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

Minutes of the Meeting of July 9, 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, July 9, 1986. All members of the Committee were present except Judge Walter R. Mansfield and Professor Wade H. McCree, Jr., who were unavoidably absent. The Secretary of the Committee and Deputy Director of the Administrative Office, James E. Macklin, Jr., and the Reporter to the Committee, Dean Daniel R. Coquillette of Boston College Law School, also attended the meeting. Accompanying Dean Coquillette was Professor Stephen N. Subrin of Northeastern University Law School, who is assisting Dean Coquillette in the local rules project. Judge Morey L. Sear, Chairman; Professor Lawrence P. King, former Reporter, and Norman H. Nachman, both members; of the Advisory Committee on Bankruptcy Rules, were present to report on the recommendations of that committee. Dean Paul A. Carrington, Reporter to the Advisory Committee on the Federal Rules of Civil Procedure, and Professor Stephen A. Saltzburg, Reporter to the Advisory Committee on the Federal Rules of Criminal Procedure, attended to report on the recommendations of their respective committees. Joseph F. Spaniol, Jr., Clerk of the United States Supreme Court and formerly Secretary to the Committee, was present. Also attending the meeting were Thomas W. Hutchison, Counsel to the House Judiciary Subcommittee on Criminal Justice; Gary Goldberger and Judith Bailey, Assistant Counsel to the House Judiciary Subcommittee on Monopolies and Commercial Law; and Terry Wooten, Counsel to the Senate Judiciary Committee. Peter G. McCabe, Assistant Director, Program Management, and David N. Adair, Jr., Assistant General Counsel, of the Administrative Office were in attendance.

Agenda I. Introductory Remarks by the Chairman

Judge Gignoux opened the meeting by introducing the above-named guests of the Committee. Judge Gignoux reported on the responses of the Judicial Conference at its March meeting to the actions requested by the Committee. In particular, Judge Jack Weinstein, a member of the Conference, expressed the following reservations concerning the gender-neutralizing amendments to the Civil Rules and the Rules of Evidence: (1) courts interpreting the amendments might consider some of the changes to be substantive, (2) some of the changes could be confusing to practitioners familiar with the current language of the Rules, (3) the amendments should perhaps be circulated for comment, and (4) promulgation of the amendments would result in great expense to the judiciary and private publishers. The Conference voted, therefore, to put off consideration of the gender-neutralizing amendments until its September meeting when the other Federal rules would be ready for consideration.

With respect to H.R. 3550, the bill amending the Rules Enabling Acts that had been enacted by the House in December, Judge Gignoux reported that there had been no action in the Senate. With respect to H.R. 4007, a bill that would amend 18 U.S.C. § 3500 to provide for increased discovery by defendants in criminal cases, Judge Gignoux noted that the Advisory Committee on Criminal Rules had not commented on this bill since it was a matter of policy to be determined by Congress. With respect to H.R. 3998, a bill 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), Mr. Hutchison reported that hearings have been held in abeyance until the American Bar Association has formulated a position on the issue.

Judge Gignoux reported for Chief Judge Pierce Lively, Chairman of the Advisory Committee on the Federal Rules of Appellate Procedure, that the Advisory Committee

had not met during the last year. The Chairman will be meeting with the new Reporter, Professor Carol N. Mooney of Notre Dame Law School, to agree on an agenda for discussion at a meeting to be held in the near future.

