govern the procedure

of these pilot magistrates. These interim rules, together with the advisory committee's notes thereto, are annexed to this report as ~~Exhibit~~ A, and your committee recommends that they be approved and forwarded promptly to the Supreme Court with a recommendation for their immediate promulgation. They are, as stated, interim rules only and the advisory committee will give further study to their final form in the light of experience, but we regard them as adequate, and necessary, for the initial period.

Admiralty Rules

The Advisory Committee on Admiralty Rules is continuing its consideration of the operation of the unified civil rules with respect to maritime cases as well as the supplemental admiralty rules, and is working on draft legislation to amend the federal statutes relating to admiralty procedure in order to bring them into conformity with the procedure and nomenclature of the unified rules.

Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules has substantially completed its task of preparing uniform rules for bankruptcy cases and is now at work on rules of procedure under chapters 10, 11, 12 and 13 of the Act. It has decided not to present a preliminary draft to our committee for publication until all are completed, which will still take some time. Work on the necessary amendments to the Bankruptcy Act to eliminate its procedural provisions which will be covered by the rules is also being continued.

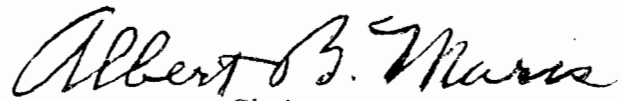
Rules of Evidence

We are delighted to report that the Advisory Committee on Rules of Evidence has completed its preliminary draft of complete uniform rules of evidence for the federal courts which draft is now being printed by the Government Printing Office and will be distributed shortly to the bench and bar for comments and suggestions. This is a monumental work on which the committee and its able reporter have worked with the greatest diligence and for which they are entitled to great credit.

Appellate Rules

Following the adoption of the appellate rules and the discharge of the Advisory Committee on Appellate Rules your standing committee has undertaken to follow the operation of the rules and to report upon such modifications, if any, as seem to be needed as the result of experience. This study is continuing and your committee expects to report upon this, as well as some other matters which have been referred to our committee in the past, at the session of the Judicial Conference in September.

On behalf of the Committee,


Chairman

March 3, 1969

INTERIM RULES FOR TRIAL OF MINOR OFFENSES
AND THE CONDUCT OF CERTAIN OTHER PROCEEDINGS BY
UNITED STATES MAGISTRATES

Rule 1. Scope

These rules apply to proceedings before United States magistrates and in the district courts under Title 18, U.S.C. §§ 3401, 3402, relating to trial of minor offenses by magistrates, and appeal from conviction in such cases.

Rule 1. Scope

ADVISORY COMMITTEE NOTE

This rule merely makes explicit the fact that these rules apply to the trial of minor offenses before United States magistrates and judges of the United States. They supplant the previous Rules for Trial of Petty Offenses Before United States Commissioners, although the commissioner rules will continue to be applicable to the trial of petty offenses before commissioners while commissioners remain in existence during the period of transition between the commissioner system and the newer United States magistrate system.

Rule 2. Applicability of District Court Rules

Procedures not provided for herein shall be governed by the Rules of Criminal Procedure for the United States District Courts to the extent they may be applicable.

Rule 2
Applicability of District Court Rules

ADVISORY COMMITTEE NOTE

This rule makes explicit the fact that the Rules of Criminal Procedure for the United States District Courts ought to be looked to when there is no specific rule provided for the trial of the minor offense. Thus, for example, rules relating to joinder, severance, venue, and many other matters ought to apply equally to the trial of the minor offense. The language of the rule is flexible, i.e., "to the extent they may be applicable." This is intended to give the United States magistrate discretion. For example, rules relating to indictment and information will obviously not be applicable since minor offenses are to be tried on the basis of a complaint instead of an indictment or information. Rule 5 (c), insofar as it relates to the preliminary examination, is not applicable because the minor offense may be tried expeditiously by the United States magistrate and there is, therefore, no need for a preliminary to determine whether there is sufficient evidence to hold the defendant for trial in the district court.

