

Mr. Herbert J. Miller, Jr., Assistant Attorney
General, Criminal Division

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Howard P. Willens, Second Assistant
Harold D. Koffsky

Meeting of the Advisory Committee on Criminal Rules
October 14-16, 1963.

This memorandum will supplement our oral reports to you regarding the meeting of the Advisory Committee on Criminal Rules held October 14-16, 1963, which we attended as representatives of the Department of Justice. Specifically, we would like to bring to your attention the projected schedule of the Committee, the specific actions taken during these meetings, our general appraisal of the Committee's work and attitudes, and our recommendations regarding action which should be taken by the Department prior to the next meeting of the Advisory Committee in January 1964.

I - Membership and Schedule of Advisory Committee.

As you know, the Advisory Committee is chaired by John C. Pickett, Judge of the Tenth Circuit Court of Appeals, and includes the following members: Joseph A. Ball (California attorney); George R. Blue (former United States Attorney who currently practices in New Orleans); Abe Fortas (Washington attorney); Sheldon Glueck (Professor of Law at Harvard); Walter A. Hoffman (District Court Judge for the Eastern District of Virginia); Thomas D. McBride (Philadelphia attorney); Maynard Pirsig (Professor of Law at Minnesota); Frank J. Remington (Professor of Law at Wisconsin); William F. Smith (Judge of the Third Circuit Court of Appeals); and Lawrence E. Walsh (New York attorney and former Deputy Attorney General). The Reporter of the Committee is Edward L. Barrett, Jr., Professor of Law at the University of California, and the Associate Reporter is his colleague, Professor Rex A. Collings, Jr.

cc: Mr. Foley ✓
Mr. Wilens
Mr. Koffsky
All Section Chiefs, Criminal Division

This was apparently the first meeting of the Advisory Committee since it circulated its proposed amendments in December of 1962. The primary purposes of the meeting were to approve tentatively those proposed amendments which had been generally endorsed by comments received by the Committee and to instruct the Reporter concerning those amendments, whether or not circulated previously, which should be considered further by the Committee. To assist the Committee, the Reporter had prepared voluminous materials, reflecting all comments received by the Committee, his own rethinking of some of the problems, proposed revisions of some of the amendments circulated, and proposed Rule amendments in addition to those circulated. As you know, the comments of the Department of Justice were delivered by us to the Reporter at the beginning of the meeting on October 14.

At the January meeting it is planned that the Committee will propose a group of amendments to the parent Standing Committee on Rules of Practice and Procedure, chaired by Judge Maris, which will in turn refer any approved amendments to the Supreme Court for adoption. It is also planned that the Committee at the January meeting will decide which proposed amendments should be circulated in booklet form to the public. It is anticipated that this latter group will consist of earlier proposed amendments which have been substantially revised by the Committee as well as new amendments which have been suggested by the Committee, the Reporter or various commentators.

II - Action taken by the Advisory Committee.

The action taken by the Advisory Committee fall generally into the following four categories. (A) Tentative approval or rejection of proposed changes which were circulated in December of 1962; (B) Postponement until January of action on circulated changes; (C) Favorable action on suggestions not included in the circulated amendments, and (D) Rejection of suggested changes to rules not included in circulated amendments. We consider the actions marked by an asterisk (*) to be of particular significance.

(A) - Tentative Approval or Rejection of Proposed Changes
Which Were Circulated in December of 1962.

1. Rule 4 (Warrant or Summons upon Complaint). The amendment to Rule 4(a) as set forth in the Preliminary Draft was approved.

* 2. Rule 5 (Proceedings before the Commissioner). The Committee approved the proposed amendment to Rule 5(a) and added the further requirement that the commissioner shall inform the defendant not only of the complaint against him but also of the affidavits filed with the complaint. The suggested amendment would add the following language "and any affidavit filed therewith, " after the word "him" in the third line of Rule 5(b).

3. Rule 6 (The Grand Jury). The proposed amendments to several subsections of this rule were adopted. No action was taken on the Department of Justice proposal that Rule 6 (e) be amended to authorize disclosure of matters occurring before a grand jury to other federal grand juries as well as to attorneys for the government. The question of disclosure of grand jury minutes to defendants, as part of the entire discovery problem, was deferred to the January meeting.

