

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25. D. C.

Summary of Report

The annexed report recommends:

1. Approval of the proposed Bankruptcy Rules (Appendix A).
2. Approval of the proposed Chapter XIII Rules (Appendix B).
3. Approval of the proposed amendments and additions to the Federal Rules of Criminal Procedure (Appendix C).
4. Approval of deferring proposed amendments to Appellate Rules 9(d) and 10(b) until they can be considered by the reconstituted Advisory Committee on Appellate Rules.
5. Approval of cooperation by the committees with the Subcommittee on Criminal Laws and Procedures of the United States Senate in the procedural aspects of its work in the revision and recodification of title 18, U.S.C.
6. Approval of requesting the elimination from the next budget for the judiciary of the proviso limiting to \$90,000 the funds available for the rules program.

Our committee, accordingly, had before it at its recent meeting proposed amendments to Criminal Rules 4(a), 9(a), 11, 12, 15, 16, 17(f), 20, 32(a), (c) and (e) and 43 and to Appellate Rules 9(b) and (d) and 10(b). In addition, we had before us a proposed perfecting amendment to Criminal Rule 50 and proposed new Criminal Rules 12.1, 12.2, 29.1 and 41.1.

Most of these rules represent the culmination of a number of years of work by the advisory committee with respect to proposals which were published to the bench and bar in January 1970 and April 1971. Our committee gave full consideration to these proposals, made a number of changes, mostly of a perfecting nature, and as thus amended approved the amendments to Criminal Rules 4(a), 9(a), 11, 12, 15, 16, 17(f), 20, 32(a), (c) and (e), 43 and 50, and the proposed new Criminal Rules 12.1, 12.2 and 29.1. The definitive approved draft of these proposals and the advisory committee's notes, which fully explain them, are annexed hereto as Appendix C.

Your committee recommends that the Judicial Conference approve them and transmit them to the Supreme Court with the recommendation that they be adopted by the Court.

Your committee does not recommend the approval at this time of the proposed new Criminal Rule 41.1 with respect to nontestimonial identification before and after arrest. The preliminary draft of this rule was published to the bench and bar in April 1971. It evoked wide criticism and serious questions were raised as to its constitutional validity. Your committee,

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Summary of Report

The annexed report recommends:

1. Discharge of the Advisory Committee on Admiralty Rules.
2. Approval of amendments and additions to the Federal Rules of Criminal and Appellate Procedure (Appendix A).

contain procedural devices which ought to be incorporated in the Federal Rules of Civil Procedure.

Criminal Rules

The Advisory Committee on Criminal Rules met on January 14 and 15, 1972 and approved in final definitive form certain amendments to Criminal Rules 1, 3, 4, 5, 6, 7, 9, 11, 12, 15, 16, 17, 20, 31, 32, 38, 40, 41, 43, 44, 46, 54 and 55, and Appellate Rules 9 and 10, and new Criminal Rules 5.1, 12.1, 12.2, 29.1 and 41.1. The preliminary draft of many of these proposals was published in January 1970 and some in April 1971. Our committee at its recent meeting considered all these proposals in detail. Action on proposed Rule 41.1, Nontestimonial Identification, was postponed until a later meeting pending further study. The other proposals were approved by our committee with some modifications, mostly minor clarifying changes. The proposals as modified and approved by our committee, together with the Advisory Committee's Notes which fully explain them, are set out in Appendix A annexed to this report.

We recommend that the proposed amendments to the Criminal Rules and Appellate Rules and the new Criminal Rules, set out in Appendix A, be approved and transmitted at an appropriate time to the Supreme Court with the recommendation that they be adopted.

On behalf of the Committee on Rules
of Practice and Procedure,

Albert B. Maris
Chairman

March 24, 1972

3/20/72

Rule 16. Discovery and Inspection.

(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.

~~DEFENDANT'S STATEMENTS; -REPORTS -OF-EXAMINATIONS
AND-TESTS; -DEFENDANT'S-GRAND-JURY-TESTIMONY-~~

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon ~~motion~~
~~request~~ of a defendant ~~the court may order the~~
~~attorney for~~ the government shall ~~to~~ permit
the defendant to inspect and copy or photograph;
any relevant (1) written or recorded statements
~~or confessions~~ made by the defendant, or copies
thereof, within the possession, custody or
control of the government, the existence of which
is known, or by the exercise of due diligence
may become known, to the attorney for the
government; the substance of any oral statement
which the government intends to offer in evidence
at the trial made by the defendant whether
before or after arrest in response to interroga-
tion by any person then known to the defendant
to be a government agent; and (3) recorded
testimony of the defendant before a grand jury

which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, on its motion, discovery of relevant records, testimony of any witness before a grand jury who was, at the time either of the charged acts or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is then available to the attorney for the government.

~~(b) - OTHER - BOOKS, - PAPERS, - DOCUMENTS, - TANGIBLE OBJECTS - OR - PLACES, -~~

(C) Documents and Tangible Objects. Upon
~~motion of a~~ request of the defendant the court
~~may order the attorney for the~~ government to shall
permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies

or portions thereof, which are within the possession, custody or control of the government, ~~upon-a-showing-of-materiality~~ and which are material to the preparation of his defense; ~~and that-the-request-is-reasonable;~~ or are intended for use by the government as evidence at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests.

Upon ~~motion~~ request of a defendant the ~~court~~ may-order-the-attorney-for-the government shall ~~be~~ permit the defendant to inspect and copy or photograph any (2) results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(E) Government Witnesses. Upon request of the defendant the government shall furnish to the defendant a written list of the names and

addresses of all government witnesses which the attorney for the government intends to call at the trial together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government. When a request for discovery of the names and addresses of witnesses has been made by a defendant, the government shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of rule 15.

