

MINUTES OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure met in Philadelphia on March 17 and 18, 1972. The committee is now composed of the following members:

Terms expiring October 1973

James Wm. Moore  
J. Lee Rankin  
J. Skelly Wright

Terms expiring October 1975

Albert B. Maris, chairman  
Bernard G. Segal  
Charles Alan Wright

Terms expiring October 1977

Charles W. Joiner  
Richard G. Kyle  
Frank W. Wilson

Dean Joiner, Judge Maris, Prof. Moore, Mr. Rankin, Judge Wilson and Judge Wright were present at the meeting. Mr. Kyle, Mr. Segal and Prof. Wright were unavoidably absent. Also present were Albert E. Jenner, Jr., chairman of the Advisory Committee on Rules of Evidence, Prof. Edward W. Cleary, reporter of the Advisory Committee on Rules of Evidence, Judge J. Edward Lumbard, chairman of the Advisory Committee on Criminal Rules, and Professor Frank J. Remington, reporter of the Advisory Committee on Criminal Rules. William E. Foley, Deputy Director of the Administrative Office and Secretary of the Committee was present on March 17th.

Judge Maris stated that the Chief Justice has asked the committee to consider certain comments with respect to the proposed rules of evidence which he had received from the Department of Justice and others and to furnish him with the views of the committee thereon. The committee proceeded to consider these comments.

Agenda Item I. Rules of Evidence

A. Propriety of codifying rules of evidence.

Judge Friendly strongly questions the right of the Supreme Court to promulgate these rules. Prof. Cleary calls attention to 70 opinions citing the proposed rules, and U.S.v. McCarthy, 7 Cir.1971, 445 F.2d 587, 591, and to the Department of Justice's approval of the codification as a whole. (1st page and last sentence, p.2.)

Judge Wright observed that these rules will save hundreds of hours of time of the judiciary.

Judge Maris: The special advisory committee reported that evidence should be codified and this was approved by this committee and the Judicial Conference.

Mr. Jenner stated that with the exception of Judge Friendly and a few others, most agree that the rules are good.

Mr. Rankin thinks <sup>Judge</sup> Friendly has a point on the forum shopping question.

THE COMMITTEE VOTED TO ADHERE TO ITS PREVIOUS DECISION RECOMMENDING THAT THE RULES BE ADOPTED BY THE SUPREME COURT

B. Considerations of specific objections

(1) Provisions affecting presentation of evidence.

RULE 107.- Remainder of or Related Writings or recorded Statements

The Department recommends that the reference to any other writing be deleted.

Prof. Cleary commented that this view had failed to impress the advisory committee, that whether to demand introduction is up to the adversary, but whether fairness requires it will be determined by the judge, and he recommends no change in rule 107. Mr. Jenner said that to accept the Department's criticism would materially change the law as it is today; introducing one piece a party is required to introduce other related matter and that this rule only states that all which should or will be introduced should come in at the same time instead of delaying the trial by coming in piecemeal, which can create an unfair record.

Prof. Moore believes there is an inconsistency with Civil Rule 32(a)(4), depositions. \*Dean Joiner observed that no doubt Rule 107 goes further than the depositions rule is intended to. Prof. Cleary pointed out that the Note calls attention to Civil Rule 32(a)(4), and that the Department does not want additional writings but just to cut back to other parts of the same writing.

Judge Maris suggested that the advisory committee's note might be rephrased.

Mr. Jenner referred to Senator McClellan's analysis and Mr. Blakey's assistance and that no criticism was voiced by them as to Rule 107.

[Rule 107]

Judge Wilson thought that a protracted hearing on the question of other writings might delay the trial.

Prof. Cleary stated the rule deals with timing, judges always had control of when a writing should be admitted. Mr. Jenner stated the advisory committee had confidence in the discretion of a judge in this regard.

Judge Maris asks whether it is thought there should be some change in the Note. Dean Joiner hopes not, and Prof. Moore agrees.

THE COMMITTEE VOTED THAT IT IS SATISFIED TO STAND ON THIS RULE AS IT IS STATED AND TO SUBMIT THIS VIEW TO THE COURT.

#### Rule 301. Presumptions

This rule was attacked by Mr. Newton. Prof. Cleary answered this fully in his comment.

