

**JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE  
ON RULES OF PRACTICE AND PROCEDURE**

**Minutes of the Meeting of February 4, 1988**

The Winter Meeting of the Judicial Conference Committee on Rules of Practice and Procedure was called to order by its Chairman, Judge Joseph F. Weis, Jr., at the Administrative Office of the United States Courts in Washington, D. C. on Thursday, February 4, 1988. All members of the Committee were present except Judge Charles E. Wiggins and Gael Mahony, Esq., who were unavoidably absent. In addition, the chairmen of all of the advisory committees and the reporters of the appellate, civil and bankruptcy advisory committees were present. Also present were the reporter to the Committee, Dean Daniel R. Coquillette of Boston College Law School; the secretary of the Committee, James E. Macklin, Jr., Esq., Deputy Director of the Administrative Office; David N. Adair, Jr., Esq., Assistant General Counsel of the Administrative Office; Mr. William B. Elridge, Director, Research Division, Federal Judicial Center; and Patricia S. Channon, Esq., Bankruptcy Division, Administrative Office. Mr. Joseph S. Spaniol, Jr., Clerk of the United States Supreme Court and former secretary to the Committee, was present. Also attending the meeting were Thomas W. Hutchinson, Esq., Counsel, and Raymond D. Smietanka, Esq., Minority Associate Counsel, House Judiciary Subcommittee on Criminal Justice, and Stef Cassella, Esq., Counsel, Senate Judiciary Committee.

**Agenda I.                    Introductory Remarks of the Chairman**

The chairman opened the meeting by welcoming the new members of the Standing Committee and the Advisory Committee attendees and by noting developments regarding

the rules enabling legislation. Judge Weis remarked that the promulgation of rules of practice and procedure since the passage of the original Rules Enabling Act has been a partnership between the Judiciary and Congress. One of the duties of the Standing Committee must be to try to maintain that partnership. Although the Committee has been operating pursuant to procedures adopted at the June 1983 meeting of the Standing Committee, the draft rules enabling legislation such as that included in currently pending H.R. 1507 would require more in the way of public notice and open meetings. He suggested that the members of the Standing Committee consider suggested changes to the procedures of the Standing and Advisory Committee. He also suggested that Standing Committee members be assigned to attend the advisory committee meetings to act as additional liaison between the advisory committees and the Standing Committee.

**Agenda II**                      **Status Report on the Study of Local Court Rules**

The chairman introduced the reporter of the Committee, Dean Daniel R. Coquillette, who reported on the status of the local rules project authorized by the Conference in September 1984 and the Conference on Local District Court Rules held at Boston College Law School on November 12 and 13, 1987. At that meeting, a small number of interested and knowledgeable judges, practitioners, and academicians met to examine and discuss the work of the project. Dean Coquillette reported that the conference was very useful in assisting the project in the completion of its report to the Standing Committee scheduled for the July meeting. The conference participants provided specific guidance on the various components of the current work of the project.

The conference revealed that there is widespread agreement about two parts of the project. It was unanimously agreed that a uniform numbering system for local rules would be helpful. Were all local rules subject to the same numbering system, the rules would be easily indexed, subject to identification by the national bar, and the process of renumbering would perhaps lead to a reexamination of local rules. There was also agreement that it was valuable for the project to identify local rules that indicate needed changes in national rules. The project can simply refer the changes to the appropriate advisory committee.

As to the other two components of the current phase of the local rules project, there was less agreement. Although most of the conferees felt that it was helpful to identify local rules that repeat either statutes or national rules and local rules that are in direct conflict with national rules, there was disagreement on the disposition of that information. Some suggested that the judicial councils should be notified for review pursuant to their authority under the provisions of Federal Rule of Civil Procedure 83. It was thought by others that such rules in the first instance should be brought to the attention of the chief judge of the district in which the rule had been promulgated. There was also some disagreement on the utility of model local rules. Of greatest concern was the method of adoption of these rules.

Dean Coquillette reported that all four components of this phase of the study would be ready for review by the Standing Committee at its July meeting. He also reported that the conference had identified some subjects as simply too controversial to deal with as part of the Local Rules Study. These subjects included attorney admissions and professional responsibility.