* 4. Rule 12A (Notice of Alibi). This proposed amendment was approved in principle by the Committee. The Reporter was instructed to draft a new rule in which consideration will be given to permitting the defendant, as well as the government, to initiate the procedure and to give discretion to the court for a protective order regarding names of witnesses. In addition, the Reporter was requested to draft a provision providing for notice when an issue of mental incompetency is to be raised, in accordance with the Department's suggestion.

5. Rule 17 (Subpoena). The Committee decided that the language of Section 1825 of Title 28 of United States Code should be used instead of that contained in the Preliminary Draft so as to make clear that fees and mileage need not be tendered when subpoenas are issued on behalf of the government.

* 6. Rule 17A (Pretrial Procedure). The Committee tentatively approved the new amendment providing for pretrial procedure in criminal cases. The Department's suggestion to eliminate the word "order" and substitute a less mandatory verb such as "invite", which was the recommendation also of the Reporter, was rejected by the Committee. The Committee also rejected the Department's proposal for an additional sentence designed to make certain that pretrial procedure is not used as a discovery mechanism extending beyond the permissible discovery in other rules or statutes. The Committee did adopt the suggestion of the Department that an additional sentence be added to the rule providing for the entry of an order reflecting the action taken at the meeting. It was decided also to make clear that the rule should not be invoked in the case of a defendant who is not represented by counsel.

* 7. Rule 18 (District and Division). After considerable discussion, the majority of the Committee decided to adopt tentatively the proposal that the place of trial is to be fixed with regard to the convenience of the defendant and his witnesses. The Committee rejected the position of this Department that the interest of the Government and/or of its witnesses were appropriate factors to be considered by the Judge in setting the place of trial. The Committee instructed the Reporter to draft an affirmative provision to the effect that trial should be held at the statutory place of holding court nearest to the place at which the crime was committed. The apparent desire of the majority of the Committee is to restrict sharply the discretion of the Judge to fix the place of trial within the district at any place other than the nearest place of holding court as previously ascertained by law, unless the convenience of the defendant and his witnesses indicates an alternative place of trial.

8. Rule 23 (Trial by Jury or by the Court). The proposed amendment to Rule 23 (b) was approved.

9. Rule 24 (Trial Jurors). In light of the unanimous disapproval contained in the complaints received by the Committee, it was decided to eliminate the proposed amendment to Rule 24 (b) which would curtail the number of peremptory challenges. The other proposed amendments to the rule were tentatively adopted by the Committee.

10. Rule 28 (Expert Witnesses and Interpreters). The proposed amendment was approved with instructions to the Reporter to revise the note so as to deal with the problem of communication between the lawyer and the non-English speaking indigent client.

11. Rule 29 (Motion for Acquittal). The proposed amendments to this rule, which the Department suggested might cause unnecessary confusion, were approved by the Committee. It was decided to defer consideration of the timing provisions in this rule and in rules 33 and 34 until this matter could be coordinated with the work of the Appellate Rules Committee.

12. Rule 30 (Instructions). The proposed amendment to this rule was approved by the Committee with the adoption of additional language designed to clarify an ambiguity in the proposed amendment. As tentatively adopted by the Committee, the last sentence of Rule 30 will read as follows: "Opportunity shall be given to make the objection out of hearing of the jury and, on request of any party, out of the presence of the jury."

* 13. Rule 32 (Sentence and Judgment). The Committee decided to delete its proposed last sentence to Rule 32(a), dealing with the right of allocution and substitute the following sentence: "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment."

With regard to the proposed amendment to Rule 32 (c)(2), dealing with disclosure of presentence investigation reports, there was considerable discussion and difference of views among the members of the Committee. The strong opposition of the majority of District Court Judges, the Bureau of Prisons, and probation officials was discussed by the Committee. The Reporter informed the Committee that relatively few comments had been received in support of the Committee's proposal. The Reporter recommended against deletion of the proposed amendment on the grounds that it might be taken as a rejection of the disclosure practice and discourage experimental moves in that direction. The Reporter suggested two alternative drafts. The second of these drafts provides as follows:

"Before imposing sentence the court shall satisfy itself as to the accuracy of the factual assertions contained in the report of the presentence investigation. In so doing the court may disclose to the counsel for the defendant or, if the defendant is not represented by counsel, the defendant all or a part of the presentence report and may afford an opportunity to defendant's counsel or the defendant to comment thereon."

