

TO: THE COMMITTEE ON RULES OF PRACTICE  
AND PROCEDURE

On behalf of the Advisory Committee on Criminal Rules, I transmit herewith various proposals to amend the Federal Rules of Criminal Procedure which, except where otherwise specifically noted, were circulated to the bench and bar in October, 1981, and were the subject of open hearings in Washington, D.C., Chicago, Illinois, and San Francisco, California, during February, 1982. Transcripts of the public hearings have been made available to all members of our Committee, and all written comments from interested persons have been similarly reviewed by the Committee.

We have concluded at our Committee meeting on June 17-18, 1982 to reject parts of certain proposals previously circulated, and in several instances we have deferred action until our next meeting pending further study of these matters.

RULE 6 — THE GRAND JURY

Rule 6(e)(2) - We have concluded to delete the underlined portion suggested in the draft circulated to the bench and bar as we feel that it is unnecessary.

Rule 6(e)(3)(A)(i) - We decided to delete the underlined words of the proposal which read "to enforce federal criminal law". On May 3, 1982, the Supreme Court granted certiorari in United States v. Sells Engineering, Inc., and the issue in that case may decide the question presented by the proposed rule change. If the issue is not decided by the Sells case, this question, will be further considered by the Committee. Stated otherwise, it has been temporarily deferred as to the deleted words.

Rule 6(e)(3)(C)(ii) has been deleted as considered unnecessary. This will require the renumbering of the following two subdivisions.

Rule 6(e)(3)(C)(iv), which will be renumbered as (iii), providing for disclosure by an attorney for the government to another grand jury, has been adopted as being consistent with existing practice, although not heretofore covered by a specific rule.

Rule 6(e)(3)(D) has been adopted with the following modifications: the deletion of "or (ii)" on line 60 because (ii) was previously deleted as being unnecessary; the deletion of the words

"and is seeking disclosure for its own use" on lines 62 and 63; the change of the word "shall" to "may" on line 64.

Rule 6(e)(3)(E) was adopted with the following modifications: the word "may" on line 74 will read "shall"; the words "only if it cannot" on line 75 have been changed and, in lieu thereof, the words "unless it can" have been substituted; the words "on the need for disclosure" on line 84 have been deleted.

Rule 6(e)(5), as proposed beginning on line 86, has been revised to read as follows: "Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. This is the complete new subdivision (5), the balance being deemed unnecessary. We have further considered the recent case of In Re Rosahn, 671 F.2d 690 (2nd Cir. 1982), and realize that constitutional questions may arise with respect to requirements of an open hearing in contempt proceedings, especially where the accused insists upon a public trial. See, Levine v. United States, 362 U.S. 610 (1960).

Rule 6(e)(6) was adopted as proposed. See lines 93-96, both inclusive.

Rule 6(g) was adopted as proposed. See lines 98-107, both inclusive.

#### RULE 11 - PLEAS

Rule 11(a)(2), relating to conditional pleas, was adopted with the following modification: on line 12, the words "afforded the opportunity" were deleted and, in lieu thereof, the word "allowed" was inserted.

Rule 11(h), Harmless Error, was adopted as proposed.

#### RULE 12 - PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTION

Rule 12(i) was adopted with one modification: the word "federal" on line 5 was deleted.

RULE 12.2 - NOTICE OF INSANITY DEFENSE OR EXPERT  
TESTIMONY OF DEFENDANT'S MENTAL CONDITION

Rule 12.2 was adopted with the following modifications: on line 9, delete the words "or innocence"; beginning with the words "No statement" appearing on line 22, delete the balance of that paragraph and insert in lieu thereof, the following:

"No statement made by the defendant in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the defendant, and no testimony by the expert based upon such statement or other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony."

The Committee adopted Rule 12.2(d) as proposed.

The Committee added a new subdivision (e) reading as follows:

"(e) INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention."

RULE 23. TRIAL BY JURY OR BY THE COURT

The Committee had previously circulated alternative proposals to the bench and bar; one an amendment to Rule 23(b) dealing with the discretionary right of the judge to permit a valid verdict to be returned by the remaining 11 jurors, if a juror became ill or otherwise unable to serve after the jury had retired to consider its verdict; the other proposed amendments to Rules 24(c) and (d), providing for the retention of one or more alternate jurors and, if a regular juror was unable or disqualified to perform his or her duties, an alternate juror could be substituted with the court instructing the entire jury to commence their deliberations anew.

By an 8 to 2 vote, the Committee decided to approve Rule 23(b) in the form proposed and circulated. Thus, proposed Rules 24(c) and (d) were abandoned.

