

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of July 16-17, 1984

The Committee on Rules of Practice and Procedure met in Asheville, North Carolina on July 16-17, 1984. All members of the Committee were present except Judge Carl McGowan who was unable to attend. Mr. Joseph F. Spaniol, Jr., Secretary to the Committee, and Mr. Leland Beck of the Administrative Office staff were also present.

Judge Walter R. Mansfield, Chairman of the Advisory Committee on Civil Rules and Professor Arthur R. Miller, Reporter; Professor Kenneth F. Ripple, Reporter to the Advisory Committee on Appellate Rules; and Mr. Joseph Patchan, a member of the Advisory Committee on Bankruptcy Rules, also attended the meeting to present the reports of their Committees.

AGENDA I. Opening Remarks

Judge Gignoux welcomed Professor Wayne LaFave as a new Committee member and introduced Professor Ripple who was invited to remain throughout the meeting.

Judge Gignoux informed the Committee that Judge McGowan was unable to attend because of recent minor surgery. The Committee authorized the Chairman, on behalf of the Committee, to convey its best wishes to Judge McGowan.

AGENDA II.

A. Committee Procedures. Judge Mansfield, by letter dated August 9, 1983, had suggested two changes in the "Procedures for the Conduct of Business by the Judicial Conference Committee on Rules of Practice and Procedure." The Committee thereupon made the following changes:

1. Paragraph 3(b). Added the words "copies of" before the word "summaries."
2. Paragraph 4(a). In the second sentence, changed the word "possible" to "practicable."
3. Paragraph 4(d). Amended this paragraph to read, "Exceptions to the time for comment, public hearings, and publication requirements of these procedures may be granted by the Standing Committee, or its Chairman."

B. Policy Considerations.

1. The Committee considered the question of whether proposed rules should be permitted to be published at the same time proposed changes are pending before the Supreme Court. After full discussion, the Committee decided that no policy on this issue should be adopted.
2. The Committee considered the suggestion of Delegate Lucille Maurer of the Maryland General Assembly that gender slanted words be removed from the various Rules of Practice and Procedure.

It was the view of several Committee members that such a task would be formidable and perhaps could not be done. Furthermore the Rules, historically, have been applied as gender neutral and have presented no problem in interpretation. On motion of Mr. Marshall, Judge Gignoux and Mr. Spaniol were authorized to draft a rule along the lines of Title I, Section I, of the U.S. Code for consideration at its next meeting. Meanwhile, Judge Gignoux will inform Delegate Maurer that the matter is under consideration.

AGENDA III. Review of the Rule Making Process.

- A. Rules Enabling Act. The Committee reviewed pending legislation, H.R. 4414, and a redraft thereof, to amend the Rules Enabling Acts. In view of previous Judicial Conference action the Committee decided to make no further recommendation.
- B. H.R. 5061, 98th Congress is a bill to amend the Evidence Rules Enabling Act. The apparent purpose is to eliminate from 28 U.S.C. §2076 a "legislative veto" provision similar to that held unconstitutional in the Chadha case. The Committee concluded that, as drafted, the bill is unclear and may not accomplish its intended purpose. The Committee therefore voted to recommend disapproval of the bill in its

present form. The Committee felt, however, that section 2076 might be amended simply by striking a portion of the second sentence relating to the legislative veto and all of the third sentence.

AGENDA IV. Reports on the Status of Advisory Committee Work.

A. Appellate Rules. In the absence of the Chairman of the Advisory Committee on Appellate Rules, Judge Pierce Lively, the Reporter to the Committee, Professor Kenneth Ripple, presented proposed amendments to Appellate Rules 19, 28, 30 and 45 and new Rules 3.1, 5.1 and 15.1. The Committee authorized the circulation of these rules for public comment. The Committee also voted to recommend to the Judicial Conference that the Advisory Committee's study of the operation of Rule 30 be published in Federal Rules Decisions or some other appropriate publication.

