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The Federal Rules of Criminal Procedure

Lester B. Orfield
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It is the writer’s purpose to set forth simply and clearly the Federal Rules of Criminal Procedure. The writer is a member of the Advisory Committee on Rules of Criminal Procedure appointed by the Supreme Court, but for any opinion expressed in this article he alone is responsible.

The Advisory Committee prepared at least ten drafts. The First Preliminary Draft to be distributed to the bench and bar was distributed in May 1943. The Second Preliminary Draft to be so distributed was distributed in February 1944. The Final Draft of the Rules known as the Report was printed in July 1944, and was submitted on August 9, 1944, to the Supreme Court for its consideration. The Rules were transmitted to the Attorney General by the Chief Justice on December 26, 1944, and reported by the Attorney General.

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to Congress on January 3, 1945. They were referred to the Committee on the Judiciary and ordered to be printed on January 3, 1945.4

Many of the rules merely restate existing law. Others involve important changes in practice. Taken as a whole they embody certain broad purposes and objectives. One is the simplification of procedure through elimination of unnecessary work, expense and delay. Another is the improvement of procedure as an instrument for the objective ascertainment of facts. A third is more complete fulfillment of democratic values in this phase of the judicial process. Last of all is the purpose of obtaining greater uniformity of procedure in the federal courts on a nation-wide basis. But uniform procedure must be as workable in the sparsely settled areas of the southwest as in a crowded urban center such as the Southern District of New York. For this reason these rules, unlike many state codes, are confined to general principles.

What are the sources of these rules? First in importance are the Federal Rules of Civil Procedure, except when constitutional guarantees and fairness preclude. A second source is the Criminal Appeals Rules which have now been in effect for more than a decade.5 A third source is various acts of Congress. A fourth source is state statutes. A fifth source is decisions of the Supreme Court and the lower federal courts on federal criminal procedure. A sixth source is the common law as found in federal, state and English judicial precedents. A seventh source is the American Law Institute Code of Criminal Procedure. Last of all, the Advisory Committee occasionally invented new procedural machinery. With respect to all its sources, the Advisory Committee did not hesitate to recommend many modifications and improvements.

CHAPTER I

SCOPE, PURPOSE, AND CONSTRUCTION

Scope. The rules govern "the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.6 They govern the procedure in cases first initiated in the state courts as state criminal cases,

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6 Rule 1.
and subsequently removed to the federal courts, except that dismissal by the prosecuting attorney shall be governed by state law.\(^7\)

**Purpose and Construction.** Under Rule 2 these rules "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

**CHAPTER II**

**PRELIMINARY PROCEEDINGS**

**Complaint.** Rule 3 provides that the "complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States." This rule eliminates the requirement of conformity to State law as to the form and sufficiency of the complaint.

**Warrant or Summons upon Complaint.** Rule 4 deals with the warrant or summons. "If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it." The provision that upon the request of the prosecuting attorney a summons instead of a warrant shall issue is new,\(^8\) although a summons has been customarily used against corporate defendants. The provision for the issuance of additional warrants on the same complaint embodies the existing practice in several districts. When a complaint names several defendants, it may be preferable to issue a separate warrant as to each in order to facilitate service and return, particularly if the defendants are arrested at different times and places. Failure to respond to a summons does not constitute contempt of court, but is ground for issuing a warrant.

The warrant is to be executed by a marshal, or by some other officer authorized by law.\(^9\) The summons may be served by any person authorized to serve a summons in a civil action. A warrant or summons may be served at any place within the jurisdiction of the

\(^7\) Rule 54(b)(1).
\(^8\) Under the First Preliminary Draft the request might be by either the prosecuting attorney or the complainant.
\(^9\) Rule 4(c)(1).
United States.\textsuperscript{10} This rule modifies the existing practice under which a warrant may be served only within the district in which it issued.\textsuperscript{11} When a defendant is apprehended in a district other than that of prosecution, this change eliminates some of the steps that are at present followed, such as the issuance of a warrant in the district of prosecution; the return of a warrant \textit{non est inventus}; the filing of a complaint on the basis of the warrant and its return in the district in which the defendant is found; and the issuance of another warrant in the latter district. Of course, this change will not modify the rights of the defendant as to removal.\textsuperscript{12}

The warrant is to be executed by the arrest of the defendant.\textsuperscript{13} The provision that the arresting officer need not have the warrant in his possession at the time of arrest is rendered necessary by the fact that a fugitive may be discovered by any one of several officers. It would be difficult if not impossible to require that a warrant be in the possession of every officer who is searching for a fugitive or who unexpectedly might find himself in a position to apprehend the fugitive.

The officer who executed a warrant is to make a return thereof to the officer before whom the defendant is brought pursuant to Rule 5.\textsuperscript{14} At the request of the prosecution, an unexecuted warrant is to be returned for cancellation to the commissioner who issued it. A warrant returned unexecuted and not cancelled, or a summons returned unserved, or a duplicate thereof, may, while the complaint is pending, be delivered by the commissioner at the request of the prosecution to the marshal or other authorized person for execution or service. Thus it is no longer necessary to secure an alias warrant.

\textit{Proceedings before the Commissioner.} Rule 5 deals with procedure immediately following apprehension of the defendant. A person arresting, whether with or without warrant, "shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit

\begin{footnotes}
\item[10] Rule 4(c) (2).
\item[11] Under the First Preliminary Draft service might be anywhere within the territorial limits of the state, though there might be several federal districts within the state.
\item[12] See Rule 40.
\item[13] Rule 4(c) (3).
\item[14] Rule 4(c) (4).
\end{footnotes}
persons charged with offenses against the laws of the United States."\textsuperscript{15} The time within which a prisoner must be brought before a committing magistrate is defined differently in different statutes. The rule supersedes all statutory provisions and fixes a single standard, namely, "without unnecessary delay." What constitutes "unnecessary delay" will have to be determined in the light of all the facts and circumstances of the case.

The commissioner is to inform the defendant of the complaint against him, of his right to retain counsel, of his right to a preliminary examination, and that he is not required to make a statement and that any statement made by him may be used against him.\textsuperscript{16} He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in those rules.

At this early stage the "defendant shall not be called upon to plead."\textsuperscript{17} He has an absolute right to waive a preliminary examination,\textsuperscript{18} in which event the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive, the commissioner is to hear the evidence within a reasonable time. The defendant may cross-examine witness against him, and may introduce evidence in his own behalf. The commissioner shall forthwith hold the defendant to answer in the district court, if from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant has committed it;\textsuperscript{19} otherwise

\textsuperscript{15} Rule 5(a). The First Preliminary Draft had provided an effective sanction in its Rule 5(b): "No statement made by a defendant in response to interrogation by an officer or agent of the government shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule". Much criticism from the bench and the bar resulted in the deletion of this rule in all subsequent drafts. But see A Statement by the Committee on the Bill of Rights of the American Bar Association on H.R. 3690 (1944).

\textsuperscript{16} Rule 5(b).

\textsuperscript{17} Rule 5(c). See Wood v. United States (App. D.C., 1942) 128 F. (2d) 265. A plea of guilty at this stage would have no function except to serve as a waiver of preliminary examination.

\textsuperscript{18} Section 40(2) of the American Law Institute Code of Criminal Procedure, on the other hand, gives the prosecution the right to demand a preliminary examination, and permits the magistrate on his own motion to conduct the hearing.

\textsuperscript{19} It may be observed that the element of probable cause applies to both the offense and the defendant's guilt. Section 54 of the American Law Institute Code applies the test of probable cause only to the defendant's guilt. It may also be observed that the defendant may be held to answer for an offense other than that stated in the complaint or warrant of arrest. See in accord section 60(2) of the American Law Institute Code.
the commissioner shall discharge the defendant. The defendant is again given the opportunity to be admitted to bail.

CHAPTER III

INDICTMENT AND INFORMATION

The Grand Jury. Rule 6 deals with the grand jury. The court is to order one or more grand juries to be summoned at such time as the public interest requires. Thus more than one grand jury may serve simultaneously at the same place of holding court in the district. As under existing statutes, the smallest grand jury may contain as few as sixteen members and the largest twenty-three. No provision is made with respect to the method of summoning and selecting grand jurors. At the direction of the Judicial Conference of Senior Circuit Judges, a committee of district judges has studied the problem of jury selection. Since diversity of practice between civil and criminal cases would be confusing, it seemed best not to deal with this subject.

Rule 6(b) sets forth in detail the method for objecting to the grand jury and to grand jurors. There may be a challenge to the array "on the ground that the grand jury was not selected, drawn or summoned in accordance with law." There may be a challenge to an individual juror "on the ground that the juror is not legally qualified." Challenges may be made by the prosecution or a defendant who has been held to answer in the district court. But it is not contemplated that defendants held for action of the grand jury shall receive notice of the time and place of the impaneling of a grand jury, or that defendants in custody shall be brought to court to attend at the selection of the grand jury. Failure to challenge is not a waiver of any objection. The objection may still be interposed by motion under Rule 6(b)(2).

After indictment there may be a motion to dismiss the indictment, based on objections to the array, or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury are not legally qualified, if it appears from the record kept that twelve or more qualified jurors concurred.

20 Rule 6(a).
21 Report of the Judicial Conference of the Committee on Selection of Jurors (September 1942).
22 The First Preliminary Draft left the court with discretion to dismiss, thus in-
The court is to appoint a foreman and a deputy foreman. The foreman is to have the power to administer oaths, is to sign all indictments, and is to keep a record of the members concurring in the finding of the indictment to be filed with the clerk of court and kept secret except on order of the court.

While the grand jury is in session, the following persons may be present: attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer. No person other than the grand jurors may be present while the grand jury is deliberating or voting.

The rules continue the traditional practice of secrecy on the part of members of the grand jury except when the court permits a disclosure. Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the attorneys for the government for use in the performance of their duties. Government attorneys are entitled to such disclosure inasmuch as they may be present in the grand jury room during the presentation of evidence. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to, or in connection with, a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The seal of secrecy on witnesses appears to be an unnecessary hardship, and may lead to injustice if a witness is not permitted to make a disclosure to counsel increasing the protection of the defendant. The rule finally adopted is a restatement of existing law, 18 U.S.C. (1940) 554(a).

In the Second Preliminary Draft the last sentence provided: “The motion may not be made after trial and its denial is not a ground for a new trial”. This was stricken because it was thought that the court should not be precluded from reviewing objections to the grand jury in the manner proposed.

23 Rule 6(c). The provision for a deputy foreman is new. See American Law Institute Code of Criminal Procedure, § 125; New York Code Criminal Procedure, § 244.

24 Under existing practice the foreman indorses the indictment although no statute requires it. Frisbie v. United States (1895) 157 U.S. 160.

25 Rule 6(d).

26 Rule 6(e).
or an associate.\textsuperscript{27} As under existing practice, the court is authorized to seal indictments until the defendant is in custody or has given bail.

As under existing law, an indictment may be found only on the concurrence of twelve or more jurors.\textsuperscript{28} The grand jury are to return the indictment to a judge in open court; filing by the foreman with the judge or the clerk is not sufficient.\textsuperscript{29} If the defendant has been held to answer, and twelve jurors do not concur in finding an indictment, the foreman is to report to the court in writing immediately. This provides means for a prompt release of a defendant if in custody, or exoneration of bail if he is on bail, in the event that the grand jury considers the case of a defendant held for its action and finds no indictment.

A grand jury is to serve until discharged by the court but no grand jury is to serve more than eighteen months.\textsuperscript{30} The beginning or expiration of a term of court is made immaterial. The court may at any time for cause shown excuse a juror either temporarily or permanently.

\textit{Indictment and Information}. Rule 7 deals with indictment and information. The method of accusation of an offense punishable by death is to be by indictment.\textsuperscript{31} The method of accusation of offenses punishable "by imprisonment for a term exceeding one year or at hard labor" is to be by indictment, or if indictment is waived by information.\textsuperscript{32} The method of accusation of other offenses may be by

\textsuperscript{27} In about 33 out of 84 district courts witnesses have been required to take an oath of secrecy. Goodman v. United States (C.C.A. 9th, 1939) 108 F. (2d) 516, 518; (1940) 14 So. Calif. L. Rev. 80.

\textsuperscript{28} Rule 6(f).

\textsuperscript{29} Rule 6(g). The Constitution does not require the grand jury to appear in a body. Breese v. United States (1912) 226 U.S. 1, 10.

\textsuperscript{30} Rule 6(g). Under existing law a grand jury serves only during the term for which it is summoned, but the court may extend its term of service for as long as eighteen months, 28 U.S.C. 421. But during such extended period a grand jury may conduct only investigations commenced during the original term. The new rule thus eliminates such a controversy as was presented in United States v. Johnson (1943) 319 U.S. 503.

\textsuperscript{31} Rule 7(a).

\textsuperscript{32} It will be observed that the term "infamous" is not used. The Fifth Amendment provides: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury ...." A crime is "infamous" if it may be punished by death or by imprisonment in a penitentiary, or for imprisonment for any term with hard labor. United States v. Moreland (1933) 258 U.S. 433. The term thus includes some crimes which are not felonies. Under 18 U.S.C. 541 all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies.
information, but indictment may also be used. Thus the method of accusation is made to depend upon which of three classes of offense is involved. The only two methods of accusation permitted in the district court are indictment and information, there being no mention of complaint, nor of presentment. Presentments are no longer used, since there is always available a United States attorney to assist the grand jury, and since prosecutions are no longer brought by private individuals. An information may be filed without leave of court.

