

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

### Minutes of the Meeting of June 21-22, 1982

The Committee on Rules of Practice and Procedure met at the Administrative Office of the United States Courts in Washington, D. C. on June 21 and 22, 1982. All members of the Committee and Mr. Spaniol, the secretary, were present.

Judge Ruggero J. Aldisert, Chairman of the Advisory Committee on Bankruptcy Rules, Mr. Charles A. Horsky, a committee member, and Professors Lawrence P. King and Walter J. Taggart, reporters to the Committee, attended the meeting on the first day and discussed the proposed new bankruptcy rules.

Judge Walter R. Mansfield, Chairman of the Advisory Committee on Civil Rules and Professor Maurice Rosenberg, a member of the committee, presented the Advisory Committee's recommendations for amendments to various rules of civil procedure that were circulated to the bench and bar for comment in June 1981.

#### AGENDA I. Opening Remarks

Judge Gignoux called attention to the recent loss through death of a colleague on the Committee, Professor Bernard J. Ward. Members of the committee expressed sadness at this loss and their gratitude for Professor Ward's many contributions to the work of the committee.

Judge Gignoux also reviewed the agenda for the next two days pointing out that the presentation on the bankruptcy rules would be made commencing at 11:00 a.m. the first day and that the proposals for changes in the civil rules would be made at the same time the second day. The Committee also has for consideration a statement of proposed operating procedures.

He also reported that the proposed amendment to Rule 4 of the civil rules, various amendments to the criminal rules and rules governing procedures in Section 2254 and Sections 2255 cases, previously recommended by the Committee, had been approved by the Supreme Court and transmitted to the Congress. They will become effective on August 1, 1982 unless further action is taken by the Congress.

Looking ahead Judge Gignoux indicated that further amendments to the criminal rules would be presented at the committee meeting to be held on August 19 and 20 and that the bankruptcy rules would also be finally reviewed at that meeting. In regard to the criminal rules Mr. Michael Remington, a member of the staff of the Administrative Office, indicated that a question had arisen as to whether the "conditional plea" is something that can be handled through rules or whether it was substantive and must be provided only by statute. Judge Gignoux stated that he would write the Reporter to the Criminal Rules Committee, Professor LaFave, asking him to be prepared to address this question at the August meeting of the committee.

Judge Gignoux pointed out that the public hearings on proposed rules changes have not really produced much of substance, as compared with the written comments which have been extremely helpful. Nevertheless the public hearings have had enormous public relations benefits and the Advisory Committee chairmen and reporters believe the practice of holding public hearings should be continued.

Judge Gignoux called attention to the vacancies existing on several rules committees and the need for the appointment of new members. Various suggestions of the names of potential committee members were suggested and were noted by Mr. Spaniol for possible recommendation to the Chief Justice.

#### AGENDA II. Reporter for the Standing Committee

The Committee discussed the desirability of employing a reporter to the Standing Committee and voted unanimously to recommend to the Judicial Conference that the Chief Justice be authorized to appoint a reporter for the Standing Committee when need arises.

#### AGENDA III. Advisory Committee on Bankruptcy Rules

Judge Aldisert summarized the activities of the Committee in recent months calling attention to the public hearings that had been held and the extensive comments received, but pointed out that the Advisory Committee still awaits reports and suggestions from formal organizations such as the American Bar Association and has requested these organizations to file their comments by July 15th. A special meeting will be held in New York City during the week of July 19 to review these comments prior to the meeting of the Advisory Committee scheduled to be held in August for the purpose of taking final action on the proposed new rules.

Judge Aldisert mentioned five broad areas remaining for review by the Advisory Committee some of which may involve policies and may be controversial in the Congress:

(1) The question of appointment of masters by bankruptcy judges. This question will be reconsidered at the Advisory Committee meeting in Chicago.

(2) The entire question of time periods. The Advisory Committee has received suggestions that the time specifications in the rules are on the one hand too short and on the other hand too long. A subsidiary question involves the policy of giving bankruptcy judges discretion to extend or shorten specified time periods. In Part VII the Advisory Committee made a conscious effort to try to follow the times specified in the civil rules. All of these matters will be reviewed.