(2) Information Not Subject to Disclosure. Except as provided in ~~subdivision-(a)(2)~~ paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

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

(4) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

~~(e) - DISCOVERY BY THE GOVERNMENT.~~

(b) DISCLOSURE OF EVIDENCE BY THE DEFENDANT.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion request of the government, condition its order by requiring that the defendant shall permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within his the possession, custody or control of the defendant, upon a showing of materiality to the preparation

~~of the government's case and that the request is~~
reasonable and which the defendant intends to
~~produce~~ introduce in evidence at the trial.

(B) Reports of Examinations and Tests.

Upon motion request of the government, the
defendant shall permit the government to inspect
and copy or photograph any results or reports of
physical or mental examinations and of scientific
tests or experiments made in connection with the
particular case, or copies thereof, within the
possession or control of the defendant, which the
defendant intends to introduce in evidence at
the trial or which were prepared by a witness
whom the defendant intends to call at the trial
when the results or reports relate to his
testimony.

(C) Defense Witnesses. Upon request of
the government, the defendant shall furnish the
government a list of the names and addresses of
the witnesses he intends to call at the trial.
When a request for discovery of the names and
addresses of witnesses has been made by the
government, the defendant shall be allowed to
perpetuate the testimony of such witnesses in
accordance with the provisions of rule 15.

(2) Information Not Subject to Disclosure.

Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(3) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.

(c) ~~(g)~~ CONTINUING DUTY TO DISCLOSE. If, ~~subsequent to compliance with an order issued pursuant to this rule,~~ and prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, he shall promptly notify the other party or his attorney or the court of the existence of the additional material or witness.

(d) REGULATION OF DISCOVERY.

(1) ~~(e)~~ Protective Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon ~~motion~~ request by ~~the-government~~ a party the court may shall permit ~~the-government~~ the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the ~~court-in~~ camera judge alone. If the court enters an order granting relief following such a showing, ~~in-camera~~; the entire text of the ~~government's~~ party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal ~~by-the-defendant~~.

(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, ~~or-with-an-order issued-pursuant-to-this-rule~~; the court may order such party to permit the discovery or inspection, ~~of materials-not-previously-disclosed~~; grant a continuance, or prohibit the party from introducing ~~in~~ evidence

~~the material~~ not disclosed, or it may enter such other order as it deems just under the circumstances.

~~Time; -Place-and-Manner-of-Discovery-and-Inspection.~~

~~An-order-of-~~ The court granting relief under this rule shall may specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

~~(f)-Time-of-Motions:--A-motion-under-this-rule-may be-made-only-within-10-days-after-arraignment-or-at-such reasonable-later-time-as-the-court-may-permit.--The motion-shall-include-all-relief-sought-under-this-rule. A-subsequent-motion-may-be-made-only-upon-a-showing-of cause-why-such-motion-would-be-in-the-interest-of-justice.~~

ADVISORY COMMITTEE NOTE

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43-46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the defendant shall permit." This is to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable or a request for a protective order under subdivision (d)(1). The court, however, has the inherent right to enter an order under this rule.

The rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases. For example, subdivision (a)(3) is not intended to deny a judge's discretion to order disclosure of grand jury minutes where circumstances make it appropriate to do so.

Subdivision (a)(1)(A) amends the old rule to provide, upon request of the defendant, the government shall permit discovery if the conditions specified in subdivision (a)(1)(A) exist. Some courts have construed the current language as giving the court discretion as to whether to grant discovery of defendant's

statements. See *United States v. Kaminsky*, 275 F. Supp. 365 (S.D.N.Y. 1967), denying discovery because the defendant did not demonstrate that his request for discovery was warranted; *United States v. Diliberto*, 264 F. Supp. 181 (S.D.N.Y. 1967), holding that there must be a showing of actual need before discovery would be granted; *United States v. Louis Carreau, Inc.*, 42 F.R.D. 408 (S.D.N.Y. 1967), holding that in the absence of a showing of good cause the government cannot be required to disclose defendant's prior statements in advance of trial. In *United States v. Louis Carreau, Inc.* at p. 412, the court stated that if rule 16 meant that production of the statements was mandatory, the word "shall" would have been used instead of "may." See also *United States v. Wallace*, 272 F. Supp. 838 (S.D.N.Y. 1967); *United States v. Wood*, 270 F. Supp. 963 (S.D.N.Y. 1967); *United States v. Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967); *United States v. Longarzo*, 43 F.R.D. 395 (S.D.N.Y. 1967); *Louz v. United States*, 389 F. 2d 911 (9th Cir. 1968); and the discussion of discovery in *Discovery in Criminal Cases*, 44 F.R.D. 481 (1968). Other courts have held that even though the current rules make discovery discretionary, the defendant need not show cause when he seeks to discover his own statements. See *United States v. Aadal*, 280 F. Supp. 859 (S.D.N.Y. 1967); *United States v. Federman*, 41 F.R.D. 339 (S.D.N.Y. 1967); and *United States v. Projansky*, 44 F.R.D. 550 (S.D.N.Y. 1968).

The amendment making disclosure mandatory under the circumstances prescribed in subdivision (a)(1)(A) resolves such ambiguity as may currently exist, in the direction of more liberal discovery. See C. Wright, *Federal Practice and Procedure: Criminal* § 253 (1969, Supp. 1971), *Rezneck, The New Federal Rules of Criminal Procedure*, 54 *Geo. L.J.* 1276 (1966); *Fla. Stat. Ann.* § 925.05 (Supp. 1971-1972); *N.J. Crim. Prac. Rule 35-11(a)* (1967). This is done in the view that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea; by minimizing the undesirable effect of surprise at the trial; and by otherwise contributing to an accurate determination of the issue of guilt or innocence. This is the ground upon which the American Bar Association Standards

Relating to Discovery and Procedure Before Trial
(Approved Draft, 1970)

has unanimously recommended broader discovery. The United States Supreme Court has said that the pretrial disclosure of a defendant's statements "may be the better practice." *Cicenia v. Layay*, 357 U.S. 504, 511 (1958). See also *Leland v. Oregon*, 343 U.S. 790 (1952); *State v. Johnson*, 28 N.J. 133, 145 A.2d 313 (1958).

