

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

Minutes of the Meeting of January 23, 1986

The Committee on Rules of Practice and Procedure met in the Conference Room of the Administrative Office of the United States Courts in Washington, D. C. on Thursday, January 23, 1986. All members of the Committee were present except Professor Wade H. McCree, Jr., who was unable to attend. James E. Macklin, Jr., the Secretary to the Committee, and Dean Daniel R. Coquillette, Reporter to the Committee, were also present.

In addition, Joseph F. Spaniol, Jr., Clerk of the Supreme Court of the United States and former Secretary to the Committee; L. Ralph Mecham, Director of the Administrative Office; Michael J. Remington, Counsel to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary; Thomas W. Hutchison, Counsel to the Subcommittee on Criminal Justice of the House Committee on the Judiciary; and David N. Adair, Jr., Assistant General Counsel of the Administrative Office, were in attendance.

Agenda I. Introductory Remarks by the Chairman

Judge Gignoux introduced Director Mecham, who welcomed the Committee and thanked them for their work. Judge Gignoux then introduced the other guests of the Committee, including Mr. Spaniol and the above-named staff of the House Judiciary Committee. Judge Gignoux also noted certain changes in the composition of the various Advisory Committees. On the Advisory Committee on Civil Rules, Judge Frank M.

Johnson, Jr. has replaced Judge Walter R. Mansfield as chairman, and Dean Paul Carrington, of the Duke University Law School, has replaced Professor Arthur Miller as Reporter. Professor Miller will remain a member of that Committee. Judge Frederick B. Lacey, current Chairman of the Advisory Committee on Criminal Rules, is retiring from judicial office, and Judge Leland C. Nielsen will replace Judge Lacey as chairman. Professor Stephen A. Saltzburg has begun his work as Reporter to the Advisory Committee on Criminal Rules. The Reporter to the Advisory Committee on Appellate Rules, Professor Kenneth F. Ripple, has been appointed United States Circuit Judge for the Seventh Circuit, and Professor Carol Ann Mooney of Notre Dame Law School has succeeded him as reporter to that Committee.

Judge Gignoux noted that Congress had taken no action to defer the effective date of the amendments to the Federal Rules of Civil, Criminal and Bankruptcy Procedure that were approved by the Standing Committee and the Judicial Conference a year ago and promulgated by the Supreme Court on April 29, 1985. These amendments, therefore, became effective on August 1, 1985.

Agenda II. Report on the Status of Advisory Committee Work

A. Appellate Rules. Judge Gignoux reported that the proposed amendments to the Federal Rules of Appellate Procedure were approved by the Judicial Conference in September and have been transmitted to the Supreme Court for its approval and submission to Congress. These amendments include the substantive changes circulated in September 1984, as well as gender-neutralizing amendments. Judge Pierce Lively, Chairman of the Advisory Committee on Appellate Rules, reported that his Committee's agenda includes consideration of a bankruptcy appellate rule (to accommodate the 1984

amendments to the Bankruptcy Code), a uniform corporate affidavit rule, and three or four minor items. He has not scheduled a Committee meeting for the immediate future.

B. Civil Rules. Judge Johnson, Chairman of the Advisory Committee on Civil Rules, has scheduled a Committee meeting for April 21 and 22, 1986. At that meeting he proposes that the Committee give further consideration to the proposals to amend Civil Rules 4, 28, 44, 51, 63 and 68 and Admiralty Rules C and E, which were circulated in September 1984. The Committee will also consider new proposals to amend Civil Rules 5, 9(b), 23, 45, 50(b), 56, 72(a), Admiralty Rule F and a suggested rule amendment to resolve a split in the circuits concerning the finality of orders of dismissal. Judge Gignoux noted that on December 20, 1985, legislation was introduced which would revise Civil Rule 68 to overturn the decision in Marek v. Chesny, ___ U.S. ___, 105 S.Ct. 3012 (1985).

