

MINUTES OF THE ADVISORY COMMITTEE ON CRIMINAL RULES
MEETING IN WASHINGTON, D.C., ON JUNE 17-18, 1982

All members of the Committee were present during some or all of the deliberations, except Wade McCree, Jr., who was unavoidably absent. Also present were Judge Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure; Ray Smientka, Tom Hutcheson, and Bobbie Kammerman of the staff of the House Judiciary Committee; and Roger Pauley of the Attorney General's Office.

The first matters discussed were proposed amendments to Rule 6(e)(2) and (3)(C)(ii). During the initial discussion it was decided to amend the proposal at line 11 to add, between "the" and "testimony," the words "identity and," with only Mr. Jensen voting "no." However, after further discussion, on motion made by Judge Hungate, seconded by Judge Lacey, and unanimously carried, all underlined language from line 11 to line 14 was stricken, as was all underlined language from lines 40 through 46.

The next matter considered was the proposed amendment to Rule 6(e)(3)(A)(i), adding the words "to enforce federal criminal law." After discussion, it was unanimously decided to defer any action upon this proposal until after the Supreme Court has decided the Sells Engineering case.

The next matter considered was the proposed amendment to Rule 6(e)(3)(C)(iv), at lines 52 to 54. Upon motion by Mr. Green, seconded by Mr. Hewitt, it was unanimously decided to send that proposal forward to the Standing Committee.

The next matter considered was the proposed amendment to Rule 6(e)(3)(D). On motion of Mr. Hewitt, seconded by Judge Nielsen, it was unanimously decided to change the first "shall" in line 64 to "may," and upon motion by Mr. Silverman, seconded by Judge Robb, and carried by a vote of "yes" 6 - "no" 5, with the Chairman not allowed to vote, the words "and is seeking disclosure for its own use" in lines 62 and 63 were stricken, and the amendment sent forward as thus amended.

The next matter considered was the proposed amendment to Rule 6(e)(3)(E). On motion by Judge Nielsen, seconded by Judge Hungate, and carried unanimously, the words "on the need for disclosure" in line 84 were stricken. On motion by Judge Nielsen, seconded by Judge Gordon, and unanimously carried, the word "may" in line 74 was changed to "shall," and the words "only if it cannot" in line 75 were changed to "unless it can," and, as so amended, sent forward to the Standing Committee.

The next matter considered was the proposed amendment to Rule 6(e)(5). On motion by Judge Smith, seconded by Mr. Silverman, the words "where it may constitutionally do so" were added at line 86, immediately following the period after "hearing."

The proposed amendments to Rule 6(e)(6) were unanimously approved.

The next matter considered was the proposed amendment to Rule 6(g). Upon motion by Judge Gordon, seconded by Judge Nielsen, this amendment was approved, with Mr. Hewitt the only "no" vote.

The next matter discussed by the Committee was the proposed conditional plea amendment to Rule 11. On the discussion of the requirement of the consent of the government, the vote was ~~6~~ to 4 to require consent of the government. After further discussion, upon motion by Judge Nielsen, seconded by Judge Hungate, the words "afforded the opportunity" in line 12 were stricken and replaced by the word "allowed," and as so amended was sent forward to the Standing Committee.

The next matter considered was the proposed amendment to Rule 11, adding subsection (h). Upon motion by Judge Nielsen, seconded by Judge Hungate, with Mr. Hewitt voting "no," that amendment was approved and sent forward to the Standing Committee.

The next matter considered was the proposed amendment to Rule 12, adding subsection (i). On motion by Mr. Hewitt, seconded by Judge Nielsen, unanimously carried, the word "federal" in line 5 was stricken; and on motion of Judge Nielsen, seconded by Judge Hungate, with Mr. Jensen voting "no," the amendment was ordered forwarded to the Standing Committee as so amended.

The next matter considered was the proposed amendment to Rule 12.2(b),(c),(d) and (e). On motion duly made, seconded and carried, the words "or innocence" on line 9 were stricken. On motion of Mr. Hewitt, seconded by Judge Nielsen, and unanimously carried, all of subsection (c), starting at the word "No" on line 22 through the end of the subsection on line 26 were stricken, and the following substituted therefor, and as so amended sent forward to the Standing Committee:

"... 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 contents 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."

On motion of Mr. Hewitt, seconded by Judge Nielsen, and unanimously carried, subsection (e) was ordered added to Rule 12.2 and sent forward to the Standing Committee, to read 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."