The requirement that the statement be disclosed prior to trial, rather than waiting until the trial, also contributes to efficiency of administration. It is during the pretrial stage that the defendant usually decides whether to plead guilty. See *United States v. Projansky*, *supra*. The pretrial stage is also the time during which many objections to the admissibility of types of evidence ought to be made. Pretrial disclosure ought, therefore, to contribute both to an informed guilty plea practice and to a pretrial resolution of admissibility questions. See ABA, Standards Relating to Discovery and Procedure Before Trial § 1.2 and Commentary pp. 40-43

(Approved Draft, 1970).

The American Bar Association Standards mandate the prosecutor to make the required disclosure even though not requested to do so by the defendant. The proposed draft requires the defendant to request discovery, although obviously the attorney for the government may disclose without waiting for a request, and there are situations in which due process will require the prosecution, on its own, to disclose evidence "helpful" to the defense. *Prady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967).

The requirement in subdivision (a) (1) (A) is that the government produce "statements" without further discussion of what "statement" includes. There has been some recent controversy over what "statements" are subject to discovery under the current rule. See *Discovery in Criminal Cases*, 44 F.R.D. 481 (1968); C. Wright, *Federal Practice and Procedure: Criminal* § 253, pp. 505-506 (1969, Supp. 1971). The kinds of "statements" which have been held to be within the rule include "substantially verbatim and contemporaneous" statements, *United States v. Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967); statements which reproduce the defendant's "exact words," *United States v. Armantrout*, 278 F. Supp. 547 (S.D.N.Y. 1968); a memorandum which was not verbatim but included the substance of the defendant's testimony, *United States v. Scharf*, 267 F. Supp. 19 (S.D.N.Y. 1967); summaries of the defendant's statements, *United States v. Morrison*, 43 F.R.D. 616 (N.D. Ill. 1967); and statements discovered by means of electronic surveillance, *United States v. Black*, 262 F. Supp. 35 (D.D.C.

The court in *United States v. Jovaneli*, 216 F. Supp. 211 (N.D. Ill. 1967), declared that "statements" as used in the old rule 16 is not restricted to the "verbatim recital of an oral statement" or to "statements which are a 'recital of past occurrences.'"

18 U.S.C. §3500,

The Jencks Act defines "statements" of government witnesses discoverable for purposes of cross-examination as: (1) "a written statement" signed or otherwise approved by a witness; (2) "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness in the presence of the government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. §3500 (c). The language of the Jencks Act has most often been given a restrictive definition of "statements," confining "statements" to the defendant's "own words." See *Hanks v. United States*, 388 F.2d 171 (10th Cir. 1968), and *Augenblick v. United States*, 377 F.2d 556 (Cl. Ct. 1967).

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970) do not

attempt to define "statements" because of a disagreement among members of the committee as to what the definition should be. The majority rejected the restrictive definition of "statements" contained in the Jencks Act, 18 U.S.C. §3500(c), in the view that the defendant ought to be able to discover in whatever form it may have been recorded statements made to the defendant and to discourage the practice, where it exists, of destroying original notes, after transcribing them into secondary transcriptions, in order to avoid cross-examination based upon the original notes. See *United States v. United States*, 373 U.S. 487 (1963). The majority rejected a restrictive definition of "statements" in order to prevent the use of other than "verbatim" statements to subject witnesses to unfair cross-examination. See American Bar Association's Standards Relating to Discovery and Procedure Before Trial pp. 61-64

(Approved Draft, 1970). The draft of Rule 16(d)(1)(A) leaves the matter of the meaning of the term "statements" thus left for development on a case-by-

case basis. Rule 16(d)(1)(A) also provides for mandatory disclosure of the substance of any oral statement made by defendant to a government agent which the attorney for the government has discovered in evidence. The reasons for permitting the government to discover his own statements seem obviously to be the substance of any oral statement which the government intends to use in evidence at the trial. See American Bar Association Standards Relating to Discovery

and Procedure Before Trial §2.1 (a)(ii) (Approved Draft, 1970). Certainly disclosure will facilitate the raising of objections to admissibility prior to trial. There have been several conflicting

decisions under the current rules as to whether the government must disclose the substance of oral statements of the defendant which it has in its possession. *Cf. United States v. Baker*, 262 F. Supp. 657 (D.D.C. 1966); *United States v. Curry*, 278 F. Supp. 508 (N.D. Ill. 1967); *United States v. Morrison*, 43 F.R.D. 516 (N.D. Ill. 1967); *United States v. Reid*, 43 F.R.D. 520 (N.D. Ill. 1967); *United States v. Armantrout*, 278 F. Supp. 517 (S.D.N.Y. 1968); and *United States v. Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967). There is, however, considerable support for the policy of disclosing the substance of the defendant's oral statement. Many courts have indicated that this is a "better practice" than denying such disclosure. *E.g., United States v. Curry, supra; Louz v. United States*, 389 F.2d 911 (9th Cir. 1968); and *United States v. Baker, supra*.

Subdivision (a)(1)(A) also provides for mandatory disclosure of any "recorded testimony" which defendant gives before a grand jury if the testimony "relates to the offense charged." The present rule is discretionary and is applicable only to those of defendant's statements which are "relevant."

The traditional rationale behind grand jury secrecy—protection of witnesses—does not apply when the accused seeks discovery of his own testimony. *Cf. Dennis v. United States*, 381 U.S. 855 (1966); and *Allen v. United States*, 390 F. 2d 476 (D.C. Cir. 1963). In interpreting the rule many judges have granted defendant discovery without a showing of need or relevance. *United States v. Glavin*, 259 F. Supp. 262 (S.D.N.Y. 1966); *United States v. Leitz*, 43 F.R.D. 395 (S.D.N.Y. 1967); and *United States v. United Concrete Pipe Corp.*, 41 F.R.D. 538 (N.D. Tex. 1966).

