COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

MINUTES OF MEETING OF OCTOBER 6-7, 1972

The standing Committee on Rules of Practice and Procedure met in the Conference Room of the Administrative Office in Washington, D.C. on October 6 and 7, 1972.

Present: Judge Albert B. Maris, chairman, Judge Charles W. Joiner, Richard E. Kyle, Esq., Professor James Wm. Moore, J.Lee Rankin, Esq., Bernard G. Segal, Esq., Judge Frank W. Wilson and Judge J. Skelly Wright. Professor Charles Alan Wright was unavoidably absent. Also present during parts of the meeting were Judge Phillip Forman, chairman of the Advisory Committee on Rules of Bankruptcy, Professors Frank R. Kennedy and Vern Countryman, reporter and associate reporter, respectively, to the committee, Professor Frank J. Remington, reporter to the Advisory Committee on Criminal Rules, and G.Robert Blakey, Esq., chief counsel of the Senate Subcommittee on Criminal Laws and Procedures, William E. Foley, Esq., secretary to the committee, Ada E. Beckman, law clerk to the chairman, and Barbara A. Gray, of the rules study staff, were also present.

AGENDA ITEM III. RULES OF CIVIL PROCEDURE

Judge Maris reported that the Advisory Committee on Civil Rules met two weeks ago and is considering the various aspects of Rule 23, the class action rule, that the committee had general discussion of the subject matter and gave instructions to its reporter, Professor Bernard J.Ward, to prepare alternative rules with respect to the third category of class actions.

AGENDA ITEM IV. RULES OF APPELLATE PROCEDURE

Judge Maris reported on the present movement in the courts of appeals to reduce the publication of opinions. In a letter dated August 31, 1972, Professor Wright proposed an amendment to the appellate rules with respect to prohibiting the citing of opinions which the court direct not be reported, as follows:

> If any court of appeals or district court has determined that an opinion or memorandum in a case is not to be published, that opinion shall not be cited in briefs or opinions in other cases.

A discussion followed. Judge Maris was of the opinion that such a prohibition might involve a question of constitutionality, the violation of the right of free speech, free press and a fair trial.

Judge Joiner was in favor of limiting the publication of opinions, saying that this involves three alternatives: (1) not to have any citations in the opinion of the court, (2) declare that published opinions have no precedential value, or (3) prohibit citing the unpublished opinion.

Mr. Foley informed the committee that the Committee on Court Administration is recommending in its report to the Judicial Conference at the October session that each circuit devise a plan, which is to be submitted to the Judicial Conference, with respect to the publication of opinions.

Judge Wilson suggested that the proposed amendment not provide that a litigant cannot cite an unpublished opinion

but that a court cannot cannot cite such an opinion, so as to make the rule provide that a court of appeals cannot cite unpublished opinions.

Professor Moore stated that such a prohibition must start at the district court level. If the district court uses an unpublished opinion, then the court of appeals must necessarily consider it.

Judge Maris suggested that West Publishing Company would list in the back of its volumes of reports the decided cases in which opinions were not published, that the Wright proposal is fraught with pitfalls, and that West would doubtless follow the wishes of the opinion-writing judge not to publish the opinion. However, since Prof. Wright was not present to discuss his suggestion, it was agreed to postpone further consideration of it.

The committee then discussed the fact that West had failed to incorporate the Advisory Committee Notes when publishing recent amendments to the Criminal Rules which went into force October 1st. Judge Maris stated that West has always been very cooperative in this regard and he felt certain that this would not happen again and that West would add the Notes. Mr. Foley was requested to contact West with respect to this matter and remind the publisher that in a May letter Mr. Foley had been assured that the Notes would be included.

AGENDA ITEM I. PROCEDURAL CHANGES INVOLVED IN PROSPECTIVE REVISION OF CRIMINAL CODE

The committee considered the proposal of Senator McClellan chairman of the Senate Subcommittee on Criminal Laws and Procedures, for a cooperative effort by his subcommittee and its counsel and our committees and reporter for the formulation of such procedural changes as are necessitated by the revision of the Federal Criminal Code now being drafted by his subcommittee, such procedural changes to be made in the Federal Rules of Criminal Procedure (either by Congress or the Supreme Court) rather than by Congressional enactment of additional procedural statutes. Judge Maris reported that this is a noval procedure. The Senate subcommittee is preparing to revise the Federal Criminal Code following the Brown Commission report and it has soliticited the assistance of the rules committees of the Judicial Conference. The suggestion has been made to set up in the bill two titles, Title I to be an enactment of the Criminal Code's substantive provisions, and Title II to incorporate amendments to the criminal rules or new rules with the proviso that these rules are to be subject to the authority of the Supreme Court to alter or amend them. Judge Maris stated that it is the desire of Senator McClellan that procedural rule making continue to be within the jurisdiction of the Supreme Court. It is important that the enactment of this new legislation make clear that the rule making power of the Supreme Court is not frozen. Judge Maris believed this to be a cooperative advance in this field.