An offense punishable by imprisonment for more than one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment. There may be no waiver in capital cases, though there might be a waiver of trial by jury. If the defendant waives, the prosecution may file an information, but may, if it chooses, still proceed by indictment. Thus, the prosecution, like the defendant, may insist on the right to an indictment. There should be no difficulty as to constitutionality. Opportunity to waive will be an essential aid to defendants, especially those who are unable to give bail, but desire to plead guilty. This rule is of great importance in those districts in which long intervals occur between sessions of the grand jury. Under the existing law, in many districts when the grand jury meets infrequently, a defendant, unable to obtain bail and desiring to plead guilty, is forced to spend weeks and even months in jail before he can commence the service of his sentence, awaiting the action of a grand jury. The rule contains adequate safeguards against improvident waivers.

The accusation by indictment or information is to be a "plain,

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33 For the historic meaning of presentment see Blackstone, Commentaries 301; 2 Story, Constitution (5th ed.) § 1784.
34 The old rule required leave of the court. Albrecht v. United States (1927) 273 U.S. 1. The First Preliminary Draft, Rule 8(c) had continued the old rule. The Second Preliminary Draft was silent on the point. The Report of the Advisory Committee (June 1944) abolished the old rule.
35 Rule 7(b). Under Rule 8(b) of the First Preliminary Draft the waiver had to be in writing, but there was no requirement that it be in open court.
concise, and definite written statement of the essential facts constituting the offense charged." It shall be signed by the prosecuting attorney. There need be no formal commencement nor conclusion, nor "any other matter not necessary to such statement." Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown, or that he committed it in one or more specified ways. It will be recalled that Civil Rule 8 permits pleading in the alternative. The accusation is to state for each count the "official or customary citation of the statute rule, regulation, or other provision of law" which the defendant is alleged to have violated. It will thus be seen that no short-form indictment or information is proposed, but rather a simplified form containing only essential allegations.

Surplusage may be stricken from the accusation on motion of the defendant. No such right is conferred on the government, or on the court of its own motion. This rule should relieve the defendant in cases where the grand jury brings in an indictment containing numerous allegations which are extremely prejudicial to the defendants, and which relate to matters that could not under any circumstances be admitted in evidence, and that are not relevant to the charges set forth in the indictment. Since the indictment may be read to the jury, and may even be taken into the jury room, there should be a method whereby irrelevant and prejudicial allegations may be stricken from the indictment.

Up to verdict or finding, the court may permit amendment of the information. But no additional or different crime may be charged, and no substantial right of the defendant may be prejudiced thereby. The possibility of amendment would seem to extend to informations used where indictments have been waived. The court for cause may

37 Rule 7(c).
38 But there is to be no dismissal or reversal of a conviction because of error in the citation or its omission, if the error or omission did not mislead the defendant to his prejudice. Thus, a means is provided by which the defendant can be properly informed without danger to the prosecution.
39 Rule 7(d).
40 The guaranty of an indictment by a grand jury implies that an indictment may not be amended. Ex parte Bain (1886) 121 U.S. 1.
41 Rule 7(e). This rule continues the existing law that, unlike an indictment, an information may be amended. Muncy v. United States (C.C.A. 4th, 1923) 289 Fed. 780.
direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment, or at such other time before or after arraignment as may be prescribed by rule or order. 

Joinder of Offenses and of Defendants. Rule 8 deals with the subject of joinder of offenses and of defendants. With respect to joinder of offenses, it is provided that two or more offenses may be charged in the same accusation in a separate count for each offense, if the offenses charged are of the same or similar character, or are based on the same act or transaction, or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

With respect to joinder of defendants, it is provided that two or more defendants may be charged in the same accusation "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Furthermore, such "defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." In the past, while a statute covered joinder of offenses, there was no statute covering joinder of defendants.

Warrant or Summons upon Accusation. Upon the request of the prosecuting attorney, the court is to issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the prosecution or by direction of the court. With respect to the form of the warrant it is provided that the amount of

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42 Rule 7(f). This rule is substantially a restatement of existing law. The First Preliminary Draft made no provision for bills of particulars.
43 Rule 8(a).
44 Rule 8(b). Compare Federal Rules of Civil Procedure, Rule 20(a). This sentence is substantially a restatement of existing law, 9 Edmunds, CYCLOPEDIA OF FEDERAL PROCEDURE (2d ed.) 4116.
45 This sentence formulates a practice now approved in some circuits, Caringella v. United States (C.C.A. 7th, 1935) 78 F. (2d) 563, 567.
47 The Supreme Court rejected the suggestion of the Advisory Committee in all its drafts calling for action by the clerk. Thus the Supreme Court continued the existing rule. Ex parte United States (1932) 287 U.S. 241. See Orfield, The Preliminary Draft of the Federal Rules of Criminal Procedure (1943) 22 Texas L. Rev. 37, 52.
48 The provision that a warrant may be issued on the basis of an information only if the latter is supported by oath is necessitated by the Fourth Amendment. See Albrecht v. United States, supra note 34 at 5.
bail may be fixed by the court and endorsed on the warrant. This practice already prevails in many districts, and is intended to facilitate the giving of bail by the defendant and eliminate delays between the arrest and the giving of bail, which might ensue if bail could not be fixed until after arrest.

CHAPTER IV
ARRAIGNMENT AND PREPARATION FOR TRIAL

Arraignment. Rule 10, entitled "Arraignment", provides that arraignment be conducted in open court and that it "shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto." This is merely a statement of the prevailing practice. Failure to comply with arraignment requirements has been held not to be jurisdictional, but a mere technical irregularity not warranting a reversal of a conviction, if not raised before trial. The defendant "shall be given a copy of the indictment or information before he is called upon to plead." The latter provision sets forth a new rule.

Pleas. Rule 11 deals with pleas: "The defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere." This provision is notable in that it marks a decision to retain the plea of nolo contendere. The use of the plea may make unnecessary a long and expensive trial, especially in anti-trust cases. The public is not harmed since the court need not accept the plea. While the plea

49 Rule 9(b)(1).
51 The Supreme Court rejected the rule proposed by the Advisory Committee that the defendant must first request a copy. See Orfield, The Preliminary Draft of the Federal Rules of Criminal Procedure (1943) 22 Texas L. Rev. 37, 53-54. Under section 193 of the American Law Institute Code of Criminal Procedure, a copy is automatically furnished.
52 Such pleas may be oral. Chairman Vanderbilt has pointed out that "much of the pleading on the criminal side of the trial court, and many of the motions, are oral, as distinguished from the formal written documents on the civil side". Vanderbilt, The New Federal Criminal Rules: Foreword (1942) 51 Yale L.J. 719, 721.
53 The plea is not retained in the American Law Institute Code, Chapter 9 §§ 209, 221.
may be illogical, it serves a practical purpose. The court may decline
to accept a plea of guilty. It shall not accept such a plea without first
determining that the plea is made voluntarily with understanding of
the nature of the charge.55

Pleadings and Motions; Defenses and Objections. One of the
longest and most significant rules is Rule 12 dealing with pleadings
and motions, and defenses and objections. A list of the pleadings is
criminal proceedings is set forth, namely the indictment and the in-
formation, and the pleas of not guilty, guilty and nolo contendere.
Demurrers, motions to quash, pleas to the jurisdiction, pleas in abate-
ment and special pleas in bar are abolished.56 The defenses and ob-
jections which previously could have been raised by one or more of
them shall be raised only by motion to dismiss or to grant appropriate
relief.57 Thus, a simple motion to dismiss would raise any point that
may now be advanced by any of the proceedings just enumerated.
This would be helpful to a defendant, who demurred when he should
have pleaded in abatement, or moved to quash when he should have
demurred. At the same time, it may expedite the administration of
justice to require objections to be raised in a single motion. At pres-
ent, the defendant may raise certain objections by pleas in abate-
ment. When they are overruled, he may raise other objections by
demurrer. After the demurrer is overruled, he may still move to quash.

Any defense or objection which is capable of determination with-
out the trial of the general issue may be raised before trial by mo-
tion.58 Defenses and objections based on defects in the institution of
the prosecution, or in the accusation, other than that it fails to show
jurisdiction in the court, or to charge an offense, may be raised only

55 The First Preliminary Draft added a requirement that the court determine that
the accusation charges an offense.

56 Rule 12(a). Compare Civil Rule 7(c) and sections 209 and 210 of the American
Law Institute Code.

57 Motions would probably lie for the following reasons not intended to be ex-
clusive: that the accusation was not obtained, filed or prosecuted according to law; that
it does not charge the defendant with the commission of an offense; that it misnames
the defendant; that it misjoins defendants or offenses; that it contains allegations which
are surplusage or duplicitous or repugnant; or that the prosecution is barred by law
because of facts concerning the defendant, as lack of jurisdiction, former jeopardy, for-
mer conviction, former acquittal, pardon, or immunity; or because of facts concerning
the alleged offense, as lack of jurisdiction, statute of limitation, justification, or entrap-
ment.

58 Rule 12(b) (1).
by motion *before* trial. The motion is to include all defenses and objections then available. Failure to present any such defense or objection constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

The two paragraphs contained in Rule 12(b)(1) and (2) classify into two groups all objections to be interposed by motion prescribed by Rule 12(a). In one group are objections which *must* be raised by motion, failure to do so constituting a waiver. In the other group are objections which at the defendant’s option may be raised by motion, failure to do so, however, not constituting a waiver. In the first group are included all defenses based on defects in the institution of the prosecution or in the accusation, other than lack of jurisdiction or failure to charge an offense. All such defenses must be included in a single motion. Among the defenses in these groups are the following: Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, defects in the accusation other than lack of jurisdiction or failure to state an offense. The provision that these defenses are waived if not raised by motion, in substance continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc.

In the other group of objections, which the defendant at his option may raise by motion before trial, are included all objections which are capable of determination without a trial of the general issue. They include such matters as former jeopardy, statute of limitations, immunity; lack of jurisdiction, failure of the accusation to state an offense. Previously such matters have been raised by demurrer, special pleas in bar, and motions to quash.

The motion is to be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter. Previously the statutes had fixed a definite limitation of time for pleas in abatement and motions to quash. The rule eliminates the requirement for technical withdrawal of a plea if it is desired to interpose a preliminary objection after the plea has been entered. Under this rule a plea will be allowed to stand in the meantime.

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50 Rule 12(b)(2).
61 Rule 12(b)(3).
A motion before trial raising objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact is to be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact are to be determined by the court with or without a jury or on affidavits, or in such other manner as the court may direct. This rule is a substantial restatement of existing law.

If a motion is determined adversely to the defendant, he is to be permitted to plead if he has not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the accusation, it may also order that the defendant be held in custardy, or that his bail be continued for a specified time pending the filing of a new accusation. "Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations." This sentence is designed to preserve the provisions of statutes permitting a reindictment if the original indictment is found defective or is dismissed for other irregularities and the statute of limitations has run in the meantime.

**Trial Together of Accusations.** Under Rule 13, the court may order two or more indictments or informations or both to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single accusation. The procedure is to be the same as if the prosecution were under such single accusation.

**Relief from Prejudicial Joinder.** Under Rule 14 if it appears that a defendant or the government is prejudiced by a joinder of offenses, or of defendants, in an accusation, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. Both Rules 13 and 14 are restatements of existing law.

**Depositions.** Just prior to the rule on depositions, the Advisory Committee in its various drafts had provided for rules on pre-trial procedure and notice of alibi. The Supreme Court rejected both rules.

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64 Rule 12(b) (4).
65 Rule 12(b) (5).
66 In the First and Second Preliminary Drafts this rule followed immediately after the rule on Relief from Prejudicial Joinder, instead of immediately preceding it as in the rules finally adopted.
Rule 15 deals with the important subject of depositions. Upon motion of the defendant and notice to the parties, depositions may be taken at any time after the filing of an indictment or information. The court may order that they be taken if it appears that "a prospective witness may be unable to attend or prevented from attending a trial or hearing." Papers and objects may be ordered to be produced with the witness. This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under *dedimus potestatem*, and *in perpetuam rei memoriam*. Unlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court, the rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all parties. It was of course contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the existing practice.

If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness, and notice to the parties, may direct that his deposition be taken. After the deposition has been subscribed, the court may discharge the witness. This rule is new in federal criminal procedure. The matter, however, is left to the discretion of the court. The rule is designed to afford a method of relief for such a witness, if the court finds it proper to extend it. It should prevent the spectacle under existing law, of witnesses being held in jail for long intervals, while likely the defendant is out on bail.

The party who secures the order for the taking of a deposition is

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67 For a discussion of the omitted rules, see Orfield, *The Preliminary Draft of the Federal Rules of Criminal Procedure* (1943) 22 Texas L. Rev. 37, 56-58. Possibly a modified form of the alibi rule may be presented to the Court for consideration in later years.

