June 9, 1985

MINUTES
ADVISORY COMMITTEE
FEDERAL RULES OF CRIMINAL PROCEDURE
WASHINGTON, D.C.
JUNE 6-7, 1985

The following Committee members were present on both days of the meeting:

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

Unable to attend the meeting were Hon. Sherman G. Finesilver and Leon Silverman, Esq., both of whom informed the Chair of trial commitments that rendered them unavailable.

Tom Hutchinson, counsel to the House of Representatives' Subcommittee on Criminal Justice attended the meeting on June 6. Roger Pauley attended the meeting with Mr. Trott on both days.

INTRODUCTIONS

Judge Lacey introduced two members of Mr. Spaniol's staff, Ann Gardner and Phil Meluch, who provided assistance throughout the meeting. Judge Lacey also introduced Judge O'Kelley, a new member of the Committee, and Professor Saltzburg, the new Reporter to the Committee.

Judge Gignoux welcomed Judge Lacey as the new Chair of the Committee and Professor Saltzburg as the new Reporter and reported on developments since the last meeting. He read a letter dated April 29th from the Chief Justice, which stated that the rules forwarded by the Judicial Conference to the Supreme Court had been sent to Congress with two minor amendments. These related to the use of pronouns. The Chief Justice suggested that attention be given to identifying and eliminating gender specific language from the Rules. Tom Hutchinson volunteered the services of his Subcommittee's staff to assist in this effort. The Committee discussed various ways of drafting gender neutral language and agreed that suggested changes should be circulated to all members as soon as possible.

Mr. Hutchinson reported that the rules transmitted to the Congress by the Supreme Court would be the subject of hearings in about two weeks. He noted that a suggestion had been made that Rule 11 should require that a court give a defendant notice about the magnitude of restitution that might be required. The Committee discussed this suggestion. The Chair asked Mr. Green to attend a hearing on June 26th as the Committee's representative, and Mr. Green agreed.

Rule 31(a) (Permitting a Defendant to Waive Unanimity)

The Committee engaged in a lengthy discussion of the proposed amendment and the comments that had been made with respect to it. Mr. Green and Mr. Hewitt briefly summarized the public hearings in Washington and San Francisco. Specific mention was made of the problem of defense counsel's recommending a waiver to a defendant without knowing how the jury stands in a case. Some members pointed out the largely negative public reaction to the amendment. The suggestion was made that the waiver concept is "pregnant with possibilities of coercion," although there was disagreement with the argument that the amendment would inevitably involve at least "subtle coercion." A suggestion was offered that the waiver take place before trial, but it was rejected as removing the advantage of the amendment.

At the conclusion of discussion, a motion was made to reject the amendment. It passed, with Mr. Trott noting a dissent.

Rules 9(a)--Section 2254 Cases and Section 2255 Proceedings (Dismissal as a Result of Delay Prejudicing Retrial)

The Committee discussed the proposed amendments and focused largely on the negative comments that had been received. Mr. Green and Mr. Hewitt briefly summarized the public hearings in Washington and San Francisco. The Committee noted that there are aberrant cases, but found little indication of a need for the amendment.

A motion was made to reject the the amendments to the two Rules. It passed unanimously.

Rule 6(e) (Suggestion) (Explicit Statement of Authority to Prevent Disclosure of Subpoena)

The Committee discussed former Committee member Judge Smith's suggestion that Rule 6(e) be amended to provide explicit authority for a district court to prevent disclosure of the issuance of a subpoena. Judge Nielsen indicated that he had entered similar orders.

Concern was expressed concerning the attorney-client relationship and the fact that Rule 6 covers both documents and oral testimony. A consensus emerged that the problem raised by Judge Smith was not easily resolved by amending Rule 6.

A motion to reject the suggested amendment carried unanimously.

Rule 17 (Suggestion) (Authority to Delay Notification of Subpoena)

Mr. Trott introduced this suggestion, which he had made in writing to the Committee. Discussion ensued and questions were asked concerning the possible advantages of amending the Financial Privacy Act rather than the rule. The discussion indicated that the problem of delayed notice related to banks, brokerage houses and other institutions and was complicated by laws in some states--e.g., California--requiring notice of subpoenas to customers. The ambiguity of the Financial Privacy Act was discussed, as was the reason for the ambiguity.

The suggestion was made that the Committee should table the suggestion and call it to the attention of Congress. This suggestion was put in the form of a motion which was passed. Mr. Trott noted his dissent.

The Committee then determined, with counsel from Judge Gignoux, that the Chair should draft a letter to the appropriate congressional committees pointing out the problem that gave rise to the suggestion. Mr. Trott and Mr. Pauley agreed to assist in the drafting of the letter and to identify the appropriate congressional committees to whom the letter should be addressed.