However, the Committee rejected this approach and adopted tentatively the following alternative:

"If the defendant is represented by counsel and so requests, the court before imposing sentence shall permit counsel for the defendant to read the report of the presentence investigation (from which the sources of confidential information may be excluded) and shall afford such counsel an opportunity to comment thereon. If the defendant is not represented by counsel and so requests, the court shall communicate, or have communicated, to the defendant the essential facts in the report of the presentence investigation (from which communication the sources of confidential information may be excluded) and shall afford the defendant an opportunity to comment thereon."

14. Rule 33 (New Trial). The proposed amendment to this rule, which was acceptable to the Department of Justice, was approved by the Committee.

15. Rule 34 (Arrest of Judgment). The proposed amendment to this rule, which also was acceptable to the Department, was approved by the Committee.

16. Rule 35 (Correction and Reduction of Sentence). The proposed amendments to this rule, which were acceptable to the Department, were tentatively approved by the Committee.

17. Rule 45 (Time). The amendment to this rule was acceptable to the Department and approved by the Committee.

* 18. Rule 46 (Bail). The various proposed amendments of this rule were overwhelmingly approved by the various commentators, including the Department. There was considerable discussion by the Advisory Committee, however, on the issue whether the rule should make clear that release on recognizance does not require the execution of any bond by the person released. The majority of the Committee felt that the language of the rule did not in effect go as far as they intended and the Reporter was requested to present a further draft at the January meeting. The Committee also suggested that the Department request Congress to amend the bail jumping statute so as to include within the reach of the statute the case of a person released on his own recognizance who fails to appear at the required time.

19. Rule 49 (Service and Filing of Papers). No objection was made to this proposed amendment and it was adopted by the Committee.

20. Rule 54 (Application and Exception). This proposed amendment was tentatively approved by the Committee and the Reporter will give consideration to the suggestion of the Department regarding the amendment of the rule to conform to the recently amended Canal Zone Code.

21. Rule 56 (Courts and Clerks). This proposed amendment, which was acceptable to the Department, was approved by the Committee.

(b) - Postponement until January of Action on Circulated Changes.

1. Rules 5 and 44 (Assignment of Counsel). The Committee decided to defer action on these proposed amendments until Congress acts on the proposed Criminal Justice Act.

* 2. Rule 11 (Pleas). The Committee tentatively approved the proposed amendment that the court address the defendant personally in determining that a plea of guilty or nolo contendere is made voluntarily with an understanding of the nature of the charge. The Committee indicated that it had never been its intent to require a judicial inquiry into the facts when a plea of nolo contendere is entered. In view of the criticism received regarding the proposal that the judge conduct an inquiry when a plea of guilty is entered, the Reporter recommended that this proposal be deleted from the proposed amendments. This was the position taken by the Department of Justice. After much discussion, however, the majority of the Advisory Committee concluded that it would be desirable to institute some such inquiry when pleas of guilty are involved. It was tentatively decided that the inquiry should be made not at the time the plea was accepted, but rather at any time prior to the entering of a judgment of conviction. Accordingly, the Reporter was instructed to submit a draft at the next meeting providing that, notwithstanding a plea of guilty, a court shall not thereafter enter judgment upon such plea without making such inquiry as may satisfy it that the defendant in fact committed the crime charged. There was no discussion by the Committee as to the nature of the desired inquiry or whether or not it should be made a matter of record.

3. Rule 15 (Depositions). Although there was apparently much opposition from defense lawyers regarding the proposed amendment giving the Government the right to take depositions, the Advisory Committee approved the proposal. The Reporter was requested to prepare a further draft of the amendment providing for the availability of witness statements at the time of taking the deposition which would otherwise be available at the time of trial under the provisions of the Jencks Act. In accord with some of our suggestions, the Reporter also was instructed to provide for written notice and to cover the effect of non-appearance by defendant who was not in custody. The question whether witnesses should be permitted to make such a motion was left unresolved.