(3) Sales at public auctions. This policy matter has bothered the Committee and will be considered.

(4) Technical changes. This is an ongoing process and will continue until the rules are submitted in final form.

(5) Paucity of comment from academia. There have been very few comments from law professors and only one professor testified at the public hearings and only on a narrow, limited issue. The Committee intends to discuss the reason for this.

Judge Gignoux indicated that it was important for the Standing Committee to know what changes the Advisory Committee has made in the final draft, as compared to what was circulated to the bench and bar. Judge Aldisert indicated that the Standing Committee has received two circulations in which this was done and that a further report will be made of any changes made at the next Advisory Committee meeting in Chicago.

It was pointed out that the official bankruptcy forms are not intended to be submitted to the Supreme Court and the Congress. They will be promulgated by the Judicial Conference.

A question was raised as to whether a reference to a rule of civil procedure in a bankruptcy rule meant the civil rule as it presently exists or as it may be amended in the future. Professor Taggart pointed out that the Committee has not decided whether the bankruptcy rules should be dynamic or static.

The suggestions of members of the Standing Committee with respect to the proposed rules as published had been consolidated into one document for purposes of review. These suggestions were then individually reviewed and discussed and were appropriately noted by the Advisory Committee representatives. In regard to appeals from decisions of bankruptcy judges, it was agreed that Rule 8001 should be clarified to restrict its application to appeals to district courts and appellate panels and that consideration should be given to the appropriate method of amending the Federal Rules of Appellate Procedure to provide for appeals to the courts of appeals. It was agreed that Rule 9020, relating to contempt, should be revised to distinguish between civil and criminal contempt.

#### AGENDA IV. Advisory Committee on Civil Rules

Judge Mansfield summarized the final report of the Advisory Committee which was submitted on March 9, 1982. The Committee reviewed all of the proposed amendments and with certain minor changes approved the amendments to Rules 6, 7, 11, 26, 52, 53, 67, 72-76, and the two proposed forms annexed as an appendix. The Committee reserved final action on Rule 16 and requested the advisory committee to submit appropriate language further amending Rule 72 to provide a 10-day period for filing objections to magistrates' rulings on nondispositive matters.

#### AGENDA V. Statement of Operating Procedures

A draft statement of operating procedures and a summary thereof were distributed. Each member of the Committee was asked to make suggestions for any changes to Mr. Spaniol who will confer with Judge McGowan about the final draft. Final action will be taken at the August meeting.

#### AGENDA VII. New Business

##### A. Resolution of the American Bar Association.

The secretary of the American Bar Association, F. William McCalpin, had transmitted to the Director of the Administrative Office a resolution adopted by the House of Delegates in January 1982 proposing four changes in the procedures for adopting federal rules of evidence and procedure. The resolution is attached hereto.

The first recommendation is that Congress delegate the rulemaking authority to the Judicial Conference. This proposal has proven to be controversial and is currently under study by the committee. The second recommendation is that the Advisory Committees be broadly representative of all segments of the legal profession, that members serve for specified terms and that the membership rotate. The Committee noted that the original design of the rules program called for broadly based advisory committees and that over the years appointments have been made on this basis. The third recommendation suggests procedures to promote openness in the rulemaking

process. In the last few years various changes have been made in the operating procedures of the rules committees. As a result almost all of the suggestions of the American Bar Association have already been adopted except the suggestion that meetings be open when final reports on proposed rules are received and action is taken. The Committee did not believe that the executive meetings of the committees should be open to the public, particularly when all records of the committee including minutes are open for public inspection. In regard to the fourth recommendation all agreed that a uniform period of delay before rules become effective would be desirable.

Judge Gignoux was authorized to respond to the American Bar Association in appreciation of their suggestions.

B. Televising Public Hearings.

A complaint had been lodged by the media about denial of television coverage of the public hearing held by the Advisory Committee on Criminal Rules in Washington, D.C., last February. The Committee noted the complaint but decided no action was required at the present time.

The Committee adjourned at 2:00 p.m. on Tuesday, June 22nd.

Respectfully submitted,

Joseph F. Spaniol, Jr.  
Secretary

June 24, 1982