

June 14, 1986

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE
JUNE 12, 1986

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, June 12, 1986. The following members were present:

Hon. Leland C. Nielsen, Chair
Hon. Sherman G. Finesilver
Hon. William L. Hungate
Hon. William C. O'Kelley
Hon. Stephen Trott
James F. Hewitt, Esq.
Richard A. Green, Esq.
Frederick B. Lacey, Esq.
Herbert J. Miller, Esq.
Leon Silverman, Esq.

The only member absent was Hon. Harvey Schlesinger. He notified the Chair of his inability to attend well before the meeting and submitted his views on the issues pending before the Committee in writing.

Also present were Hon. Edward T. Gignoux, Chairman of the Standing Committee on the Rules of Practice and Procedure; Roger Pauley, who accompanied Mr. Trott; James E. Macklin, Jr., Deputy Director of the Administrative Office, who was assisted by Ann Gardner; and Tom Hutchinson, counsel to the House of Representatives' Subcommittee on Criminal Justice, who attended after the lunch break. For a brief period immediately after lunch, Mr. David Adair was present. He was introduced by Mr. Macklin as a member of the General Counsel's office who would be working in the future with the Committee.

INTRODUCTION OF NEW MEMBERS

Judge Nielsen introduced Judge Finesilver, the only new member present at the meeting, and indicated that the other new member, Magistrate Schlesinger, would be unable to be present.

RULE CHANGES UNDER CONSIDERATION

A. Rules Approved by Committee

Rule 6(a) (Providing for the Selection of Alternate Grand Jurors)

The Chair reminded the Committee that it had approved this amendment last year and sent its rule to the Standing Committee. The Standing Committee did not forward the rule to the Judicial Conference because of a general policy against submitting a single rule change absent some emergency. The Committee repeated its support for the rule and indicated that it expected that the amendment ultimately would be forwarded to the Judicial Conference and that nothing more should be done at this time.

B. Rules Previously Approved by Committee in Principal

1. New Rule 12.3 (Notice of Public Authority Defense)

Judge Nielsen noted that the Committee had approved in principle the notice of public authority defense rule. Although the Standing Committee had no occasion to address the merits of the proposed rule, the Reporter noted that Judge Gignoux had suggested that the original draft appeared to be longer than necessary and that it would be desirable to arrive at a final draft that the Justice Department, the proponent of the original rule, would support. Judge Gignoux confirmed this.

The Reporter discussed a revised version of the rule which he had circulated to the Committee. This draft followed the 4-3 vote of the previous meeting and specifically barred a trial judge from preventing a defendant from testifying in support of a public authority defense as a sanction for a violation of the rule. The draft departed from the original draft in its provisions for the timing and order of discovery.

Mr. Trott and Mr. Pauley indicated that they preferred the timing and order provisions in the original draft. Judge Hungate moved to withdraw the new draft, Mr. Trott seconded the motion, and it passed 8-1, with Mr. Hewitt noting a dissent.

Mr. Lacey then moved to adopt the original Justice Department language regarding sanctions. Judge O'Kelley seconded the motion, which was defeated by a 6-3 vote.

After expressing uncertainty about whether it wanted to go forward with a rule, Mr. Trott proposed a new version of the sanctions section. This version received unanimous support. Thereafter, Judge Finesilver moved to adopt the rule in principle. This motion passed unanimously.

The Reporter indicated that he would circulate a new draft to Mr. Trott and Mr. Pauley for their input and then circulate it to the entire committee. It was agreed that the Members would make any suggestions or note any objections within five days of receiving the draft. Absent a specific request by a Member that the rule be reconsidered next year, it was agreed that a final draft will be sent to the Standing Committee.

2. Amendment to Rule 30 (Timing of the Court's Charge)

At the June, 1985 meeting, the Committee approved a proposed amendment in principle. Specifically the Committee voted as follows:

1. The rule should permit the court to instruct before argument, after argument, or both times. (Unanimous)

2. The time for objections should be as stated in the current rule and the language about "prompt objections" should be rejected. (Unanimous)

3. There should be no requirement that the court indicate the substance of instructions to counsel before giving them. (4-3, with Mr. Green, Mr. Hewitt, and Mr. Miller noting dissents)

The Reporter prepared the following draft to implement the Committee's vote:

Rule 30. Instructions

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all [adverse] parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [, but t] The court may [shall] instruct the jury before or after the arguments are completed or at both times. . . .

A motion was made to reconsider the 4-3 vote against a requirement that the court indicate the substance of all instructions to counsel before giving them. This time the vote was 7-2 against the requirement, with M. Hewitt and Mr. Miller noting their dissents.

