

**MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE
MAY 7-8, 1987
Washington, D.C.**

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on May 7-8, 1987. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Nielsen called the meeting to order at 9:00 a.m. on Thursday, May 7, 1987. The following members were present:

Hon. Leland C. Nielsen, Chair
Hon. Sherman Finesilver
Hon. William L. Hungate
Hon. William C. O'Kelley
Hon. William Weld
James F. Hewitt, Esq.
Richard A. Green, Esq.
Frederick B. Lacey, Esq.
Leon Silverman, Esq.
Stephen A. Saltzburg, Reporter

Also present were Hon. Edward T. Gignoux, Chairman of the Standing Committee on the Rules of Practice and Procedure; Roger Pauley, who was designated by Mr. Weld as the representative of the Criminal Division of the Department of Justice when Mr. Weld was away from the meeting; James E. Macklin, Jr., Deputy Director of the Administrative Office, together with Ann Gardner and David Adair; Tom Hutchison, Counsel for the Subcommittee on Criminal Justice of the House of Representatives Judiciary Committee, Ray Smietanka, Associate Counsel of the Subcommittee, and Cindy Blackburn, Staff Counsel to the Senate Judiciary Committee. Judge Gerald Tjoflat, Chair of the Committee on Probation Services, was present during the afternoon session on May 7th.

INTRODUCTION OF NEW MEMBERS

Judge Nielsen introduced Mr. Weld, the only new member present, and indicated that Committee member Herbert J. Miller regretted that he could not attend the meeting. Judge Nielsen explained that the Chief Justice had designated the Assistant Attorney General for the Criminal Division of the Department of Justice as a member of the Committee, so that whoever holds this position will serve on the Committee without the necessity of being appointed by

name. Also, the Assistant Attorney General may designate someone to serve in his place. Judge Nielsen also introduced Mr. Hutchison and Ms. Blackburn to the Committee. Later, when Mr. Smietanka arrived, Judge Nielsen introduced him to the Committee.

CRIMINAL RULE CHANGES UNDER CONSIDERATION
A. Changes Previously Approved

1. Rule 30 (Timing of the Court's Charge). Judge Gignoux reported that this amendment had been reported to the Congress by the Supreme Court. Tom Hutchison indicated that it was unclear whether there would be hearings on the amendment. Judge Gignoux, Judge Nielsen and Professor Saltzburg indicated that they would attend any hearings.

2. Rule 6(a) (Providing for the Selection of Alternate Grand Jurors). This amendment was approved by the Standing Committee and sent to the Judicial Conference. Judge Gignoux reported that there was no problem with the amendment.

3. Rule 12.3 (Notice of Public Authority Defense). A public hearing was scheduled on this proposed new rule for February 13, 1987 in Washington, but the hearing was cancelled as a result of lack of public interest in testifying. The Committee received numerous written submissions, all of which were summarized and appended to the Reporter's memorandum on the rule, dated April 12, 1987. The memorandum suggested possible amendments to the proposed rule which were considered by the Committee. The Reporter prepared a revised version of the rule and comment which was circulated to the Committee. The revised rule and comment were approved by the Committee, with Mr. Hewitt dissenting. Judge Nielsen, as Chair, did not vote, but expressed serious reservations about the rule. The Committee agreed that the timing of any submission of the rule to the Judicial Conference should be left to the discretion of the Standing Committee. A copy of the rule and comment as approved is appended hereto as Appendix "A."

4. Amendment adding Rule 24 (d) (Changing the Requirement that Alternate Strikes Only be Used Against Alternates When the Strike Method of Selection is Used). This proposed new rule was returned by the Standing Committee. The Criminal Rules Committee discussed whether to change the proposed amendment, to resubmit it, or to table it. The Committee considered inter alia the position of the Chair of the Jury Committee in its discussions. By a 4-3 vote, the Committee decided to table the proposal.

NEW CRIMINAL RULE AMENDMENTS PROPOSED

1. Proposed Amendment of Rule 5.1 (c)(1) (Local Rule Reference). The Committee voted unanimously to table a suggestion by Judge Walter Hoffman that Rule 5.1(c)(1) be amended to delete the words "by local rule." The Committee determined, however, that at some point this change might well be desirable as part of a general "cleaning up" of the rules.

2. Proposed Amendment of Rule 16 (c) (Notice of Additional Discovery). The Committee voted unanimously to table a suggestion by Judge Walter Hoffman that Rule 16 (c) be amended to require notification of the court as well as a party or his attorney. The Committee determined, however, that at some point this change might well be desirable as part of a general "cleaning up" of the rules.

3. Proposed Amendment of Rule 17 (d) (Service of Subpoenas). The Committee voted unanimously to table a suggestion by Judge Walter Hoffman that Rule 17 (d) be amended to provide that service of process should be permitted by any person authorized by law to make service. The Committee determined that the rule was sufficiently broad to cover all persons over 18 years of age and that few problems had arisen with the rule.