* 4. Rule 16 (Discovery and Inspection). The weight of opinion received by the Committee regarding its proposed amendments to Rule 16 was to the effect that the amendments did not go far enough in permitting discovery by defendants of materials in the possession of the Government. As a result, the Reporter tendered for the consideration of the Advisory Committee two alternative drafts extending the right of discovery beyond that contained in the proposed amendments circulated to the public. At the request of the Department of Justice, further consideration of these alternative drafts was postponed until the January meeting. The Department obligated itself to submit specific comments and alternative drafts to the Advisory Committee in time to be circulated to the members of the Committee prior to this meeting. It was clear from the discussion which took place that the majority of the Committee is strongly in favor of extended revision of this rule.

(C) - Favorable Action on Suggestions not Included in Circulated Amendments.

1. Rule 7(f) (Bill of Particulars). The Committee tentatively decided to circulate after the January meeting a proposed amendment to Rule 7(f) designed to encourage the courts to grant more complete bills of particulars. The tentative language agreed upon by the Committee would provide as follows: "The court shall direct the filing of a bill of particulars if the court is satisfied that to do so would be in the interest of justice before arraignment or within ten days after arraignment or at such other time as the court may permit."

* 2. Rule 8 (Joinder of Offenses and of Defendants). Extensive materials were presented to the Committee dealing with a proposed amendment to Rule 8 which would require the government to join in a single indictment all criminal offenses arising out of a course of conduct which are known to the prosecution at the time of the filing of the indictment. The proposal submitted by the Reporter for the Committee's consideration is a slight variation of the applicable provision of the Model Penal Code drafted by Professor Remington. Some of the practical difficulties in the proposed rule were presented to the Committee, and it was decided to reserve decision as to whether any proposed amendment to Rule 8 along these lines should be circulated to the public until after the Committee had received and considered the comments of the Department of Justice.

* 3. Rule 17 (Subpoena). In response to criticism received regarding Rule 17(b), dealing with the issuance of subpoenas at the request of indigent defendants, the Reporter was instructed to prepare a proposed amendment which would eliminate the necessity in such cases that the indigent defendant reveal his case to the Government in order to obtain the issuance of a subpoena. The Reporter was requested to prepare a draft to the effect that an indigent defendant may subpoena witnesses who live within 100 miles of the court without any limitation and may subpoena a witness who resides beyond this limit with the permission of the court.

* 4. Rule 23 (Trial by Jury or by the Court). A few comments were received by the Committee criticizing the requirement that the Government consent before the defendant waive his right to jury trial.

After some discussion, which reflected considerable sentiment for the elimination of this requirement in Rule 23(a), the Reporter was requested to prepare a draft accomplishing this change for discussion at the January meeting.

* 5. Rule 24 (Trial Jurors). The Reporter was requested to draft a proposal which would give the defendant the right to ask questions on voir dire as well as submit questions to the court. The opinion of the Committee was divided on this issue. A proposal was made to the Committee that any investigative reports on jurors prepared by the Federal Bureau of Investigation or other agency in the possession of the government should be provided to the court and the defendants. The Committee appeared divided on the necessity or desirability of making this proposed change. It was decided to request the Reporter to conduct an inquiry into the use of questionnaires in the selection of jurors and to reserve this question for further discussion at the January meeting.

6. Rule 25 (Judge; Disability). A suggestion made by Judge Lumbard as to procedure if a trial judge becomes disabled will be the subject of a draft proposal by the Reporter.

7. Rule 32 (Sentence and Judgment). The Committee discussed certain proposals of the Appellate Rules Committee and instructed the Reporter to advise the Appellate Rules Committee accordingly. In our opinion, none of these proposals appeared of great significance and, in any event, the Department will have ample opportunity to comment when they are made public. With regard to Rule 32 (a)(2), the Advisory Committee agreed with the Appellate Rules Committee that the court should be required at the time of sentencing to inform the defendant of his right of appeal. After some discussion it was decided that a general notification of right of appeal would suffice and that it was not necessary for the judge to notify the defendant of the specific procedures required for an *informa pauperis* appeal.