THE COMMITTEE VOTED TO STAND ON THIS RULE.

#### Rule 405 and 608(a). Character; Evidence of and Methods of Proof.

Prof. Cleary thinks the Department's point is not well taken.

THE COMMITTEE WAS SATISFIED WITH THIS RULE AS WRITTEN, AND THAT NO CHANGES BE MADE.

## Evidence

### Rule 611(b). Scope of cross-examination (Order of Interrogation)

Prof. Cleary calls attention to comment(c) in the Note, p.84, 2d paragraph.

Judge Wright stated that the Department's view can extend a trial, he thinks it best to get all out of the witness when he is on the stand and not to bring him back and that a judge can control leading of a witness. This rule will expedite the trial to get everything out of a witness.

THE COMMITTEE VOTED TO RETAIN THE RULE AS WRITTEN.

### Rule 612. Writing used to refresh memory.

Prof. Cleary said the Department's suggested amendment does not incorporate the rule of the Goldman case; that the Department has resisted the rule insofar as it provided that an adverse party is entitled to have the writings produced used by a witness to refresh his memory. Mr. Jenner thinks this a good rule, and Sen. McClellan did not object to this rule but was satisfied with it.

Judge Maris stated that the Department's earlier position was that the rule was too broad and the rule was narrowed to meet its objection.

THE COMMITTEE VOTED TO ADHERE TO THE PROVISIONS OF THIS RULE.

## Evidence

### (2) Provisions affecting admissibility of evidence

Rule 404(b). Other Crimes, Wrongs or Act. [Referred to by Judge Friendly as 401(b)]

Prof. Cleary stated that no other objections were received other than Judge Friendly's and it is difficult to understand what he means.

Judge Wright stated that this rule states the existing law, possibly broadly.

THE COMMITTEE VOTED TO RETAIN THE RULE AS WRITTEN.

Rule 410. Evidence of withdrawn plea.

The Department wants to strike "or of statements made in connection with any of the foregoing pleas or offers". Prof. Cleary thinks that if the plea is withdrawn and/not <sup>this fact is</sup> admissible in evidence, then statements in respect thereto should not be admissible, and finds no merit in the suggested amendment.

THE RULE WAS APPROVED AS WRITTEN.

Rule 601. Competency (Dead Man's Statutes)

Prof. Cleary refers to the Note to Rule 501, pp. 43-46.

THE RULE WAS APPROVED AS WRITTEN.

Rule 606(b). Inquiry into jury proceedings.

This rule is intended only to apply to a juror testifying as to what happened in the jury room with respect only to outside influence. The change had been made in response to Sen. McClellan,

[Evidence Rule 606(b)]

that a juror not be harrassed; the rule does not mean what Judge Friendly says it does.

THE COMMITTEE VOTED TO RETAIN THE RULE AS WRITTEN.

Rule 608(b). Specific instances of conduct.

The Department wants to delete "and not remote in time". Prof. Cleary stated that this rule does not deal with the Michelson rule, where a defendant puts his reputation in issue. This is only as to truth and veracity.

THE COMMITTEE VOTED TO RETAIN THE RULE AS WRITTEN.

Judge Wilson expressed concern about Rule 607 as giving lawyers the opportunity to immediately impeach a witnesses' character. Judge Maris asked how can a witness be cross-examined before he testifies. Prof. Cleary explained that Rule 611(c) takes care of this (leading questions) (p.84 Note).

The committee recessed for lunch.

The committee reconvened at 2.30 P.M., temporarily laying aside the evidence rules and proceeded to consider the proposed amendments to the Criminal Rules recommended by the Advisory Committee on Criminal Rules, and Prof. Cleary and Mr.

Jenner were excused.

Present:

Albert B. Maris, chairman

Charles W. Joiner

James Wm. Moore

J. Lee Rankin

Frank W. Wilson

J. Skelly Wright  
Judge Lumbard and Prof. Remington

Agenda Item II. CRIMINAL PROCEDURE

A. Proposals submitted by Advisory Committee in final form for approval.

(1) Proposals published in January 1970

Rule 1. Scope.

