

Agenda 8
Rules Committee
March 1961

REPORT OF THE COMMITTEE ON RULES OF
- PRACTICE AND PROCEDURE

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The standing Committee on Rules of Practice and Procedure met in the Supreme Court Building in Washington on February 24, 1961. Judges Maris, Clark and Wright, Professor Moore, and Messrs. Ford, Rankin and Segal were present. Judge Boldt and Dean Ladd were unavoidably absent. Judges Pope and Prettyman, Chairmen of the Admiralty and Appellate Advisory Committees, respectively, and Professors Kaplan, Currie and Kennedy, Reporters for Civil, Admiralty and Bankruptcy Rules, respectively, were also present during part of the meeting.

Since the last meeting of the standing Committee, four of the Advisory Committees, those for the Appellate Rules, Bankruptcy, Admiralty, and Civil Rules, submitted to the Committee preliminary drafts of proposed rules and amendments to existing rules for circulation to the bench and bar. These drafts were promptly and widely

circulated in printed form under the dates of November 1960, November 1960, December 1960, and January 1961, respectively. Comments and criticism were solicited and these when received were promptly transmitted to the appropriate advisory committee for study. Following such circulation and after full consideration of the communications thus received three of the advisory committees, those for Civil, Admiralty, and Bankruptcy Rules, approved definitive drafts of proposed amendments and reported them to the standing Committee for consideration and action at the meeting on February 24, 1961.

Advisory Committee on Civil Rules

The Advisory Committee on Civil Rules has undertaken a formidable program. In fact, it would be difficult to overstate the significance and the potentialities of this new work toward the improved administration of justice.

The Committee has completed a preliminary examination of the 1955 proposed amendments to the Rules of Civil Procedure which were made by the former Advisory Committee, and which the Supreme Court did not, at the time, deem it advisable to transmit to the Congress. The Reporter's comprehensive report to the Advisory Committee upon

the 1955 proposed amendments was considered at the first meeting of the Committee on December 5-7, 1960, and conclusions were reached upon certain of the proposals, subject to further consideration, research and drafting, which is going forward.

The Advisory Committee decided to recommend the prompt amendment of certain Rules of Civil Procedure [Rules 25, 54 and 86 and Forms 2 and 19] which are causing confusion and difficulty. The proposed amendments provide (1) for the automatic substitution as a party of the successor when a public officer who sues or is sued in his official capacity dies, resigns or otherwise ceases to hold office, (2) for authority to enter a final appealable judgment as to one or more but fewer than all of the parties in a multiple-parties suit, and (3) for the inclusion in Forms 2 and 19 of averments consistent with present statutory requirements.

The preliminary draft was published and circulated to the bench and bar throughout the country in January 1961. The comments and suggestions received have been analyzed by the Reporter and considered by the Advisory Committee. Since the standing Committee gave the bench and bar until March 10, 1961 to submit their comments, and additional comments may, therefore, yet be received, the advisory committee's recommendation was tentative. Its final recommendations

will be presented to the Judicial Conference orally by the chairman of the standing Committee. Meanwhile the advisory committee tentatively recommends that the preliminary draft as circulated be approved with minor changes as indicated in Exhibit 1 hereto.

The standing Committee on Rules of Practice and Procedure, having considered the draft of the proposed amendments to the Federal Rules of Civil Procedure and accompanying notes at its meeting on February 24, 1961, recommends that the draft be approved by the Judicial Conference, with any changes proposed in the final report of the advisory committee, and transmitted to the Supreme Court with the recommendation that the amendments be promulgated.

The Advisory Committee on Civil Rules has approved a program of future work which includes, in addition to research, further study and consideration of certain of the proposals made in 1955 by the former Advisory Committee, (a) a general study of the subject of parties (Rules 17-25) which has been initiated, and (b) a general study of Discovery (Rules 26-37) with related study of the Pre-trial Conference (Rule 16), a plan of which has been outlined comprising both analytic work by the Reporter and his associates and field investigation by the Project for Effective Justice at Columbia University Law School to be financed by a foundation. It is

contemplated that the analytic work will start about July 1, 1961, and that the work devising a pattern of field investigation will start about September 1, 1961.

Advisory Committee on Admiralty Rules

The Advisory Committee on Admiralty Rules has devoted its study to (1) matters of an emergency nature resulting from the decision in Miner v. Atlass, 363 U.S. 641, and (2) long-range planning of the program of the committee.