## RULE 32 - SENTENCE AND JUDGMENT

Rule 32(a)(1)(A) was approved as circulated. As to proposed Rule 32(c)(3)(A), the Committee voted to reject the proposed required disclosure of the probation officer's recommendation as to the sentence, and to reincorporate the words "exclusive of any recommendation as to sentence" which now appears in present Rule 32(c)(3)(1).

Other modifications are: in Proposed Rule 32(c)(3)(A), delete the word "entire" on line 25; delete the words "recommendations or" appearing at the end of line 28 and the first word on line 29; reinsert lines 41 through 48 which were inadvertently deleted in error; under (C) on lines 51-53, modify to read:

"(C) Any material which may be disclosed to the defendant and his counsel shall be disclosed to the attorney for the government."

The Committee adopted subdivision (D) appearing on lines 54 through 67, and further adopted the minor change in the wording of proposed (E) which now appears in the existing rules as (D).

The Committee also adopted the proposed revisions to Rule 32(d) relating to the Plea Withdrawal, all as circulated to the bench and bar.

## RULE 35 - CORRECTION OR REDUCTION OF SENTENCE

The Committee adopted the proposal to clarify Rule 35(b) to provide for authority to consider a reduced sentence following revocation of probation. This is the one proposal which was unanimously approved by the bench and bar.

## RULE 41 - SEARCH AND SEIZURE

The Committee deferred action on the proposed amendment to Rule 41(a), (b) and (h) until our next meeting. The deferral does not reflect the Committee's acceptance or rejection of the proposed modifications.

## RULE 43.1 - EXCLUSION OF PUBLIC TO AVOID JURY PREJUDICE

The proposed new rule quite naturally promoted the most comment from the bench, bar and media, the latter having been specifically invited to present its views. While the media's position is that of absolute opposition, as we anticipated, there were many

other questions raised as to our original proposal and we concluded that extensive modifications would have to be made which may necessitate a recirculation of any modified proposal. We, therefore, voted to defer further action until the next meeting of the Committee.

MINOR AMENDMENTS - NOT CIRCULATED

(1) Rule 16(a)(3), relating to Grand Jury Transcripts, was approved for modification due to the recent promulgation of Rule 26.2 and the proposed adoption of Rule 12(i). It will read as follows:

"(3) Grand Jury Transcripts. Except as provided in Rules 6, 12(i) and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury."

Of course, if Rule 12(i) - as proposed - does not finally meet with approval, this will require the deletion of any reference to Rule 12(i), but will still require a modification to include the reference to Rule 26.2.

(2) Rule 55 was adopted to read as follows:

"Rule 55. Records. The clerk of the district court and each United States magistrate shall keep records in criminal proceedings in such form as the Director of the Administrative Office of the United States Courts may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made."

This proposed Rule 55 was previously submitted, in slightly different form, to the Standing Committee and we were asked to reconsider the matter. We believe the present proposal meets the previous possible objections. We were directed not to include Rule 55 in our distribution to the bench and bar.

(3) Rule 58. Forms.

After some discussion, the Committee voted to abrogate this Rule 58 in its entirety, including all forms. A proposed revision was submitted, but the Committee felt that the present forms, last revised in 1949, were too obsolete.

NEW PROPOSALS DEFERRED OR OTHERWISE  
REFERRED TO ANOTHER COMMITTEE

(1) A proposal to amend Rule 49, the filing of a Dangerous Offender Notice, was deferred to our next meeting. This problem was presented in the case of United States v. Gaylor, No. 80-5016, decided by the Fourth Circuit in 1981, in an unpublished opinion. It will be considered at our next meeting and, in our opinion, need not be circulated to the bench and bar.

(2) A proposal to clarify what standard should be applied following probation revocation and whether bail pending appeal should be granted is, in the opinion of the Committee, a matter for the Committee on Appellate Rules, and the Secretary, Joseph F. Spaniol, Jr., is respectfully requested to take such action as may be necessary.

(3) The Judicial Conference of the Ninth Circuit has adopted resolutions seeking the amendment of Rule 30 with respect to (1) the time when the court should charge the jury, either before or after the final arguments of counsel, (2) the mandatory furnishing of instructions to counsel before the final arguments of counsel, and (3) the mandatory furnishing of a copy of the charge to the jury upon retiring.

The Committee voted to defer action on this proposal until our next meeting.

(4) The Department of Justice has proposed further amendments to Rule 6(e)(3)(A)(ii) and a new addition to Rule 6(e)(3)(C). The Committee voted to defer action on these proposals until our next meeting.

This completes our report as to actions taken at our meeting on June 17-18, 1982. The Chairman or Reporter will be pleased to respond to further inquiries from the Committee on Rules of Practice and Procedure.

Respectfully submitted,

WALTER E. HOFFMAN, Chairman,  
Advisory Committee on  
Criminal Rules

July 21, 1982