Rule 3. The Complaint

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a United States magistrate.

Rule 3. The Complaint

ADVISORY COMMITTEE NOTE

This is rule 3 of the district court rules adapted to the United States magistrate. It supplants old rule 1 of the commissioner rules which provided for an "information" as a way of instituting a petty offense prosecution. Since complaints are used to initiate prosecutions for serious offenses there seems no good reason to use a different document for starting prosecutions for minor offenses.

Rule 4. Warrant or Summons Upon Complaint

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it or a summons for the appearance of the defendant shall issue in lieu thereof. The finding of probable cause may be based upon reliable hearsay. Before ruling on a request for a warrant the United States magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recorded by suitable recording equipment. To carry out the policy against unnecessary detention of defendants prior to trial, the magistrate may issue a summons instead of a warrant and shall issue a summons instead of a warrant whenever requested to do so by the attorney for the government. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The warrant shall be signed by the United States magistrate and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available United States magistrate.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a United States magistrate at a stated time and place.

(c) Execution or Service; and Return. The warrant shall be executed, the summons served, and return made as provided for in rule 4 (c) of the Rules of Criminal Procedure for the United States District Courts.

Rule 4
Warrant or Summons Upon Complaint

ADVISORY COMMITTEE NOTE

This is rule 4 of the district court rules modified to reflect some recent changes in the law which are not as yet reflected in rule 4 of the district court rules. It supplants old rule 1 of the commissioners' rules.

There are two principal modifications in existing rule 4 of the district court rules:

(1) This rule deals in greater detail with the method by which the complainant shall establish probable cause for the issuance of the warrant. It makes explicit the fact that a probable cause finding may be based upon "reliable hearsay." This phrase is intended to incorporate into the rule the requirements set forth in recent decisions of the United States Supreme Court. See, e.g., *Giordenello v. United States*, 357 U.S. 480, 78 S. Ct. 1245 (1958); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964). The new rule also makes clear that the magistrate may require the complainant to appear personally and may examine him or witnesses to determine whether probable cause exists. See American Law Institute, Model Code of Pre-Arrest Procedure, Tent. Draft No. 1, section 6.03 (1966). If the magistrate does hear from the complainant or witnesses,

the testimony must be recorded. This is to insure that there exists an adequate basis for reviewing the propriety of the issuance of the warrant if its issuance should be attacked upon a subsequent motion to suppress evidence seized incident to the arrest, for example.

(2) This rule makes it possible for the magistrate to issue a summons in lieu of an arrest warrant even though not requested to do so by the attorney for the government (the requirement of the present rule). Under the proposed rule, the magistrate may issue a summons in his discretion and should do so whenever it is appropriate, giving due weight to the policy against unnecessary detention of defendants prior to trial. The provision of the present rule, requiring the issuance of a summons "upon the request of the attorney for the government," is retained in the view that the magistrate ought to be able to rely upon the representation by the attorney for the government that a warrant is unnecessary and ought not have the responsibility of exercising an independent judgment about the propriety of using a summons in this situation.

Rule 5. Initial Appearance Before the United States Magistrate

(a) Filing of Complaint. If a person arrested without a warrant is brought before a United States magistrate, a complaint shall be filed forthwith. When a person, arrested with or without a warrant or given a summons, appears initially before the United States magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Statement by the United States Magistrate. The United States magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the circumstances under which he might secure pretrial release under 18 U.S.C. 3146. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The United States magistrate shall allow the defendant reasonable time and opportunity to consult counsel.

(c) Minor Offenses. If the charge against the defendant is a minor offense triable by the United States magistrate under 18 U.S.C. 3401, the United States magistrate shall carefully explain to the defendant that he has a right to trial in the district court, and shall not proceed to call upon the

defendant to plead or try the case unless the defendant, after such explanation, signs a written consent to be tried before the United States magistrate that specifically waives both a trial before the district court and any right to trial by jury that he may have. Proceedings shall be taken down by a court reporter or recorded by suitable sound recording equipment.