The Supreme Court of the United States handed down its opinion in the Miner case on June 20, 1960, and referred to the Admiralty Committee, by name, a major problem in admiralty rulemaking.

Briefly stated, prior to the Miner case, several districts, in which more than half the private admiralty suits are filed, had adopted local rules specifically making the Federal Rules of Civil Procedure applicable to the taking of depositions of parties and witnesses. Other districts had local rules making the civil rules applicable to matters not otherwise covered. And in certain other districts, for one reason or another, the practice with respect to depositions was broader than was authorized by the existing admiralty rules.

The Supreme Court decided as a matter of law that discovery-deposition procedures were not authorized by the General Admiralty Rules, that local district courts did not possess the authority to promulgate and establish discovery-deposition rules in admiralty cases and, finally, that such basic changes in admiralty practice could be made only in accordance with 28 U. S. C. 2073 which requires promulgation of proposed rules by the Supreme Court and reporting to Congress.

The most evident consequences of the decision are that as in the *Atlass* case itself, lawyers generally are prevented from taking discovery depositions which they would like to take; and depositions already taken, while they may have served a useful purpose, cannot now be used in evidence.

The results in many districts were quite serious because of the many depositions already taken, involving hundreds of thousands of dollars.

The Supreme Court was mindful that its decision would cause some dislocation in practice in the districts where such rules had been in force, and expressed the hope that the Advisory Committee on Admiralty Rules would give the matter its early attention.

Pursuant to this directive and at the request of the standing Committee the Admiralty Advisory Committee promptly acted and

sought by letter the experience and advice of approximately 90 United States district judges and 1,000 admiralty lawyers in those districts having local discovery rules in admiralty. The responses were full and representative, indicated overwhelming approval of the deposition practice, and included valuable technical suggestions for drafting purposes.

The result of all this activity was the drafting by the Advisory Committee of proposed new and amended Rules of Practice in Admiralty and Maritime Cases, relating to depositions and discovery and providing for summary judgment and declaratory judgment procedure. The draft was submitted to the standing Committee for distribution and was printed. Nearly 5,000 copies were distributed in December 1960 to the bench and bar.

The proposed amendments would (1) authorize depositions and discovery in admiralty practice substantially in accordance with the Civil Rules, (2) authorize the use of depositions taken prior to July 20, 1960, in reliance on local rules or practices, as well as all depositions taken by consent of the parties, to the same extent as if they had been authorized by valid rules, (3) authorize summary judgments in admiralty and (4) authorize declaratory judgments in admiralty.

The Advisory Committee met in Washington on February 20, 1961 and examined the comments and suggestions received from the bench and bar. These were overwhelmingly favorable and required no changes in the amendments as drafted, but certain clarifying changes were made in the notes accompanying the proposed amendments, as well as some typographical corrections. These are indicated on Exhibit 2 to this report.

The standing Committee on Rules of Practice and Procedure, having considered the definitive draft of the proposed amendments to the Rules of Practice in Admiralty and Maritime Cases and accompanying notes at its meeting on February 24, 1961, recommends that the draft be approved by the Judicial Conference and transmitted to the Supreme Court with the recommendation that the amendments be promulgated.

The future program of the Admiralty Committee includes extensive research and consideration of the advisability and feasibility of unifying the practice in civil and admiralty cases under a single set of rules of procedure which would, of course, include all special provisions required in admiralty. This is an undertaking of great importance to the bench and bar.

Advisory Committee on Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules, in addition to embarking upon a comprehensive program aimed at improving the General Orders and Official Forms in Bankruptcy, made a thoroughgoing study of the statutes enacted since 1952 -- the most recent year in which amendments to the General Orders and Official Forms were adopted -- and developed a preliminary draft containing proposed revisions of certain general orders and official forms in bankruptcy.

The proposed amendments would (1) bring the General Orders and Official Forms into harmony with recent amendments of the Bankruptcy Act; (2) bring them into harmony with current and sound practice; and (3) correct obvious departures from approved form.

The amendments are designed to correct an unnecessarily confusing and annoying situation which, until the Rules Committees were established, had little hope for continuous attention. Statute after statute was enacted amending the Bankruptcy Act and the General Orders and Official Forms fell farther and farther behind and out of date; yet, they existed as official procedure and criteria in the handling of bankruptcy litigation.