68 Rule 15(a). Neither the First nor the Second Preliminary Drafts contained the following language in the enumeration of conditions under which depositions might be taken: "That his testimony is material and that it is necessary to take his deposition in order to present a failure of justice"; nor any requirement that the order of the court directing the taking of the deposition be made "upon notice to the parties."

69 Rev. Stat. (1878) § 866, 28 U.S.C. 644. This statute has been generally held applicable to criminal cases. Clymer v. United States (C.C.A. 10th, 1930) 38 F. (2d) 581; Wong Yim v. United States (C.C.A. 9th, 1941) 118 F. (2d) 667, *cert. den.* (1941) 313 U.S. 589. The rule continues the limitation of the statute that the taking of depositions is to be limited to cases in which they are necessary "in order to prevent a failure of justice."

70 Rules 26(a) and 30, Federal Rules of Civil Procedure.
to give to every other party reasonable written notice of the time and place for its taking, and the name and address of the person to be examined. The court may extend or shorten the time on motion of any party upon whom the notice is served.

The rule expressly confers the right to counsel upon the defendant at the taking of the deposition. The defendant is given not only the right to counsel, but when he "cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant’s attorney for attendance at the examination shall be paid by the government." Existing law does not empower the courts to direct the government to pay the expenses of taking depositions in behalf of indigent defendants.

All the drafts proposed by the Advisory Committee had changed existing law by permitting the prosecution as well as the defendant to take depositions. The Supreme Court rejected such proposals.

The deposition in whole or in part may be used at the trial or upon any hearing. It may be used in four situations: (1) if it appears that the witness is dead; (2) if the witness is out of the United States; (3) if the witness is unable to testify because of sickness or infirmity; or (4) if the party offering the deposition has been unable to procure the attendance of the witness by a subpoena. Any deposition may also be used by any party to contradict or impeach the testimony of the deponent as a witness.

**Discovery and Inspection.** Under Rule 16, upon the defendant's motion at any time after the filing of the accusation, the court may order the prosecution to permit the defendant to inspect and copy or photograph designated papers or tangible objects, obtained from or

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71 Rule 15(b). This subdivision and subdivisions (d) and (f) set forth the procedure to be followed in the event that the court grants an order for the taking of a deposition. The procedure is similar to that in civil cases, Rules 28-31, Federal Rules of Civil Procedure.

72 Rule 15(c).


74 Rule 15(e). In providing when and for what purpose a deposition may be used at the trial, this rule generally follows the Federal Rules of Civil Procedure, Rule 26(d) (3). The only difference is that in civil cases a deposition may be introduced at the trial if the witness is at a greater distance than 100 miles from the place of trial, while this rule requires that the witness be out of the United States. The explanation is that a subpoena in a civil case runs only within the district where issued, or one hundred miles from the place of trial, while a subpoena in a criminal case runs throughout the United States.
belonging to the defendant, or obtained from others by seizure or by process. The defendant must show that the items sought may be material to the preparation of his defense, and that the request is reasonable. It is doubtful under existing law whether discovery may be permitted in criminal cases. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him. The rule is a restatement of this procedure. In addition, it allows the procedure to be employed in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The whole subject is left within the discretion of the court.

Subpoena. Rule 17, corresponding rather closely to Civil Rule 45, lays down the rule as to subpoena. A subpoena may be issued by the clerk or by a committing magistrate. It is to state the name of the court and the title, if any, of the proceeding. It is to command each person to whom it is directed to attend and testify at the time and place therein specified. The Sixth Amendment provides: “In all criminal prosecutions the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor.” Full provision is made for the issuance of subpoenas in behalf of indigent defendants. The statutory requirement that the witness for such defendant be within the district or within one hundred miles of the place of trial is removed.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court may quash the subpoena if compliance would be unreasonable. The court may direct that the objects designated shall

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77 Rule 17(a). This rule differs from Civil Rule 45 in that it permits subpoena to be issued by commissioners. It does not permit issuance by attorneys as may be done in some states. Cf. N. Y. Code Crim. Proc. (1945) §§ 194, 611.
78 There has been but few cases interpreting this provision. Rottschaefer, Constitutional Law (1939) 797.
79 Rule 17(b).
80 Rule 17(c). This rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure.
be produced before the court at a time prior to the trial, and may upon their production permit the objects to be inspected by the parties and their attorneys. This should be fair to both the defendant and the prosecution, and should prevent delay during the trial especially in cases where numerous defendants may have been subpoenaed.

A subpoena may be served by a marshal, by his deputy or by any other person who is not a party and who is not less than eighteen years of age. Service is made by delivering a copy to the person named, and by tendering to him the fee for one day's attendance and the mileage allowed by law. The provision allowing persons other than the marshal to serve the subpoena, and requiring the payment of witness fees in government cases is new matter.

A subpoena for a witness may be served at any place within the United States. A subpoena to a witness in a foreign country is to issue as prescribed by existing statutes.

An order to take a deposition is authorization for issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named. A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county in which he resides or is employed or transacts his business in person. A nonresident may be required to attend only in the county wherein he is served with a subpoena, or within forty miles from the place of service, or at such other place as is fixed by an order of court.

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81 This provision is made for responding to subpoenas duces tecum prior to the trial. This does not appear in Civil Rule 45(b).
82 Rule 17(d). This rule corresponds to Civil Rule 45(c).
83 The Supreme Court deleted the following language from the Advisory Committee's Report: "When the subpoena is issued on behalf of the government or of an indigent defendant fees and mileage need not be tendered." 84 Rule 17(e)(1). This rule differs from Civil Rule 45(e)(1) in that it provides that a subpoena may be served anywhere within the United States. For existing Federal practice with respect to the service of subpoenas for witnesses in criminal cases, see Rev. Stat. (1878) § 876 [as amended, 43 Stat. (1925) 1264] 28 U.S.C. (1940) 654. Under the Civil Rules 45(e) service in the absence of statute is to be in the district or within 100 miles of the place of hearing or trial. 85 This rule is like Rule 45(e)(2) of the Federal Rules of Civil Procedure. See Blackmer v. United States (1932) 284 U.S. 421, upholding the validity of the statute referred to in the rule. 86 Rule 17(f)(1). Compare Civil Rule 45(d)(1), the last sentence of which has been dropped because experience indicates that in view of the safeguards provided in subdivision (b) of Civil Rule 45, the provision imposes an unnecessary duty upon the court. 87 Rule 17(f)(2). This is identical with Civil Rule 45(d)(2).
Failure without adequate excuse to obey a subpoena served may be deemed a contempt of the court issuing the subpoena or of the court of the district in which the subpoena was issued if it was issued by a commissioner. 88

CHAPTER V.

VENUE

District and Division. Under Rule 18, except as otherwise permitted by statute or by these rules, the prosecution is to be had in a district in which the offense was committed. 89 But if the district consists of more than one division, the trial is to be had in the division in which the offense was committed. Thus other proceedings, such as the finding and return of an indictment, may be had elsewhere in the same district.

Transfer Within the District. Under Rule 19, in a district containing more than one division, the arraignment may be had, a plea entered, the trial conducted, or sentence imposed in any division, and at any time, provided the consent of the defendant is obtained. This avoids hardships arising out of the infrequency of terms of court and the difficulty of transferring cases from one division of a district to another. Delay in the disposal of criminal cases should be much reduced. The policy of the Sixth Amendment guaranteeing a speedy trial is promoted. The right to trial in the state and district where the crime was committed, guaranteed by the same amendment is preserved.

Transfer from the District for Plea and Sentence. An innovation is introduced by the provision in Rule 20 that a defendant arrested in a district other than that in which the accusation is pending may state in writing after receiving a copy of the accusation, that he desires to plead guilty or nolo contendere, to waive trial in the district of the alleged crime, and to consent to disposition of the case in the

88 Rule 17(g). This rule is substantially the same as Rule 45(f) of the Federal Rules of Civil Procedure.

89 The Constitution provides for trial in the state and district of the commission of the crime. Article III, Section 2, paragraph 3 and Amendment VI. Under 36 Stat. (1911) 1101, 28 U.S.C. (1940) 114 "prosecutions" had to be within the division of the commission of the crime. But "prosecutions" did not cover the work of the grand jury, and it was the prevailing practice to impanel a grand jury for the whole district at a session in some division, and to distribute the indictments among the divisions in which the offenses were committed, Salinger v. Loisel (1924) 265 U.S. 224, 237.
district of arrest. The approval of the United States Attorney for each district is a prerequisite. Thus, possible interference with the administration of justice is prevented. Thereupon the clerk of the district of the alleged crime is to transfer all papers in the proceedings or duplicates thereof to the clerk of the district of arrest. After such a transfer, if the defendant pleads not guilty, there is to be a retransfer to the district of the alleged crime. The defendant's statement shall not be used against him unless he was represented by counsel when it was made. The rule protects the defendant against the hardship involved in a removal proceeding.

Change of Venue. A noteworthy innovation brought about by the rules is the provision made in Rule 21 for change of venue. There was no statutory provision allowing change of venue from one federal district to another. Moreover, the Federal Rules of Civil Procedure provide: "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." Only the defendant is given the right to change of venue. To confer any such right on the prosecution might violate the right of the defendant to a trial by a jury of the state and district in which the crime had been committed. The defendant is given an absolute right, since the rule provides that the court shall order the change if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division. If the accusation alleges an offense committed in more than one district or division, the court may on the defendant's motion transfer the proceeding to another district or division in which the commission of the offense is alleged if required in the interests of justice. Upon a transfer all papers in the proceeding or duplicates

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00 This should be valid on the analogy of waiver of trial by jury. Patton v. United States (1930) 281 U.S. 276. As to removal proceedings see Rule 40.

Under Rule 40(c) of the First Preliminary Draft, the defendant could not consent to transfer from the district unless he was represented by counsel. Such a requirement would, however, result in unnecessary delay.

01 28 U.S.C. 114, supra note 89, provides only for transfer from one division of a district to another division of the same district.


03 Rule 21(a). This rule does not supersede the statute enabling a party to secure a change of judge on the ground of personal bias or prejudice. 28 U.S.C. 25.

04 Rule 21(b).
thereof, and any bail taken, are to be transmitted by the clerk to the new district.⁹⁵

**Time of Motion to Transfer.** A motion to transfer is to be made at or before arraignment or at such other time as the court or these rules may prescribe.⁹⁶

CHAPTER VI

TRIAL

**Trial by Jury or by the Court.** Rule 23 deals with trial by jury. Article III, Section 2, Paragraph 3, and the Sixth Amendment, confer the right to trial by jury. The rule provides that cases required to be tried by jury shall be so tried "unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."⁹⁷ A definite rule as to waiver is laid down. The waiver must be in writing. Not only must the defendant consent, but two other parties must join in such consent: the court and the prosecution.⁹⁸ It will be recalled that waiver of indictment need not be in writing; it inferentially requires the consent of the prosecution though not of the court; the defendant need not be represented by counsel; and the offense must not be punishable by death. Under the Federal Rules of Civil Procedure, trial is not to be by jury unless the party wishing it serves a written demand on the other party.⁹⁹

The jury is to contain twelve members, but at any time before verdict the parties may stipulate for a lesser number.¹⁰⁰ This contemplates the empanelling of less than twelve jurors, as well as a subsequent reduction in the size of the jury because of death or illness.

In cases tried without a jury, the court shall make a general finding and shall in addition on request find the facts specially.¹⁰¹ Such

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⁹⁵ Rule 21(c).
⁹⁷ Rule 23(a). Under 28 U.S.C. (1940) §770, "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, shall be by jury."
⁹⁸ This seems to be required under Patton v. United States (1930) 281 U.S. 276.
⁹⁹ Civil Rule 38(d). This radical difference between criminal and civil procedure is based on the differing approach of each towards trial by jury. In criminal cases the defendant's right to trial by jury must be carefully safeguarded.
¹⁰⁰ Rule 23(b). This was held proper after the impanelling of twelve jurors in Patton v. United States (1930) 281 U.S. 276, where only eleven jurors were used because of illness of a juror.
¹⁰¹ Rule 23(c). Compare Civil Rule 52(a) under which the court is required to "find the facts specially and state separately its conclusions of law thereon." See Clark and Stone, Review of Findings of Fact (1937) 4 U. of Chi. L. Rev. 215.
action should be of aid to the appellate court which in such cases has no verdict of the jury and no formal instruction by which to ascertain the basis of the decision of the trial court. The Supreme Court rejected the proposal of the Advisory Committee that the judge "may in addition find the facts specially." This rule changes existing law in so far as it requires the court in a case tried without a jury to make special findings of fact if requested.

**Trial Jurors.** Rule 24 covers the examination and peremptory challenge of jurors, and the use of alternate jurors. The court is left in full charge of the examination of prospective jurors. The court itself may conduct the examination. If it does so it shall permit the defendant and his attorney or the prosecuting attorney to supplement the examination by such further inquiry as it deems proper, or shall itself submit such additional questions of the parties as it deems proper. The court may also permit the defendant or his attorney and the prosecuting attorney to conduct the examination. In the past, counsel have been guilty of much abuse in the examination of prospective jurors. In addition, examination by the court should save a great deal of time.