Making disclosure mandatory without a showing of relevance conforms to the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1 (a)(iii) and Commentary pp. 64-66 (Approved Draft, 1970). Also see Note, *Discovery by a Criminal Defendant of His Own Grand-Jury Testimony*, 68 Columbia L. Rev. 311 (1968).

In a situation involving a corporate defendant, statements made by present and former officers and employees relating to their employment have been held discoverable

as statements of the defendant. United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969). The rule makes clear that such statements are discoverable if the officer or employee was "able legally to bind the defendant in respect to the activities involved in the charges."

Subdivision (a)(1) (B) allows discovery of the defendant's prior criminal record. A defendant may be uncertain of the precise nature of his prior record and it seems therefore in the interest of efficient and fair administration to make it possible to resolve prior to trial any disputes as to the correctness of the relevant criminal record of the defendant.

Subdivision (a)(1) (C) gives a right of discovery of certain tangible objects under the specified circumstances. Courts have construed the old rule as making disclosure discretionary with the judge.

Cf. United States v. Kaminsky, 275 F. Supp. 365 (S.D.N.Y. 1967); Gerinson v. United States, 358 F. 2d 761 (5th Cir. 1966), cert. denied, 385 U.S. 823 (1966); and United States v. Tanner, 279 F. Supp. 457 (N.D. Ill. 1967). The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object at the trial, or (c) the document or tangible object was obtained from or belongs to the defendant.

Disclosure of documents and tangible objects which are "material" to the preparation of the defense may be required under the rule of Brady v. Maryland, 373 U.S. 83 (1963), without an additional showing that the request is "reasonable." In Brady the court held that "due process" requires that the prosecution disclose evidence favorable to the accused. Although the Advisory Committee decided not to codify the Brady rule, the requirement that the government disclose documents and tangible objects "material to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason sub-

division (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial §2.1 (a)(v) and Commentary pp. 68-69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the

physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal § 254 especially n. 70 at p. 513 (1969, Supp.1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal §254 at p. 510 especially n. 58 (1969, Supp.1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial §2.1 (a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial §2.1 (a)(iv) and Commentary pp. 66-68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to test expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandated under the rule of *Brady v. Maryland, supra*.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of those witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, e.g., Alaska R. Crim. Proc. 7 (c); Ariz. R. Crim. Proc. 153 (1956); Ark. Stat. Ann. § 43: 1001 (1947); Cal. Pen. Code § 995 (n) (West 1957); Colo. Rev. Stat. Ann. §§ 39-3-6, 39-4-2 (1963); Fla. Stat. Ann. § 906.29 (1944); Idaho Code Ann. § 19-1404 (1948); Ill. Rev. Stat. ch. 38, § 114-9 (1970); Ind. Ann. Stat. § 9-903 (1956); Iowa Code Ann. § 772.3 (1950); Kan. Stat. Ann. § 62-931 (1964); Ky. R. Crim. Proc. 6.08 (1962); Mich. Stat. Ann. § 28.980 (Supp. 1971); Minn. Stat. Ann. § 628.08 (1947); Mo. Ann. Stat. § 545.070 (1953); Mont. Rev. Codes Ann. § 95-1503 (Supp. 1969); Neb. Rev. Stat. § 29-1602 (1964); Nev. Rev. Stat. § 173.015 (1967); Okla. Stat. tit. 22, § 384 (1951); Ore. Rev. Stat. § 132.550 (1939); Tenn. Code Ann. § 40-1708 (1955); Utah Code Ann. § 77-20-3 (1953). For examples of the ways in which these requirements are implemented, see *State v. Mitchell*, 181 Kan. 193, 310 P.2d 1063 (1957); *State v. Parr*, 129 Mont. 175, 283 P.2d 1086 (1955); *Phillips v. State*, 157 Neb. 419, 59 N.W.2d 59S (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial; 18 U.S.C. § 3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial § 2.1 (a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating

to Discovery and Procedure Before Trial
§2.1 (a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal cases, 44 F.R.D. 481, 499-500 (1968); Ratnoff, *The New Criminal Deposition Statute in Ohio-- Help or Hindrance to Justice?*, 19 Case Western Reserve L. Rev. 279, 284 (1968). See, e.g., *United States v. Estep*, 151 F. Supp. 668, 672-673 (N.D.Tex. 1957):

Ninety per cent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter.

See also the dissenting opinion of Mr. Justice Clark in *Roviano v. United States*, 353 U.S. 53, 66-67 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. *Bergen Drug Co. v. Parke, Davis & Company*, 307 F.2d 725 (3d Cir. 1962); and *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Discovery and Procedure Before Trial §2.5 (b) (Approved Draft, 1970). It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not disclose "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case" or "statements made by government witnesses or prospective government witnesses to agents of the government." The only proposed change is that the "reports, memoranda, or other internal government documents made by the attorney for the government" are included to make clear that the work product of the government attorney is protected. See C. Wright, *Federal Practice and Procedure: Criminal* §254 n.92 (1969, Supp. 1971); United States v. Rothman, 179 F. Supp. 935 (W.D.Pa. 1959); Note, "Work Product" in *Criminal Discovery*, 1966 Wash.U. L.Q. 321; American Bar Association, *Standards Relating to Discovery and Procedure Before Trial* §2.6 (a) (Approved Draft, 1970); cf. Hickman v. Taylor, 329 U.S. 495 (1947). Brady v. Maryland, 373 U.S. 83 (1963), requires the disclosure of evidence favorable to the defendant. This is, of course, not changed by this rule.

Subdivision (a)(3) is included to make clear that recorded proceedings of a grand jury are explicitly dealt with in rule 6 and subdivision (a)(1)(A) of rule 16 and thus are not covered by other provisions such as subdivision (a)(1)(C) which deals generally with discovery of documents in the possession, custody, or control of the government.