The preliminary draft was transmitted to the standing Committee, printed and submitted to the bench and bar in November, 1960

for consideration and suggestions. Following receipt of such suggestions and in the light of discussion had at the meeting of the Advisory Committee in December, the draft was revised in minor particulars and definitively approved. A copy is annexed as Exhibit 3.

The standing Committee on Rules of Practice and Procedure, having considered the definitive draft of the proposed revision of certain general orders and official forms in bankruptcy and accompanying notes at its meeting on February 24, 1961, recommends that the draft be approved by the Judicial Conference and transmitted to the Supreme Court with the recommendation that the amendments be promulgated.

An additional matter of importance in the work of the Advisory Committee on Bankruptcy Rules relates to the existing statutory authority for promulgating procedural rules in bankruptcy.

Section 30 of the Bankruptcy Act provides:

"All necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

There is no requirement that the Court refer to Congress the bankruptcy rules and forms which it promulgates pursuant to this authority. In other areas of its rulemaking responsibility, of course, the Supreme

Court is required by pertinent legislation to report proposed rules to Congress. Once the rules reported to Congress by the Court have gone into effect at the close of a statutory waiting period, all conflicting laws, including Congressional enactments, are superseded. No such effect attaches to the General Orders and Official Forms in Bankruptcy promulgated pursuant to section 30 of the Bankruptcy Act. The result is that Congress is constantly being called upon to give time to the consideration of bills dealing with needed changes in small details of procedure now set out in the Bankruptcy Act.

The Advisory Committee concluded at its December meeting, after consideration of the matter, that rule making in bankruptcy should conform to the pattern prescribed for rule making in the areas of civil procedure and admiralty, and recommended to the standing Committee the enactment of Congressional legislation to substantially the following effect:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

"Such rules shall not abridge, enlarge, or modify any substantive right.

"Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

The standing Committee on Rules of Practice and Procedure, having considered the proposal that legislation should be enacted providing that rule making in bankruptcy should conform to that prescribed for civil actions and admiralty cases, recommends that the proposal be approved by the Judicial Conference of the United States and that appropriate legislation be requested from Congress.

Advisory Committee on Criminal Rules

The Advisory Committee on Criminal Rules held its first meeting in Washington on October 14, 1960. At that time, the Committee decided that it would proceed to a study of all the Criminal Rules, but that any tentative or final report on its recommendations would be held in abeyance until the entire study has been completed, except where a situation otherwise requires. As a consequence, it is not expected that the Advisory Committee will forward to the standing Committee any recommendations until such time as a tentative draft covering all the Rules has been prepared.

At the October 14 meeting, the Advisory Committee discussed many of the problems arising from Rule 5. Since that meeting, tentative drafts covering Rules 1-9, 44, 18-22, and 10-17, have been prepared by the Reporter and circulated to the members for preliminary consideration.

Advisory Committee on Appellate Rules

Upon its appointment, the Advisory Committee on Appellate Rules was presented with the immediate task of drafting a proposed rule for the review of decisions of the Tax Court of the United States. Congress had placed responsibility for promulgation of such a rule upon the Supreme Court in 1954, 28 U. S. C. 2074, but the existing personnel and facilities of the Supreme Court are in no sense adequate to perform this type of rulemaking function. Moreover, with the ever-increasing length of the calendars, it is obviously not feasible for the Justices themselves to do the work essential to the original drafting of new or amended rules of procedure. Thus, the task was assigned to the standing Committee on Rules of Practice and Procedure and referred as a first order of business to the Advisory Committee on Appellate Rules.

The Advisory Committee prepared a preliminary draft of a proposed rule for the review of decisions of the Tax Court. The

draft was printed and widely circulated in November, 1960.

Many suggestions and comments were received and these were considered at the meeting of the Advisory Committee on January 30, 1961. At that meeting it was decided to give the preliminary draft further study in the light of the communications received and to report upon it to the standing Committee at a later date.

The Advisory Committee is developing a comprehensive program for improving appellate procedure in the United States courts, including a broad examination of the appellate rules to determine how well they are working, to pinpoint the specific problems, and to identify those areas in which there is little or no difficulty. In addition to rules relating to the appeal of civil and criminal cases, there are the rules governing the appeal of admiralty and maritime cases, bankruptcy cases, the review of orders of administrative agencies, the unique -- and urgent -- problems in appeals in forma pauperis, and many other technical matters which will be given attention.