APPROVED AS SUBMITTED

Rule 3. The Complaint

APPROVED AS SUBMITTED

Rule 4. Arrest Warrant or Summons Upon Complaint

The rule was approved in principle, with certain amendments, and the Reporter stated he would present another draft which he did on the following day. ~~see follows~~ The redrafted Rule, as amended; provides:

"Rule 4. Arrest Warrant or Summons Upon Complaint

(a) ISSUANCE. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall issue a summons for the appearance of the defendant, except as provided in subdivision (b)(2).

(b) ISSUANCE OF AN ARREST WARRANT. A warrant shall issue whenever:

(1) A defendant fails to appear in response to a summons; or

(2) A valid reason is shown for the issuance of an arrest warrant rather than a summons; or

(3) A summons having issued, a valid reason is shown for the issuance of an arrest warrant. This showing may be made to a magistrate either in the district in which the summons was issued or the district in which the defendant is found.

(c) PROBABLE CAUSE. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a summons or warrant, the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce. The magistrate shall promptly make or cause to be made a record or summary of



[Criminal]

such proceeding. More than one warrant or summons may issue on the same complaint or for the same defendant.

(d) FORM.  
(same as (b))

(e) EXECUTION OR SERVICE; AND RETURN.  
(same as (c))

The Reporter will redraft the Note to conform to the rewritten draft. Dean Joiner moved that the redraft of Rule 4, as amended, be approved. Seconded.

THE COMMITTEE VOTED TO APPROVE THE RULE AS THUS SUBMITTED.

Rule 5. Initial Appearance Before the Magistrate.

Mr. Rankin suggested that the phrase "comply with rule 4(a)" be amended to read "comply with the probable cause requirement of rule 4(a)". It was also suggested that the phrase "with respect to showing probable cause" be inserted following "comply with Rule 4(a)". ALL AGREE TO THE AMENDMENT, LEAVING THE PRECISE LANGUAGE TO BE USED TO THE REPORTER.

Judge Maris asked whether the committee should spell out in Rule 4 that a summons may be converted into a warrant upon showing of valid reasons therefor. Judge Wright suggested that this be added to the Note, that a summons may be substituted for a warrant or vice versa. Judge Maris was of the opinion that this should be incorporated into the Rule. Dean Joiner suggested that the phrase "or at any time a valid reason is shown" be inserted in Rule 4(a), after "summons," and before "a warrant". THE COMMITTEE VOTED TO MAKE THE AMENDMENT. Judge Wright suggested that an addition be made to the Note "either in the district of issuance or of arrest".

[Criminal Rule 5]

The committee returned to consideration of Rule 5. Judge Wright suggested that the first sentence of the last paragraph of subsection (c) be amended to read "A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court." The phrase "other than a petty offense" was transposed from the end of the sentence to between "offense" and "which", in the first sentence.

ALL APPROVE THE RULE AS THUS AMENDED.

RULE 5.1 Preliminary Examination

After much discussion it was agreed to approve RULE 5.1(a) and (b) AND TO PASS CONSIDERATION OF RULE 5(c)(1) and (2) to tomorrow. The reporter will check whether the Magistrates Act requires <sup>a</sup> recording of every hearing.

RULE 6. The Grand Jury

The purpose of this rule is to conform with the Jury Act, 28 U.S.C. § 1867.

APPROVED AS SUBMITTED.

Agenda Item (3) Unpublished proposals relating to criminal forfeiture

Rule 7. The Indictment and the Information.  
Rule 7(c)(1), (2), (3), Nature and Contents

Dean Joiner suggests that subsections (2) and (3) be transposed so that "Criminal Forfeiture" will be (2) and "Harmless Error" the final subsection.

THE RULE WAS APPROVED AS THUS AMENDED.

[criminal]

Rule 9. Warrant or Summons Upon Indictment or Information

The committee agreed that showing of probable cause should not be determined by the clerk. Accordingly, Judge Wright moved that the phrase "a showing of probable cause on the face of the information or as is required by rule 4(a)" be deleted from (a)(1), that subsection to read "in the information, if it is supported by oath".

AS THUS AMENDED, RULE 9 WAS APPROVED. The Reporter was requested to add to note the need for probable cause.

Rule 11. Pleas

After discussion and consideration of each subsection, RULE 11 WAS APPROVED AS SUBMITTED.