The right of peremptory challenge is maintained and the number regulated. Each side is entitled to twenty peremptory challenges if the offense charged is punishable by death. Under the existing rule in cases of treason or capital offenses, the defendant is entitled to twenty and the government only to six. The government is entitled to six, and the defendant to ten, if the offense is punishable by imprisonment for more than one year. Each side is entitled to three if the offense is punishable by imprisonment for not more than one year, or by fine, or both. If there is more than one defendant, the court may allow the defendants additional peremptory challenges, and permit them to be exercised separately or jointly. While continuing the rule that multiple defendants are deemed a single party for purposes of challenge, the rule vests in the court discretion to allow

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103 Rule 24(a). This rule is similar to Rule 47(a) of the Federal Rules of Civil Procedure. Uniform procedure in civil and criminal cases on this subject is desirable.
104 Rule 24(b).
105 36 Stat. (1911) 1166, 28 U.S.C. (1940) §424. Under the American Law Institute Code §282 each side is given ten challenges if the offense charged is punishable by death or life imprisonment, six as to other felonies, and three as to misdemeanors.
106 In the First and Second Preliminary Drafts each side is given six challenges.
additional peremptory challenges to multiple defendants, and to permit such challenges to be exercised separately or jointly. Experience with cases involving numerous defendants demonstrates the wisdom of this change.

Provision is made for the use of alternate jurors. The First Preliminary Draft, and no later drafts, had provided that an alternate juror, not replacing a regular juror before the retirement of the jury, should not retire with the jury, but should remain under order of the court and not be discharged until the jury is discharged. Then, if prior to the verdict, a juror died or became ill or otherwise unable to perform his duty, the court might substitute an alternate juror.

Disability of Judge. Under Rule 25, if, through absence from the district, death, sickness or other disability, the judge before whom the defendant has been tried, cannot perform the duties to be performed after a verdict, any other judge regularly sitting in or assigned to the court may perform the duties. But if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial. Thus it appears that the substitute judge may sentence, rule on motion for new trial, or act in connection with an appeal.

Evidence. Rule 24 covers the tremendously important subject of evidence. This proved to be one of the most difficult questions dealt with by the Advisory Committee. Under the rule, the "admissibility of evidence, and the competency and privileges of witnesses shall be governed, except when an act of Congress, or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and

107 Rule 24(c). This rule is not based on the present statute, 47 Stat. (1932) 380, 28 U.S.C. (1940) §417a but rather on Civil Rule 47(b). The Civil Rule is more concise than the statute. Furthermore, uniformity of the Criminal Rule with the Civil Rule is desirable.

Civil Rule 47(b) permits only one or two alternate jurors. The Criminal Rule, in allowing up to four, takes account of the greater need in a criminal case. Frequent mistrials are thus made eliminable.


109 Compare Rule 63 of the Federal Rules of Civil Procedure. The provision takes the place of Criminal Appeals Rule 13 which defines "trial judge."
experience.”110 The Committee concluded not to follow Civil Rule 43. The significant part of the latter rule provides: “All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States, on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence, governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.”111 It has not been clear beyond debate that the Civil Rule has brought about certainty in the law of evidence, or simplified or liberalized it.112 The tendency of the Civil Rule to make evidence more freely admissible may be unfair to defendants in criminal cases. Thus, evidence obtained by unreasonable searches and seizures in violation of the Fourth Amendment might be made admissible in many states.

The criminal rule contemplates a uniform body of rules of evidence to govern in criminal trials, while the civil rule prescribes partial conformity to State law, and therefore results in a divergence between districts. In civil actions in which jurisdiction is based on

110 In the First Preliminary Draft, the Advisory Committee had provided only for resort to “the principles of the common law as interpreted by the courts of the United States.” Four members of the Committee regarded such language as too narrow and subsequent drafts adopted the language proposed by the minority members. See Orfield, The First Preliminary Draft of the Federal Rules of Criminal Procedure (1943) 22 Texas L. Rev. 37, 68.

The rule contemplates the development of a uniform body of rules of evidence to be applied in federal criminal cases. It is based on Funk v. United States (1933) 290 U.S. 371; Wolfe v. United States (1934) 291 U.S. 7, which indicated that in the absence of statute the federal courts in criminal cases are not bound by the state law of evidence, but are guided by common law principles as interpreted by the federal courts “in the light of reason and experience.” The rule does not confine the applicable law of evidence to that originally existing at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions. See Pendleton Howard, Evidence in Federal Criminal Trials (1942) 51 Yale L. J. 763.


diversity of citizenship, the state substantive law governs the rights of the parties. It follows that uniformity of rules of evidence is not so essential. On the other hand, since all federal crimes are created by acts of Congress, uniform rules of evidence are desirable, since otherwise the same facts under differing rules of evidence may lead to an acquittal in one district and to a conviction in another.

The Advisory Committee rejected still another possibility, that of laying down a full and rather elaborate system of rules of court for evidence. Such rules would be largely similar for criminal and civil cases. This would of course necessitate study by the Advisory Committee on Rules of Civil Procedure as well as the Advisory Committee on Rules of Criminal Procedure, and joint consideration by them. In 1944, the House of Delegates of the American Bar Association approved the following recommendation of its Standing Committee on Jurisprudence and Law Reform:

"Resolved, that this Association recommend to the Advisory Committees on Rules of Civil and Criminal Procedure of the Supreme Court of the United States a study of the Model Code of Evidence adopted and promulgated by the American Law Institute, with a view to determining how far its provisions should be adopted as rules of procedure for the district courts of the United States."  

**Proof of Official Record.** Under Rule 27, an official record, or an entry therein, or the lack thereof, may be proved as in civil actions. The rule does not supersede statutes regulating modes of proof in respect to specific official records. In such cases parties have the option of following the general rule or the pertinent statute.

**Expert Witnesses.** Under Rule 28, the court may order the defendant or the prosecution to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court in its discretion may appoint witnesses agreed upon by the parties.  

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118 69 REPORTS OF THE AMERICAN BAR ASSOCIATION (1944) 185, 251.

The Advisory Committee on Rules of Federal Civil Procedure state in the SECOND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 51 (May 1945): "While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute."

114 This rule incorporates by reference Rule 44 of the Federal Rules of Civil Procedure, which provided a simple and uniform method of proving public records and entry or lack of them.
parties. It may also appoint witnesses of its own selection. The court is not to appoint a witness unless he consents to act. A witness so appointed is to be informed of his duties at a conference in which the parties shall have opportunity to participate. Such witness is to advise the parties of his findings, and may later be called to testify by the court or by any party. He is to be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

Motion for Acquittal. Rule 29 deals with motion for judgment of acquittal. Motions for directed verdict are abolished. Motions for judgment of acquittal are to take their place. Thus, the nomenclature accords with the realities. The court is to enter judgment of acquittal of one or more offenses charged in the accusation on motion of the defendant, or of its own motion, at any time after the evidence on either side is closed, if the evidence is not sufficient to warrant a conviction. A defendant, whose motion at the close of the evidence offered by the government is not granted, may, even though he did not reserve the right to do so, offer evidence as if the motion had not been made.

Provision is made for judgment notwithstanding the verdict, a rather striking innovation in criminal cases. In net effect, the defendant against whom a verdict has been returned is permitted to

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115 The power of the court to call its own witnesses, though rarely used, is recognized in the federal courts, Young v. United States (C.C.A. 5th, 1939) 107 F. (2d) 490; Litsinger v. United States (C.C.A. 7th, 1930) 44 F. (2d) 45. This rule establishes a procedure whereby the court may exercise this power as to expert witnesses. This rule is based, in part, on the Uniform Expert Testimony Act, *Hand Book of the National Conference of Commissioners on Uniform State Laws* (1937) 337; see, also, A. L. I. Code of Criminal Procedure §§ 307-309; CA. PEN. CODE §1027.

116 Rule 29(a).

117 Compare Civil Rule 50(a). The purpose of this sentence is to remove the doubt existing in some jurisdictions on the question whether the defendant is deemed to have rested his case if he moves for a directed verdict at the close of the prosecution's case. The purpose of the rule is expressly to reserve the right of the defendant to offer evidence in his own behalf, if such motion is denied.

118 Rule 29(b). It has been held that a court may reserve decision on a motion for directed verdict and render judgment of dismissal after return of verdict. *Ex parte* United States (C.C.A. 7th, 1939) 101 F. (2d) 870. This was affirmed by an equally divided court in United States v. Stone (1939) 308 U.S. 519. The rule sanctions this practice. Rule 27 is modeled on Civil Rule 50(b).
renew a motion which he may have made previously for a directed verdict. Whenever a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the case either before or after the jury has rendered a verdict of guilty, or has been discharged. If the motion is desired, and the case submitted to the jury, the motion may be renewed within five days after the discharge of the jury, and may include in the alternative a motion for a new trial. If no verdict is returned, the court may order the entry of judgment of acquittal or order a new trial. As a consequence of this device, the court no longer loses its power to direct a verdict as soon as the jury retires. Furthermore, it is not confined to granting a new trial, if it is found that the motion for a directed verdict should have been granted when originally made. Unnecessary new trials may thus be obviated.

Instructions. Under Rule 30, at the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies of such requests are to be furnished the adverse party at the same time. Prior to argument to the jury, the court is to inform counsel of its proposed action upon the requests. But, as under present law, the court is to instruct after the completion of argument. Objection to the charge or omission therefrom should be made before the jury retires to consider its verdict. The party should state distinctly the matter to which he objects and the grounds of his objection. The penalty for noncompliance is inability to assign as error.

Some attorneys will object to the requirement that objections to the charge must be made before the jury retires. But this requirement offers the judge an opportunity to make such corrections as he thinks are proper. Some attorneys favor having the charge precede argument, so that they might discuss the case in the light of the instructions. But it seems preferable that the last words heard by the jury

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119 The First Preliminary Draft provided a ten-day period instead of five.

120 Except for this sentence, this rule corresponds to Rule 51 of the Federal Rules of Civil Procedure. It seems proper that the procedure as to instructions should be the same in civil and criminal cases.
should come from a neutral court rather than from interested and impassioned counsel.

Verdict. Under Rule 31, a verdict is to be unanimous. The jury is to return the verdict to the judge in open court. No provision is made with respect to special verdicts or sealed verdicts. If there are two or more defendants, a verdict may be returned by the jury at any time during its deliberations with respect to a defendant as to whom it has agreed. Defendants as to whom it does not agree may be tried by another jury. The defendant may be convicted of any offense which is necessarily included in that with which he is charged, or of an attempt to commit either the offense charged or an included offense. Polling the jury may occur when the verdict is returned, and before it is recorded. Polling is not automatic, but must occur at the request of any party, or on the court's own motion. If the poll reveals that there is not unanimous concurrence, the jury may be ordered to retire for further deliberations or may be discharged.

CHAPTER VII
JUDGMENT

Sentence and Judgment. Sentence is to be imposed without unreasonable delay. Pending sentence, the court may commit the defendant or continue or alter bail. Before imposition of sentence, the court is to afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment.

A judgment of conviction must set forth the plea, the verdict or finding, and the adjudication and sentence. It is to be signed by the judge and entered by the clerk.

It will be noted that the rule contemplates that sentencing is to be left in the hands of the courts. The Committee on Punishment for

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121 Rule 31(a). The First Preliminary Draft permitted the parties to stipulate for a stated majority of the jurors.
124 Rule 31(d).
126 Rule 32(b).
Crime in its Report to the Judicial Conference "recommends that the sentencing function be left in the trial courts."127 The power to sentence is not to be given to some administrative agency or disposition tribunal.128

An important criminological development making presentence investigation the normal procedure is achieved through a provision that before sentence or probation, "unless the district court otherwise directs," the probation service shall make a presentence investigation and report to the court.129 It takes the positive intervention of the court to stop the process of presentence investigation. The court may intervene for reasons it deems suitable, such as interference with the work of the probation service in supervising persons on probation, parole, or conditional release. It is intended that the court should exercise its discretion in individual cases, and not that it should issue sweeping orders not requiring presentence investigations as to certain classes of offenders. Some district courts are still greatly understaffed. It will be noted that presentence investigation is contemplated even in cases where there is to be no probation. Such investigation will aid in the imposition of sentence and in correctional treatment. Very full protection to the defendant is given by the provision that the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.130 It would appear that the presentence investigation may be made before the determination of guilt.131

127 Report to the Judicial Conference of the Committee on Punishment for Crime (June 1942) 1. Under the recommendation of this committee the trial court would, where it thought the sentence should be more than a year, impose initially the maximum sentence with power to modify the sentence later. A Board of Corrections would be created to advise him as to such sentences, but the court might ignore its recommendations. See Report, pp. 7-8.

128 For references to the literature concerning disposition tribunals, see Orfield, Criminal Appeals in America (1939) 119-121.