(d) Offenses Not Triable by the United States Magistrate.

If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead and the United States magistrate shall proceed as follows:

(1) Right to Preliminary Examination. The United States magistrate shall inform the defendant of his right to a preliminary examination. A defendant is entitled to a preliminary examination, unless waived, when charged with any offense which is to be tried in the district court including either a minor offense or a petty offense. If the defendant waives preliminary examination, the United States magistrate may forthwith hold him to answer in the district court. If the defendant does not waive examination, the United States magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than the periods prescribed in 18 U.S.C. 3060.

(2) Pretrial Release. To achieve the policy against unnecessary detention of defendants prior to trial, the United States magistrate shall, at the earliest opportunity, authorize the release of the defendant where appropriate under the terms provided by these rules and by 18 U.S.C. 3146.

Rule 5
Initial Appearance Before the United States Magistrate

ADVISORY COMMITTEE NOTE

This is present rule 5 of the district court rules modified to reflect the Federal Magistrates Act of 1968 and the Bail Reform Act of 1966.

Subdivision (a) is new in form but not in substance. It provides, as does current rule 5 (a), for the filing of a complaint if an arrest is made without a warrant.

Subdivision (b) is similar to present rule 5 (b) except for two changes: (1) it makes explicit reference to 18 U.S.C. 3146, the applicable portion of the Bail Reform Act of 1968, and (2) it eliminates the reference to the right to a preliminary examination, a matter dealt with in subdivision (d) of the proposed rule which provides for notification of the right to a preliminary examination if the offense is not triable by the United States magistrate and, as a consequence, must be bound over to district court for trial.

Subdivision (c) reflects 18 U.S.C. 3401 (The Federal Magistrates Act of 1968) which provides for the trial of the "minor offense" by the United States magistrate who is qualified to do so under 18 U.S.C. 3401 (a). "Minor offense" is defined in 18 U.S.C. 3401 (f) as including offenses "the penalty for

which does not exceed imprisonment for a period of one year, or a fine of not more than \$1,000, or both" with specified exceptions.

Subdivision (d) provides for a procedure to be followed by the United States magistrate when the offense is not triable by him.

Subdivision (d)(1) makes explicit the fact that a defendant who does not waive his right to trial in district court is entitled to a preliminary examination for any offense including both a minor and a petty offense. It also, by necessary implication, makes clear that a defendant is not entitled to a preliminary examination if he consents to be tried by the United States magistrate even though the offense may be one not heretofore triable by the United States commissioner and therefore one as to which the defendant has had a right to a preliminary examination. The rationale is that the preliminary examination serves as a probable cause requirement to justify holding the defendant in custody or on bail during the period of time it takes to bind the defendant over to the district court for trial. See State v. Solomon, 158 Wis. 146, 147 N.W. 640 (1914).

Subdivision (d)(2) makes reference to the applicable provision of the Bail Reform Act of 1966.

Rule 6. Arraignment

If the defendant consents in writing to be tried by the United States magistrate, the magistrate shall take the defendant's plea to the charge set forth in the complaint. If the defendant indicates a desire to plead guilty or nolo contendere, the magistrate shall proceed in accordance with the requirements of rule 11 of the Rules of Criminal Procedure for the United States District Courts. If the defendant pleads not guilty, the magistrate shall either conduct a trial immediately or fix a time for the trial.

Rule 6. Arraignment

ADVISORY COMMITTEE NOTE

This rule provides for arraignment on the complaint which serves as the charging document in cases triable by the United States magistrate. The rule makes explicit the fact that rule 11 (of the district court rules) is applicable to pleas of guilty in cases before a United States magistrate.

Rule 7. Trial

(a) Date of Trial. The date of trial shall be fixed at such a time as will afford the defendant a reasonable opportunity for preparation and for representation by counsel if desired.

(b) Procedure. The trial shall be conducted as are trials of criminal cases in the district court by a district judge in a criminal case where a jury is waived.

