

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of June 21, 1974 Meeting

The standing Committee on Rules of Practice and Procedure met in the Library of the Administrative Office of the United States Courts in Washington, D. C. on Friday, June 21, 1974.

The following members were present during the meeting:

Roszel C. Thomsen, Chairman  
Charles W. Joiner  
Richard E. Kyle  
James Wm. Moore  
Bernard G. Segal  
Frank W. Wilson  
Carl McGowan

Others attending all or part of the session were Judge Phillip Forman, Chairman of the Advisory Committee on Bankruptcy Rules, Professor Frank R. Kennedy, Professor Lawrence P. King, reporters of the advisory committee and Professor Charles Seligson, a member. Professor Frank J. Remington and Professor Wayne LaFave, reporters of the Advisory Committee on Criminal Rules also attended.

Bankruptcy Rules

Judge Forman reported that the rules and forms under Chapter XI (Arrangements) of the Bankruptcy Act, which were approved by the Judicial Conference in September 1973 and transmitted to the Supreme Court, pursuant to the request of this committee, were prescribed by the Supreme Court by order effective July 1, 1974 and were transmitted to the Congress by the Chief Justice. He further added that a preliminary draft of rules under Chapter IX (Composition of Indebtedness of Local

Taxing Agencies) is being printed for distribution to the bench and bar for comment, and a draft of rules covering railroad reorganization proceedings under Chapter VIII of the Act is under consideration by the advisory committee. Rules under Chapter X (Corporate Reorganization) and XII (Real Property Arrangements) which have been circulated to the bench and bar and the comments received and studied by the advisory committee, were presented to the standing committee for approval and transmission to the Judicial Conference. A discussion of Chapter X rules began with the three items pointed out in the memorandum from the Securities and Exchange Commission which deals with the most striking changes in the statute.

Judge Thomsen indicated that experience in the transmission of the proposed evidence rules and proposed amendments to the criminal rules to the Congress has shown that rules will be more closely examined in the future, particularly where there will be important criticism. He requested Professor Kennedy, as former Executive Director of the Commission to Study the Bankruptcy Laws of the United States, to give a summary of its report to Congress. Professor Kennedy stated that the commission recommended the separation of administrative functions from judicial functions through the creation of a separate agency in the executive branch which would take over the reorganizational functions now performed by the SEC, since they are contemplating a consolidation of Chapters X, XI, and XII into one Chapter VII on reorganization. The SEC feels that the proposed Chapter X

rules will take away some of their power.

Rule 10-103. Reference of Cases: Withdrawal of Reference and Assignment.

Judge Joiner expressed his feeling that Congress may react to this change in light of the SEC comments and therefore may cause the rules to be delayed. After discussion Professor Seligson recommended adoption of a compromise which would enable the judges of each court to determine whether they want to handle the reference of cases by rule or on an individual case basis. Mr. Segal moved approval of the modification suggested by Professor Seligson with the appropriate language drafted by the reporter and his motion carried.

Rule 10-108. List of Creditors and Stockholders; Inventory

(a) Lists Required. Professor Seligson disagreed with the SEC recommendation because he felt it would be a mistake to require a trustee in bankruptcy in every case to notify individually each creditor as to the amount of his claim on the list prepared by the trustee and as to whether or not his claim is disputed, contingent, or unliquidated. He also indicated that there are sometimes 1,000 creditors involved and this procedure would be too time consuming. Judge McGowan wondered if the advisory committee's version of the rule would change current procedure and Professor Seligson replied that it would not. Professor King pointed out that the information regarding claims is

spelled out in an official form. Mr. Segal suggested retaining the rule as submitted and the committee agreed.

Rule 10-305. Acceptance or Rejection of Plans.

The law now provides that a plan must be accepted by the holders of two-thirds of the claims of each class filed and allowed and by stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, with certain exceptions. The advisory committee proposed that the two-thirds majority be of the claims and stock interests voted. Judge Joiner felt that this was a very material change of substance that would affect the number of plans that might be approved. Professor Seligson stated that the committee felt they made an improvement by allowing a creditor, so listed as one, to express his views as to whether the plan should be accepted or rejected, whereas before the rule change, the creditor had to file a claim before he could express his views. Regardless of this improvement, Mr. Segal felt Congress would disapprove the rules because of the change in substance. He could not imagine how the advisory committee could argue that a change as to the requisite number to approve a plan is not substance. Professor Kennedy stated the advisory committee also felt a great improvement had been made by the fact that the amended rule would cut down on a great amount of claim filing. After discussion, Judge Joiner suggested that the proposed rule be redrafted to require in each case that in addition to the requirements now stated in the proposed rule, the vote meet the requirements of § 179 of Chapter X.