Agenda II. Report of the Advisory Committee on Bankruptcy Rules

Judge Morey L. Sear, Chairman of the Advisory Committee on Bankruptcy Rules, reported on the work of that Committee. By way of introduction, Judge Sear noted that in 1979, Congress had created an entirely new bankruptcy structure pursuant to the Bankruptcy Reform Act of 1978. Although the provisions of the Act were to be fully effective in April 1984, the Supreme Court of the United States in Northern Pipeline Construction Company v. Marathon Pipeline Company, 458 U.S. 50 (1982), found that the broad grant of jurisdiction to bankruptcy judges violated Article III of the Constitution. In response to that case, Congress, in 1984, amended the Act to vest jurisdiction of all cases under title 11, United States Code, in the United States district courts. Bankruptcy judges are established as a unit of the district court. District courts are authorized to refer bankruptcy matters to bankruptcy judges, and all of the district courts have promulgated local rules referring bankruptcy matters to bankruptcy judges in those courts. As a result of the 1984 amendments to the bankruptcy and judicial codes, it was necessary to amend the 1983 bankruptcy rules to provide rules of practice and procedure applicable to district judges when sitting in bankruptcy and to bankruptcy courts when exercising the district court's jurisdiction. In drafting proposed amendments to the bankruptcy rules, the Advisory Committee also sought to clarify definitions, to resolve inconsistencies, to make the rules gender-neutral, and to remove rules dealing with procedures that were not of concern to practitioners but were, in fact, internal operating procedures for judges and clerks.

The preliminary draft of proposed changes to the rules was circulated to members of the bench and bar in November 1985. Public hearings were held in San Francisco on February 20, 1986, Chicago on March 13, 1986, and Washington, D.C., on April 17, 1986. The Advisory Committee reviewed all of the comments and testimony and made a number of changes reflecting those comments and testimony.

Judge Sear noted six major changes in the rules contained in the proposed amendments. These six changes relate to (1) the authority of the bankruptcy judge to hear a motion for the withdrawal of a reference to the bankruptcy judge, (2) the authority of the bankruptcy judge to hear a motion to abstain, (3) the authority of the bankruptcy judge to hear a motion to remand, (4) the contempt power of a bankruptcy judge, (5) the right to a jury trial before the bankruptcy judge, and (6) the method for obtaining consent for the bankruptcy judge to hear "non-core" proceedings.

Judge Sear also reviewed the organization of the rules and noted that the rules were renumbered so that the different parts of the rules referred to particular phases of bankruptcy proceedings.

Judge Sear reviewed each part of the revised rules with the Committee. In connection with that review, the Committee made several changes to the proposed amendments and their accompanying Committee notes. First, in Rule 8015, the Committee agreed to add the phrase "to the court of appeals" to the next-to-last sentence of that rule for clarity. The whole sentence would now read, "If a timely motion for a rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of a subsequent judgment."

In addition, the Committee decided to refer to the Advisory Committee on the Federal Rules of Appellate Procedure the issue treated in the last sentence of

Rule 8015. That sentence provided as follows: "A notice of appeal filed before disposition of a motion for rehearing shall have no effect; a new notice of appeal must be filed." The Committee was of the view that this subject was more appropriate for the Advisory Committee on Appellate Rules. To conform to this deletion, the Committee agreed to delete the last sentence of the Committee Note to Rule 8015 dealing with the same subject.

Rule 9028 of the proposed amendments deals with disability of a judge during the course of the proceedings. Judge Gignoux noted that a proposed amendment to Civil Rule 63 deals with the same subject and provides for the disability of a judge not only after trial but during trial as well. The Committee agreed that the bankruptcy rules should be consistent with the civil rules and agreed that Rule 9028 would be amended so that it would simply refer to Civil Rule 63.

Judge Hoffman moved that the proposed amended bankruptcy rules, as further amended by the Committee, be approved and sent to the Judicial Conference in September for approval and submission to the Supreme Court for transmittal to Congress. Professor LaFave seconded the motion, and the motion was carried unanimously. Judge Gignoux noted that the rules as approved were subject to editing for technical and typographical corrections.

Judge Sear also noted that the bankruptcy forms were also being modified by a forms task force. The amended forms will be ready by the date of the Judicial Conference. Judge Sear further noted that the forms do not need to be circulated for comment, but that, pursuant to Bankruptcy Rule 9009, they must be approved by the Judicial Conference. Judge Sear explained that when the forms are ready, Mr. McCabe will send them to the members of the Advisory Committee on Bankruptcy Rules and the Standing Committee.

