

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivisions (a) and (b). 1. This rule introduces an addition to existing law. "Lawyers not thoroughly familiar with Federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems to be a defect in the federal law, which the proposed rules would cure." Homer Cummings, 29 A.B.A.Jour. 655; Medalie, 4 Lawyers Guild R. (3)1, 5.

2. The rule provides for two kinds of motions that may be made by the defendant for a change of venue. The first is a motion on the ground that so great a prejudice exists against the defendant that he cannot obtain a fair and impartial trial in the district or division where the case is pending. Express provisions to a similar effect are found in many State statutes. See, e.g., Ala. Code (1940), Title 15, sec. 267; Cal.Pen.Code (Deering, 1941), sec. 1033; Conn.Gen.Stat. (1930), sec. 6445; Mass.Gen.Laws (1932) c. 277, sec. 51 (in capital cases); N.Y. Code of Criminal Procedure, sec. 344. The second is a motion for a change of venue in cases involving an offense alleged to have been committed in more than one district or division. In such cases the court, on defendant's motion, will be authorized to transfer the case to another district or division in which the commission of the offense is charged, if the court is satisfied that it is in the interest of justice to do so. The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court.

3. The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed. Constitution of the United States, Article III, Sec. 2, Par. 3; Amendment VI. By making a motion for a change of venue, however, the defendant waives this constitutional right.

4. This rule is in addition to and does not supersede existing statutes enabling a party to secure a change of judge on the ground of personal bias or prejudice, 28 U.S.C. 25 [now 144]; or enabling the defendant to secure a change of venue as of right in certain cases involving offenses committed in more than one district, 18 U.S.C. 338a(d) [now 876, 3239] (Mailing threatening communications); *Id.* sec. 403d(d) [now 875, 3239] (Threatening communications in interstate commerce).

Note to Subdivision (c). Cf. 28 U.S.C. 114 [now 1393, 1441] and Rule 20, *supra*.

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

Subdivision (a).—All references to divisions are eliminated in accordance with the amendment to Rule 18 eliminating division venue. The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18. It is also made clear that on a motion to transfer under this subdivision the court may select the district to which the transfer may be made. Cf. *United States v. Parr*, 17 F.R.D. 512, 519 (S.D.Tex. (1955)); *Parr v. United States*, 351 U.S. 513 (1956).

Subdivision (b).—The original rule limited change of venue for reasons other than prejudice in the district to those cases where venue existed in more than one district. Upon occasion, however, convenience of the parties and witnesses and the interest of justice would best be served by trial in a district in which no part of the offense was committed. See, e.g., *Travis v. United States*, 364 U.S. 631 (1961), holding that the only venue of a charge of making or filing a false non-Communist affidavit required by §9(h) of the National Labor Relations

Act is in Washington, D.C. even though all the relevant witnesses may be located at the place where the affidavit was executed and mailed. See also Barber, *Venue in Federal Criminal Cases: A Plea for Return to Principle*, 42 Tex.L.Rev. 39 (1963); Wright, *Proposed Changes in Federal Civil, Criminal and Appellate Procedure*, 35 F.R.D. 317, 329 (1964). The amendment permits a transfer in any case on motion of the defendant on a showing that it would be for the convenience of parties and witnesses, and in the interest of justice. Cf. 28 U.S.C. §1404(a), stating a similar standard for civil cases. See also *Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S.C. 240 (1964). Here, as in subdivision (a), the court may select the district to which the transfer is to be made. The amendment also makes it clear that the court may transfer all or part of the offenses charged in a multi-count indictment or information. Cf. *United States v. Choate*, 276 F.2d 724 (5th Cir. 1960). References to divisions are eliminated in accordance with the amendment to Rule 18.

Subdivision (c).—The reference to division is eliminated in accordance with the amendment to Rule 18.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 21 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 21(d) consists of what was formerly Rule 22. The Committee believed that the substance of Rule 22, which addressed the issue of the timing of motions to transfer, was more appropriate for inclusion in Rule 21.

COMMITTEE NOTES ON RULES—2010 AMENDMENT

Subdivision (b). This amendment requires the court to consider the convenience of victims—as well as the convenience of the parties and witnesses and the interests of justice—in determining whether to transfer all or part of the proceeding to another district for trial. The Committee recognizes that the court has substantial discretion to balance any competing interests.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made after the amendment was released for public comment.

Rule 22. [Transferred]

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Rule 22 has been abrogated. The substance of the rule is now located in Rule 21(d).

TITLE VI. TRIAL

Rule 23. Jury or Nonjury Trial

(a) **JURY TRIAL.** If the defendant is entitled to a jury trial, the trial must be by jury unless:

- (1) the defendant waives a jury trial in writing;
- (2) the government consents; and
- (3) the court approves.

(b) **JURY SIZE.**

(1) *In General.* A jury consists of 12 persons unless this rule provides otherwise.

(2) *Stipulation for a Smaller Jury.* At any time before the verdict, the parties may, with the court's approval, stipulate in writing that:

- (A) the jury may consist of fewer than 12 persons; or
- (B) a jury of fewer than 12 persons may return a verdict if the court finds it necessary