Professor Kennedy pointed out that the advisory committee knew they were changing the statute but they felt they did so only in a procedural manner. Judge Wilson felt the problem of substance appears in how the vote is determined and that this is eliminated by Judge Joiner's suggestion. The members agreed that the rule be redrafted along the lines of Judge Joiner's suggestion. This addition to subdivision (e) read as follows:

"which in no event shall be less than the requisite majorities of the filed and allowed claims and stock interests. An acceptance or rejection of a plan shall be deemed to constitute the filing of a claim or stock interest for the purpose of voting on a plan except as to any creditors or stockholders whose proof of claim or stock interest has previously been filed."

Judge Joiner felt the "except" clause was confusing and should be added to the note. He made a motion to accept the language with this amendment and his motion carried. It was agreed that modifications of the language of the proposed rule which would not change the substance may be made if approved by Judges Thomsen and Joiner.

#### Chapter XII Rules (Real Property Arrangements)

Professor King explained that since these rules follow Chapter X in the claim filing procedure they would have to make the same change as just made in Rule 10-301 by the committee. He stated that the only other change is in the note to Rule 12-23

to explain that the rule does not change the statute. This suggestion was made by the Tax Division of the Department of Justice. The members approved the rules with the above changes.

Proposed Rules Governing Habeas Corpus Proceedings

Rule 1. Scope of Rules--Judge McGowan questioned the title of these rules. He felt they might have been referred to as 2254 rules just as we refer to the 2255 rules. Professor Remington replied that these rules determine the scope of § 2254 more broadly since there is some question as to whether they cover a person in federal custody but subject to state law. Judge Wilson asked why the scope of these rules could not be defined in terms of § 2254 and Professor Remington informed him that they could and their applicability could be left to the discretion of the judge as explained in the note. Judge Joiner felt that, if this was agreed upon, the discretionary clause should be in the rule itself. Mr. Segal pointed out that by following § 2254, any future amendments to the section would be incorporated by reference, which is not done in the draft. Judge Wilson made a motion to redraft Rule 1 of the habeas corpus rules in terms of § 2254 and a second subdivision would indicate that in other cases it may be discretionary with the judge. Also, he suggested that the 2255 rules be redrafted in terms of § 2255. His motion carried.

Rule 2. Petition--Judge Wilson pointed out that if a habeas corpus claim and a 1983 claim were both filed, one would have to be stricken, therefore, he suggested deleting lines 44 and 45, "and it shall assert no other claims for relief against the respondent," leaving this to the district court. After a brief discussion, his motion carried.

Judge Wilson felt the sentence, "No citation of authorities need be furnished," in the form was unnecessary. Judge Joiner moved to delete the sentence and Professor Remington agreed that it could be deleted with no loss. The members also agreed. Judge Thomsen suggested that the form replace the petition now used as soon as the Judicial Conference can approve it, regardless of whether the rules are adopted. Professor Remington suggested the form be gone over for format and Mr. Foley stated that Mr. Imlay could take care of it.

Rule 3. Filing Petition and Rule 4. Preliminary Consideration by Judge--The fact that the sentence on line 26 does not include the mailing of the petition to the respondent as implied in the next sentence requiring the respondent to answer the petition if ordered by the court was questioned by Judge Wilson. Professor Remington replied that the sentence giving the attorney a copy of the petition is new and the advisory committee note explains that he does not have to answer unless ordered to do so by the court. Judge Wilson felt this assumption is not clear; therefore, this new provision should be taken out of Rule 3 and included in Rule 4 where it can be sent out at one time with the order. He suggested the following language, "in either case a copy of the petition be served with the order on the state's attorney general." Judge Joiner suggested line 4 of Rule 3 be changed to provide for three copies rather than two and the members agreed to these amendments in both rules.



Rule 5. Answer; Contents--Professor Remington stated that this was revised because of a transcript problem. It was reworded to give the answering party first choice as to reports of transcripts. The members approved the rule as drafted.

Rule 6. Discovery--Judge McGowan felt "a statement of the questions" should be replaced by "subject matter" because it might be argued that if all questions which are expected to be asked but are not listed as the examination progresses may be out of order. After discussion the members agreed to amend the rule as suggested by Judge McGowan.

Rule 7. Expansion of Record--Judge Wilson felt the words "if not controverted" on line 14 of subdivision (b) were contrary to the statute (§ 2245) and should be deleted. The committee agreed.

Rule 8. Evidentiary Hearing--Judge Wilson objected to a phrase on line 14 and suggested it be changed to "who requests and qualifies." After discussion, Mr. Segal pointed out that the problem could be taken care of by explaining in the note that if the petitioner waives, the judge would not be obligated to appoint counsel. The members agreed.

Rule 9. Delayed or Successive Petitions--Judge McGowan felt the explanation of the presumption which is rebuttable by petitioner should be in the rule rather than the note. It was agreed to take out the reference to the rules of evidence in the note and include, "there should be a presumption

rebuttable by the petitioner that there is prejudice to the to the state" in the rule. Judge Wilson pointed out that "absolutely" should not be used in Item III of the form and the members agreed to its deletion.