Rule 12. Pleadings and Motions Before Trial. . .

Judge Wright observed that this rule is a step in the right direction. Mr. Rankin asked why not make this rule apply equally to the government. It was agreed to delete "the defendant" from the first sentence of Rule 12(f)

and to substitute therefor "a party", the sentence to read "Failure by a party to raise defenses or objections. . . "

THE RULE WAS APPROVED AS AMENDED.

Professor Remington stated he would report in the morning with respect to this rule and Rule 41.1.

[Criminal]

Rule 12.1 Notice of alibi.

After much discussion and many amendments to the rule as submitted, it was approved in principle and the reporter was requested to submit a rewritten draft. The following day a redraft of the rule was submitted by the reporter, which, after certain amendments, provides, as follows:

(a) NOTICE BY DEFENDANT. If a defendant intends to rely upon the defense of alibi, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk.

(b) DISCLOSURE OF INFORMATION AND WITNESSES. Upon receipt of notice that the defendant intends to rely upon an alibi defense, the attorney for the government may inform the defendant in writing of the specific time, date, and place at which the offense is alleged to have been committed. If the government gives such information, the defendant shall inform the attorney for the government in writing of the specific place at which he claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. The attorney for the government shall then inform the defendant in writing of the names and addresses of the witnesses upon whom the government intends to rely to establish defendant's presence at the scene of the alleged offense.

(c) TIME OF GIVING INFORMATION. The court may fix the time within which any exchange of information referred to in subdivision (b) shall be accomplished.

(d) CONTINUING DUTY TO DISCLOSE. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in any information furnished under subdivision (b) of this rule, the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(e) FAILURE TO COMPLY. Upon the failure of either party to comply with the mandatory requirements of this rule, the court shall exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

The reporter will redraft the Note to conform to the rewritten rule. RULE 12.1, as thus redrafted and amended, WAS APPROVED BY THE COMMITTEE.

[Criminal]

Rule 12.2. Notice of Insanity

The following amendments were made by the committee to this rule:

Subdivision (a). line 5, substitute notify for inform  
line 6, insert "in writing" after  
"government"

Subdivision (b). line 10, substitute "notify" for "inform"  
10, insert "in writing" after "govern-  
ment"  
line 11, the phrase "file such notice"  
should read "file a copy of  
such notice with the clerk."

[Subdivision (c) The subtitle "PSYCHIATRIC EXAMINATION" is  
omitted and should be inserted]

[Subdivision (d) The subtitle "FAILURE TO COMPLY"  
is omitted and  
should be inserted]

Subdivision (d) line 3, between "or" and "(c)" insert  
"to submit to an examination ordered  
under subdivision"

Rule 12.2, AS THUS AMENDED, WAS APPROVED BY THE COMMITTEE.

6.15 P.M.

The Committee adjourned the meeting to tomorrow at 9 A.M.

The Committee reconvened at 9 A.M. on Saturday, March 18th.

Present: Albert B. Maris, chairman  
Charles W. Joiner  
James Wm. Moore  
Frank M. Wilson  
J. Skelly Wright

Judge Lumbard  
Professor Remington

Rule 15. Depositions

Mr. Rankin asked why there was such a distinction in the language between the stricken and the new language. Dean Joiner said that the taking of depositions ~~is~~ in this rule and <sup>are</sup> the limitations/ provided in other rules. ~~Dr.~~ Moore recommends parallel language to Civil Rule 34. Judge Wright questioned why "prospective witness or a party". Professor Remington stated that 18 U.S.C. § 3503 uses the same language. Judge Wilson suggested that it should be clear that cross-examination is not a special circumstance. Dean Joiner asked: are not the ~~se~~ <sup>the testimony is to be</sup> special circumstances if/ preserved for use at trial? Judge Wright stated the purpose of the rule is if the witness is unavailable for trial.

It was recommended that the Note be clarified by adding "or not to be taken primarily for cross-examination".

It was moved that Rule 15(g) "Unavailability" be amended by substituting "deponent" for "declarant" and substituting "deposition" for "statement" and that the Note be conformed to the amendments with a clarifying statement.