After discussion of the conference report, Judge Weis suggested that the model rules be available at the time courts undertake to renumber their local rules in accordance with a uniform numbering system. In the course of renumbering local rules, courts may wish to consider adopting some or all of the model rules.

The Standing Committee approved in principle the development of a uniform numbering system. As part of this development, selected districts would be asked to apply the numbering system to their local rules and comment on the process.

With respect to admission to practice and professional responsibility, Judge Weis suggested that the subject be discussed informally with the Executive Committee of the Judicial Conference before proceeding.

**Agenda III.                    Reports on the Status of Advisory Committee Work**

**A.    Appellate Rules - Judge Jon O. Newman**

Judge Newman reported that two items are ready for submission to the Standing Committee. These items are an amendment to Rule 27(a) of the Rules of Appellate Procedure and changes made necessary by the Bankruptcy Amendments and Federal Judgeship Act of 1984. Judge Newman also reported that a number of matters have been tabled that are still awaiting action and that a number of suggestions are under consideration for dealing with appeals under the Sentencing Reform Act of 1984. Judge Weis suggested that the Advisory Committee submit the two items ready for action to the Standing Committee, which will consider those matters and hold them for reference to the Judicial Conference until such time as more items are ready for submission.

B. Civil Rules - Judge John F. Grady

Judge Grady reported that Federal Rule of Civil Procedure 47 dealing with the method of selecting alternate jurors would be taken under consideration so that this rule and Federal Rule of Criminal Procedure 24 would be as consistent as possible.

Judge Nielsen commented that the Civil Advisory Committee's amendment to Rule 44 strikes reference to the Canal Zone but does not adjust for the fact that the "Trust Territory of the Pacific Islands" does not include Palau, the Marshall Islands, and the Federated States of Micronesia. It was agreed that the Advisory Committee would coordinate with the Pacific Territories Committee to make the necessary change.

Judge Grady also reported that the Advisory Committee proposes to rewrite Rule 63 dealing with the disqualification of a judge after trial. Judge Weis suggested that any change in language to Rule 63 be coordinated so that the language of that rule is as consistent as possible with the language in Federal Rule of Criminal Procedure 25 dealing with the same subject.

Judge Grady also reported that the Committee proposes to abolish official forms by abrogating Rule 84, which sanctions them. Judge George reported on the experience of the Advisory Committee on Bankruptcy Rules, which discussed the possibility of eliminating official forms. The Committee concluded that some forms should be official, but others would simply be approved by the Advisory Committee for suggested use. Certain pilot districts are utilizing experimental forms at the present time. Judge Weis suggested that a subcommittee be appointed to study the issue of the continuation of official forms.

Judge Grady also reported on a proposal to amend Rule 72 regarding the time for objection to a magistrate's order. Judge Nielsen suggested that the ten days referred to

in Rule 72 does not necessarily mean ten days under the definitions in Rule 6 of the Federal Rules of Civil Procedure, which provides for the computation of time under the Rules. Judge Weis suggested that the reporters of the various advisory committees get together and report to the Committee on the problem of time computations such as those added by the 1985 amendment to Rule 6.

C. Criminal and Evidence Rules - Judge Leland C. Nielsen

Judge Nielsen reported that the Advisory Committee proposed to amend Federal Rule of Evidence 609(a) to provide for some protection, but not as much as provided criminal defendants, to civil litigants and the Government against unfair impeachment of their witnesses. After discussion, the Standing Committee voted to approve tentatively the amendment to Rule 609, but Judge Weis indicated that the amendment could be reconsidered at the summer meeting.

Judge Nielsen also reported on the proposed new rule 12.3, requiring notice of public authority in criminal cases. In Judge Nielsen's opinion, this new rule should be taken up in connection with a broader review of discovery in the criminal rules. Judge Nielsen noted, however, that Assistant Attorney General William F. Weld had written to the chairman objecting to any delay in consideration of this rule. Judge Nielsen also reported that Judge Edward Becker, chairman of the Committee on Criminal Law and Probation Administration, suggested consideration of amendments to Criminal Rules 11, 16 and 32 and Evidence Rule 1101(b)(3) to take into account requirements of the Sentencing Reform Act of 1984. The Standing Committee unanimously agreed to remand Rule 12.3 to the Advisory Committee for further consideration.