The next matters discussed were the proposed amendments to Rules 23 and 24, regarding loss of jurors after deliberations have begun. From a show of hands, seven members favored the Rule 23 approach; three, the Rule 24 approach. On motion by Judge Nielsen, seconded by Judge Gordon, with eight votes in favor and three (Judge Robb, Mr. Hewitt and Mr. Green) voting

"no," the proposed amendment to Rule 23 was sent forward to the Standing Committee.

The next matter discussed was the proposed amendments to Rule 32, and on a 5 to 4 vote, the proposal to require the disclosure of the recommendation as to sentence was defeated. On motion duly made, seconded and carried by a 5 to 4 vote, the language in lines 26 and 27, "exclusive of any recommendation as to sentence," were reinstated, and the word "entire" in line 25 was stricken. On motion duly made, seconded and carried, unanimously, the words "which may be" were added between the words "material" and "disclosed" in line 52, and the word "also" in line 52 was stricken. On motion by Judge Smith, seconded by Mr. Hewitt, and unanimously carried, the amendment to Rule 32(c)(3)(D) was approved. And the amendments to all of Rule 32, as so amended, were forwarded to the Standing Committee.

The next matter discussed was the proposed amendment to Rule 35(b). Upon motion by Judge Nielsen, seconded by Judge Smith, and unanimously carried, that amendment was approved and forwarded to the Standing Committee.

The next matter discussed was the proposed amendment to Rule 41, allowing the federal probation officer to secure a search warrant. After discussion, and upon motion by Judge Nielsen, seconded by Judge Smith, and unanimously carried, this matter was deferred until the next meeting of the Committee.

The next matter discussed was the proposed amendment to Rule 16(a)(3), made necessary by the recent adoption of Rule 26.2 and is now proposed Rule 12(i). After discussion, and on motion of Judge Nielsen, seconded by Judge Gordon, and unanimously carried, that amendment was approved and ordered forwarded to the Standing Committee.

The next matter discussed was the proposed amendment to Rule 55, which the Standing Committee returned to us for reconsideration.

On Motion duly made, seconded and carried, the following amendment to Rule 55 was sent forward to the Standing Committee, subject to their possible deletion of the words "with the approval of the Judicial Conference of the United States."

The proposed Rule would 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, with the approval of the Judicial Conference of the United States, may prescribe. The clerk shall enter in the records each order or judgment of the court and the date such entry is made."

The next matter discussed was the proposed amendment to Rule 58. On motion by Mr. Vinson, seconded by Judge Smith, carried on a 6 to 1 vote, Rule 58 and the forms following it were deleted.

The Committee again discussed the provisions of proposed Rule 55. On motion of Judge Nielsen, seconded by Mr. Hewitt, and unanimously carried, the words "with the approval of the Judicial Conference of the United States" were stricken.

On June 18th, the Committee returned to a further discussion of the proposed amendment to Rule 6(e)(5), to the holding In re Roseahm (1982), 671 Fed. 2d, 690, which held that a contempt hearing must be public. After discussion and on motion by Judge Nielsen, seconded by Judge Smith, and unanimously carried, the words "where it may constitutionally do so," which had been inserted in line 86, were stricken and replaced by the words "subject to any right to an open hearing in contempt proceedings." On motion by Mr. Hewitt, seconded by Judge Gordon, carried 5 to 4, the word "occurred" in line 89 was replaced by the word "occurring," and the (ii) at the end of that line was stricken.

The next matter considered by the Committee were Assistant Attorney Jensen's proposals to amend Rule 6, and after discussion, these proposals were deferred to the next meeting of the Committee.

After discussion, the proposed amendment to Rule 30 was deferred until the next meeting of the Committee.

After discussion the proposed amendments to Rule 49, regarding the dangerous offender, were deferred to the next meeting of the Committee.

After discussion of the problem of bail pending appeal, it was determined that this proposal should be sent to the Advisory Committee on Appellate Rules for their consideration.

This left for discussion our proposed Rule 43.1. In view of the virtual unanimous opposition by all branches of the media and the lukewarm support of the bar for the proposal, on motion by Judge Nielsen, seconded by Judge Lacey, and un-animously carried, any action on this proposal was deferred until the next meeting, in anticipation of additional directions from the Supreme Court in its pending cases in this area.