4. Proposed Amendments of Rule 32 (Sentencing Reform). The Committee devoted a substantial portion of the meeting on both days to consideration of possible amendments of Rule 32 in light of the guidelines sent to Congress by the Sentencing Commission. Judge Tjoflat explained the problems that the guidelines may cause district courts and the work that the Probation Committee was undertaking. A motion was made to circulate for public comment a draft amended rule prepared by the Probation Committee, but the motion failed. A second motion was made to circulate only a portion of the Probation Committee's draft, but it was withdrawn after discussion. A third motion was made to adopt a Model Local Rule and to submit it to the Standing Committee. The Committee reviewed a draft of a Model Local Rule, but ultimately rejected it. In the end, the Committee unanimously agreed that no action should be taken at this time, but the Committee should monitor what Congress does in response to the Sentencing Commission's submission and support the Probation Committee's efforts to prepare probation officers for the tasks that will be required by the guidelines.

5. Proposed Amendment of Rule 33 (Timing of Motion for New Trial). The Committee examined several problems generated by Rule 33's requirement that motions for new trials be filed within 7 days of the verdict or that an extension be granted, not simply requested, within the 7 day period. A suggestion was made that the 7 day period should be expanded to 30 days. This was discussed together with the question whether a new trial motion might be granted even after sentencing. Alternatives were considered, including amending Rule 45 to provide for greater flexibility in considering new trial motions. Finally, the Committee unanimously agreed to table any proposal to amend Rule 33 and to have the Reporter prepare a memorandum discussion the time limits in Rules 29, 33, 34 and 45.

6. Proposed Amendment of Rule 38 (a)(3) (Stay of Fines). The Committee discussed the need to amend Rule 38 (a)(3) to conform to the Sentencing Reform Act. Tom Hutchison indicated that there it is unclear whether the Act will take effect in the form in which it was originally enacted. The Committee unanimously agreed to table any proposed amendment and suggested that should Congress enact legislation that would require a change in the rule, Congress might wish to make the change as part of the legislation.

7. Proposed Amendment of Rule 46 (g) (Biweekly Reports). The Committee voted unanimously to table a suggestion by Judge Walter Hoffman that Rule 46 (g) be amended to require the biweekly report to be made to a particular judge rather than to the court. The Committee determined, however, that at some point this change might well be desirable as part of a general "cleaning up" of the rules, although there appeared to be no current problem with the reports covered by the rule.

8. Proposed Amendment of Rule 56 (Add Martin Luther King, Jr.'s Birthday). The Committee voted unanimously to add the words "Birthday of Martin Luther King, Jr." immediately after New Years Day in the rule to correct an oversight that occurred when Rule 45 was amended.

9. Entrapment Defense. The Committee unanimously voted to table a suggestion by Chief Judge Real of the Central District of California that it change the entrapment defense. The Committee viewed any change in the defense as substantive, not procedural.

EVIDENCE RULES APPROVED BY THE COMMITTEE IN PRINCIPLE

1. Amended Fed. R. Evid. 609 (a) (Impeachment of

Witnesses in Civil Cases and Prosecution Witnesses). At its June, 1986 meeting the Committee approved an amendment to Rule 609 (a) in principle. The Committee unanimously approved a draft and comment circulated by the Reporter after making minor changes in the language. A copy of the rule and comment is appended hereto as Appendix "B." The Committee directed the Reporter to circulate the proposed rule and comment to the Civil Rules Committee for its reaction.

NEW EVIDENCE RULE AMENDMENTS PROPOSED

1. Chief Judge Everett's Suggestions. Chief Judge Everett of the Court of Military Appeals suggested ten possible changes in the evidence rules. The Committee determined that there was no need for amendments at this time, although it recognized some problems in the language of Rule 412. Congress recently changed the federal law to redefine offenses that formerly were rape and attempted rape, and the Committee was told that Congress is considering changes in Rule 412. Thus, the Committee tabled any consideration of the rule to await congressional action.

SECTION 2254 AND 2255 RULES AND MISDEMEANOR RULES

1. Gender Neutralization. The Committee unanimously agreed upon gender neutralizing changes to the Section 2254 Rules, the Section 2255 Rules, and the Misdemeanor Rules. Copies of these Rules are appended hereto as Appendix "C."

2. Time Limits. The Committee unanimously tabled a proposal to write into the rule time limits for court action.

CONCLUSION AND ADJOURNMENT

Judge Nielsen indicated that the Committee would meet again either on September 28-29, 1987 or November 19-20, 1987, probably in Washington. Judge Finesilver expressed a preference for the November dates. The Committee adjourned at 10:30 a.m. on May 8, 1987.

RESPECTFULLY SUBMITTED,

STEPHEN A. SALTZBURG
REPORTER