C. Criminal Rules. Judge Gignoux reported that Professor Saltzburg, the Reporter of the Advisory Committee on Criminal Rules, has indicated that his agenda for the Committee includes revised drafts of Rule 12.3 (public authority defense), Rule 30 (jury instructions before and after argument), and Rule 6(a) (alternate grand jurors). The Committee has decided not to proceed with two proposals circulated in September 1984: Rule 31 (waiver of unanimous verdict) and Rule 9(a) of the Rules of Procedure under Sections 2254 and 2255 (permitting dismissal of habeas petition if Government prejudiced by delay in filing). It is anticipated that the Advisory Committee will meet next summer.

D. Evidence Rules. Judge Gignoux noted that the Judicial Conference at its September meeting had approved the Standing Committee's proposal that an Advisory Committee on the Federal Rules of Evidence not be reactivated. Instead, an ad hoc group consisting of members of the Civil and Criminal Rules Committees, with Professor Saltzburg as reporter, will review the Evidence Rules and make proposals to the Standing Committee for any needed changes. The only pending proposal is an amendment to Rule 609(a) (impeachment by evidence of prior conviction) to clarify an ambiguity as to whether the rule applies in civil as well as criminal cases.

E. Bankruptcy Rules. It was reported that the Advisory Committee on Bankruptcy Rules has prepared proposed amendments to the Bankruptcy Rules to conform them to the substantive and procedural changes in the Bankruptcy Code brought about by the Bankruptcy Amendments and Federal Judgeship Act of 1984. A preliminary draft of these proposed rule changes, which include gender-neutralizing amendments, has been circulated to the bench and bar for comment. Public hearings will be held on February 20 in San Francisco, on March 13 in Chicago, and on April 17 in Washington, D. C. Written comments will be received until May 20. Recommendations will be submitted to the Standing Committee this summer for transmission to the Judicial Conference in September 1986. Judge Gignoux requested that members of the Standing Committee make an effort to attend the various public hearings.

Agenda V. Proposed Plan for Study of Local Court Rules

In September 1984, the Judicial Conference authorized the appointment of a reporter to the Standing Committee to undertake an in-depth study of local court rules, which have proliferated in recent years and some of which may be inconsistent with the Federal rules. Dean Daniel R. Coquillette of Boston College Law School, who has been appointed by the Chief Justice as Reporter to the Standing Committee, submitted his proposed plan for the study of local rules.

Dean Coquillette noted that the mandate for the study of local rules was a broad one. He also noted that there are over 3,400 such rules and that, in addition, the study should include a review of standing orders and procedures required by local custom and practice. He stated that a first step in any study should be the acquisition of a complete, accurate and up-to-date set of local rules and any standing orders, standard operating procedures and other informal rules or forms that are used by the judges of the various districts in handling litigation pending in those districts.

Dean Coquillette stated that, given the broad nature of the mandate and the volume of local rules and practices to be studied, the assistance of someone with prior experience in the study of local rules would facilitate the project. He recommended that he be authorized to obtain the assistance of Professor Stephen N. Subrin of Northeastern Law School. He advised that Professor Subrin is a leading academic expert in the area and Reporter to the Massachusetts Supreme Judicial Court Standing Committee on Rules of Civil Procedure.

Dean Coquillette suggested that a study of the local rules could involve two phases: a legal analysis of the various local rules, and an empirical analysis of the functioning of the rules. The latter phase would involve collecting information from

those familiar with the operation of various local rules. This could be accomplished by questionnaires, a general call for comments, or a conference at which the subject would be discussed.

Mr. Spaniol suggested that over the years there had been a number of attempts to solve the problems of the proliferation and inconsistency of local rules. All of those attempts have ended in failure. Thus, the current study should proceed cautiously and in phases. The first phase should simply be to analyze the language of the local rules and identify the problems based on such analysis. Such analysis, of course, would involve procuring a complete, accurate and up-to-date set of local rules. The analysis could, however, concentrate on the rules of the metropolitan districts.

Mr. Hickey and Professor LaFave also suggested that the project proceed in phases and that the broader goals of the project be determined after the first phase, which would be the legal analysis of the rules. Judge Mansfield also endorsed a two-phased approach. He noted that the problems identified with local rules consisted of lack of openness in adoption, lack of consistency between local rules and the Federal rules, and an excess number of local rules. A first-phase analysis of local rules would identify inconsistencies.