130 This did not appear in the First and Second Preliminary Drafts.

131 The rule does not contain the following provision which appeared in the First Preliminary Draft: "The presentence investigation shall be made after determination of the question of guilt unless the defendant or his attorney consents in writing that it be made earlier." The Probation Act [43 Stat. (1925) 1259, 18 U.S.C. (1940) §§ 724-728] does not specify the time when the presentence investigation may be made.
Specific provision is made with respect to the report of the pre-sentence investigation. The report "shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior, as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." It should thus present a thorough social case history of the defendant. The Supreme Court deleted the following sentence proposed by the Advisory Committee: "After determining of the question of guilt, the report shall be available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate." Under existing practice in a few districts, the reports are read from the bench, and in one or two districts they are even filed with the clerk of the court as public information. Keeping the report confidential should make it easier for the probation officer to obtain information. The Advisory Committee had felt that the defendant should have access to the report, so that he might know what information motivated the court and that he might answer any erroneous information contained in the presentence report.

Normally, a motion to withdraw a plea of guilty may be made only before sentence or suspension of imposition of sentence. But "to correct manifest injustice, the court, after sentence, may set aside the judgment of conviction and permit the defendant to withdraw his plea." After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

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132 Rule 32(c) (2). The Probation Act, supra note 131, does not prescribe the scope of the presentence investigation. See ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, PROBATION (1939) 174.


135 Rule 32(d). This greatly expands Criminal Appeals Rule 2(4) allowing only ten days after entry of the plea. See American Law Institute Code of Criminal Procedure (1931) §230.

New Trial. Under Rule 33, the court may grant a new trial to a defendant "if required in the interest of justice." Thus it is possible to obtain a new trial on any fair or reasonable ground. Under the existing statute, new trials may be granted "for reasons which new trials have usually been granted in the courts of law."137

The rule is favorable to the defendant not only with respect to the grounds for new trial, but also as to the time limit for motion for new trial. In the normal case, a motion for new trial must be made within five days after verdict or finding of guilt or within such further time as the court may fix during the five-day period.138

Under the rule as proposed in the Report of the Advisory Committee of June 1944:139 "A motion for a new trial based on the ground of newly discovered evidence, or on the ground that the defendant has been deprived of a constitutional right, may be made at any time before or after final judgment; but, if an appeal is pending, the court may grant the motion only on demand of the case." The rule thus abolished time limitations on motions for new trial based on newly discovered evidence.140 The Supreme Court struck the words, "or on the ground that the defendant has been deprived of a constitutional right may be", and substituted the words, "may be made only before or within two years".141

Arrest of Judgment. Rule 34 confers the right to arrest of judgment on either of two traditional grounds: that the accusation does

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138 Under Rule 2(3) of the Criminal Appeals Rules, such motion could be made only "within three (3) days after verdict or finding of guilt."
139 Rule 35, lines 6 to 12.
140 Rule 2(3) of the Criminal Appeals Rules required such a motion to be made within sixty days except in capital cases. Under section 362 of the American Law Institute Code of Criminal Procedure, such a motion must be made within one year after verdict or at a later time if the court for good cause permits.
not charge an offense; or that the court was without jurisdiction of the offense charged. The Criminal Appeals Rules did not specify the grounds. The motion in arrest must be made within five days after determination of guilt or within such further time as the court may fix during the five-day period. The Criminal Appeals Rules had allowed only a three-day period, and there was no provision for an enlargement.

**Correction or Reduction of Sentence.** The Criminal Appeals Rules did not deal with the subject of correction or reduction of sentence. Under Rule 35 of the present rules, a motion for the correction of an illegal sentence may be made at any time. A legally proper, but a criminologically excessive, sentence may be reduced within sixty days after imposition of sentence, or within sixty days after receipt by the court of a mandate issued upon affirmance of the judgment, or dismissal of the appeal, or within sixty days after receipt of an order of the Supreme Court denying certiorari.

Under existing law, situations have arisen where trial courts have, by entry of orders from time to time, extended for the purposes of a particular case the term of court at which a sentence was imposed for periods of years; and have granted motions for reduction of sentence long after imposition, the theory being that reduction of a sentence is always permissible during the same term of court. Action of this kind looks like encroachment upon the pardoning power and is clearly undesirable. The proposed rule prescribes a fixed period within which reduction of sentence can occur, and makes immaterial whether or not the term of court has expired. The rule protects the defendant to the extent that it extends the power of a judge to reduce a sentence imposed after a trial has been held near the end of a term.

**Clerical Mistakes.** Under Rule 36 clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission, may be corrected by the court at any time

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Rule 12(b)(2) provides: "Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

143 The Criminal Appeals Rules failed to provide for a motion in arrest after a plea of guilty.

and after such notice, if any, as the court orders. This rule continues the law as to the power of the court to correct clerical errors at any time. With respect to other errors, "arising from oversight or omission", the law has allowed the correction of such errors during the term, at least if the effect is to reduce the penalty.

CHAPTER VIII

APPEAL

Taking Appeal and Petition for Certiorari. Rule 37 is designed to prescribe a uniform procedure for the taking of appeals in all criminal proceedings. It includes all appeals in all criminal cases. It applies to appeals taken under the Criminal Appeals Act, which permits direct appeal to the Supreme Court by the prosecution from a decision quashing, setting aside, or sustaining a demurrer or plea in abatement to an indictment, or arresting a judgment, if the decision is based upon invalidity or construction of the statute underlying the accusation, and from a decision sustaining a special plea in bar when the defendant has not been put in jeopardy. It applies also to an appeal by the prosecution from a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to an accusation, or any count thereof, under the Act of May 9, 1942. The Criminal Appeals Rules laid down by the Supreme Court apparently did not apply to appeals by the prosecution. The rule applies also to appeals to the circuit courts of appeals now governed by the Criminal Appeals Rules.

145 This provision closely resembles Rule 60(a) of the Federal Rules of Civil Procedure.
146 See Rupinski v. United States (C.C.A. 6th, 1925) 4 F. (2d) 17.
147 See United States v. Benz (1931) 282 U.S. 304; Ex parte Lange (1873) 85 U.S. 163.
149 Rule making power for those appeals is specifically conferred upon the Supreme Court by the Act of May 9, 1942, to be exercised "in accordance with the provisions of the Act of June 29, 1940," 18 U.S.C. (1940) §687. The Supreme Court transmitted to the Attorney General for reporting to Congress a rule of court making the Criminal Appeals Rules applicable to these appeals, except with respect to the time for taking such appeals.
150 Orfield, CRIMINAL APPEALS IN AMERICA (1933) 253; cf. Nye v. United States (1941) 313 U.S. 33, 43-44.
An appeal is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal and citations are abolished as are assignments of errors. The notice of appeal “shall set forth the title of the case, the name and address of the appellant and of appellant’s attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order.” On direct appeals to the Supreme Court, the requirement of a jurisdictional statement is continued. The duplicate notice of appeal and a statement of the docket entries is to be forwarded immediately by the clerk of the district court to the clerk of the appellate court. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to advise parties, but his failure to do so does not affect the validity of the appeal.

An appeal by a defendant may be taken within ten days after entry of judgment or order appealed from. However, if a motion for a new trial or in arrest of judgment has been made within the ten-day period, the appeal may be made within ten days after the entry of the order denying the motion.

Extraordinary protection is given to a defendant not represented by counsel. When the court after trial imposes sentence upon such a defendant, the court must advise the defendant of his right to ap-

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151 Rule 37(a)(1). Appeals by defendants to the circuit court of appeals, and appeals by the prosecution to the circuit court of appeals, or from the district to the Supreme Court are taken by substantially the same method as is prescribed in Rule 3 of the Criminal Appeals Rules (1934) 292 U.S. 661, 662.

152 The rule does not affect the defendant since he cannot appeal directly to the Supreme Court. Moreover, to abolish jurisdictional statements would make it difficult for the Supreme Court to ascertain whether the appeal is a proper one for it to note probable jurisdiction.

153 This is virtually identical with the first paragraph of Rule 5 of the Criminal Appeals Rules.

154 This provision is taken from Rule 73(b) of the Federal Rules of Civil Procedure.

155 Rule 37(a)(2). This is based on Criminal Appeal Rule 3, though it adds the words, “or order appealed from” immediately after the words, “days after entry of judgment”. It increases the appeal period from five days to ten days.

156 This will ordinarily be within five days after verdict. A motion for new trial on the ground of newly discovered evidence did not extend the time for appeal under the Criminal Appeals Rules. Burr v. United States (C.C.A. 7th, 1936) 86 F. (2d) 502, cert. den. (1937) 300 U.S. 664; Fewox v. United States (C.C.A. 5th, 1935) 77 F. (2d) 699; Legis. (1939) 52 Harv. L. Rev. 983, 984.
If the defendant so requests, the clerk shall prepare and file in behalf of the defendant a notice of appeal. This avoids the hardship arising under Criminal Appeal Rule 2 requiring that a formal notice of appeal be filed within five days after entry of judgment of conviction. An appeal by the prosecution, when authorized by statute, may be taken within thirty days after entry of the judgment or order appealed from. Petition to the Supreme Court for a writ of certiorari should ordinarily be made not later than thirty days after the entry of the judgment. But the Court or a justice thereof for cause shown may extend the time. Such extension can be made only within the original thirty-day period. Furthermore, only a thirty-day extension may be granted. Under the existing Criminal Appeal Rule, only thirty days after the entry of the judgment of the appellate court is permitted.

Stay of Execution and Relief Pending Review. A sentence is to be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail. A stay is not automatic as it is under the present Criminal Appeals Rule. It will be necessary for the defendant to take an affirmative step if he desires a stay. A sentence to pay a fine, if an appeal is taken, may be stayed by the district or circuit court of appeals upon terms deemed proper to the court. An order placing the defendant on probation shall be stayed if an appeal is taken. Admission to bail upon appeal or certiorari shall be as provided in these rules.

If application is made to a circuit court of appeals or to a circuit judge or to a Supreme Court justice for bail pending appeal, or for

158 Rule 37(b) (2).
159 Criminal Appeal Rule 11. The existing rule appears to deprive the Court of all power to grant all extensions. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1936) §§ 381, 386.
160 Rule 38(a) (1).
161 Rule 38(a) (2).
162 Rule 3 (a) (4). This provision did not appear in the First and Second Preliminary Drafts. It was deemed necessary because of recent decisions holding that an order placing the defendant on probation is appealable.
163 Rule 38(b). See Rule 46(a) (2), and subdivision (c) of this rule.
164 See Rule 38(c).
an extension of time to docket the record on appeal,\textsuperscript{167} or for any other relief which might have been granted by the district court, the application shall be upon notice. The application must show either that it is not practicable to apply to the district court or that application has been made and denied with the reasons given for the denial, or that its action on the application did not afford the relief to which the applicant considers himself entitled.\textsuperscript{168} Under the existing rule, the appellant may "shop around" for bail without being required to state what happened on prior applications.\textsuperscript{169}

\textit{Supervision of Appeal}. Rule 39 deals with the supervision of the appeal by the appellate court.\textsuperscript{170} The appellate court is to have supervision and control of the proceedings on appeal from the time of the filing with its clerk of the notice of appeal, except as provided in these rules.\textsuperscript{171} It will be noted that the rule does not empower the appellate court to hear new evidence or witnesses or to reduce sentences which are excessive, though legal, or to reduce verdicts to lesser degrees of the crime.\textsuperscript{172} The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge with respect to the prosecution of the appeal, including any order fixing or denying bail.\textsuperscript{173}

The rules governing the preparation and form of the record on appeal in civil actions are to apply to the record on appeal in all criminal proceedings, except as the Criminal Rules otherwise pro-

\textsuperscript{167} Compare Criminal Appeal Rule 4.


\textsuperscript{169} The rule specifically governs applications for extension of time to file the record on appeal, Rule 39(c), and for bail pending appeal, Rule 46(a)(2).

\textsuperscript{170} Criminal Appeal Rule 6.

\textsuperscript{171} Compare Civil Rule 73(a).

\textsuperscript{172} Rule 39(a). This is like Criminal Appeal Rule 4, save that it omits the final clause "including the proceedings relating to the preparation of the record on appeal." This language is deleted since, under Rule 39(b), based on Civil Rule 75(g), the clerk of the district court is to prepare the record and transmit it to the circuit court.

\textsuperscript{173} Cf. Orfield, \textit{Improving Procedure on Judgment and Appeal in Federal Criminal Cases} (1943) 27 Minn. L. Rev. 169, 185-186.

\textsuperscript{174} This is based on Criminal Appeal Rule 4, but does not, like that rule, require five days notice before the court may act. It includes orders denying bail as well as fixing it.
Thus, the old-fashioned method of bill of exceptions is abolished. The method of preparing the record in criminal appeals will be substantially the same as that now provided for civil appeals. No good reason exists why the record in both classes of cases should not be the same.

Of much value is a provision that the circuit court of appeals may dispense with the printing of the record on appeal and review the proceedings on the typewritten record. This may be done not only in proceedings in forma pauperis, but also in any other criminal proceeding. The record on appeal must be filed with the appellate court and the proceeding there docketed within forty days from the date the notice of appeal is filed in the district court. Generous provision is made to avoid cases of hardship to defendants as well as to the government by a provision that in all cases, the district court or the appellate court may for cause shown extend the time for filing and docketing. Moreover, such extension need not be made during the forty-day period after the filing of the notice of appeal. The requirement of good cause should prevent a repetition of the long delays which once existed in the disposition of federal criminal appeals. The present rule largely ignores the existing Criminal Appeal Rule and

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174 Rule 39(b)(1). As to appeals to the circuit court of appeals, see Civil Rules 75 and 76. As to direct appeals, see so much of Civil Rule 72 as relates to the preparation and certification of the record on appeal.