The Committee unanimously adopted the Reporter's draft and voted to send it to the Standing Committee. Judge Signoux suggested that the Reporter send the Committee's rule to the Reporter for the Civil Rules, Paul Carrington, and the Reporter indicated that he would do so. Judge Signoux also suggested that the Standing Committee would attempt to assure that the civil and criminal rules were uniform.

C. New Matters

1. Proposed Amendment of Rule 24 (c) (Changing the Requirement that Alternate Strikes Only be Used Against Alternates When the Strike Method of Selection is Used)

2. Proposed Amendment of Rule 24 (c) (Permitting the Selection of Regular Jurors and Alternates without Striking Alternates Until After the Charge)

The Committee considered two proposed changes in Rule 24 (c). The first was suggested by Judge Bilby on behalf of the Ninth Circuit District Judges Association. The Association desired an amendment that would explicitly permit all peremptory challenges to be exercised at one time if the struck jury method of selection were employed. The second suggestion by Judge Jacob Mishler grew out of a court of appeals' opinion, United States v. Viserto, 596 F.2d 531 (2d Cir. 1979), finding error in the procedure he employed which permitted 14 jurors to be selected without identifying alternates with respect to strikes. The parties had stipulated to the procedure, but the court of appeals found that Rule 24 (c) was mandatory.

Both suggestions led the Committee to conclude that there several reasonable ways to select jurors and that permitting the parties to select their preferred way had much to commend it. Mr. Hewitt moved to add the Reporter's draft section 24 (d) to Rule 24, and Judge Hungate seconded the motion. Discussion ensued over whether uniformity or flexibility was desired. The Committee voted unanimously to approve the draft with some modifications. It also unanimously decided to send the draft to the Jury Committee and to the Civil Rules Committee, even though the civil rule on peremptory challenges is statutory rather than a part of the Federal Rules of Civil Procedure. The language approved by the Committee reads as follows:

(d) Alternative Jury Selection Procedures. With the consent of the parties, the court may permit the parties to select the regular jurors and alternates in accordance with other procedures.

3. Proposed Legislation to Amend Rule 17 (Service By Persons Other than Marshals)

The Committee discussed legislation that would permit government officers other than marshals and persons under contract with the government to serve and execute subpoenas and process. Mr. Hewitt questioned whether the statute would cause any problem with the payment of fees to witnesses. Mr. Trott indicated that the concern was shared by the government. Mr. Macklin accepted responsibility for attempting to find out more about the proposed legislation. The Committee took no further

action on this matter.

4. Proposed Amendment of Rule 6 (e) (To Permit Justice Department to Disclose Grand Jury Information for Use in Civil Cases)

The Committee discussed the proposal by Mr. Trott which would permit a prosecutor to share information with government lawyers for use in civil cases and, with court permission, to share information with agencies to aid them in carrying out their responsibilities. Judge Nielsen expressed concern about the possibility that Congress also would want access to grand jury material, and Mr. Hewitt echoed the concern. Mr. Silverman voiced a strong opinion that no change should be made in the rule, but Mr. Green disagreed and argued that duplication of investigative effort could be wasteful. Mr. Trott defended the rule. Discussion followed in which Judge Finesilver indicated that he believed the proposal changed the traditional role of the grand jury, Mr. Miller said the problem was difficult but he opposed change, Mr. Lacey agreed with Mr. Miller, and Judge Hungate indicated that he would not change the rule. Mr. Trott moved to amend the rule and Mr. Green seconded the motion. The vote against the motion was 7-2.

5. Congressional Statement Regarding Rule 11 (c)

The Committee reached a conclusion supported by all members (except Mr. Hewitt who had reservations) that the House Subcommittee Report, which addressed the last amendment to Rule 11 and indicated that a trial judge was required to warn a defendant who wished to enter a plea of guilty of the maximum amount of restitution, was erroneous. Mr. Trott explained that restitution is not part of the penalty within the meaning of the rule, and other members agreed. Preferring to leave the question to judicial decisions, Judge Finesilver moved that the Committee take no action in response to the Report. The motion was seconded by Judge O'Kelley, and it carried unanimously.

6. Proposed Amendment of Jencks Act--Discovery Reform

The fact that Representative Conyers' Subcommittee had held hearings on a proposal to amend the Jencks Act to provide discovery of witness names and statements prior to trial was discussed. Tom Hutchison noted that the hearings were over and that the bill would be marked up, but said that the Criminal Rules Committee had not been asked to take a position on the proposed change. No member of the Committee expressed a desire to indicate views on the bill, and the matter was dropped.

7. Proposed Amendment of Rule 32.1 (Bond Requirement for Probation Violators)

A probation officer had suggested that the rule be amended to provide an additional bond requirement for a probation violator after ~~probable~~ cause was found that he committed a felony while on probation. The Committee concluded that there was insufficient need for an amendment at this time and that the proposal might conflict with the Bail Reform Act of 1984. Judge O'Kelley moved that no action be taken, Mr. Hewitt seconded the motion, the Chair firmly supported it, and it passed unanimously.