Subdivision (g) was amended as follows:

line 2, "deponent" substituted for "declarant"

[Criminal Rule 15]

line 5, "deposition" substituted for "statement"  
line 8, "deposition" substituted for "statement"  
line 11, "deposition" substituted for "statement"  
line 16, "deposition" substituted for "statement"  
line 18, "deponent" substituted for "declarant"  
line 22, "deposition" substituted for "statement"

RULE 15, as thus amended, WAS APPROVED BY THE COMMITTEE

Rule 16. Discovery and Inspection

Judge Wright suggested that the defendant be given the same right to preserve testimony as the government has. Judge Wright asked why is a magistrate required to be present under Rule 15 and not under Rule 16? Prof. Remington suggested that he could cross-reference Rule 16 with Rule 15, add that the government may perpetuate in accordance with Rule 15 and also give the same right to the defendant.

Judge Wright moved that the draft be changed to include the defendant, to refer the procedure to Rule 15 and extend the rule to include the defendant on the same basis as the government.

It was moved that testimony be perpetuated under the procedure provided in Rule 15 and be available to the defendant as to the government. ALL APPROVE THE MOTION.

Subdivision (v) of Rule 16 "Government Witnesses" was amended by striking the last sentence and amending the second sentence to read:

"Where 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."

[Crimiaal Rule 16]

ALL APPROVE THE AMENDMENT AS SET OUT ABOVE.

Paragraph (2) of Government Witnesses: The phrase "the attorney for the government or by government agents" is amended to read "the attorney for the government or other government"

ALL APPROVE SUBSTITUTING "OTHER" FOR "BY" in the ABOVE PHRASE.

With respect to "(3) Grand Jury Transcripts", Judge Wright asked that the Supreme Court case and the District of Columbia case permitting grand jury transcripts to the defendant be cited in the Note, if this is agreeable to Professor Remington.

subparagraph (b) Disclosure of Evidence by the Defendant will be modified to include the right of the defendant to perpetuate testimony. Judge Wright moved that the following sentence be added as a second sentence to (iii) Defense Witnesses:

"Where 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."

IT WAS MOVED AND SECONDED THAT THE AMENDMENT BE ADDED AS STATED ABOVE.

RULE 16 WAS APPROVED WITH THE CHANGES THUS MADE.



Judge Wright commented on the fact that the District of Columbia courts require agencies to preserve notes, tapes, etc., taken immediately after an occurrence and that these may not be destroyed. Dean Joiner questioned whether the courts are in a position of policing agency procedures in this respect. Judge Wilson suggested that case law be permitted to broaden such a rule.

Professor Remington stated that the advisory committee should work in the area of pretrial identification and Judge Lombard suggested that preservation of notes and other preliminary identification material be referred to the advisory committee for study.

then  
The committee/discussed "(d) Regulation of Discovery", and was satisfied with the provisions.

Following this discussion another motion was made to approve Rule 16 with the changes recommended. Seconded. ALL APPROVE.

The committee then turned to consider the remaining rules of evidence.

[evidence]

Rule 609(b), (c) and (d). Evidence of Prior Convictions.

Re:609(b). The Department's objection is that this will make burdensome work.

Judge Maris pointed out that the changes made were satisfactory to Sen. McClellan, but after discussion it was agreed that the committee will recommend to the Court that Rule 609(b) and (c) be amended as suggested by Professor Cleary on page 12 of his 2/8 memorandum.

"Recommendation: Subdivisions (b) and (c) respectively should be amended as follows:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date ~~of his most recent conviction or~~ of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, ~~and (2) the procedure under which the same was granted or issued required~~ based on a substantial showing of rehabilitation and the witness has not been convicted of a subsequent crime, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure or was based on innocence."

THE COMMITTEE APPROVED THE FORM OF THIS AMENDMENT.

Rule 609(d) Juvenile Adjudications.

The committee agreed that this subdivision should not be amended and approved it in its present form.

[evidence]

Agenda Item B(3). Provisions relating to privilege

Art.V. Privileges Generally.

The New York County Bar attacked this Article and recommended that it be omitted.

Judge Maris stated that it has been the judgment of the advisory committee that there be uniform provisions with respect to privilege.

Judge Wright moved that the committee adhere to its prior position. ALL APPROVE ARTICLE V AND AGREE THAT PRIVILEGE RULES SHOULD BE CODIFIED.