Subdivision (a)(4) is designed to insure that the government will not be penalized if it makes a full disclosure of all potential witnesses and then decides not to call one or more of the witnesses listed. This is not, however, intended to abrogate the defendant's right to comment generally upon the government's failure to call witnesses in an appropriate case.

Subdivision (b) deals with the government's right to discovery of defense evidence or, put in other terms, with the extent to which a defendant is required to disclose its evidence to the prosecution prior to trial. Subdivision (b) replaces old subdivision (c).

Subdivision (b) enlarges the right of government discovery in several ways: (1) it gives the government the right to discovery of lists of defense witnesses as well as physical evidence and the results of examinations and tests; (2) it requires disclosure if the defendant has the evidence under his control and intends to use it at trial, without the additional burden, required by the old rule, of having to show, in behalf of the government, that the evidence is material and the request reasonable; and (3) it gives the government the right to discovery without conditioning that right upon the existence of a prior request for discovery by the defendant.

Although the government normally has resources adequate to secure much of the evidence for trial, there are situations in which pretrial disclosure of evidence to the government is in the interest of effective and fair criminal justice administration. For example, the experimental "omnibus hearing" procedure (see discussion in Advisory Committee Note to rule 12) is based upon an assumption that the defendant, as well as the government, will be willing to disclose evidence prior to trial.

Having reached the conclusion that it is desirable to require broader disclosure by the defendant under certain circumstances, the Advisory Committee has taken the view that it is preferable to give the right of discovery to the government independently of a prior request for discovery by the defendant. This is the recommendation of the American Bar Association Standards Relating to Discovery and Procedure Before Trial, Commentary, pp. 43-46 (Approved Draft, 1970). It is sometimes asserted that making the government's right of discovery conditional will minimize the risk that government discovery will be viewed as an infringement of the defendant's constitutional rights. See discussion in C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971); Moore, Criminal Discovery, 10 Hastings L.J. 865

(1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am. Cr. L.Q. 3 (1967). There are assertions that prosecution discovery, even if conditioned upon the defendant's being granted discovery, is a violation of the privilege. See statements of Mr. Justice Black and Mr. Justice Douglas, 39 F.R.D. 69, 272, 277-278 (1966); C. Wright, Federal Practice and Procedure: Criminal § 256 (1969, Supp. 1971). Several states require defense disclosure of an intended defense of alibi and, in some cases, a list of witnesses in support of an alibi defense, without making the requirement conditional upon prior discovery being given to the defense. *E.g.*, Ariz. R. Crim. P. 192 (B) (1956); Ind. Ann. Stat. § 9-1631-33 (1956); Mich. Comp. Laws Ann. §§ 768.20, 768.21 (1968); N.Y. CPL § 250.20 (McKinney 1971); and Ohio Rev. Code Ann. § 2945.58 (1954). State courts have refused to hold these statutes violative of the privilege against self-incrimination. See *State v. Thayer*, 124 Ohio St. 1, 176 N.E. 656 (1931), and *People v. Rakice*, 260 App. Div. 452, 23 N.Y.S. 2d 607, aff'd, 289 N.Y. 306, 45 N.E. 2d 812 (1942). See also rule 12.1 and Advisory Committee Note thereto.

Some state courts have held that a defendant may be required to disclose, in advance of trial, evidence which he intends to use on his own behalf at trial without violating the privilege against self-incrimination. See *Jones v. Superior Court of Nevada County*, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P. 2d 919 (1962); *People v. Lopez*, 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P. 2d 16 (1963); Comment, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif. L. Rev. 135 (1963); Note, 76 Harv. L. Rev. 838 (1963). The court in *Jones v. Superior Court of Nevada County*, *supra*, suggests that if mandatory disclosure applies only to those items which the accused intends to introduce in evidence at trial, neither the incriminatory nor the involuntary aspects of the privilege against self-incrimination are present.

On balance the Advisory Committee is of the view that an independent right of discovery for both the defendant and the government is likely to contribute to both effective and fair administration. See Louiseli, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53

Calif. L. Rev. 89 (1965), for an analysis of the difficulty of weighing the value of broad discovery against the value which inheres in not requiring the defendant to disclose anything which might work to his disadvantage.

Subdivision (b)(1)(A) provides that the court shall order pretrial disclosure of any documents and tangible objects which the defendant has in his possession, custody, or control and which he intends to introduce in evidence at the trial.

Subdivision (b)(1)(B) provides that the court must grant the government discovery of the results of physical or mental examinations and scientific tests or experiments if (a) they were made in connection with a particular case; (b) the defendant has them under his control; and (c) he intends to offer them in evidence at the trial or which were prepared by a defense witness and the results or reports relate to the witness's testimony. In cases where both prosecution and defense have employed experts to conduct tests such as psychiatric examinations, it seems as important for the government to be able to study the results reached by defense experts which are to be called by the defendant as it does for the defendant to study those of government experts. See Schultz, *Criminal Discovery by the Prosecution: Frontier Developments and Some Proposals for the Future*, 22 N.Y.U. Intra. L. Rev. 268 (1967); American Bar Association, *Standards Relating to Discovery and Procedure Before Trial* §3.2 (Supp., Approved Draft, 1970).

Subdivision (b)(1)(C) provides for discovery of a list of witnesses the defendant intends to call at trial upon motion of the government. State cases have indicated that disclosure of a list of defense witnesses does not violate the defendant's privilege against self-incrimination. See *Jones v. Superior Court of Nevada County*, *supra*, and *People v. Lopez*, *supra*. The defendant has the same option as does the government if it is believed that disclosure of the identity of a witness may subject that witness to harm or a threat of harm. The defendant can ask for a protective order under subdivision (d)(1) or can take a deposition in accordance with the terms of rule 15.

Subdivision (b)(2) is unchanged, appearing as the last sentence of subdivision (c) of old rule 16.