Judge Hoffman moved to congratulate the Advisory Committee on its fine work amending the bankruptcy rules. The motion was seconded and carried by acclamation.

Agenda V. Report on the Study of Local Court Rules

Dean Daniel Coquillette, Reporter to the Committee for the Local Rules Study, reported cn the progress of the local rules study. Dean Coquillette reminded the Committee that the first step in the first phase of the study was to collect all of the local rules of all of the district courts. Accordingly, a letter had been sent by Judge Gignoux to all districts asking for local rules, standing orders, or any other device that served as a local rule. All but three districts have reported and sent at least some materials pursuant to the request. The districts that had not responded were the Eastern District of North Carolina, the Western District of Virginia, and the District of the Virgin Islands. These districts will be contacted to attempt to obtain their local rules. Judge Hoffman noted that the Western District of Virginia has no local rules.

Dean Coquillette reported that he has been working closely with the Federal Judicial Center during the process of collecting local rules. The Center, based on work done by the Clerks Division of the Administrative Office, has formulated an index to the local rules. There is presently one copy of that index, which is in machine-readable form. Another copy will be made soon. In addition, as a result of cooperation between the local rules study and the Federal Judicial Center, the Federal Judicial Center now has a collection as complete as that generated by the local rules study.

The second step of the first phase of the study is to attempt to define the key problems and issues presented by the local rules. In an attempt to do this, the local rules of seven districts are being studied in depth. These districts were chosen as a cross section of all of the districts in the United States. They represent urban and rural districts, districts in which the local rules had been carefully drafted and districts in

which local rules have simply proliferated, and include districts such as the Southern District of New York with particular problems due to the nature of the districts.

In addition, seven topics that are commonly the subject of local rules were chosen for study, as these topics are dealt with in all districts. The topics were chosen because they have received extensive comment or have been viewed as problem areas. The topics are (1) bifurcated trials, (2) removal bonds, (3) limits on the number of interrogatories, (4) assignment of cases, (5) alternate dispute resolution, (6) verification of civil rights forms, and (7) pretrial conference procedures.

Some preliminary observations from the study are as follows: There is a tremendous diversity in the type and quality of local rules. Many local rules include restatements of statutes and national rules. Most districts do not have good indices of their rules, and it is very difficult for practitioners from one district to determine the substance of the local rules of another district without reading all of the local rules.

Dean Coquillette submitted a budget to the Committee for approval for fiscal year 1987. The budget includes a full-time coordinator-clerk to receive a salary consistent with that of a judicial law clerk. The budget also includes the services of Stephen N. Subrin of Northeastern Law School, two research assistants, one filing clerk, a part-time typing assistant, and computer expenses. The budget for fiscal year 1987 is proposed to be $57,750.

Judge Hoffman moved that, subject to the availability of funds, the proposed budget be approved. Professor LaFave seconded the motion and it was carried.

Mr. Hickey asked whether the resources of the Federal Judicial Center were being used so that duplication of effort was not necessary. Dean Coquillette replied that full advantage was being taken of the Federal Judicial Center resources and that both the study and the Federal Judicial Center were profiting by the study.

Mr. Hutchison noted that, should the Administrative Office find it necessary to seek additional funds from Congress, he would attempt to assist the Administrative Office in getting funds for the study. Mr. Macklin indicated that money could be found for the 1987 budget but that funds would have to be sought from Congress for a 1988 budget. Dean Coquillette indicated that he would provide an estimate for the 1988 budget in time to be included in the budget request of the Administrative Office for fiscal year 1988.

Mr. Hutchison asked Dean Coquillette whether thought had been given to a solution to inconsistencies between the local rules and the national rules. Judge Gignoux noted that H.R. 3550, now pending, would require that local rules be reviewed for consistency by the judicial councils of the circuits. Dean Coquillette noted that at this stage, problems were being identified. When problems were sufficiently identified, solutions would be studied.