Rule 501. General Rule

ALL APPROVE THIS RULE

Rule 504. Psychotherapist-Patient Privilege.

Judge Wright stated that Congress is becoming more and more realistic in its view of drug addicts and that they should be treated as sick human beings and it is now established that most crimes are by drug addicts who must have money to purchase drugs and thus they support organized crime. He is in favor of retaining the provision "drug addition".

ALL MEMBERS OF THE COMMITTEE APPROVED THE RULE AS WRITTEN AND RECOMMEND NO CHANGE

Rule 505. HUSBAND-WIFE PRIVILEGE.

The committee reviewed the Department's objections. Prof. Cleary stated that pressures to a testifying spouse are easily applied and to accept the Department's position would reduce the privilege to a nullity. Dean Joiner stated that

these objections are <sup>not</sup> now new and have been considered.

ALL APPROVE THE RULE AS STATED WITHOUT CHANGE.

Rule 509 (a) Military and State Secrets.

Prof. Cleary says that the Department suggests an amendment to the advisory committee Note (that the note left out "arbitrary") Judge Maris reported that the reformulation of this rule was satisfactory to Sen. McClellan who indicated that Congress might broaden it.

AND NOTE

ALL APPROVE THE RULE/AS STATED WITHOUT CHANGE.

Rule 510(c)1,2 and 3. Identity of Informer.

Mr. Rankin is impressed with the Government's position and with Prof. Cleary's recommendation (p.5, 2/8)

Judge Wilson agrees with Mr. Rankin.

Mr. Rankin moved that an amendment be made in the rule as recommended by Prof. Cleary, that the sentences be stricken and Prof. Cleary's recommendation be accepted.

ALL APPROVE THAT PROFESSOR CLEARY'S RECOMMENDATIONS BE ACCEPTED.

510(c)(1). All agree that the phrase "for the government." be added at the end of the sentence after "witness"

[evidence]

Rule 510(c)(2). Testimony on Merits.

To meet the Department's objections, the Committee agreed to delete the 2d sentence and to substitute therefor Prof. Cleary's recommendation (see Cleary 2/8 p.5)

"The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds the matter cannot be resolved satisfactorily upon affidavit."

It was also agreed to delete from the 5th, or next to the last, sentence the final phrase "an order of court" and to substitute therefor "consent of the government".

It was also agreed to delete the 6th, or last, sentence and to substitute therefor

"All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a showing in camera, at which no counsel or party shall be permitted to be present."

(c)(2)

RULE 510, as thus amended, WAS APPROVED BY THE COMMITTEE.

Rule 510(c)(3). Legality of Obtaining Evidence

To meet the Department's objections, the third sentence was amended to read as follows:

concerned with the issue of legality  
"All counsel and parties shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present."

Rule 510(c)(3) as thus amended WAS APPROVED BY THE COMMITTEE

RULE 510(c)(1), (2) and (3), as thus amended, was APPROVED BY THE COMMITTEE.

[evidence]

Agenda Item (4) Provisions relating to hearsay.

Article VIII-Hearsay Generally.

The committee considered the objections of Judge Friendly and the N.Y. County Lawyers but concluded that the principles embodied in the rules were well established and approved codification of hearsay.

Rule 801(d)(1). Prior Statements

The committee considered the objections received with respect to this subsection but adhered to its prior view and approved the rule as drafted.

Rule 803(6). Business Records

The committee considered the objections received with respect to this subsection. The RULE WAS APPROVED AS DRAFTED.

Rule 803(18). Learned Treatises

The committee considered the objections received from Judge O'Sullivan but adhered to its prior view and APPROVED THE RULE IN ITS PRESENT FORM.

Rule 803(24). Other Exceptions.

The committee considered the criticisms received but adhered to its prior view and APPROVED THE RULE IN ITS PRESENT FORM.

Rule 804(b)(4). Statements against penal interest.

The committee considered the views of the Department and Judge Friendly. Prof. Cleary commented that he thinks the Department is unduly concerned and that amendments were made

[evidence]

after discussions with Mr. Blakey; and that to eliminate this rule would be retrogressing. He recommended no change in the rule.