B. Civil Rules. The Chairman of the Advisory Committee on Civil Rules, Judge Walter R. Mansfield, and the Reporter, Professor Arthur R. Miller, presented proposed amendments to Civil Rules 6, 45, 52, 71A, 83, Supplemental Admiralty Rules B, C and E and Official Form 18-A.

The Committee decided that the proposed revision in Rule 6 to extend the time limitations in the civil rules for additional periods when the office of the clerk of the district court is inaccessible should be modified to conform to the existing standard contained in Criminal Rule 45(a); that the provision in Rule 45(a), which was added by the

Advisory Committee after the comment period had closed, should be deleted; that the word "become" in line 21 of the proposed amendment to Rule 71A should be changed to "are found by the court to be" and that other minor changes suggested by the Chairman of the Advisory Committee be approved. The Committee thereupon voted to transmit these proposed amendments to the Judicial Conference with a recommendation that they be approved by the Conference and transmitted to the Supreme Court in accordance with law. The Chairman of the Advisory Committee will provide a "gap report" to be included with the submission.

The Committee also approved circulation of the Advisory Committee's Preliminary Draft of Proposed Amendments to Civil Rules 4, 28, 44, 51, 53 and 68 and Admiralty Rules C and E to the bench and bar and public generally for comment.

C. Criminal Rules. In the absence of Judge Walter E. Hoffman, Chairman of the Advisory Committee on Criminal Rules, Professor Wayne LaFare submitted proposed amendments to Criminal Rules 6, 11, 12.1, 12.2, 35, 45, 49 and 57. The Committee reviewed these proposals and voted to submit them to the Judicial Conference with a recommendation that they be approved by the Conference and transmitted to the Supreme Court for the Court's consideration pursuant to law. The proposed amendments to Rules 9(a) of the Rules Governing Section 2254 Cases and Section 2255 Proceedings in the district courts are to be recirculated for public comment in a revised form.

The Committee also authorized the circulation of a proposed amendment to Criminal Rule 31 and amendments to Rules 9(a) of the Rules Governing Section 2254 Cases and 2255 Proceedings in the United States District Courts to the bench and bar and public generally for comment.

D. Bankruptcy Rules. In the absence of Judge Ruggero J. Aldisert, Chairman of the Advisory Committee on Bankruptcy Rules, Mr. Joseph Patcham, a member of the Committee, presented the preliminary draft of the proposed amendments to Bankruptcy Rules 5002 and 5004 with a request that they be released to the bench and bar for comment on an expedited basis. The Committee authorized the circulation of these proposed amendments with comments due by January 1, 1985 and agreed to recommend to the Judicial Conference that the Committee be authorized to submit the final proposals to the Supreme Court prior to the March session of the Conference, so that the members of the Court would have as much time as possible for their review. The Court would thereafter be notified of the action taken by the Judicial Conference on these proposed amendments.

E. Evidence. Judge Gignoux reported that no action had as yet been taken on the Committee's recommendation for the reactivation of an Advisory Committee on Rules of Evidence. Mention was made of the recent report of the Litigation Section of the American Bar Association and Mr. Hickey

volunteered to obtain a copy from the ABA office in Chicago which the Chairman could send to the Chief Justice for his information.

AGENDA V. Study of Local Rules of Court.

The Committee decided to recommend to the Judicial Conference that the Chief Justice be authorized to appoint a Reporter to the Standing Committee for the purpose of preparing a plan for a study of the local rules of the district courts and, perhaps conduct any approved study. The Advisory Committee on Appellate Rules has already determined to undertake a study of the local rules of the appellate courts with the assistance of its Reporter, Professor Ripple.

AGENDA VI. Report to the Judicial Conference

The Chairman and Secretary were authorized to prepare the Committee Report for submission to the Judicial Conference.

AGENDA VII. Time and Place of Next Committee Meeting

The Committee decided, tentatively, to hold its next meeting in Washington, D.C. on Monday and Tuesday, January 28-29, 1985.

Respectfully submitted:

Joseph F. Spaniol, Jr.
Secretary