

MINUTES OF THE MEETING OF THE  
ADVISORY COMMITTEE ON CRIMINAL  
RULES HELD AT THE ADMINISTRATIVE  
OFFICE, WASHINGTON, D.C. ON  
THURSDAY, JULY 6, 1978 AND FRIDAY,  
July 7, 1978

PRESENT:

Honorable Walter E. Hoffman, Chairman  
Honorable Roger Robb  
Honorable Frank A. Kaufman  
Honorable Frederick B. Lacey  
Honorable Leland C. Nielsen  
Honorable Russell E. Smith  
Honorable Wade H. McCree, Jr.  
by Kenneth S. Geller  
Honorable Philip B. Heymann  
and Roger Pauley  
Richard A. Green, Esquire  
James F. Hewitt, Esquire  
William L. Hungate, Esquire  
Leon Silverman, Esquire  
Professor Wayne R. LaFave, Reporter  
Joseph F. Spaniol, Jr., Secretary

GUESTS:

Honorable Roszel C. Thomsen, Chairman  
Standing Committee on Rules of Practice  
and Procedure  
Professor Frank J. Remington, member  
Standing Committee  
Bob Lembo, Counsel, Subcommittee on Criminal  
Justice of the House Judiciary Committee

Professor Wayne LaFave opened the meeting at 9:30 a.m.  
with introductory remarks in the delayed arrival of Judge  
Hoffman.

The first matter to be taken up was discussion of  
the drafted amendments to Rule 6--The Grand Jury.

Item One: Rule 6(e)--Recording and Disclosure of Proceedings

Judge Smith moved for the removal of the second sentence in the draft ("any reporter employed to record grand jury proceedings shall be an officer of the court") which resulted in discussion of whether the reporter should be a court officer and whether it should be determined on the basis of the reporter's designation as official or non-official. The comments then turned to who should properly have custody of the records (transcripts). Some members believed it would be an inconvenience to require the records to remain with the clerk's office and questioned whether the records were the property of the court or the U. S. attorney's office. Particular problems addressed were the availability and integrity of the records, and the financial factors to be considered. A motion to delete the second sentence and adopt new language in the third sentence ("shall be subject to order of the court but shall remain in the custody of the U. S. Attorney...") was carried unanimously. A motion to delete the fourth sentence was also carried unanimously.

Item Two: The Scope of the Recording

Judge Hoffman addressed the problem of abuses by the U. S. Attorneys in the grand jury proceedings. Mr. Heymann expressed the view of the Justice Department that the recording of the entire proceeding (excluding deliberation) would ultimately lead to review of every pretrial proceeding on the entire deliberation. This would result in a mini-trial on the adequacy of the proceedings leading to a charge, a point which most of the Committee believes is already subject to review and within control of the judge. Particular problems commented on were conduct of U. S. Attorneys resulting in bias and the possible dangers of witnesses being unrepresented by counsel. Judge Lacey believes a uniform system to be adopted and used by all U. S. Attorneys will result in better law, with which the representatives of the Justice Department agree. A motion to adopt the rule as drafted was carried with Judge Smith objecting.

Item Three: Ambiguity of the Word "Inadvertent" in line 7

A motion to substitute the word "unintentional" for "inadvertent" was carried unanimously.

Item Four: Resolved

Item Five: Disclosure by U. S. Attorney

It was noted that this was a Congressional change in the rule and it was suggested it would be best to leave this until problems arise in the future. So agreed.

Item Six: Future Considerations

It was agreed that future consideration would be given to proposals to allow defense counsel in the jury room and warnings to be given to grand jury witnesses.

Rule 7--The Indictment and the Information

Item One: Subdivision (g)

Mr. Pauley expressed the common feeling there was no need for subdivision (g). Judges Smith and Nielsen disagreed. A motion to follow the recommendation of the Editorial Committee to delete the subdivision was carried with two objections (Judges Smith and Nielsen).

Item Two: Expansion of Subdivision (c)(2)-- No action.

Item Three: Scope of Subdivision (c)(2)--No action.

Item Four: Language Change in Subdivision (c)(2)

Motion to adopt the change was carried unanimously.