Appointment of Reporters

The Judicial Conference, at its session on September 18, 1958, approved a resolution which established the basic organization of the Rules Committees. Paragraph 5 of that resolution reads:

(5) To assist the committees in carrying out their duties a reporter and such associate or assistant reporters as may be necessary should be appointed by the Chief Justice for limited terms of service and at adequate salaries. Supporting staff for the work of the reporter and of the committees should be provided by the Administrative Office.

During the organizational stages of the Rules undertaking, as jurisdiction of the various committees was refined, it was found by the standing Committee that no one Reporter could handle properly and expeditiously the varied matters that are before the civil, admiralty, bankruptcy, criminal and appellate rules committees. As a consequence, instead of appointing a principal Reporter, with associates or assistants, the standing Committee recommended to the Chief Justice the appointment of full Reporters for each of the Advisory Committees. While this change has not altered the objectives of the Rules undertaking, it is nevertheless a necessary change in organization which should be brought specifically to the attention of the Judicial Conference and, if it accords with the views of the Conference, have Conference approval.

Your Committee recommends that paragraph 5 of the Resolution of September 18, 1958, be amended to read as follows:

Each of the Advisory Committees shall have a Reporter, appointed by the Chief Justice for limited terms of service and at adequate salaries. Supporting staff for the work of the reporter and of the committees should be provided by the Administrative Office.

Advisory Committee on Federal Rules of Evidence

The Judicial Conference previously referred to the Committee on Rules of Practice and Procedure a proposal to establish uniform rules of evidence for the federal courts. [Sept. 1958]

At its meeting in December, 1960 the Advisory Committee on Civil Rules adopted the following resolution:

That the Advisory Committee on Civil Rules urge the standing Committee to initiate a project, at a time thought suitable by the standing Committee and whether through an existing committee or a new group, to study the feasibility of adopting uniform rules of evidence for the Federal courts and, if found feasible, to draft such rules.

The proposal urging the promulgation of federal rules of evidence has broad support in the bench and bar. It also has the support of the American Bar Association, the American Law Institute, the Federal Bar Association, the National Conference of Commissioners on Uniform State Laws, and the Judicial Conferences of several circuits.

The standing Committee is convinced that the proposal looking forward to the promulgation of Federal Rules of Evidence is meritorious, that it deserves serious study as to its advisability and feasibility and that, if resolved in favor of such rules, that uniform rules of evidence for the federal courts should in due course be promulgated. Therefore:

The standing Committee on Rules of Practice and Procedure
recommends that the Judicial Conference of the United States amend
paragraph 2 of its Resolution adopted September 18, 1958, to read as
follows:

(2) That six advisory committees be created, one on practice and procedure in civil cases, one on practice and procedure in admiralty cases, one on practice and procedure in bankruptcy cases, one on practice and procedure in criminal cases, one on rules of evidence in the federal courts, and one on appellate practice and procedure, the members of the advisory committees to be appointed by the Chief Justice for terms of four years, the first appointments to be for staggered terms of two and four years, the members to be eligible for re-appointment for one additional term only, and the members to consist of broadly representative judges, lawyers and law teachers.

Newly Appointed Members

The following appointments have been made by the Chief Justice:

To the standing Committee:

Peyton Ford, Esquire
1000 Connecticut Avenue
Washington 6, D. C.

To fill the vacancy created by the
death of Phillip B. Perlman

To the Advisory Committee on Civil Rules:

Professor Charles Alan Wright
University of Texas Law School
Austin, Texas

To fill the vacancy created by the
resignation of Professor Charles T.
McCormick for reasons of health.

To the Advisory Committee on Civil Rules (Continued)

W. Brown Morton, Jr., Esquire
247 Park Avenue
New York 17, New York

To fill the vacancy created by the
appointment of Peyton Ford, Esq.
to the standing Committee.

To the Advisory Committee on Admiralty Rules:

William G. Symmers, Esquire
37 Wall Street
New York 5, New York

To fill the vacancy created by the
death of Arnold W. Knauth, Esquire.

William A. Grimes, Esquire
640 Mathieson Building
Baltimore 2, Maryland

To fill the vacancy created by the
resignation of Professor Brainerd
Currie, who became the Reporter
for the Committee.

Sam L. Levinson, Esquire
Northern Life Tower
Seattle 1, Washington

Stuart B. Bradley, Esquire
135 South LaSalle Street
Chicago, Illinois

John C. McHose, Esquire
634 South Spring Street
Los Angeles, California

As additional members.

Respectfully submitted,

Albert B. Maris

Chairman

March 9, 1961