(c) Record. Proceedings under this rule shall be taken down by a court reporter or recorded by suitable sound recording equipment, except that, in the case of a person charged with a petty offense as defined in 18 U.S.C. 1, the defendant may waive the requirement that a verbatim record be kept.

Rule 7. Trial

ADVISORY COMMITTEE NOTE

Subdivisions (a) and (b) are based upon present rule 2 of the Rules for the Trial of Petty Offenses Before United States Commissioners.

Subdivision (c) is based upon 18 U.S.C. 3401 (e) with the addition of a provision allowing a defendant to waive a record in a petty offense case.

Rule 8. Forfeiture of Collateral in Lieu of Appearance

When authorized by a local rule of the district court, a magistrate may accept a forfeiture of collateral security, in lieu of appearance, as a proper disposition of a case involving a petty offense as defined in 18 U.S.C. 1.

Rule 8
Forfeiture of Collateral in Lieu of Appearance

ADVISORY COMMITTEE NOTE

Rule 8 is new. It recognizes a practice, now common in the federal system, of forfeiting collateral in lieu of appearance, particularly in minor traffic cases. The existence of the practice is recognized in the Bail Reform Act of 1966 which provides: "Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security when such disposition is authorized by the court." 18 U.S.C. 3146 (g).

For rule 8 to be operative, the district court must, by local rule, authorize the forfeiture of collateral. Presumably the rule should specify the type of petty offense for which this disposition is proper and prescribe a schedule of collateral for particular offenses.

Attached hereto is a sample form used in the Northern District of California.

CONSENT TO PROCEEDING IN DEFENDANT'S

ABSENCE AND AUTHORIZATION FOR REPRESENTATIVE TO APPEAR

I, the undersigned, agree to have my case brought before the United States Magistrate for the Northern District of California, on the ____ day of _____, 19____, at 2:00 o'clock PM of said day or thereafter, to answer a charge of violating Sec. 13 Title 18, US Code and Section(s) _____ of the California Vehicle Code at the Presidio of San Francisco, California and hereby consent to have my case tried before said United States Magistrate on said charge and appoint as my representative _____, to appear for me at said time and to do all things necessary to conclude the proceedings in my absence. I understand that I am entitled to be represented by counsel and to elect to be tried before the United States District Court in these proceedings, and that in signing this consent, I waive such rights.

SIGNATURE OF DEFENDANT

If you wish to have these proceedings handled in your absence, it will be necessary for you to sign this form and enclose check or money order, made payable to the United States Magistrate in the amount of \$_____. This amount will then be forfeited as a fine and the matter terminated.

This office is in receipt of your check/money order in the amount of \$_____. The matter, however, cannot be terminated without your signing this form.

This form must be returned to the address indicated below:

Office of the Post Provost Marshal
Presidio of San Francisco, California
Attn: US Courts Liaison NCO

Rule 9. Docket

The United States magistrate's proceedings shall be entered in his docket which shall show: (1) the defendant's written consent to be tried before the United States magistrate; (2) the date of the complaint and upon whose oath it was made; (3) the date of the issue and service of the warrant; (4) the defendant's plea or pleas; (5) the names of the witnesses for the United States and for the defendant and a condensed summary of the testimony of each and of any documentary evidence received (whenever there is no record kept in accordance with rule 7 (c)); (6) the judgment and sentence of the United States magistrate.

Rule 9. Docket

ADVISORY COMMITTEE NOTE

Rule 9 is based upon present rule 3 of the Rules for Trial of Petty Offenses Before United States Commissioners. The proposed rule contains minor modifications to conform to the new United States magistrate procedure.

Rule 10. Probation

(a) A magistrate who exercises trial jurisdiction under this section, and before whom a person is convicted or pleads either guilty or nolo contendere, may, with the approval of a judge of the district court, direct the probation service of the court to conduct a presentence investigation on that person and render a report to the magistrate prior to the imposition of sentence.

(b) The probation laws shall be applicable to persons tried by a magistrate under this section, and such officer shall have power to grant probation and to revoke or reinstate the probation of any person granted probation by him.

