

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 4

Professor Remington stated Rule 4 (dated 12-16-68) had been tentatively approved at the meeting of September-October 1968. He suggested "Magistrate" be defined in rule 54. Judge Hoffman wanted it understood that the federal judges have all the power of a magistrate. Rule 54 defines the magistrate as including a United States judge. It was suggested the definition of "Magistrate" and "United States magistrate" be changed to cite "18 U.S.C. 3401", which limits the meaning of "Magistrates". Judge Edwards stated as far as the issuance of search warrants was concerned, unless there were a statutory requirement, there would be no real need for extending the authority to issue a search warrant beyond a United States Magistrate. Regarding the number of magistrates there are likely to be in a district, Mr. Imlay stated the Administrative Office will make surveys and the results will go to the Judicial Conference. Judge Edwards stated if there were a legitimate geographic problem, he saw no reason why the committee should anticipate that it could not be solved under the terms of the New Magistrate Act unless it had been unable to be solved under the Commissioners Act. He stated that he saw no reason to contemplate greater difficulty under the Magistrates Act than under the Commissioners Act. Judge Zirpoli moved approval of Rule 54(c) including the citation: "18 U.S.C. 3401". The motion carried.

The reporter with regard to Rule 3 The Complaint, stated it was self-explanatory and continued the law as is. There was a motion to approve Rule 3 as drafted. The motion carried.

There was a motion that Rule 4 in its entirety be adopted as drafted. The motion carried.

RULE 5

Judge Hoffman moved the adoption of Rules 5 and 5.1 as drafted.

Judge Edwards stated he felt the approval of Rules 5 and 5.1 should be decided upon separately. Judge Hoffman stated Rule 5 was interlocked with Rule 5.1. Judge Edwards agreed but stated there were some problems he felt should be resolved with regard to Rule 5.1.

The reporter stated that at the time of the initial appearance under rule 5, the warrant should have the complaint attached thereto. In some districts only the warrant is read, on the ground that the warrant alleges the offense and the complaint serves a different purpose. If a warrant or a summons is issued by a federal or state judicial officer, the complaint or any affidavit filed therewith should be attached to the warrant or summons. Mr. Meserve agreed adding also any record of interrogation under Rule 4(a) should also be attached.

Judge Hoffman moved the adoption of Rule 5 in its entirety. The motion carried. (The reporter stated he understood that along with the adoption of Judge Hoffman's motion, there would be a statement in the Note with reference to the problem of the "papers" used at the initial appearance (i.e., complaint, warrant, affidavit, transcript of testimony) .) It was the consensus of the members the reporter would make the addition to the Note.

RULE 5.1

Judge Zirpoli stated he felt "or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States" should be left in Rule 5. The chairman stated the motion as: "The state judicial officer provision be restored in Rule 5(a) and that Rule 5.1 be limited to what a state officer will do if an arrested person is brought before him." Judge Zirpoli stated if Rule 5 were left as drafted and then a separate section immediately followed as Rule 5.1 does, the order in which the rules appear suggests the preference that the proceedings be held wherever possible before a United States magistrate. The reporter stated that this was the purpose of the draft.

Judge Edwards stated there were two additional issues which were involved with these rules. One of them was that Mr. Imlay had informed him that there was no federal statutory provision for payment for services by any state judicial officer. There was provision under the old Commissioners Act, but that provision was not carried over into the new Federal Magistrate's Act. He stated there would either be volunteers or no one at all unless there is a provision made for reimbursement for state officers to conduct the hearings. The other issue was that he did not understand what Rule 5.1 provided with relation to a finding of probable cause. He questioned whether it was to be made at the first preliminary hearing by the state officer or to be delayed until the appearance before a United States magistrate. He felt the original probable cause for arrest determination would have to be made before the state judicial officer. Judge Maris felt that rule 5.1 was too "premature". He suggested waiting until the Magistrates Act goes into effect to see whether more or less magistrates are necessary.

Dean Barrett moved the approval of Rule 5 restoring "or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States" and deleting Rule 5.1. Judge Maris then stated the problems of this rule could be dealt with if they still remained after the Magistrates Act became effective. The motion carried.

RULE 5.2

With regard to subdivision (c), it was decided "person" was too broad. It was moved "defendant" be in lieu thereof. The motion carried.

Mr. Meserve moved the adoption of Rule 5.2 in its entirety as amended. The motion carried.

The rule will be Rule 5.1 with the deletion of the original Rule 5.1.

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.]