Subdivision (b)(3) provides that the defendant's failure to introduce evidence or call witnesses shall not be admissible in evidence against him. In states which require pretrial disclosure of witnesses' identity, the prosecution is

not allowed to comment upon the defendant's failure to call a listed witness. See *O'Connor v. State*, 31 Wis. 2d 684, 143 N.W. 2d 489 (1966); *People v. Mancini*, 6 N.Y. 2d 853, 160 N.E. 2d 91 (1959); and *State v. Cocco*, 73 Ohio App. 182, 55 N.E. 2d 430 (1943). This is not, however, intended to abrogate the government's right to comment generally upon the defendant's failure to call witnesses in an appropriate case, other than the defendant's failure to testify.

Subdivision (c) is a restatement of part of old rule 16 (g).

Subdivision (d)(1) deals with the protective order. Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed. See *Will v. United States*, 389 U.S. 90 (1967). The

language "by the judge alone" is not meant to be inconsistent with *Alderman v. United States*, 394 U.S. 165 (1969). In *Alderman* the court points out that there may be appropriate occasions for the trial judge to decide questions relating to pretrial disclosure. See *Alderman v. United States*, 394 U.S. at 182 n.14.

Subdivision (d)(2) is a restatement of part of old rule 16 (g) and (d).

Old subdivision (f) of rule 16 dealing with time of motions is dropped because rule 12(c) provides the judge with authority to set the time for the making of pretrial motions including requests for discovery. Rule 12 also prescribes the consequences which follow from a failure to make a pretrial motion at the time fixed by the court. See rule 12(f).

V.

Amendments intended to conform the rules
to the Federal Magistrates Act, 18 U.S.C. § 3103a,
the decision in *Warden v. Hayden*, 387 U.S. 294 (1967)
and other Supreme Court decisions

Rule 41. Search and Seizure

VI.

Other amendments

Rule 4. Arrest Warrant or Summons Upon Complaint

- (a) Issuance of a Summons
- (b) Issuance of an Arrest Warrant
- (c) Probable Cause
- (d) Form
- (e)

Rule 9. Warrant or Summons Upon Indictment or Information

- (a) Issuance

Rule 11. Pleas

Rule 12. Pleadings and Motions Before Trial;
Defenses and Objections

Rule 12.1. Notice of Alias

Rule 12.2. Notice of Insanity

Rule 15. Depositions

Rule 16. Discovery and Inspection

Rule 17. Subpoena

* * *

(1)

* * *

(2) Place

Rule 20. Transfer from the District for Plea and
Sentence

MINUTES OF THE MEETING OF THE
ADVISORY COMMITTEE ON THE FEDERAL
CRIMINAL RULES HELD AT THE
LAFAYETTE BUILDING, ROOM 638,
WASHINGTON, D.C., ON FRIDAY,
JANUARY 14 AND SATURDAY, JANUARY
15, 1972

PRESENT:

Hon. J. Edward Lumbard, Chairman
Joseph A. Ball, Esq.
Hon. R. Ammi Cutter
Robert S. Erdahl, Esq.
William E. Foley, Esq.
Hon. Gerhard A. Gesell
Hon. Walter E. Hoffman
Harold D. Koffsky, Esq.
Hon. Albert B. Maris
Hon. Leland C. Nielsen
Professor Frank R. Remington, Reporter
Hon. Roger Robb
Barnabas F. Sears, Esq.
Hon. Russell E. Smith
Professor James Vorenberg (absent Saturday)
Hon. William H. Webster
Hon. Joseph Weintraub
Franklin D. Kramer, Secretary

ABSENT:

Hon. Frank M. Johnson, Jr.
Hon. Wade H. McCree, Jr.
Henry E. Peterson, Esq.

Rule 6 was then approved.

Rule 9 was approved.

Rule 12 was approved with the caveat that the Note make clear that decision by the trial judge on grand jury motions may be deferred until after the trial.

Rule 16. In Rule 16(a)(1)(v), the need to define "unavailable" arose. It was agreed that the definition should be consistent with the definitions used in Rule 15 and in the proposed Rules of Evidence. Determination of the precise place to put the definition was deferred until it was decided whether Rule 15 would be accepted.

The question was raised whether Rule 16 provided for the maximum amount of discovery allowable or merely prescribed a minimum. For instance, could a trial judge order the government attorney to turn over the grand jury minutes to the defendant? It was unanimously agreed that Rule 16 provided only a minimum, i.e., what the defendant can demand of right, and that the rule was not intended to restrict the trial judge's power to order broader discovery in appropriate cases. It was agreed that the Note should reflect this sentiment and in particular that 16(a)(3) was not intended to restrict the trial judge's discretion to make disclosure of grand jury minutes in appropriate cases.

Rule 16(b)(1)(ii) and (iii) were amended to read "shall" in place of "may."

Rule 16(a)(4) was amended to read "shall" instead of "may." In response to Judge Robb's question, it was pointed out that the protective order provision, 16(d) was available, in appropriate cases, to restrict discovery. It was agreed that the Note should point out the type of cases in which protective orders might be appropriate.

Mr. Erdahl raised the question whether 16(d)(2) and 16(d)(3) ought to be transposed. The necessity of including 16(d)(2) at all was considered since 16(d)(3) authorizes the court to make "other order[s] as it deems just." It was agreed that 16(d)(2) should be deleted as a separate paragraph and, with "shall" changed to "may," added as a clause to 16(d)(3).

The title of Rule 16(a)(2) was changed to "Information Not Subject to Disclosure."

Rule 16 was then approved.

Rule 17 was approved.

Rule 20 was approved.

Rule 29.1 was approved after the words "be permitted to" had been stricken.

MINUTES OF MEETING OF THE ADVISORY
COMMITTEE ON THE FEDERAL CRIMINAL
RULES HELD AT THE LAFAYETTE BUILDING,
ROOM 442, WASHINGTON, D.C., ON
FRIDAY, SEPTEMBER 24 AND SATURDAY,
SEPTEMBER 25, 1971.