Judge Nielsen also advised that the Advisory Committee was considering amendments to Rule 41(a) which would authorize a magistrate to approve a warrant that could be executed outside of the district where it was issued if the property or person subject to the warrant moves outside the district, and would also authorize the issuance of a warrant for property outside the United States if the United States is lawfully entitled to seize the property. Also under consideration is an amendment of Rule 41(e), dealing with the treatment of evidence, and amendments to Rule 32 and Rule 6(e).

D. Bankruptcy Rules - Judge Lloyd D. George

Judge George reported that the Advisory Committee on Bankruptcy Rules is a newly reconstituted committee and that individuals on the Committee had been asked to specialize in certain areas of the bankruptcy rules. Judge George also reported that one of the primary concerns of the Advisory Committee was the implementation of the United States Trustee System. It has been decided to delete Part 10 of the rules, designed to accommodate trustees in the various pilot districts, and the matters referred to in Part 10 would be integrated into the body of the rules. In order to reduce the number of official forms, certain rules will need to be amended to delete references to forms that the Advisory Committee believes should no longer be official forms. Judge George also noted timing problems resulting from the time computation provisions of Rule 9006. The appeal period of 11 days, for example, could actually result in 15 days. This result is particularly problematic in bankruptcy cases where assets are tied up pending appeal. Judge Weis suggested that this matter be taken up in connection with a reconsideration of timing problems in all of the rules.

**Agenda IV.                    Review of Procedures for the Conduct of Business by the  
Judicial Conference Committees on Rules of Practice and  
Procedure**

The secretary of the Standing Committee, James E. Macklin, Jr., summarized the procedures currently in effect governing the Standing Committee and the various advisory committees. The proposal to open meetings to the public and to provide notice prior to those meetings was discussed by the Committee. It was noted by Mr. Hutchinson that the fact that meetings were opened to the public did not mean that the public was entitled to participate in such meetings. Judge Pointer suggested that language in the current proposed rules enabling legislation provided that notice be "sufficient" for interested parties to attend. He suggested that this language is very broad and that "appropriate notice" would be superior. Mr. Macklin noted that the Judicial Conference has indicated that it does not object to the current proposed rules enabling legislation. Judge Weis suggested that, pending passage of the rules enabling legislation, the chairmen of the advisory committees should be encouraged to experiment with notice and open meetings and to consider meeting outside of Washington to broaden opportunities for participation. Judge Weis also asked that individual members of the Committee express their interest in serving as liaison with the various advisory committees.

**Agenda V.                    New Business**

Mr. Macklin reported that the Office of the Law Revision Counsel, U. S. House of Representatives, has identified a number of technical errors in recent amendments to the rules. The amendments to the civil, criminal, and bankruptcy rules were submitted by the Supreme Court in March 1987 and took effect in the absence of congressional action

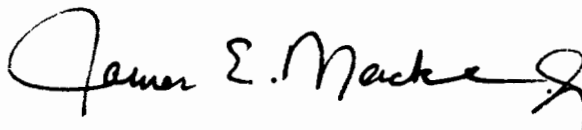


on August 1, 1987. The gender neutralizing amendments to the Federal Rules of Evidence submitted by the Supreme Court to Congress took effect on October 1, 1987 failing congressional action. The Standing Committee agreed unanimously to transmit the technical amendments, with the exception of the amendment to Civil Rule 44(a)(1) referring to the Panama Canal Zone, to the Judicial Conference and recommend that they be forwarded to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

**Agenda VI. Time and Place of Next Committee Meeting**

It was agreed that the next meeting of the Standing Committee would be held in Washington, D. C. on July 18 and 19, 1988.

Respectfully submitted, for the Committee on Rules of Practice and Procedure

A handwritten signature in cursive script that reads "James E. Macklin, Jr." with a stylized flourish at the end.

James E. Macklin, Jr.  
Secretary