Agenda IV. Report of the Advisory Committee on the Federal Rules of Civil Procedure

Dean Paul D. Carrington, Reporter to the Committee on Civil Rules, reported on the activities of that Committee. Dean Carrington noted that consideration of amendments to Rule 4 and other rules pertaining to service of process had been tabled since Rule 4 had been so recently amended. The first proposed amendment for consideration by the Committee was Rule 51, pertaining to the sequence of instruction and argument. The rule currently provides for instructions prior to argument, but suggestions have been made that the court should have discretion as to the sequence of instruction and argument. Judge Hoffman noted that the Advisory Committee on the Rules of Criminal Procedure had approved an amendment to Rule 30 of the Criminal Rules to accomplish the same purpose. Although the language of the two rules was not identical, the purpose was the same and the identical language was not considered

necessary. Approval of Rule 51 was put off until discussion of the criminal rules because the committee felt that unless other rules were submitted to the Conference, the amendment to Rule 51 was not urgent.

Dean Carrington also reported on the proposed amendment to Rule 63 dealing with the inability of a judge to proceed. The present rule applies only when a judge is unable to proceed after trial. The amendment is designed to eliminate the necessity for a new trial in appropriate cases when a judge is disabled during trial. Dean Carrington noted an inadvertent gender reference in the first paragraph of the Committee Notes, which was eliminated by the Committee. Mr. Mahony noted that the third paragraph of the proposed Committee Notes implied that a new judge could recall witnesses where an assessment of credibility was required. Mr. Mahony questioned whether the witness would be recalled before the jury in a jury-tried case. Mr. Mahony also questioned why the proposed amendment contained two clauses when it appeared that the two clauses could be consolidated.

Dean Carrington noted that, in light of the comments, the Committee Note would have to be rewritten. Professor LaFave moved to remand the proposed amendment to the Advisory Committee for reconsideration, particularly whether the rule should deal with disabilities during trial and after trial in different clauses. Mr. Mahony seconded the motion and the motion was carried.

Dean Carrington also reported on the proposed amendments to Admiralty Rules C and E, which deal with the service of a warrant for the arrest of a vessel. Judge Hoffman noted that, as written, the rules would not require a marshal to serve a warrant for the arrest of cargo on board a vessel that was also being arrested. Judge Hoffman suggested that if property to be arrested were located on the vessel, there is no reason why the marshal could not serve the warrant on both the vessel and the cargo.

Judge Hoffman moved to refer the rules back to the Advisory Committee with the suggestion that language authorizing a marshal to serve property on a vessel to be arrested be added to the rules. Professor LaFave seconded the motion, noting also that Rule C, as written, only requires the clerk to deliver a warrant in the case of a vessel. The motion was amended to include the recommendation that explicit authority be given to the clerk to issue a warrant and to deliver the warrant promptly for service. The motion as amended was carried.

The Committee next considered a number of changes to the gender-neutralizing amendments previously approved by the Committee, but tabled by the Judicial Conference. The changes were designed to clarify the gender-neutralizing amendments and not to affect substance. The changes were suggested by a subcommittee of the Advisory Committee consisting of Professor Maurice Rosenberg and Ms. Larrine S. Holbrooke. The Committee agreed to approve changes to the amendments to Rules 8(a)(3), 12(a), 16(f), 17(a), 36(b), 38(c), 41(b), 44.1, 45(f), 46, 51, 53(d), 68, 71, 81(c), Rule (F)(5), and Rule (F)(6). The Committee did not accept amendments to Rules 13(a), 15(c), 32(a)(4), 36(a), 37(b)(2)(E), 37(c), 53(a), and 63. Suggested changes to amended Rules 15(c), 17(c), and 26(f)(5) had already been made by the Committee. Judge Hoffman moved that, with the changes made by the Committee, the gender-neutralizing amendments to the Civil Rules be approved and sent to the Judicial Conference in September for approval and submission to the Supreme Court for transmittal to Congress. The motion was seconded by Mr. Hickey and approved by the Committee. Judge Gignoux noted that the approval was subject to corrections of a technical nature, including typographical errors.