Judge Wright agreed that the purpose of the rules was to move forward.

THE COMMITTEE APPROVED THE RULE WITHOUT AMENDMENT.

The Committee thus completed its consideration of the proposed Rules of Evidence and requested the Chairman to forward a letter to the Chief Justice with the recommendations of the Committee.

Recess for lunch

At 2 P.M. the committee reconvened and turned to consideration of the remaining criminal rules.

[criminal]

Rule 17. Subpoena

The committee approved the amendments to Rule 17.

Rule 20. Transfer from the District for Plea and Sentence.

The committee considered the amendments to this rule.

Judge Wright moved its approval, seconded. ALL APPROVE THE RULE AS AMENDED.

Rule 29.1 Closing Argument

The committee considered the amendments to this rule and it was approved without objection.

Rule 31. Verdict

The committee considered the amendments to this rule and it was approved. The reporter was requested to reconsider the style of the rule.

Rule 32. Sentence and Judgment.

Judge Wright moved that this rule be approved in its entirety, seconded, THE COMMITTEE APPROVED THIS RULE AS AMENDED.

Rule 38. Stay of Execution, and Relief Pending Review  
THIS RULE WAS APPROVED AS AMENDED.



Rule 40. Commitment to Another District

Rule 40(a). Arrest in Nearby District

It was agreed to strike the phrase "without being bound by the amount of bail fixed under rule 9(b)(1)" at  
to  
the end of subsection (a) and/substitute therefor "who shall not be bound by the amount of bail previously fixed."

Judge Wright moved approval of the rule. Seconded.

RULE 40 WAS APPROVED AS AMENDED.

Rule 41. Search and Seizure

Judge Maris suggested a change in the language in the third sentence from the end of subsection (c). It was agreed to strike out "warrant directs that it may be served at any time. The" in the 6th, 7th and 8th lines from the bottom of subsection(c), also to strike out "may" in the 6th line from the bottom and change "authorize" to "authorizes" in the 4th line from the bottom so that the lines will read "unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime."

ALL APPROVE RULE 41 WITH THE MINOR CHANGE MADE.

Rule 41.1 Nontestimonial Identification

Judge Maris suggested that this rule, as presented, requires further study and the committee agreed that final decision will be postponed to a future meeting of the standing committee, after further consideration by the advisory committee.

Rule 43. Presence of the Defendant

Judge Wright asked whether there should be a suggestion in the rule that the judge announce to the defendant that he must be present during his trial. Judge Maris did not think it necessary.

RULE 43 APPROVED BY THE COMMITTEE.

[criminal]

Rule 44. Right to and Assignment of Counsel

THE RULE, AS AMENDED, WAS APPROVED BY THE COMMITTEE.

Rule 46. Release from Custody.

After full discussion by the committee of the new provisions added to this rule, RULE 46 WAS APPROVED.

Rule 54. Application and Exception.

THIS RULE WAS APPROVED BY THE COMMITTEE

Rule 55. Records

THIS RULE WAS APPROVED BY THE COMMITTEE

Proposed Amendments to Federal Rules of Appellate Procedure

Appellate Rule 9. Release in Criminal Cases

RULE APPROVED BY THE COMMITTEE

Appellate Rule 10. The Record on Appeal

This rule was recommended by the Judicial Conference and the advisory committee was requested to prepare a rule.

ALL MEMBERS OF THE COMMITTEE APPROVE THE RULE.

The Committee authorized the Chairman to report to the Judicial Conference the proposals (other than Rule 41.1) of the advisory committee for amendment of the criminal and appellate rules with the modifications approved by the standing committee.

**Agenda Item III. ADVISORY COMMITTEE ON ADMIRALTY RULES**

Judge Maris reported that the Advisory Committee on Admiralty Rules had found no need to be active for several years and he suggested that our committee recommend to the Judicial Conference that the advisory committee be released from further service. After discussion, it was agreed to recommend to the Judicial Conference that the advisory committee be discharged.

**Agenda Item IV. Progress of other Advisory Committees.**

Judge Maris reported on the progress of the Advisory Committees on Civil Rules and Bankruptcy Rules.

The committee authorized the chairman to prepare a report to the Judicial Conference.

There being no further business, the committee adjourned to the Fall meeting.