175 For the present procedure see Criminal Appeal Rules 7, 8, and 9, 28 U.S.C. (1940) §776.


177 Rule 39(c).

178 The power of the district court was limited in Criminal Appeal Rule 9 as well as in Civil Rule 73(g). Under Rule 8 of the Rules of the Supreme Court, as amended February 27, 1939, the appellant can set forth the evidence in full, thus not so much time is needed to prepare the record. Legis. (1939) §2 HARV. L. REV. 983, 986.

179 As to extension by the appellate court, see Rule 38(c) of the present rules.

The effect of the proposed rule is to confer equal powers of extension upon the district courts and circuit courts of appeals.

180 The Criminal Appeal Rule involves a retention of the bill of exceptions, while
is modeled on the Civil Rule. Under the Criminal Appeal Rule, the appellant is required to procure the settlement of a bill of exception and file it with the clerk of the trial court within thirty days after the taking of the appeal, or such further time as the trial judge may fix within such thirty-day period. Under the Civil Rule, the record on appeal is to be filed with the appellate court and the action there docked within forty days from the date of the notice of appeal; but the time for filing and docketing may be extended by the district court, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order, provided that the district court shall not extend to a day more than ninety days from the date of the first notice of appeal. The proposed criminal rule permits the court to extend at any time and for an indefinite period.

Unless good cause is shown for an earlier hearing, the appellate court is to set the appeal for argument on a date not less than thirty days after the filing, in that court, of the record and as soon after the expiration of that period as the state of the calendar will permit. Preference is to be given to the criminal over civil appeals. Under this provision, a circuit court may adopt such rules for the calendaring of the civil rule substitutes a simple record on appeal. Under the Criminal Appeal Rules, a district judge could not grant an extension when the first ran out. See cases cited in Ray v. United States (1937) 301 U.S. 158, 162; Legis. (1939) 52 Harv. L. Rev. 983, 985. But the court held that under Rule 4, the circuit court of appeals could fix an indefinite period of any time. Ray v. United States (1937) 301 U.S. 158, aff'd (C.C.A. 2d, 1936) 86 F. (2d) 942; Legis. (1939) 52 Harv. L. Rev. 983, 986; Orfield, The Federal Criminal Appeals Rules as Interpreted in the Decisions (1942) 21 N. C. L. Rev. 28, 45-49.

181 Criminal Appeal Rule 9. See also Rule 8 governing appeals without bills of exceptions. For existing law as to the time for docketing appeals in the Supreme Court, see Revised Rules of the Supreme Court of the United States (1939) Rules 10(1) and 11(1), fixing the time at 40 days except in appeals from the Ninth Circuit, for which 60 days is allowed.

182 Civil Rule 73(g). However, under Civil Rule 6(b), the district court may extend, and so may the circuit court of appeals, even after the expiration of the forty-day period. Ainsworth v. Gill Glass and Fixture Co. (C.C.A. 3d, 1939) 104 F. (2d) 83; Holtzoff, Practice Under the Federal Rules of Civil Procedure (1940) 20 Boston U. L. Rev. 179, 289; Cf. 1 Moore, Federal Practice §6.06; Ilsen and Hone, Federal Appellate Practice as Affected by the New Rules of Civil Procedure (1939) 24 Minn. L. Rev. 1, 44, note 233. Subsequent cases have cast doubt on the power of the district court. Mutual Benefit Health and Accident Association v. Snyder (C.C.A. 6th, 1940) 109 F. (2d) 469; Burke v. Canfield (App. D.C., 1940) 111 F. (2d) 526.

183 Rule 39(d). This rule is virtually identical with Criminal Appeal Rule 10. The rule applies to appeals to the circuit courts of appeals and to direct appeals to the Supreme Court. For provision as to district court calendars, see Rule 50.
criminal appeals as will best meet the particular problems of that court. Rules now in force in the circuit courts of appeal remain in effect until changed by the courts themselves.

CHAPTER IX
SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Removal. Rule 40, covering removal, received very careful attention from the Advisory Committee. It makes some rather important changes in existing procedure. The basic aim of removal proceedings is to accord safeguards to a defendant against an improvident removal to a distant point for trial. At the same time, it must be recalled that removal proceedings have been used by defendants to secure delay and to frustrate prosecution by impeding transportation even as between adjoining districts and between places within a few miles of each other. The rule is intended to deal with both situations.

For removal purposes, all cases in which the defendant is apprehended in a district other than that of the offense have been divided under the rule into two groups: first, those in which the place of arrest is in the same state, or if in another state, then less than 100 miles from the place of prosecution; and, second, cases in which the arrest occurs in a state other than that in which the prosecution is pending and the place of arrest is 100 miles or more distant from the latter place.

In the first group, removal is abolished. The right of the defendant to the usual preliminary hearing is preserved, but the committing magistrate would bind him over to the district court of prosecution. In state prosecutions, there are no removal proceedings as between different parts of the same state, the defendant being transported by virtue of the process under which he was arrested. The existing procedure has developed largely out of judicial decisions, the only governing statute being very general, 18 U.S.C. (1940) §591. The scope of a removal hearing, the issues to be considered, and other similar matters are governed by court decisions. Beavers v. Henkel (1904) 194 U.S. 73; Tinsley v. Treat (1907) 205 U.S. 20; Henry v. Henkel (1914) 235 U.S. 219; Rodman v. Pothier (1924) 264 U.S. 399; Morse v. United States (1925) 267 U.S. 80; Fetters v. United States ex rel. Cunningham (1931) 283 U.S. 638; United States ex rel. Kassin v. Mulligan (1932) 295 U.S. 396. See Alexander Holtzoff, Removal of Defendants in Federal Criminal Procedure (1945) 33 Calif. L. Rev. 230.

187 Rule 40(a).
provision as to arrest in another state but at a place less than one hundred miles from the place of prosecution was added in order to preclude obstruction against bringing the defendant a short distance for trial.

In the second group, removal proceedings are continued.\textsuperscript{187} The practice to be followed in removal hearings will depend on whether the demand for removal is based upon an indictment or upon an information or complaint. In the latter case, proof of identity and proof of reasonable cause to believe the defendant guilty will have to be adduced before a warrant of removal will be issued. In the former case, proof of identity coupled with a certified copy of the indictment will be enough, as the indictment conclusively shows probable cause. In the case of an indictment, the grand jury, an arm of the court, has already found probable cause. Since the action of the grand jury cannot be reviewed by a district judge in the district of prosecution, it appears illogical to permit such review collaterally in a removal proceeding by a judge in another district. The present rule, treating the certified copy as only prima facie evidence of probable cause,\textsuperscript{188} is abrogated.

\textit{Search and Seizure.} Rule 41 regulates the subject of search warrants.\textsuperscript{189} They may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.\textsuperscript{190} The rule continues existing grounds for issuance.\textsuperscript{191}

A warrant shall issue only on affidavit sworn to before the judge or commissioner establishing the grounds for issuing the warrant.\textsuperscript{192}

\textsuperscript{187} Rule 40(b). Under the rule, all removal hearings are to take place before a United States commissioner or a district judge. No jurisdiction is conferred on state or local magistrates. In practice such hearings have not been before such state officers though the law permitted it. \textit{9 Edmunds, Encyclopedia of Federal Procedure} 3919.

Only the district judge may discharge the defendant, under Rule 40(b)(3), whereas under the present practice, the commissioner could also discharge. The rule continues the present rule that only the district judge may order removal.

\textsuperscript{188} Tinsley v. Treat (1907) 205 U.S. 20.

\textsuperscript{189} While under Rule 41(g), Rule 41 supersedes the general provisions of 18 U.S.C. (1940) §§ 611-626, relating to search warrants, it does not supersede, but preserves, all other statutes permitting searches and seizures in specific situations.

\textsuperscript{190} Rule 41(a). This rule restates existing law, 18 U.S.C. (1940) §611.


\textsuperscript{192} Rule 41(c). This rule restates existing law, 18 U.S.C. (1940) §§ 613-616, 620; Dumbra v. United States (1925) 268 U.S. 435.
If the judge or commissioner is satisfied of the existence of the grounds for the application, or that there is probable cause to believe that they exist, he is to issue a search warrant, identifying the property, and naming or describing the person or place to be searched. It is to be directed to a civil officer of the United States authorized to enforce any law thereof. It is to state the grounds for its issuance and the names of the persons whose affidavits or depositions have been taken, and is to command the officer forthwith to search. Unless the affidavits or depositions are positive that the property is on the person or in the place to be searched, it should direct that it be served in the day time. It is to designate the federal district court or the commissioner to whom it shall be returned. It may be served only within ten days after its date. The return is to be made promptly and to be accompanied by a written inventory of any property taken.

The rule on motion for return of property and to suppress evidence is with one exception a restatement of existing law and practice. While under present law a motion to suppress evidence or to compel return of property obtained by an illegal search and seizure may be made either before a commissioner subject to review by the court on motion, or before the court, the rule provides that such motion may be made only before the court. The object of the rule is to prevent multiplication of proceedings and to bring the matter before the court in the first instance. While during the days of prohibition, when such motions were frequent, it was a common practice in certain districts for commissioners to hear motions; the prevailing practice at the present time is to make such motions before the district court.

Criminal Contempt. The subject of criminal contempt is dealt with in Rule 42. The Act of November 21, 1941, permits the Supreme Court to lay down rules of procedure in “proceedings to punish for criminal contempt of court.”

193 18 U.S.C. (1940) §613 requires that the warrant shall “particularly describe” the property and place to be searched. The rule substitutes the word “identify” since an error of description does not necessarily prevent identification of the place, and should not therefore nullify the search warrant.

194 Rule 41(d). This rule is a restatement of existing law, 18 U.S.C. (1940) §§ 621-624.


196 18 U.S.C. (1940) §689. This Act made both the 1934 and 1940 rule-making acts applicable to criminal contempt proceedings.
The rule does not endeavor to define a criminal contempt or to distinguish it from a civil contempt. To do this would constitute prescribing a rule of substantive law. The rule does, however, lay down two different types of procedure depending on the kind of contempt involved: summary procedure as to contempts in the presence of the court; and something close to regular criminal procedure as to other contempts. If the judge certifies that the contempt was committed in the actual presence of the court and that he saw or heard the conduct constituting the contempt, summary punishment for a criminal contempt may be imposed. The order of contempt should recite the facts and should be signed by the judge and entered of record.

In all other cases a contempt is to be prosecuted on notice. Such notice is to state the time and place of hearing, allowing a reasonable time for the preparation of the defense. It is to be given in any of three ways: orally by the court in open court in the presence of the defendant, or by an order to show cause, or by an order of arrest issued on the application of the United States attorney or of an attorney appointed for that purpose by the court. The notice is to state the essential facts constituting the criminal contempt “and describe it as such”. The latter provision will thus result in an early decision on the complicated question of the difference between a criminal and a civil contempt. The defendant is to be entitled to trial by jury in any case in which an act of Congress so provides. Thus, the right

197 Since the word “court” is used, it follows that an act done while the court was not in session, such as when the judge is traveling, is not summarily punishable.

The provision for certification by the judge results in some notice to the defendant, and should assure fairly prompt disposition since the judge must have seen or heard the conduct.

198 Rule 42(a). This substantially restates existing law, Ex parte Terry (1888) 128 U.S. 289; Douglas v. Adel (1935) 269 N.Y. 144, 146, 199 N.E. 35, 36. The words “without notice or hearing” contained in the First and Second Preliminary drafts were stricken.

199 Rule 42(b). It appears that the procedure in criminal contempt cases now covered by statute is to be found in 11 U.S.C. (1940) §69; 28 U.S.C. (1940) §§ 385-390, 703, 714-717; 29 U.S.C. (1940) §§ 111, 112. In contempts not arising under these statutes, the courts have followed any procedure sufficient to insure notice and hearing to the defendant. See Savin, Petitioner (1889) 131 U.S. 267; Camarota v. United States (C.C.A. 3d, 1940) 111 F. (2d) 243.


201 Trial by jury is as of right if the proceeding is brought under the Act of March 23, 1932, c. 90, sec. 11, 47 STAT. (1932) 72, 29 U.S.C. (1940) §111 (Norris-La Guardia Act), or the Act of October 15, 1914, c. 323, sec. 22, 38 STAT. (1914) 738, 28 U.S.C. (1940) §387 (Clayton Act).
to trial by jury is not enlarged, but is left where it now is. There are certain basic differences between contempts and crimes making it unwise to treat them alike with respect to jury trial. The defendant shall have the right to admission to bail as provided in these rules. When the alleged contempt consists of disrespect to a judge, that judge shall be disqualified from presiding except with the defendant’s consent.202

CHAPTER X

GENERAL PROVISIONS

Presence of the Defendant. Rule 43 lays down a specific rule as to the presence of the defendant. “The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.”203 As has been seen he may be also present at his preliminary examination,204 at the taking of depositions,205 and at oral notice of criminal contempt hearing.206 The first sentence is a restatement of existing law. The principle does not apply to hearings on motions made prior to or after trial.207

In prosecutions for offenses not punishable by death, the defendant’s voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including verdict. This is a restatement of the existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence.