PRESENT:

Hon. J. Edward Lumbard, Chairman
Joseph A. Ball, Esq.
Robert S. Erdahl, Esq.
Hon. Gerhard A. Gesell
Hon. Walter E. Hoffman
Harold Koffsky, Esq.
Hon. Wade H. McCree, Jr.
Hon. Leland C. Nielsen
Hon. Russell E. Smith
Professor James Vorenberg
Hon. William H. Webster
Hon. Joseph Weintraub
Will Wilson, Esq.
Professor Frank J. Remington, Reporter

Absent: *Judge ALBERT B. MARIS*

Hon. Frank M. Johnson, Jr.
Hon. Roger Robb
Hon. Walter V. Schaefer
Barnabas F. Sears, Esq.

Chief Justice Warren Burger made some introductory remarks and the committee then began consideration of the proposed Rules amendments.

Rule 45

Rule 45 has to do with the prompt disposition of criminal cases. Professor Remington said that the great majority of comments favored some rule, though the responses were equally divided between a flexible or

Rule 16

All members of the committee felt that the government as well as the defendant should have independent discovery rights. The question whether independent government discovery violated a defendant's rights was raised but it was unanimously agreed that Rule 16 would not violate a defendant's Fourth and Fifth Amendments rights. Thus the alternative draft of Rule 16 was rejected.

The committee felt that defendant discovery under Rule 16(a) should proceed on request rather than under court order. Accordingly the language of the rule was changed in Rule 16(a)(i), (iii), (iv) and (v) to read, "Upon request of a defendant, the government shall permit the defendant to ..." This is in contrast to 16(a)(vi) where discretion was left with the court. It was decided that while the content of lines 77-82 ought to be maintained in the notes, this sentence could be dropped from the text as the protective order provision, Rule 16(d)(1), was adequate.

A further change in 16(a)(1) at line 20, after "person" insert "then."

The committee unanimously approved Rule 16(a)(1) and (2).

Action on 16(a)(3) was postponed until the January meeting .

16(a)(4) was approved, with the following changes. In line 114 "subdivision (a)(i)(vi) of" was deleted and in line 116 "commented upon" was replaced by "grounds for comment upon failure to call a witness."

[The Friday meeting adjourned at 6:00 P.M.
and resumed Saturday morning at 9:00 A.M.]

Professor Blakey, counsel to the Senate Committee on the Judiciary, was present by invitation to discuss the rules regarding criminal forfeiture.

Criminal Forfeiture

Criminal Forfeiture affects Rules 7(c)(3), 31, 32 and 54.

Professor Blakey explained criminal forfeiture as allowing the government to recover all property in which a defendant had acquired a possessory interest as a fruit of his criminal activities. In contrast, civil forfeiture involves all property used illegally as a means of implementation of the crime. In a criminal forfeiture case, the issues before the jury would be ownership and the relationship to illegal activity. Usually the illegal activity will be proved in the case in chief and the government will then only have to prove ownership. A

A verdict binds only the defendant and the government. It was agreed to amend Rule 32, Note, to indicate that the authority of seizure is limited to the government's interest.

Rules 7(c) (3), 31, 32 and 54 were unanimously approved.

The committee then resumed its consideration of the Rule proposals of January, 1970.

Rule 16

Rule 16(b) was rediscussed and all were in agreement that an independent right of discovery was preferable. The Reporter was designated to make the necessary editorial changes to provide for discovery upon request of the government.

Rule 16(b) (iii), line 152 "shall" was changed to "may" to give the court discretion.

Rule 16(b) (2) was to be revised by the Reporter to agree with the revision of Rule 16(a) (4).

Rule 16(d) (1), line 196, "may" was changed to "shall."

Rule 17

Rule 17 was unanimously approved.

Rule 20

Rule 20 was unanimously approved.

MINUTES OF THE JANUARY 6-8, 1969 MEETING OF THE
ADVISORY COMMITTEE ON CRIMINAL RULES

The eleventh meeting of the Advisory Committee on Criminal Rules convened in the Conference Room of the Administrative Offices of the United States Courts, 725 Madison Place, N.W., Washington, D.C. on January 6, 1969 at 10:00 a.m. and adjourned at 2:00 p.m. on January 8, 1969. The following members of the Committee were present during all or part of the sessions:

John C. Pickett, Chairman
Joseph A. Ball
Edward L. Barrett, Jr.
George R. Blue
George C. Edwards (absent on Wednesday)
Walter E. Hoffman (absent on Wednesday)
Frank M. Johnson, Jr. (New Member)
Robert W. Meserve (absent on Wednesday)
Maynard Pirsig
Fred M. Vinson, Jr. (absent on Wednesday)
Alfonso J. Zirpoli
Frank J. Remington, Reporter

Mr. Sears was working on a trial and was unable to attend. Others attending all or part of the sessions were Honorable Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Harold K. Koffsky, Chief of Legislation and Special Projects Section, Criminal Division, Department of Justice; Mr. William E. Foley, Secretary, Advisory Committees on Rules of Practice and Procedure; Mr. Carl H. Imlay, General Counsel, Administrative Offices of the United States Courts.

Judge Pickett called the meeting to order and welcomed the members and guests. In particular, he welcomed Judge Frank M. Johnson, Jr. as a new member.

Professor Remington stated there were three objectives of the meeting: the first and most important, whether the committee felt some rules should be circulated, in particular, Rules 4, 5, 12, 16, 41 and 45; the second, whether the new terminology necessitated by the Federal Magistrates Act should be used throughout the rules; and the third, whether interim rules for the trials of minor offenses should be adopted.

RULE 12

The reporter explained the changes which were made to Rule 12 pursuant to suggestions made at the September-October 1968 meeting. One important change is to limit Rule 12 (as it requires the government to give notice) to situations in which the defendant would have a right to discovery under Rule 16.