Agenda III. Report of the Advisory Committee on Criminal Rules and Rules of Evidence

Professor Stephen Saltzburg reported on the activities of the Advisory Committee on the Federal Rules of Criminal Procedure. Professor Saltzburg first noted the

proposed amendment to Rule 30, dealing with the sequence of instructions and argument, which had been previously circulated for comment and approved by the Advisory Committee. Professor Saltzburg suggested that the Committee approve the rule without recirculation. Professor Saltzburg also reminded the Committee that it had previously approved an amendment to Rule 6(a), which had not been referred to the Judicial Conference since, at the time, no other rules were ready for submission.

Judge Hoffman moved to submit Rule 30 and Rule 6(a) to the Judicial Conference in September for approval and submission to the Supreme Court for transmittal to Congress. Professor LaFave seconded the motion, and it was approved by the Committee.

Professor Saltzburg also noted that new Rule 12.3, which was suggested by the Department of Justice, was ready for circulation. Rule 12.3 would require a defendant who is intending to claim the defense that he was acting on behalf of a Government entity to give notice and to provide certain information. Professor LaFave suggested an amendment to the first sentence of Rule 12.3(a)(1) as follows: "A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney for the Government a written notice of such intention and file a copy of such notice with the clerk." Professor LaFave also suggested a change to the second sentence of that section to read as follows: "Such notice shall summarize the facts supporting the defense and identify the law enforcement or Federal intelligence agency on behalf of which the defendant claims the actual or believed exercise of the public authority occurred." Mr. Hickey seconded the motion for the changes, and it was approved by the Committee.

Judge Gignoux noted that the first sentence of proposed new Rule 12.3(d) provided that the rule would not supersede the provisions of the Classified Information Procedures Act. This reference is, of course, unnecessary since the rule-making authority is not sufficient to supersede substantive statutes. The Committee agreed to such change and requested that the Committee Notes be modified to reflect the deletion.

The Committee agreed to approve the proposed rule for circulation to the bench and bar and to hold one public hearing in Washington, D.C., after six months of comment period.

Professor Saltzburg also discussed the proposed amendment to Rule 24(d) dealing with alternative jury selection procedures. Professor LaFave suggested that the proposed amendment was too broad. The rule was simply intended to permit a struck jury system but, as written, could be construed as providing much broader authority. Mr. Hickey moved to remand the proposed amendment to the Advisory Committee for further consideration in light of the objections as to breadth. Mr. Mahony seconded the motion, and it was carried.

Professor Saltzburg noted the request of the Department of Justice that the Advisory Committee consider an amendment dealing with appeals in coram nobis cases. Professor LaFave moved that the issue be referred to the Advisory Committee on Appellate Rules for consideration. Judge Kearse seconded the motion, and it was approved by the Committee. With respect to the Rules of Evidence, Professor Saltzburg reported that the ad hoc committee to study the Evidence Rules recommended no changes at the present time, but that an amendment to Rule 609(a) to deal with civil cases be considered at the next meeting of the Advisory Committee.

Mr. Hickey moved that the gender-neutralizing amendments to the Criminal and Evidence Rules be approved and sent to the Judicial Conference in September for

approval and submission to the Supreme Court for transmittal to Congress. The motion was seconded by Professor LaFave and approved by the Committee.

Judge Gignoux requested the views of the Committee on whether the gender-neutralizing amendments to the Criminal, Civil, and Evidence rules should be simply forwarded to the Conference for its consideration or whether they should be forwarded to the Conference with the recommendation that they be submitted to the Supreme Court for transmittal to Congress. Mr. Mahony moved that the gender-neutralizing amendments be forwarded with a recommendation that they be submitted to the Supreme Court. Mr. Hickey seconded the motion, and it was approved by the Committee.

Agenda VI. New Business

The Committee agreed that the next meeting of the Standing Committee would be Monday, January 12, 1987, in Washington, D.C.

Respectfully submitted,

James E. Macklin, Jr.
Secretary