Rule 10. Probation

ADVISORY COMMITTEE NOTE

Rule 10 is based upon 18 U.S.C. 3401 (c)(d).

Rule 11. Appeal

(a) Notice of Appeal. An appeal shall be taken within ten days after entry of judgment of conviction. An appeal shall be taken by filing with the United States magistrate a notice in duplicate stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

(b) Record. The United States magistrate shall forward to the clerk of the district court the duplicate notice of appeal together with a transcript, tape, or other recording of the proceedings; his docket entries and copies of the complaint, the warrant, the defendant's written consent to be tried before the United States magistrate, and any order concerning bail pending appeal, certified under his hand and seal. These shall constitute the record on appeal.

(c) Transcript. Within ten days after the filing of the notice of appeal, the appellant shall order from the United States magistrate a transcript of such part of the proceedings not already on file as he deems necessary for inclusion in the record. If the appellant intends to urge on appeal that a

finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on the appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary he shall, within ten days after the service of the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. If the appellant shall refuse to order such parts, the appellee shall either order the parts or apply to the district court for an order requiring the appellant to do so. At the time of ordering, a party must make satisfactory arrangements for payment of the cost of the transcript unless an affidavit is made that he is unable to pay or give security therefor, in which case it shall be at the expense of the United States as provided for in 18 U.S.C. 3401 (e).

(d) Stay of Execution.

(1) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. If the defendant is not admitted to bail, the

court may recommend to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near the place of trial or the place where his appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of his appeal to the district court.

(2) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(3) Probation. An order placing the defendant on probation shall be stayed if an appeal is taken.

(e) Bail. Admission to bail shall be as provided for in 18 U.S.C. 3148.

(f) Scope of Appeal. The defendant shall not be entitled to a trial de novo in the district court. The scope of appeal shall be the same as an appeal from a judgment of a district court to a United States court of appeals.

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Rule 11. Appeal

ADVISORY COMMITTEE NOTE

Subdivision (a) is based upon present rule 4 (2) of the Rules for the Trial of Petty Offenses Before United States Commissioners and rule 3 (c) of the Rules of Appellate Procedure.

Subdivision (b) is based upon current rule 4 (3) of the commissioners' rules modified to reflect the fact that the United States magistrate is to be a court of record.

Subdivision (c) is based upon rule 10 (b) of the Rules of Appellate Procedure with a provision for payment by the United States as provided for in 18 U.S.C. 3401 (e).

Subdivision (d) is based upon rule 38 of the Rules of Criminal Procedure for the United States District Courts.

Subdivision (e) makes reference to the applicable provision of the Bail Reform Act of 1968.

Subdivision (f) is based upon current rule 4 (6) of the commissioners' rules with new language added to make clear that the scope of appeal is the same as that involved in an appeal to a United States court of appeals from a conviction in district court.

Rule 12. New Trial.

The United States magistrate, on motion of a defendant, may grant a new trial to him if required in the interest of justice. The United States magistrate may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within six months after final judgment, but if an appeal is pending the United States magistrate may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven days after a finding of guilty or within such further time as the court may fix during the seven-day period.

Rule 12. New Trial

ADVISORY COMMITTEE NOTE

Rule 12 is based upon present rule 33 of the Rules of Criminal Procedure for the United States District Courts modified to reflect the new jurisdiction of the United States magistrate. The period of time within which a motion for a new trial may be made is reduced from two years (as in rule 33) to six months. The present rule for the Trial of Petty Offenses Before United States Commissioners contains a time limit of 60 days (rule 5).

Rule 13. Correction or Reduction of Sentence

The United States magistrate may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The United States magistrate may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the United States magistrate of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The United States magistrate may also reduce a sentence upon revocation of probation as provided by law.

1/21/69

Rule 13
Correction or Reduction of Sentence

ADVISORY COMMITTEE NOTE

Rule 13 is based upon current rule 35 of the Rules of Criminal Procedure for the United States District Courts.