Rule 9--Warrant or Summons Upon Indictment or Information

Item One: Use of the Words "under oath" in line 5

Mr. Hewitt suggested adding the words "under oath" after "a showing of probable cause" in line 5, as is required by Rule 4(a). A motion to adopt such change was carried.

Item Two: Language Change in line 9-13

Professor LaFave noted the suggestion of the Editorial Committee to delete the line "or by direction of the court" (line 10) because of the conflict with the word "shall" in line 2. The Editorial Committee would also add language allowing the court, in its discretion, to issue either a warrant or a summons when the attorney for the government makes no request. Mr. Pauley suggested there may be some inconsistency with Rule 4(a). Judge Hoffman moved that Rule 4(a) be amended to be consistent with the change in Rule 9. The motion was carried unanimously.

Item Three: Language in Rule 9(b)(1)

Judge Hoffman explained the history of the past consideration of this problem and the Committee agreed there was no need for a change.

Rule 11--Pleas

Item One: No action

Item Two: Language Change in lines 18-22

The word "not" was added to the end of line 19, ("court does not"). The recommended changes by the Editorial Committee were agreed to and adopted.

Item Three: Additional Paragraph in the Advisory Committee Note

Judge Hoffman explained the Editorial Committee's feeling on the need for additional comment. A motion to adopt the additional language was carried unanimously.

Item Four: Language Change in line 35

The Editorial Committee suggested changing the word "person" to "defendant" in line 35. The motion was carried unanimously.

Item Five: Language Change in Rule 11(e)(6)(C) & (D)

The Editorial Committee recommends the adoption of narrower language in Rule 11(e)(6)(C) & (D). Mr. Hewitt expresses his concern with the chilling effect of the narrower language. Judge Lacey suggests a clarification of the extent of 11(e)(6)(C) by adding the words "in court." A motion to adopt the changes as amended was carried, with Mr. Hewitt noting his objection.

Item Six: No action

Item Seven: No action

Item Eight: No action

Item Nine: Language Change in lines 55 and 60

A motion to adopt the editorial change in lines 55 and 60 was carried unanimously.

Item Ten: No action

Item Eleven: Language Change in lines 55-58

The Editorial Committee suggested a clarification of lines 55-58 by making use of Evidence Rule 106. A motion to accept these changes was carried unanimously.

Item Twelve: Repetition of Identical Rules

It was expressed that the identical rules were found to be necessary in both sets of rules and that this Committee not take any action. A motion to refer the matter to the Standing Committee was carried unanimously. \_

Item Thirteen: Scope of Rule 11(e)(6)(C)

Mr. Hewitt noted his disagreement with the Editorial Committee on the scope of the language in 11(e)(6)(C). No further action was taken.

Item Fourteen: No action

#### Rule 17--Subpoena

An addition to Rule 17 was recommended by the Editorial Committee to permit discovery of defense witnesses statements. A motion to adopt the addition was carried unanimously.

#### Rule 18--Place of Prosecution and Trial

Item One: No action

Item Two: No action

Item Three: Revision of the Advisory Committee Note

Professor LaFave noted that he had revised the second paragraph of the Advisory Committee Note to make proper note of the Sixth Amendment provision therein.

Item Four: No action

Rule 26.2--Production of Statements of Witnesses

Mr. Hewitt questioned the authority of the Rules Committee to transfer something from Title 18 (i.e. § 3500) to the criminal rules. Judge Kaufman and Mr. Pauley disagreed, noting the rule is procedural and is in accordance with the functions of this Committee. Professor Remington related the history in the adoption of the Federal Rules of Criminal Procedure, and noted that this Committee is on record as believing procedural changes in the rules are the proper scope of the Committee. A motion to approve Rule 26.2 was carried with Mr. Hewitt objecting.

Rule 32--Sentence and Judgment

Item One: Update of Statutory Reference in Rule 32(c)(3)(E)

The correction suggested by the Editorial Committee was approved by the Committee.

Item Two: Plea Withdrawal--Rule 32(d)

After a lengthy discussion on the distinctions of Rule 32(d) pleas and pleas under § 2255 the Committee suggested that language be drafted for consideration by the Committee on the following day.