Rule 12.3 (Suggestion) (Notice of Public Authority Defense)

Mr. Trott introduced this suggestion, which he had made in writing prior to the meeting. The Committee discussed the need for an addition to the rule, problems of speedy trials, and the definition of the defense and the agencies covered by the suggestion. During the discussion, sentiment developed for covering state and local, as well as federal, law enforcement agencies and federal intelligence agencies.

The bulk of the discussion focused on the remedy for noncompliance. Concern was expressed about the striking of a defense which would result in a defendant's being denied the right to testify in his own behalf.

A motion was made to adopt the suggestion, with some language changes (mentioned above) and tracking the language of Rule 12.1 with respect to the sanctions for noncompliance. The motion carried 4-3, with Judge Nielsen, Judge O'Kelley, and Mr.

Trott dissenting from the part of the motion dealing with sanctions.

Subsequently, Mr. Trott moved to reopen and to permit a court to impose additional sanctions. The language suggested was "or it [the court] may enter such other order as it deems just under the circumstances." The motion to reopen was defeated, 3-4, with the same votes cast as on the original motion.

As a courtesy to the Committee, Mr. Trott noted, after a recess between the meeting days, that the Department of Justice would testify against the amendment because of the sanction provision. A motion to reconsider the entire amendment died for lack of a second, as the Committee determined that it would be advantageous to circulate the proposed amendment and to receive public comment upon it.

Rule 24(b) (Suggestion) (Providing Additional Challenges to the Government)

Mr. Trott introduced a proposed amendment to increase the number of peremptory challenges available to the government. The discussion emphasized the problems of defense counsel in multi-defendant cases, who often must share challenges. Several members expressed the view that there was no problem warranting an amendment.

A motion to reject the suggestion passed. Mr. Trott noted a dissent.

Rule 26.2 (Suggestion) (Early Disclosure of Witness Statements)

The Committee considered the resolution of the Ninth Circuit Judicial Conference concerning early disclosure of statements of government witnesses. The discussion noted that many prosecutors routinely provide statements, that many judges encourage the practice, and that there may be resistance to the practice among some prosecutors.

Much of the discussion examined the propriety of a change in the rules in light of the Jencks Act. During this discussion, Judge Gignoux reported on a bill of Senator Kastenmeier which would change the Rules Enabling Act to remove the "trumping" provision which, on its face, appears to allow a rule to supersede a statute. Mr. Hutchinson noted that the "trumping" aspect of the Act might not mean what many assume it means.

In light of the Jencks Act, a motion to table the suggestion carried unanimously.

Rule 30 (Suggestion)
(Timing of Instructions; Notice to Counsel)

The Chair reminded the Committee that the amendment to permit the judge to instruct the jury before argument that had been circulated in 1984 had been tabled in order to permit the criminal and civil rules to be amended in similar fashion. Judge Gignoux reported on the meeting of the Civil Rules Committee. That Committee had agreed to permit the judge to instruct before or after argument, or both. It also agreed to add language requiring a prompt objection, which in no event could be made after the jury retires.

The Committee discussed practices under the current rule and the variance around the country. Attention was paid to how lawyers make and judges receive objections.

A motion was passed which provided 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)

Rule 32 (Suggestion)
(Conforming Amendments to 1984 Statutes)

The Chair informed the Committee that he had asked the Reporter to examine the 1984 Comprehensive Crime Control Act and the 1984 Fine Enforcement Act to see whether the Rules required amendments as a result of the legislation. The possible conforming amendments identified by the Reporter were discussed in detail.

The Committee's judgment was that where an amendment might be desirable, the Chair should call it to the attention of the Congress, without indicating that the Committee had approved any amendment. Since the legislation has effective dates that complicate matters, Congress may wish to consider conforming amendments and procedures for implementing them.

The Committee unanimously agreed to call the following matters to the attention of appropriate congressional committees:

1. The possibility of amending subdivision (c)(3)(A) to provide that the disclosure of the presentence report shall be made at least ten days prior to sentencing as provided by the legislation.

2. The possibility of amending subdivision (a)(2) to inform the defendant of his right to appeal a sentence.

3. The possibility of amending subdivision (b) to add a (b)(3) which would conform the rule to the Fine Enforcement Act with respect to payment requirements.

The Committee rejected a proposal to amend subdivision (b)(1) to give the judge authority to modify a judgment on the ground that the proposal amounted to readoption of a practice under Rule 35 that Congress rejected in the 1984 legislation. Mr. Hewitt noted a dissent.

The Committee unanimously approved a motion to table Mr. Hewitt's motion that a probation officer's recommendations be disclosed to the defense. The Committee unanimously approved a motion that the Chair write a letter to the Probation Committee, chaired by Judge Tjoflat, to request that Committee's guidance as to the wisdom of disclosure in light of the changes in sentencing made by the 1984 legislation.