Rule 10. Transfer of Petition to Another District--  
Judge Wilson felt "division" should be added along with "district!" After discussion regarding where the petition must be filed, Judge Joiner suggested adding "in a state" after "in a district" to take care of the interstate problem and leave the intrastate problem to present law. Judge Wilson felt the rule as written simply applies to the unusual Braden situation and not the general one. He suggested the rule first state the general situation as in § 2241(d) and then provide for the exceptions. In order to do so, Professor Remington stated the rule would repeat the statute that a petition can be filed either in the district of incarceration or the district in which the court sat that convicted him and add that, if it is in a district other than the one in which the trial court sat, then the court may," etc. However, Judge Thomsen felt this should be left to the discretion of the judge as provided in the statute and not the state as suggested. An alternative was suggested in which the rule provide for interstate transfer and the note refer to those limited to intrastate. After further debate, Judge Joiner moved to eliminate the rule since it added nothing to the present law and since the statute seems to be adequate. His motion carried.

Rule 11. Powers of Magistrates--Judge Wilson questioned the use of the word, "disposing" in line 7. He suggested replacing it with, "granting or denying relief" and the committee agreed. Judge Joiner moved to adopt the policy of the rule unless changed by the decision in the Wedding v. Wingo case. The committee agreed.

Rule 12. Federal Rules of Civil Procedure; Extent of Applicability--Approved as written.

Rule 13. Definition--Judge McGowan pointed out that this rule would repeal one of the D. C. statutes regarding habeas corpus. Mr. Segal moved to eliminate the rule because of the jurisdictional objections and his motion carried.

Proposed Rules Governing § 2255 Proceedings for the United States District Courts

Professor Remington stated that these rules would be revised to conform to the changes made in the habeas corpus rules.

Rule 1. Scope of Rules--It was agreed to rewrite this rule to specify § 2254.

Rule 2. Motion--The same change will be made as in Rule 2 of the habeas corpus rules.

Rule 3. Filing Motion--The same conforming change.

Rule 4. Preliminary Consideration by Judge--The same conforming change.

Rule 5. Answer; Contents--No change.

Rule 6. Discovery--Same conforming change.

Rule 7. Expansion of Record--Same conforming change.

Rule 8. Evidentiary Hearing--Same conforming change.

Rule 9. Delayed or Successive Motions--Same change.

Rule 10. Powers of Magistrates--Same change.

Rule 11. Time for Appeal--Since § 2255 is the continuation of a criminal case, Judge Wilson felt the last phrase should be changed to, "from the original judgment of conviction in the district court." His motion carried.

Rule 12. Federal Rules of Criminal and Civil Procedure; Extent of Applicability--No change.

Proposed Amendments to the Federal Rules of Criminal Procedure

Rule 23. Trial by Jury or by the Court--(c) Trial Without a Jury--Approved as written.

Rule 24. Trial Jurors--(b) Peremptory Challenges.--Judge Wilson felt the 3-week advance notice under item (C), Time for Making Motion, is unnecessary and Judge Thomsen suggested it be change to 1 week.

(c) Additional Jurors--(1) Selection--Judge Joiner suggested adding the word "additional" to the last two clauses since they are separate and could be misconstrued.

(2) Waiver--Judge Wilson felt this item merely spells out a technique followed by some district judges and is unnecessary because waivers are provided for in Rule 23(b). He moved to delete it and make any desirable changes in Rule 23(b) to more appropriately achieve the result. Rule 24 was approved as amended.

Rule 40.1. Removal from State Court--Professor Moore did not want the filing of a petition for removal to prevent the state court from proceeding further by providing that the petition be made within 10 days after arraignment because in some states the case is tried the same day the indictment is returned since there is no provision for removal before arraignment. Judge Wilson suggested this ambiguity be cleared up by providing that the petition be made not later than 10 days after arraignment. Judge Thomsen pointed out that the state court should be allowed to proceed with the trial but only to the point of sentencing and not judgment. Judge Joiner suggested that the rule be redrafted to provide for that point and Judge Wilson stated the last sentence of item (2) should be changed to indicate that if the trial is already in progress it may proceed to completion but not to judgment. Judge Joiner disagreed because once the district court has determined that the case should be removed the case should proceed no further. He also stated the question arises when the district court cannot make the determination and they want the trial in the state court to prevent the use of this rule as a delaying procedure. The members agreed that the rule should be studied further and re-drafted. Judge Wilson pointed out that "plainly" on line 27 should be changed to "clearly" and the members agreed.

Rule 41. Search and Seizure--Professor Remington stated this rule now provides for the obtaining of a warrant on the basis of a telephone call rather than a written affidavit.

There was discussion as to whether the oath taken over the telephone is valid and whether the oral testimony would be valid if the person was not available the next day for certification. Professor Remington indicated that reports from California revealed that this procedure has worked well but since there is more time before the rule is sent to the Judicial Conference these areas of concern could be studied further.

The meeting adjourned at 6:00 p.m.