Item Three: Revocation of Probation

Mr. Hewitt questioned the recording procedures under 32(f)(1)(D) and (2)(E). Judge Robb suggested a language change in lines 67 and 74 which was approved by the Committee.

Item Four: Proposal to Allow Probationer to Question Witnesses Under All Circumstances--Rule 32(f)(2)(D)

After lengthy discussion on the right of confrontation and when that right properly attaches the Committee deferred the matter to the following day in order to have members of the Probation Division of the Administrative Office present.

Rule 35--Correction or Reduction of Sentence

Item One: No action

Item Two: No action

Rule 40--Commitment to Another District  
Deferred to the following day.

Rule 41--Search and Seizure

Item One: No action

Item Two: Additional language in the Advisory Committee  
Note

Professor LaFave suggested that additional language explaining the scope of Rule 41 coverage be added to the Advisory Committee Note. A motion to adopt such language was carried unanimously.

Item Three: No action

Rule 43--Presence of the Defendant

Mr. Hewitt voiced a strong objection to Rule 43(b), Forfeiture of Right to be Present. Mr. Pauley suggested that due notification to the defendant of a proceeding in absentia would be a proper modification. Judge Kaufman then offered a change to that effect in the language in lines 11-12. A motion to accept this amendment was carried with Mr. Hewitt and Mr. Hungate noting their objections. [Note the reconsideration of this matter in the session on the following day.]

Criminal Rules Committee Meeting  
July 7, 1978

Judge Hoffman, Chairman, opened the meeting at 9:30 a.m. by introducing Mr. Wayne Jackson and Mr. Donald Chamlee from the Probation Division of the Administrative Office. Judge Hoffman then reopened discussion of Rule 32(d) & (f), inviting comments from Mr. Jackson and Mr. Chamlee.

Rule 32--Sentence and Judgment

Item One: Rule 32(f)(2)--Revocation Hearing

After lengthy discussion on 32(f)(2) there was a motion to eliminate the phrase "within a reasonable time" at line 84. The motion did not carry and it was determined that the language will stay with an additional explanation in the note.

Item Two: Language Change in Rule 32(f)(1)

Judge Kaufman noted the problem with the language at line 41 and then made a motion to include the words "at such hearing" before "the probationer shall" which was carried unanimously.

Item Three: Language Change in Rule 32(f)(1)

Mr. Silverman motions the word "taken" in line 31 be changed to "held in." The motion was carried unanimously. A motion to adopt Rule 32(f) as amended was carried unanimously.

Item Four: Language Change in Rule 32(d)

A motion to adopt new language for 32(d), Withdrawal of Plea of Guilty, was carried with Mr. Pauley objecting. A motion that Rule 32 as amended is adopted was carried unanimously.

Rule 43--Presence of the Defendant

On reconsideration, a motion to leave the rule to remain as it presently exist was carried unanimously.

Rule 40--Commitment to Another District

Item One: No action

Item Two: Making the Bail Provision Applicable to the Entire Rule

The Editorial Committee suggested to move the bail provision to the end to make it applicable to the entire rule. A motion to adopt this change was carried unanimously.

Item Three: Language Change in Rule 40(a).

The Editorial Committee recommended that the words, "without warrant" at line 2 of Rule 40(a) be stricken. The Committee approved the recommendation.

Items Four through Nine: No action

A motion to adopt Rule 40 as drafted was carried unanimously.

Rule 44--Right To and Assignment of Counsel

Items One through Four: No action

Item Five: Additional References to be Added to the  
Advisory Committee Note

It was noted that the recent Supreme Court case of Holloway v. Arkansas should be included in the Advisory Committee Note. The Committee approved such an addition. A motion to adopt Rule 44 as drafted was carried unanimously.

Rules under §§ 2254 and 2255

A motion to adopt Rule 10 of §§ 2254 and 2255 cases and Rule 11(e) of § 2255 cases was carried unanimously.

Judge Hoffman suggested for future consideration needed changes to Rule 11(e).

Finally, there was a short discussion on the need to meet annually in order to submit reports to the Standing Committee. It was agreed that the Chairman has the authority to call meetings and appoint subcommittees at his discretion.

Judge Hoffman adjourned the meeting at 12:00 Noon with thanks to all those attending.