Rule 38 (Suggestion)
(Mandatory Fine Provisions; Conforming Amendment)

Another possible conforming amendment to the 1984 legislation would have placed in Rule 38 language indicating the requirement in the Fine Enforcement Act that, absent exceptional circumstances, the court shall require a defendant to make certain payments or post a bond when a fine is stayed. Because of problems with the effective date of the Act and the substantive nature of the suggestion, the Committee unanimously voted to reject the suggestion.

Rule 42(b) (Suggestion)
(Giving Probation Officers Power to Seek Orders to Show Cause)

The Committee unanimously rejected the suggestion by Anthony Partridge of the Federal Judicial Center that Rule 42 be amended to permit probation officers to apply for show-cause orders when supervised release conditions are violated. It found no need for the amendment.

Rule 49 (Suggestion) (Single Spaced Papers)

The Committee unanimously rejected a suggestion that papers filed in federal courts be single-spaced rather than double-spaced.

Rule 9(a) (Suggestion) (Clairfy Rules 9(a) in Section 2254 Cases and Section 2255 Proceedings)

The Committee unanimously rejected Professor Yackle's suggestion that the words "or claim therein" be added to the rules. It found that there was no current problem and that federal courts understood that a complaint is not dismissed in its entirety in a civil case because of one invalid claim.

Procedure for Hearings (Suggestion)

The Committee unanimously rejected Professor Wilke's suggestion that the hearing procedures be modified to make them less formal.

Evidence Amendments

Judge Gignoux reported on the developments with respect to possible appointment of an Advisory Committee on Evidence. He noted the Federal Judicial Center's Conference on the Federal Rules of Evidence in Williamsburg in 1980 and the American Bar Association's 1983 Report of its Litigation Section, "Emerging Problems Under the Federal Rules of Evidence." He also described the Litigation Section's February 1985 program in Washington D.C., which considered proposals for amending the evidence rules. Judge Gignoux explained that the participants in the 1985 program developed reservations about an Advisory Committee, because of a concern that it might recommend too many changes to rules that were working well.

Judge Gignoux inquired of the Committee's willingness to consider evidence questions. The Committee indicated that it would do so if assigned the task.

Rule 6(a) (Amendment) (Alternate Grand Jurors)

In light of Judge Clarie's letter reporting the survey of federal district courts by the Administrative Office, the Committee voted, to accept the amendment to Rule 6(a) that had been circulated to the bench and bar in 1983 and tabled by the Committee in 1984. Judge Nielsen noted a dissent.

The Committee adopted the identical language circulated in 1983 and the Reporter's Comment thereto. It determined that no further need to circulate the amendment.

ABA Criminal Justice Section Recommendations

The Committee considered all of the suggestions for amendments made by the Criminal Justice Section of the American Bar Association. These suggestions were made as the result of an invitation by the Chair to the Section to comment on possible amendments in light of the 1984 legislation enacted by Congress.

The Committee unanimously concluded that some of the suggestions were good ones, but that they should be made by the Section itself, not by the Committee. Thus, the Committee unanimously approved a motion that the Chair indicate as an informational matter the Committee's reaction to the Section's suggestions, and that the Chair indicate the Committee's conclusion that the Section should pursue its suggestions directly with Congress.

The Committee reached the following conclusions regarding the Section's suggested amendments:

1. Rule 6(e)(C) & (D) should not be amended. Both the Congress and the Supreme Court have approved language and no further change is needed.

2. Rule 32 (c)(2) might benefit from the addition of language indicating that a probation officer should, if practicable and directed by the court, provide information concerning a defendant's gross pecuniary gain. However, there was concern about the practicability of the proposal. The Committee approved the Chair's writing to the Probation Committee to suggest that it consider the idea.

3. Rule 32 (c) (3) should be called to the attention of the Congress, as the Committee had approved earlier.

4. Rule 32 (f), which would conform the rule to the Fine Enforcment Act and specify burdens of proof, ought to be considered by the Congress.

5. Rule 32.1 (b) should not be amended to include the words "or fine." The amendment is unnecessary and problematic.

6. Rule 35 should not be amended. It would fly in the face of Congressional action. Judge Nielsen and Mr. Hewitt noted their dissents.

7. Rule 38 should not be amended, since the change is unnecessary, although it would provide parallel language in the rule.

8. Rule 41 (b) should not be amended to add language making a cross-reference to federal statutes, since the cross-reference adds nothing of substance and might be confusing. The statute limits the use of warrants and the rule amendment might be read as not being so limited.

RESPECTFULLY SUBMITTED,

Stephen A. Saltzburg,
Reporter