A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sen-

202 This provision is based in part on 29 U.S.C. (1940) §112 and the views of Chief Justice Taft in Cooke v. United States (1925) 267 U.S. 517, 539.


204 Rule 5(c). See American Law Institute Code §46.

205 Rule 15(a) and (b).

206 Rule 42(b).

tence in the defendant’s absence. This rule already prevails in some
districts comprising very large areas. In such districts considerable
trial might be necessary, resulting in expense and hardship not com-
mensurate with the gravity of the charge. This rule which favors de-
fendants is left discretionary with the court. The defendant’s presence
is not required at a reduction of sentence under Rule 35. This is in
the interest of both the prosecution and the defendant, because of the
delay and expense that would often be involved if presence were
necessary.

Assignment of Counsel. The Sixth Amendment guaranties to the
accused the right to assistance of counsel for his defense in all federal
“criminal prosecutions”. The accused may expressly waive the right,
but it is the duty of the trial court to permit him to do so only with
full knowledge of his rights.208 One convicted upon his plea of guilty
without having the aid of counsel is deprived of his constitutional
right if he does not voluntarily waive his right to counsel.209 Rule 44
provides: “If the defendant appears in court without counsel, the
court shall advise him of his right to counsel and assign counsel to
represent him at every stage of the proceedings unless he elects to
proceed without counsel or is able to retain counsel”.210

It is the purpose of the rule to indicate that the right to have coun-
sel assigned by the court relates only to proceedings in court and,
therefore, does not include preliminary proceedings before a commit-
ing magistrate. Although the defendant is not entitled to assignment
counsel with respect to preliminary proceedings, he is entitled to
be represented by counsel retained by him if he so chooses.211

On September 13, 1944, the House of Delegates of the American
Bar Association adopted the following resolution recommended by
the Committee on Jurisprudence and Law Reform:212

208 Johnston v. Zerbst (1938) 304 U.S. 458; Glasser v. United States (1942) 315
U.S. 60; Adams v. United States ex rel. McCann (1942) 317 U.S. 269, 279. As to the
right in the state courts see Betts v. Brady (1942) 316 U.S. 455.


210 The rule is a restatement of the principles enunciated in the recent decisions. See
Holtzoff, The Right to Counsel Under the Sixth Amendment (1944) 20 N. Y. U. L. Q.
Rev. 1.

211 Rule 5(b) (Proceedings before the Commissioner); Rule 40(b) (Removal). As
to defendant’s right of counsel in connection with the taking of depositions see Rule
15(c).

212 H. R. 4290 is as follows:

"Be it enacted . . . , that whenever a defendant shall be arraigned in any district
Resolved, That this Association approve in principle the Bill H.R. 4290, relative to the appointment and compensation for counsel for impoverished defendants in certain criminal cases in the United States district courts; and that the Secretary of the Association certify its approval of the bill in principle to the Chairman of the Committee on Judiciary of the House of Representatives.

Time. Rule 45 deals with the subject of time. In computing any period of time the day of the event after which the designated period of time begins to run is not to be included, but the last day of the period so computed is to be included unless it is a Sunday or a holiday. When a period of time is less than seven days, intermediate Sundays and holidays are to be excluded. A half holiday is not considered a holiday. The rule is in substance the same as Rule 6 of the Federal Rules of Civil Procedure. It seems sound to have the same rule in civil and criminal cases to preclude possible confusion.

The court may for cause shown, at any time in its discretion, order the period enlarged if application is made before the expiration of the period originally prescribed; or upon motion permit the act to be done after the expiration of the specified period where the failure to act was a result of excusable neglect. But it may not enlarge the period for taking any action under Rules 33, 34, and 35 except as provided in those rules, or the period for taking an appeal.

The time period is not affected or limited by the expiration of the court of the United States upon the charge that he has committed any felony, and shall request the court to appoint counsel to assist in his defense, and shall by his own oath, or such other proof as may be required, satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel, not exceeding two, for such defendant, to be paid upon order of the court by the United States marshal compensation at a rate not to exceed $25 per day for each counsel, for the number of days such counsel is actually employed in court upon the trial, and $25 for service in preparing for trial or plea.


Rule 45(a). With subdivision (a) compare Rule 13 of the Criminal Appeal Rules (1934) 292 U.S. 661, 666, which provides:

"For the purpose of computing time as specified in the foregoing rules, Sunday and legal holidays (whether under Federal law or under the law of the state where the case was brought) shall be excluded."

The Criminal Appeal Rules thus gave additional time in periods of seven days or more, and were silent as to half holidays. See Legis. (1939) 52 Harv. L. Rev. 983, 984.

Rule 45(b).

Rule 33 covers new trial, 34 arrest of judgment, and 35 correction or reduction of sentence.
The expiration of a term of court does not affect the power of a court to do any act in a criminal proceeding. Thus, there are abolished the difficulties caused by the expiration of terms of court.

A written motion, other than one which may be heard ex parte and notice of the hearing thereof, shall be served not later than five days before the time specified for the hearing unless a different period is fixed by rule or order of the court. Such an order may for cause shown be made on an ex parte application.

Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice upon him, and the notice is served upon him by mail, three days are to be added to the prescribed period.

Bail. Bail is dealt with in Rule 46. Before conviction, a defendant arrested for an offense not punishable by death is given the right to bail. Where he is arrested for an offense punishable by death, the defendant is given no right to bail, but the grant of bail rests in the discretion of the court "giving due weight to the evidence and to the nature and circumstances of the offense."

Bail may be allowed pending appeal or certiorari only if it appears that a substantial question is involved. Bail may be granted by the trial judge or by the appellate court, or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting to bail.

The amount of bail shall be such as in the judgment of the commissioner or court will insure the presence of the defendant. In arriving at the amount, the court is directed to take account of four factors: the nature and circumstances of the offense charged, the

\[216\) Rule 45(c). This is done for civil cases by Rule 6(c) of the Federal Rules of Civil Procedure.\]
\[217\) Rule 45(d). \textit{Cf.} Rules 47 (Motions) and 49 (Service and filing of papers).\]
\[218\) Rule 45(e).\]
\[219\) Rule 46(a)(1). The language is "shall be admitted to bail." This is based on 18 U.S.C. (1940) §596. Under this section admission to bail is mandatory, prior to conviction, in noncapital cases. Hudson v. Parker (1895) 156 U.S. 277.\]
\[220\) This is based on 18 U.S.C. (1940) §597.\]
\[221\) Rule 46(a)(2). This rule is in substance a restatement of Rule 6 of the Criminal Appeal Rules, with the addition of a reference to bail pending certiorari. This rule does not supersede 18 U.S.C. (1940) §682, which provides for the admission of the defendant to bail on his own recognizance pending an appeal taken by the prosecution.\]
\[222\) The Supreme Court deleted the words "if the appellate court is not in session."\]
\[223\) Rule 46(c). The Eighth Amendment provides that excessive bail should not be required.\]
weight of the evidence against the defendant, the financial ability of
the defendant, and his character.

The court may require a person whose testimony is material, to
give bail, for his appearance as a witness, upon a showing that it may
become impracticable to secure his presence by subpoena.\textsuperscript{224} For fail-
ure to give bail, the witness may be committed to the custody of the
marshal. His release may be ordered whenever the court finds that he
has been detained for an unreasonable period. The court may modify
at any time its requirement as to bail.

If the defendant is admitted to bail, he is to execute a bond for his
appearance.\textsuperscript{225} The court may require one or more sureties or may
accept cash or bonds. In proper cases no security need be required.
Bail on appeal is to be deposited in the registry of the district court.

Sureties, except approved corporate sureties, are to justify by af-
fidavit.\textsuperscript{226} They may be required to describe the property by which
they propose to justify and the encumbrances thereon, the number
and amount of other bonds remaining undischarged and all their other
liabilities.

Full provision as to forfeiture is made in the rule.\textsuperscript{227} If there is a
breach of condition of a bond, a forfeiture is to be declared by the
district court.\textsuperscript{228} The court may direct that a forfeiture be set aside,
upon such conditions as the court may impose, if justice does not re-
quire enforcement of the forfeiture.\textsuperscript{229} This last provision changes
existing law in that it increases the court's discretion to set aside a
forfeiture. The present power of the court is confined to cases in
which the defendant's default has not been willful.\textsuperscript{230} When a for-
feiture has not been set aside, the court shall on motion enter a judg-

\textsuperscript{224} Rule 46(b). Compare Rule 15(a) on the taking of a deposition of a witness who
has been committed because of inability to give bail. This rule is substantially a restate-
ment of existing law, 28 U.S.C. (1940) §657.

\textsuperscript{225} Rule 46(d). This rule is based in part on 6 U.S.C. (1940) §15, and is a restate-
ment of existing practice.

\textsuperscript{226} Rule 46(e). This rule resembles section 79 of the American Law Institute Code
but introduces an element of flexibility. Corporate sureties are regulated by 6 U.S.C.
(1940) §§ 6-14.

\textsuperscript{227} Rule 46(f). This rule is in substance the existing law, somewhat expanding

\textsuperscript{228} Rule 46(f)(1).

\textsuperscript{229} Rule 46(f)(2). The First and Second Preliminary Drafts conferred no such
broad discretion.

\textsuperscript{230} Continental Casualty Co. v. United States (1942) 314 U.S. 527.
ment of default and execution may issue thereon. The obligors, by entering into a bond, submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent for the service of papers affecting their liability. Their liability may be enforced on motion without the need of an independent action. Simple motion procedure for enforcing forfeited bail bonds is substituted for the procedure by scire facias, which was abolished by Rule 81(b) of the Federal Rules of Civil Procedure. After entry of judgment of default, the court may remit it under the conditions applying to the setting aside of forfeiture. Full provision as to exoneration is made.

Motions. Under Rule 47, an application to the court for an order shall be by motion. A motion, except one made during a hearing or trial, shall be in writing unless the court permits it to be made orally. It must state its grounds and the relief or order sought. It may be supported by affidavit. The practice as to motions is thus left simple and flexible, and the question whether the motion should be written or oral is left to the discretion of the court and the parties. The rule is intended to state general requirements for all motions.

Dismissal. The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall then terminate. None of the drafts of the Advisory Committee required leave of court though a considerable number of its members favored such a provision; the committee's draft required the prosecution to file a statement of reasons. This provision changes the common law rule that the prosecutor may enter a nolle prosequi at his discretion, without any action.

231 Rule 46(f)(3).
232 This is similar to Rule 73(f) of the Federal Rules of Civil Procedure.
233 Rule 46(f)(4).
234 Rule 46(g).
235 This rule resembles Rule 7(b), Federal Rules of Civil Procedure, except that it permits the court to allow motions to be made orally and does not require that its grounds shall be stated "with particularity."
236 This is not intended to permit "speaking motions," as, for example, a motion to dismiss on information for insufficiency supported by affidavits, but rather to authorize the use of affidavits when they are appropriate to establish a fact, e.g., authority to take a deposition or former jeopardy.
237 For particular provisions applying to specific motions, see Rules 6(b)(2), 12, 14, 15, 16, 17(b) and (c), 21, 22, 29, and 41(e).
238 Rule 48(a).
by the court. The rule requiring leave of court prevails in many states. The rule confers the power to dismiss by leave of court on the Attorney General as well as the district attorney, since the Attorney General exercises "general superintendence and direction" over the district attorneys "as to the manner of discharging their respective duties." Moreover, it has been the administrative practice that the Attorney General supervises the filing of *nolle prosequis* by the district attorneys.

The word "complaint" was used in order to settle a doubt as to whether the district attorney may file a dismissal between the time when the defendant is bound over and the finding of an indictment. It has been thought in several districts that the district attorney must await the grand jury's action. The situation sometimes worked unnecessary hardship on innocent defendants.

It is also provided that if there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the accusation.

**Service and Filing of Papers.** Under Rule 49 four classes of papers are to be served upon the adverse parties: written motions other than those which are heard *ex parte*, written notices, designations of record on appeal and similar papers. Whenever under these rules, or by a court order, service is required or permitted to be made upon a party represented by an attorney, service shall be upon the attorney unless the court orders service upon the party himself. Immediately following the entry of an order made on a written motion subsequent to arraignment, the clerk is to mail to each party affected a notice there-

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239 Confiscation Cases (1869) 74 U.S. 454, 457; United States v. Woody (D. Mont., 1924) 2 F. (2d) 262.


242 No such provision appeared in the First and Second Preliminary Drafts.

243 This rule restates the inherent power of the court to dismiss a case for want of prosecution. *Ex parte Altman* (S. D. Cal., 1940) 34 Fed. Supp. 106. The rule did not appear in the First and Second Preliminary Drafts.

244 Rule 49(a). This is an adaptation of Rule 5(a) of the Federal Rules of Civil Procedure.

245 Rule 49(b). This rule is similar to Rule 5(b) of the Federal Rules of Civil Procedure.
of, and should make a note in the docket of the mailing. Papers required to be served are to be filed with the court. The manner of filing is to be as in civil actions.