8. Proposed Amendment of Rule 41 (a) (Moving Property and Extra-territorial Searches)

Mr. Trott proposed an amendment to the rule to provide that a magistrate issuing a warrant could issue it so that it applied to property that might move outside the court's jurisdiction or outside the United States. Mr. Pauley explained that H.R. 4952, a bill sponsored by Congressman Kastenmeier that deals with electronic privacy, adopts the substance of the proposed amendment with respect to Title III warrants and beepers. Judge Nielsen raised constitutional questions concerning the proposed change in Rule 41. Ultimately, Mr. Trott withdrew his proposal for an amendment and indicated that for the present time he will await the outcome of the legislation that has been proposed.

9. Proposed Amendment of Rule 35 (b) (To Extend Its Life Until the 1984 Comprehensive Crime Control Act Sentencing Provisions Take Effect)

The Committee was faced with a problem caused by the language used by the Supreme Court in amending Rule 35. The Court made the amendment effective until Nov. 1, 1986, the date the Comprehensive Crime Control Act of 1984 was to make changes in Rule 35. However, the effective date of the relevant portion of the Act was changed to Nov. 1, 1987. Thus, unless some action is taken, the pre-amendment version of Rule 35 will become effective again. Tom Hutchison indicated that Congress could remedy the problem when it makes technical and conforming amendments to the Act. The Committee unanimously agreed to defer to Congress.

10. Proposed Amendment of the Federal Rules of Criminal Procedure to Make Them Gender Neutral

Under the guidance of Judge Gignoux, the Committee approved gender neutral language changes to the Federal Rules of Criminal Procedure. The Committee did so unanimously in response to the request of the Chief Justice. It took no position in favor of or

in opposition to making these changes. A ten day period for additional review was established, with any additional problems to be called to the Reporter's attention within this time period.

11. Report of the Evidence Subcommittee and Consideration of the Status of the Gender Neutral Changes to the Federal Rules of Evidence

Judge Gignoux explained that the gender neutral changes to the Federal Rules of Evidence that the Committee had approved by consensus derived from circulations during the last year had been considered by the Judicial Conference, which had decided to take no action until all gender neutral changes to all rules were ready. The Committee again unanimously agreed that its gender neutral changes were a response to the request of the Chief Justice. No position for or against these changes was taken.

Judge Hungate reported that an ad hoc group had met the previous day at 2:00 p.m. in the Federal Judicial Center to consider recommendations for change in the Federal Rules of Evidence. Present at that meeting were Judge Hungate, Mr. Lacey, Mr. Macklin, Mr. Pauley, and the Reporter. Magistrate Schlesinger submitted his views in writing. The ad hoc group discussed the suggestions that had been made, all of which are examined in memoranda that were circulated to the entire Committee well before the June 12th meeting. Proposals for changes in Rules 104(a), 201 (g), 301, 408, 609(a)(2), 703, 705, 801 (d)(2)(E), 803(5), and 803 (18) were deemed unnecessary, largely for the reasons set forth in the Reporter's memoranda.

The ad hoc group recommended, however, that the Committee consider a proposed change in Rule 609 (a). Discussion ensued and the Committee reached a unanimous view that the rule should be amended to protect witnesses in civil cases and government witnesses in criminal cases, but not to the same extent as the criminal defendant is protected. The Reporter is to draft and circulate a proposed rule.

12. Proposed Amendments to Rule 32 (In Light of 1984 Statutory Changes)

Judge Tjoflat's proposed changes in this rule did not come to the Committee as a whole until the day of the meeting. The Committee unanimously agreed to put off any consideration until next year and in the interim that the Chairman would ask for some explanation as to the specifics of and reasons for the changes.

13. Proposed Amendment to Clarify Time for Appeal of Coram Nobis Cases

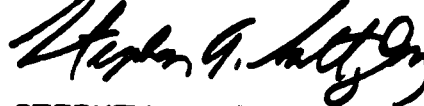
Mr. Pauley called to the Committee's attention a 2-1 decision of the Ninth Circuit Court of Appeals in a case raising

the question whether the 10 day criminal appeals period or the 60 day civil period for 2255 motions applies to appeals in cases involving writs of coram nobis. The Committee unanimously agreed that the matter should be referred to the Advisory Committee on the Appellate Rules, and Judge Gignoux indicated he would put the matter before the Appellate Rules Committee.

CONCLUDING REMARKS

Judge Nielsen indicated that he hoped the membership of the Committee would remain as it is. He indicated that at the present time there appears to be no need for a winter meeting and that the next meeting probably will be in May or June.

RESPECTFULLY SUBMITTED,



STEPHEN A. SALTZBURG
REPORTER