Judge Hoffman made the following two motions: 1) that the Administrative Office, subject to the availability of funds, be authorized to contract with Professor Subrin of Northeastern School of Law for the purpose of assisting the reporter in the local rules project; and 2) that the Committee initially authorize the reporter to obtain copies from district courts of all local rules, standing orders, standard operating procedures, and such other informal rules or forms as may be adopted or used by judges of the districts in the handling and trial of all cases, to analyze the same with such

recommendations as may be made by the reporter, and to report back to the Committee at its meeting in January 1987. Both motions were seconded and unanimously approved.

Dean Coquillette will prepare for Judge Gignoux's signature a letter to the clerks of court with a copy to the chief judges of those courts asking for copies of the rules and other materials. The clerks would be requested to reply by March 1.

Judge Mansfield asked that the General Counsel's office study the question of whether the Standing Committee could legally solicit and/or receive private funding for the conduct of the local rules study.

Mr. Hickey moved that, in the discretion of the reporter, the reporter obtain such technical assistance as needed in the phase-one survey, subject to the availability of funds. The motion was seconded and approved.

Dean Coquillette agreed to prepare a memorandum regarding the current status of the local rules project.

Agenda III. Report on H. R. 3550 and Other Legislation

Judge Gignoux reported on H. R. 3550, a bill that would amend the Rules Enabling Acts. It was noted that in March, 1983, Congressman Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, had introduced H. R. 4414, which would substantially revise the Rules Enabling Acts. This legislation was referred to the Standing Committee for comment. The Committee expressed the views that were later adopted by the Judicial Conference. Hearings were held at which Judge Gignoux testified, and revisions were made to the original legislation. The latest version of the proposed legislation is H. R. 3550, introduced by Congressman Kastenmeier and enacted by the House on December 9.

H. R. 3550 amends the provisions of the Rules Enabling Acts in several significant respects. It consolidates all rules enabling provisions into three new sections, sections 2072, 2073 and 2074 of title 28, United States Code. Although the original bill would have transferred the rulemaking authority from the Supreme Court to the Judicial Conference, H. R. 3550 would continue to vest rulemaking authority in the Supreme Court. This change from the original proposal resulted largely as a result of the concerns expressed by the Conference of State Chief Justices and the Chief Justice's indication that the Supreme Court was willing to continue its current function. H. R. 3550 also contains detailed provisions regarding Rules Committee structure and operating procedures that largely codify the current committee practice. The bill eliminates the one-House veto provision in the current Evidence Rules Enabling Act, which is probably unconstitutional in light of Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). H. R. 3550 also provides that all rules amendments shall be transmitted to Congress by May 1 to become effective on December 1 of the year in which submitted. This, in effect, provides a uniform 7-month waiting period instead of the 90 and 180-day periods provided in the current acts.

Although H. R. 3550 incorporates many of the Judicial Conference's recommendations, there are two provisions that remain of concern: (1) H. R. 3550 requires all Rules Committee meetings to be open to the public with adequate public notice; (2) the bill does not carry forward the "supersession" provision of the current Rules Enabling Acts. Currently, a procedural rule supersedes a procedural statute in force at the time the procedural rule is promulgated.

H. R. 3550 also addresses the problem of local court rules. It requires district courts, as well as courts of appeals, to appoint advisory committees. Before promulgating a local rule, the court must give appropriate notice and opportunity for comment. The Administrative Office would be required to compile local district and circuit court rules. Judicial councils would be required to review district court rules, and the Judicial Conference would be required to review circuit court rules.

The bill is currently pending in the Senate. There is no indication that hearings will be scheduled.

Judge Mansfield noted that the House Report accompanying H. R. 3550 criticizes the current rulemaking process in that it is used to create substantive law by means of rulemaking. However, the report does not offer any guidance as to what should be the distinction between substantive and procedural rules. Judge Mansfield indicated that, if the Senate holds hearings on the legislation, it should consider the question of providing firm guidance as to the distinction between substance and procedure in the context of rulemaking.