Calendars. Under Rule 50, the district courts may provide for placing criminal proceedings upon appropriate calendars. This is a restatement of the inherent power of the courts over their own calendars, although in practice in most districts the assignment of criminal cases for trial is handled by the United States Attorney. Preference is to be given to criminal proceedings as far as practicable.

Exceptions Unnecessary. Under Rule 51, which is identical, except for one word, with Civil Rule 46, exceptions to rulings or orders of the court are made unnecessary. In cases where an exception was formerly necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court, and his grounds therefor. If a party has no opportunity to object at the time a ruling or order is made, the absence of an objection is not permitted to prejudice him. The effect of this rule is to do away with the need for noting an exception to the ruling of the court on an objection taken at the trial. The practice will be made uniform in civil and criminal cases, and should prevent confusion to

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246 Rule 49(c). This is an adaptation of Rule 77(d) of the Federal Rules of Civil Procedure. Where the losing party, in reliance on the clerk's obligation to send a notice, failed to file a timely notice of appeal, it was held competent for the trial judge to vacate the judgment because of the clerk's failure to give notice and to enter a new judgment. Hill v. Hawes (1944) 320 U.S. 520.

247 This rule incorporates by reference Rule 5(d) and (e) of the Federal Rules of Civil Procedure.

248 At this point the Supreme Court rejected the rule proposed by the Advisory Committee on Communications by Counsel to Judge. See Rule 52 of the Report of the Advisory Committee (June 1944), and the same rule in the Second Preliminary Draft (February 1944). The rule had been criticized as preventing the practice of counsel submitting to the trial judge copies of their trial briefs at the beginning of a trial, and because it might be taken as a reflection on the probity of the judges.


251 The first word in civil rule 46 "Formal", preceding the word "exceptions", is dropped out in the Criminal Rule.

252 See Criminal Rule 30, supra note 120 and text thereto, as to objections to instructions to the jury.
lawyers trying both civil and criminal cases. Certain states have abolished the use of exceptions in criminal and civil cases.  

**Harmless Error and Plain Error.** The first part of Rule 52, dealing with harmless error, is worded as simply and concisely as is possible: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The rule is not stated in the narrower form of being confined to defects of form in the indictment or information, or with respect to the admission or exclusion of evidence. It is much shorter than the corresponding civil rule. The basic importance of the rule is that it rejects a doctrine which once existed in the criminal law that prejudice should be presumed from the commission of error.  

The second part of the rule deals with plain error. "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The Federal Rules of Civil Procedure and the Criminal Appeals Rules are silent as to plain error, and one-half of the circuit courts of appeals in the 1939 amendments of their rules had deleted the provisions to the effect that a court, at its option, may notice plain error not assigned. The Civil Rules Committee had less occasion to deal with plain error, since it is basically a problem of appellate procedure.  

**Regulation of Conduct in the Court Room.** Under Rule 53, the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court. Such a rule is of course needed much more in the state courts than in the federal courts.  

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253 CAL. PEN. CODE (Deering, 1941) § 1259; MICH. STAT. ANN. (Henderson, 1938) §§ 28.1046, 28.1053.  
254 Rule 52(a).  
255 18 U.S.C. (1940) §556 is limited to defects in the indictment. However, 28 U.S.C. (1940) §391, provides that on appeal or motion for new trial, the court shall disregard technical errors not affecting substantial rights of the defendant.  
256 It really amounts to a shortened form of the second sentence of Civil Rule 61.  
257 This rule restates existing law. Wiborg v. United States (1896) 163 U.S. 632, 658. Rule 27 of the Rules of the Supreme Court provides that errors not specified will be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified."  
258 The words "from the court room" did not appear in the First and Second Preliminary Drafts.  
259 For the type of abuse which this rule should prevent see Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure* (1935) 21 A.B.A.J. 301, 304.
Application and Exception. Rule 54 deals with the application of the rules and the exceptions to such application. The rules apply to all criminal proceedings in the district courts of the United States, which include those of the District of Columbia, Alaska, Hawaii, Puerto Rico, and the Virgin Islands. The rules also apply to criminal proceedings in the circuit courts of appeals and in the Supreme Court. Though not so provided in the First and Second Preliminary Drafts, it was ultimately provided that only the rules governing proceedings after verdict should apply in the Canal Zone. There are no grand juries in the Canal Zone, all prosecutions being instituted by information. Because of these circumstances, and because of the peculiar status of the Canal Zone and its quasi-military nature, it was thought best to make only part of the rules applicable.

The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. The rules apply to criminal cases removed to the district courts from state courts, and govern all procedure after removal except dismissal by the prosecution. They apply to proceedings for offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district. The rules do not alter the power of the judges or commissioners to hold to security of the peace and for good behavior. Nor do the rules govern trials before commissioners. Nor do the rules apply to extradition and rendition of fugitives, forfeiture of property for violation of a


250 Rule 54(a)(1). Under the order promulgating the Criminal Appeal Rules, paragraph 2, only proceedings in the district courts of the United States, and in the District of Columbia, were covered by the rules, though the court had the power under statute to make the coverage wider. On March 17, 1941, the Supreme Court extended the operation of the rules to the other areas named (1941) 312 U.S. 721.

251 Rule 54(a)(2). Rules 3, 4, and 5, supra, relate to proceedings before commissioners. These rules do not apply to state and local judges and magistrates, who seldom act in federal cases, and are unfamiliar with federal procedure.

Rule 54(b)(1). This rule restates existing law, except that it does not affect whatever power the state prosecutor may have to dismiss. The rule does not affect the mode of removal, now covered by 28 U.S.C. (1940) §§ 74-76.

252 Rule 54(b)(2). Compare Rule 18.

253 Rule 54(b)(3).

254 Rule 54(b)(4). Such proceedings are governed by the Rules of Procedure and Practice promulgated by the Supreme Court on January 6, 1941, 311 U.S. 733.
federal statute, and the collection of fines and penalties. They do not apply to the prosecution of juvenile delinquents, so far as the rules are inconsistent with the Federal Juvenile Delinquency Act. It will be noted that the rules are silent as to the subject of habeas corpus. There have been repeated holdings by the Supreme Court that habeas corpus is a civil proceeding. The civil rules deal only with appeals in habeas corpus proceedings.

As used in these rules the term "State" includes District of Columbia, Territory, and insular possession. The phrase "Act of Congress" includes any act of congress locally applicable to, and in force in, the same areas. "District court" includes all district courts named in subdivision (a), paragraph (1) of this rule. "Civil action" refers to a civil action in the district court. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States attorney, and an authorized assistant of a United States attorney.

Records. Under Rule 55, such records in criminal proceedings are to be kept by the clerk of the district court, and United States commissioners as the Directors of the Administrative Office, with the approval of the Judicial Conference of Senior Circuit Judges, may prescribe. Under existing law, the Administrative Office is authorized

265 Rule 54(b)(5).
266 Ex parte Bollman (1807) 8 U.S. 75, 101; Ex parte Tom Tong (1883) 108 U.S. 556; Riddle v. Dyche (1923) 262 U.S. 333, 335. The procedure in such cases is prescribed by 28 U.S.C. (1940) §§ 451-466.
267 Rule 81(a) provides: "In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeals except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States."

That under the rules a habeas corpus case is not referable to a master, nor comparable to an equity case, see Holiday v. Johnston. (1941) 313 U.S. 342.
268 Rule 54(c). Compare Rule 81(e) of the Federal Rules of Civil Procedure. In conjunction with this rule one should read 1 U.S.C. (1940) §§ 1-6, containing general rules of conjunction.
270 See Civil Rule 79(a) (Books Kept by the Clerk and Entries Therein: Civil Docket); and Rules of Practice in Trials of Petty Offenses by United States Commissioners, Rule III. See also 28 U.S.C. (1940) §568, and instructions to clerk and United States Commissioners issued by the Attorney General on October 1, 1929. The Act creating the Administrative Office became effective subsequent to the effective date of the Civil Rules.
to prescribe for clerks and commissioners the form and content of
dockets, indices, files, minute books, order books, statistical case re-
ports, and fiscal records.271 In view of this fact, it seemed preferable
not to prescribe the records to be kept, but to vest the power to do so
in the Director of the Administrative Office of the United States
Courts.

Courts and Clerks. Under Rule 56, the circuit court of appeals
and the district court are to be deemed always open for the purpose
of filing any proper paper, of issuing and returning process, and of
making motions and orders.272 The clerk's office with the clerk in
attendance is to be open during business hours on all days except
Sundays and legal holidays.273

Rules of Court. Under Rule 57, rules "made by district courts
and circuit courts of appeals for the conduct of criminal proceedings
shall not be inconsistent with these rules."274 Copies of all rules thus
prescribed, upon their promulgation, to be furnished to the Adminis-
trative Office of the United States Courts. The analogous civil rule
provided for furnishing copies to the Supreme Court of the United
States. The clerk of each court is to arrange, subject to the approval
of the Director of the Administrative Office, to have rules promptly
published and made available to the public. This should avoid the
difficulty now existing in some districts arising out of lack of admin-
istrative machinery for the printing and distributing of local rules of
court. Lawyers unfamiliar with local practice have found it difficult
to obtain or consult copies of local rules.

271 See 28 U.S.C. (1940) §446(1) and section 6 of the Act of August 7, 1939, creating
the Administrative Office. For a report of the present practice of keeping of records of
clerks see "Proposed Improvements in the Administration of the Offices of Clerks of
United States District Courts, submitted to the Director of the Administrative Office of
the United States Courts, July 1941, prepared by the Bureau of the Budget, Executive
Office of the President." Passim, pp. 9-20, 35, 37-42, 55-60, 97-98.
272 This closely resembles Rule 77(a) of the Federal Rules of Civil Procedure, except
that it applies to circuit courts of appeals as well as to district courts. In connection with
this rule, see 28 U.S.C. (1940) §§ 14 and 15, which "indicate a policy of avoiding the hardships
241 U.S. 606, 611.
273 This is identical with the first sentence of Rule 77(c) of the Federal Rules of
Civil Procedure. The term "legal holidays" includes federal holidays as well as holidays
prescribed by state law.
274 This rule substantially restates 28 U.S.C. (1940) §731. A similar provision is found
in Rule 83 of the Federal Rules of Civil Procedure. See also Criminal Appeal Rule 12.
At present, under the Attorney General's instructions to clerks of court, copies of local
rules are to be furnished to the Department of Justice Library.
"If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." One of the aims of this provision is to abrogate any existing requirement of conformity to State procedure on any point whatsoever. Although the rules are designed to create a comprehensive procedure for federal criminal cases, it seemed preferable not to prescribe a uniform practice as to some matters of detail, but to leave the individual courts free to regulate them, either by local rules or usage. Among such matters are the method of impaneling a jury, the mode and order of interposing challenges to jurors, the order of counsel's arguments to the jury, the matter of sealed verdicts, and other similar details.

**Forms.** Rule 58 provides: "The forms contained in the Appendix of Forms are illustrative and not mandatory." Twenty-seven forms are set out in the Appendix. The Federal Rules of Civil Procedure provide forms. So do the existing Criminal Appeals Rules; and the Petty Offense Rules. Many state codes provide forms for summonses, warrants, committments, recognizances, indictments, informations, and subpoenas.

**Effective Date.** The Criminal Appeals Rules did not require any reporting to Congress, becoming effective at a date fixed by the Supreme Court. Similarly, Rule 32 through 39 of the present rules covering the same subjects were not reported to Congress. All the other rules must be reported to Congress at the beginning of a regular session of Congress.

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276 Rule 57(b).
277 The Federal Rules of Civil Procedure have been held to repeal the Conformity Act, Sibbach v. Wilson (1941) 312 U.S. 1, 10. Federal Circuit Judge A. M. Dobe states in an article, *The Federal Rules of Civil Procedure* (1939) 25 Va. L. Rev. 261, 262: "The federal equity rules are superseded and federal statutes inconsistent with the rules are repealed, though federal statutes on points not covered by the rules remain in full force and virtue."
277 See Civil Rule 84 and Appendix of Forms.
278 Forms under Rules 3 and 4. Two forms under each rule were set out (1933) 292 U.S. 661.
279 Form under Rule 4 (1940) 311 U.S. 733.
280 See American Law Institute Code §§ 152, 153, and 188, covering indictment and information. In England, simplified forms are provided under the Indictments Act, 1915, 5 & 6 Geo. V, c. 90, and a Rules Committee is provided to amend and make new forms and rules.
282 It is my supposition that they will be placed in effect when the balance of the rules go into effect. They are not in effect as yet, though no submission to Congress is required.
session, and cannot become effective until after the close of the session. Rule 59 provides that these rules "take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945." They are to govern all criminal proceedings thereafter commenced, and so far as just and practicable all pending proceedings.

Title. Under Rule 60 these rules may be known and cited as the "Federal Rules of Criminal Procedure." No provision is made for abbreviation.

\[283\] 54 STAT. (1940) 688; 18 U.S.C. (1940) §687. As to the similar statutes as to the Civil Rules see 28 U.S.C. (1940) §§723b, 723c.

\[284\] For the corresponding civil rule see Rule 86 of the Federal Rules of Civil Procedure.

\[285\] This rule is similar to Rule 85 of the Federal Rules of Civil Procedure. Placing the rule at the very last seems preferable to the arrangement of the civil rules placing it next to the last.