Judge Hoffman moved the approval of Rule 12 as drafted. He amended his motion after further consideration of subdivision (c) Motion Date. He felt the second and third sentences were unnecessary. He then moved the adoption of Rule 12 with the deletion of the second and third sentences of subdivision (c). Before a formal vote was taken, Judge Johnson questioned the language of subdivision (g) Records. Judge Edwards agreed and suggested placing a semicolon after "hearing", and "shall be" preceding "made", and adding "under (b)(3) and (b)(5)" at the end of the subdivision. He wanted the subsection limited to its title Records. It was suggested by the reporter that the subsection read: "A verbatim record shall be made of all proceedings at the hearing including such findings of fact and conclusions of law as are made orally." Dean Barrett moved approval of the reporter's suggestion. The motion carried. It was then suggested the subdivision be rewritten as: "A verbatim record shall be made of all proceedings at the hearing; and, where factual issues are involved in determining a motion, the court shall state the essential findings." The subsection was preferred by the members. The motion to delete the last two sentences of subdivision (c) carried. Judge Johnson moved the deletion of subdivision (h). When present Rule 12(b)(5) of the Federal Rules of Criminal Procedure was read aloud, he withdrew his motion. It was moved and carried to adopt Rule 12 as amended.

RULE 16

A discussion was held on the desirability of granting discovery to a statement given to "any" government agent. In conspiracy cases, the government agent may have been an undercover or "special" agent (informant). The reporter stated that "government agent" could be limited to a government agent who questions a defendant.

Judge Edwards was against the phrase "intends to offer in evidence at the trial". Mr. Vinson stated until the rebuttal stage of the argument or trial, the attorneys do not know what is intended to be used. Judge Edwards suggested that disclosure be limited to an oral statement which the prosecution intended to offer with some recognition that there can be surprises that come out in the course of the trial with relation to such matters. Mr. Meserve stated Rule 16.2 contained this stipulation. Mr. Vinson moved the deletion of Rule 16(a)(1)(ii). The motion carried by a vote of 5 for and 3 against. Mr. Meserve suggested amending Rule 16(a)(1)(ii) by adding at the end "in the course of formal interrogation". The word "formal" being used was intended to exclude "informants". Dean Barrett wanted "whether before or after arrest" inserted. He moved "formal" be stricken. Professor Remington repeated the pending motion: "(ii) the substance of any oral statement made by the defendant in response to interrogation by any government agent whether before or after the arrest which the government intends to offer in evidence at the trial". It was discussed the "government agent" should be known. The proposed subsection was amended to read: "the substance of any oral statement made by the defendant in response to interrogation by any person known to the defendant in response to interrogation by any person known to the defendant to be a government agent whether before or after arrest which the government intends to offer in evidence at the trial;". It was decided "before or after arrest" should follow "any oral statement made". The motion carried. Judge Edwards suggested the reporter include in the Note the purpose of subdivision (ii) as being to specifically exclude from the requirement of "disclosure", informants. Judge Zirpoli moved Rule 16(a)(1) and (2) be adopted as amended. The motion carried. There was a motion to approve Rule 16(a)(3). The motion carried. It was stated the changes which were made with respect to subsection (a)(1) would apply to subsection (a)(2). Mr. Meserve moved the approval of subsection (a)(4). The reporter suggested "or" be used as a conjunction between subdivisions (i) and (ii). This was agreeable.

[At this point, 5:05 p.m., the meeting adjourned until 9:00 a.m. January 7, 1969.]

Judge Pickett opened the meeting announcing that his term as chairman and as a member of the committee expires after this meeting.

With regard to Rule 16(5) Order to Inspect Building or Place, it was decided the committee should leave "property rights" alone. Mr. Meserve moved "buildings and places" be reinstated in subdivision (4) and that subdivision (5) be stricken. The motion carried.

The reporter stated subdivision (6) Reports of Examinations and Tests was basically the current rule except it is made mandatory. The current rule read "The court may . . ." Mr. Meserve moved the adoption of subdivision (6), which becomes subdivision (5). The motion carried.

In discussing subdivision (7), which becomes (6), Government Witnesses, the reporter suggested striking "in rebuttal" in the last sentence. This was agreeable with the members.

With regard to rule 16(a)(6), it was suggested that "or others to physical or substantial economic harm" be inserted after "may subject the witness". It was suggested "or coercion or the threat thereof" be added. After discussion, Judge Hoffman moved it read: "or others to physical or substantial economic harm or coercion." The motion carried. Judge Zirpoli moved subdivision (6) be adopted as amended. The motion carried.

RULE 16(b)(1) National Security.

Mr. Vinson stated the problem with this subdivision was "disclosure to whom" shall not be required. It was moved "to anyone other than the court" would be inserted after "Disclosure". The motion carried. It was moved "such disclosure may" be in lieu of "it". There was a motion to place a period after "national security" in the third line and striking the remainder of the sentence. There was a motion to approve the subsection as amended. The motions carried.

RULE 16.1 Disclosure by the Defendant.

The reporter stated the ABA proposals recommended government discovery independent of defense discovery. Professor Pirsig moved the committee be in favor of the principle of full discovery by the government subject to limitations of self-incrimination.

Judge Hoffman moved the adoption of Rule 16.1. (Alternative No. 1). The motion lost. There was a motion to approve Rule 16.1 as similar to Rule 16. The motion carried.

Mr. Meserve moved Rule 16.2 be rewritten. The motion was carried. The rewriting will include the current rules. Mr. Meserve then moved approval of Rule 16.3 as submitted. The motion carried.

RULE 41. Search and Seizure.

RULE 45. Time.

There was general discussion and an agreement to keep these items on the agenda for the next meeting.

[At this point, 5:00 p.m., the meeting adjourned until Wednesday, January 8, 1969.]

The meeting convened at 9:00 a.m. Judge Pickett was unable to attend the last session due to illness. The reporter drew the attention of the members to a memorandum dated January 2, 1969 with reference to suggested changes and additions to the present United States Commissioners Rules. These were discussed, recommendations made and the decision reached that interim rules should be redrafted in accordance with the committee discussion and submitted to the standing Committee.

[The meeting adjourned at 1:00 p.m.]