Judge Gignoux stated that if he were called upon to give testimony on this pending legislation, he would be in contact with other members of the Committee for their assistance.

Judge Gignoux noted two other legislative initiatives of interest to the Committee. Congressman Conyers, Chairman of the House Judiciary Subcommittee on Criminal Justice, has introduced H. R. 4007 to amend 18 U.S.C. § 3500 to provide for increased discovery by defendants in criminal cases. The bill would require the disclosure of a list of witnesses to the defendant prior to trial, with a provision for protective orders. The Standing Committee referred this bill to the Advisory Committee on Criminal Rules.

Congressman Conyers has also introduced H. R. 3998 to amend Rule 68 of the Rules of Civil Procedure to overturn the decision in Marek v. Chesny, ___ U.S. ___, 105 S.Ct. 3012 (1985). The bill would amend Rule 68 to provide that "costs" do not include attorneys' fees. Judge Mansfield noted that the Advisory Committee on Civil Rules is currently working on an amendment to Rule 68, although the amendment does not deal with the issues raised in Chesny. The Committee referred this legislation to the Advisory Committee on Civil Rules.

Agenda IV. Proposed Gender-Neutralizing Amendments

A. Evidence Rules. The gender-neutralizing amendments to the Rules of Evidence had been circulated to the Advisory Committees on Civil and Criminal Rules with requests for comments by January 2. Judge Gignoux reported that comments had been received by Professor Saltzburg and incorporated into the amendments. The amendments were considered by the Standing Committee, and several technical and grammatical changes were made. The Standing Committee also decided to amend Rule 1101(a), which deals with the applicability of the Rules of Evidence, to include proceedings before United States bankruptcy judges. The amendment was deemed to be clarifying, insofar as Rule 1101(b) already refers to bankruptcy cases and Bankruptcy Rule 9017 indicates that the Federal Rules of Evidence apply to bankruptcy proceedings. The Advisory Committee notes were also amended to reflect this change. Judge Gignoux stated that he would ask Judge Morey L. Sear, Chairman of the Advisory Committee on Bankruptcy Rules, to review the change.

It was moved that the gender-neutralizing amendments to the Rules of Evidence be approved and sent to the Judicial Conference in March for approval and submission to the Supreme Court for transmittal to Congress. The motion was seconded and carried unanimously.

B. Civil Rules. The gender-neutralizing amendments to the Civil Rules had been circulated to the Advisory Committee on Civil Rules and any comments have been incorporated into the amendments. Several technical and grammatical changes were made by the Standing Committee, and members of the Committee requested that the rules be proofread once more before submission to the Judicial Conference. A motion was made that, subject to proofreading, the gender-neutralizing amendments to the Civil Rules be approved and sent to the Judicial Conference in March for approval and submission to the Supreme Court for transmittal to Congress. The motion was seconded and unanimously carried.

After discussion the Standing Committee decided that it was unnecessary to neutralize the term "she" when referring to vessels in the Admiralty Rules. The Standing Committee also decided that the use in the civil rules of the term "seamen" refers to specific statutory language and that the term need not, therefore, be neutralized.

C. Criminal Rules. Judge Gignoux noted that the gender-neutralizing amendments to the Criminal Rules will be circulated within the next several weeks, and the Standing Committee will give final approval to these rules at its summer meeting.

D. Bankruptcy Rules. Judge Gignoux noted that the gender-neutralizing amendments to the Bankruptcy Rules are contained in the proposals now awaiting comments from bench, bar, and public.

Agenda IX. New Business

Judge Mansfield suggested that since Congress was considering legislation to amend Rule 68, the work that the Advisory Committee on Civil Rules has currently been doing with regard to Rule 68 be referred to Congress for incorporation in the proposed legislation. Judge Gignoux noted that this approach will be suggested to the Advisory Committee.

Agenda VIII. Time & Place of Next Committee Meeting

The Standing Committee agreed to have its next meeting on Wednesday and Thursday, July 9 and 10, 1986, in Washington, D. C.

Respectfully submitted,



James E. Macklin, Jr.
Secretary