8. Rule 35 (Correction or Reduction of Sentence). In order to meet the criticism of various commentators, including the Department of Justice, the Advisory Committee accepted in principle a draft amendment submitted by the Clerk of the Supreme

Court amending the second sentence of Rule 35. The proposed amendment is designed to clarify the situation when the Supreme Court enters an order or judgment denying review of, or having the effect of upholding, a judgment of conviction.

* 9. Rule 46 (Bail). In addition to the other action of the Committee dealing with Rule 46, the Reporter was requested to draft a provision to the effect that the court must release a person unable to meet the terms of the bail set after a certain fixed period of time. There was limited discussion of this proposal and it is not clear whether a majority of the Committee would be in favor of such a proposal or not.

10. Rule 49 (Service and Filing of Papers). The Committee approved for circulation the following amendment to Rule 49(c): "Lack of notice of the entry by the Clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in the Rules of Procedure for the United States Courts of Appeals."

11. Rule 55 (Records). The Committee tentatively approved for circulation an amendment to Rule 55 requiring that the Clerk maintain a criminal docket in which each order or judgment of the court is entered and requiring that the entry of an order or judgment shall show the date the entry is made.

(D) - Rejection of Suggested Changes to Rules Not Included in Circulated Amendments.

1. Rule 5 (Proceedings Before the Commissioner). The Advisory Committee discussed the current inadequacies of the preliminary examination in the Federal system. A proposal to increase the evidentiary showing before the Commissioner was defeated in the Committee. A proposal to require a preliminary examination in all cases prior to indictment was also rejected by the majority of the Committee.

2. Rule 14 (Relief from Prejudicial Joinder). The Committee discussed the problem of prejudice to a defendant arising from the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. The Committee rejected, however, the proposal made by one commentator requiring a mandatory severance in such cases. The Committee deferred until its discussion on discovery the problem of discovery of such statements and confessions made by the co-defendant.

3. Rule 30 (Instructions). The Committee rejected a proposal that would require instructions to be written and submitted to the lawyers prior to argument to the jury.

4. Rule 32 (Sentence and Judgment). The Committee rejected a proposed amendment to Rule 32(b) which would require the sentencing prior to trial of a co-defendant who is going to testify as a witness for the prosecution.

5. Rule 46 (Bail). The Committee discussed the suggested amendment of Rule 46(e) made by United States Attorney Morgenthau regarding corporate sureties. The Committee requested the Department to reconsider and redraft, if necessary, a proposed amendment dealing with this matter.

III - General Analysis.

As the above summary indicates, the Committee has reserved until future meetings many questions of crucial importance to the Department of Justice. Neither the procedures of the Committee nor the attitudes of its members afford a basis for believing that the views of this Department will be carefully and/or favorably considered.

Although the Reporter of the Committee organizes the materials and presents the issues in a useful way, the members of the Committee do not necessarily follow his suggestions. As a result, there is considerable discussion of tangential or irrelevant issues and much drafting of proposed amendments during the course of the meeting. In view of the several articulate and forceful members of this Committee, this is not unexpected, but it results in decisions being made with somewhat more precipitation than we might have anticipated. As a consequence, this places a premium on careful written preparation in advance of the meeting and effective oral presentation during the meeting.

On some of the most important issues, such as broad extension of discovery, there appears to be a clear majority of the Committee which shares the views of defense attorneys and most commentators. Messrs. Ball, Fortas, and McBride, in addition to Professors Glueck and Pirsig, seem ready to extend discovery as far as proposed by the Reporter in his proposed draft regardless of any critical comments or objections of the Department of Justice or other law-enforcement agency. On the other hand, former Deputy Attorney General Walsh and Judges Hoffman and Smith are inclined to take a more conservative view which would reflect the position of the Department of Justice. We are inclined to think that Judge Pickett, if his vote were necessary, would share this position. Decision on this issue and similar controversial issues may well depend, therefore, on the votes of Professor Remington and Mr. Blue. To the extent their views could be gathered at this meeting, I think that they desire substantial reform, but perhaps not as much as that endorsed by the above-listed five, depending on the opposing considerations which might be brought to light by the Department of Justice or other agencies interested in these rules.