Prof. Remington stated that Mr. G. Robert Blakey, chief counsel

to the subcommittee, had indicated that the present rules would not be included in the bill but only the amendments or new rules.

Judge Joiner stated he was in favor of the committees working with the Senator's subcommittee.

Judge Maris made it clear that the approval of the Judicial Conference would be needed, that the Advisory Committee and the standing committee might have to hold joint meetings to approve the suggested legislation but would need authority from the Judicial Conference before doing so.

Prof.Moore observed that there is the same problem existing in the bankruptcy area and that some liason is needed, that if the bankruptcy rules go into effect before a substantive statute is passed then the question arises what is left of the present statute.

Judge Maris stated that the Commission on the Bankruptcy Laws of the United States should tailor a bankruptcy act to fit the rules and that Prof. Kennedy is the executive director of that Commission.

Mr. Segal thought that Judge Maris was right about requiring Judicial Conference authority and that it should be made clear to the Judicial Conference that this is an opportunity, otherwise the Senate subcommittee will go ahead without working with our committees.

Judge Maris stated that Mr.Blakey had hoped to have a bill ready now but it was impossible and he hoped to have a committee print of what will be proposed rather than a bill ready by possibly the middle of November. Judge Maris is to report to the Judicial Conference and to request authority and, if approved, our committee will then be free to cooperate. Judge Joiner agreed that this is a desirable procedure.

Mr. Segal moved that a resolution go to the Judicial Conference that this committee be authorized to operate along the lines contained in the letter of Senator McClellan and thus deviate from the usual procedure of going to the country with proposed amendments or rules, and to the Judicial Conference for approval and to the Supreme Court for adoption.

Judge Joiner seconded the motion. ALL APPROVE.

AGENDA ITEM II. RULES OF CRIMINAL PROCEDURE

Judge Maris read Prof.Wright's letter of October 3, 1972, a copy of which is contained in the desk book provided for each member, commenting on various of the proposed amendments to the criminal rules, and his general feeling of uneasiness about the frequency with which the criminal rules are being amended. Mr. Segal was of the view that amendments must be made when necessary. Prof. Moore agreed that the rules must have continuous surveillance and be amended when needed. Judge Maris observed Prof.Wright's point that perhaps too much detail is being provided. Mr. Segal stated that this depends on each individual rule. Prof.Moore said that experts disagree on this point. Judge Maris asked whether the maximum discretion must be left with the judge? Mr.Rankin stated he didn't want to admit that the committee has been too prolix about the rules and thinks this should be considered case by case, and that Prof.Wright should state the particular rule he has in mind.

Judge Maris stated that the rules being considered in this item have all been approved by this committee except Rule 41.1.

RULE 4. RULE 4 WAS PASSED BY THE COMMITTEE AS HAVING BEEN PREVIOUSLY APPROVED.

RULE 9(a). This rule is in the same form as was approved at the March meeting. There being no objection, Rule 9(a) was passed on the basis of having been approved at the last meeting.

RULE 11. The committee discussed Prof.Wright's comments on substituting "term of imprisonment" for "punishment", as proposed by the Advisory Committee. Mr. Rankin asked, "Isn't the issue the penalty?" Prof.Remington shared the doubt whether the substitution of "term of imprisonment" was editorial.

Judge Wilson moved that Rule 11(c)(2) be amended as follows:

> "(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered;"

Judge Joiner seconded the motion and the MOTION WAS UNANIMOUSLY CARRIED.

Rule 11(c)(2) as thus amended was APPROVED.

Judge Wilson offered a further editorial amendment, moving that the word "and" be inserted at the end of subdivisions (c)(1) and (2) after the word "offered;" so as to read "offered; and".

THE MOTION WAS SECONDED AND WAS APPROVED BY ALL.

Judge Wilson questioned why Rule 11(e)(1) provided that "The attorney for the government and the attorney for the defendant may engage in discussions" and what happens in the case of a defendant acting pro se? Judge Wilson moved that "or the defendant when acting pro se" be inserted in Rule 11(e)(1), line 2, after "defendant" and before "may", the line to read:

> "ment and the attorney for the defendant, or the defendant when acting pro se, may engage"

Mr. Rankin seconded the motion. It was suggested that the Note

indicate that the appropriate practice is for the judge to appoint counsel for this purpose.

ALL APPROVED THIS AMENDMENT EXCEPT JUDGE JOINER WHO OPPOSED, AND THE SUBDIVISION WAS THUS AMENDED.

The question was then raised with respect to subdivision (f) of Rule 11 as to why the term "or nolo contendere" does not appear after "plea of guilty". Prof.Remington explained that this term did appear in the original draft and the change was made in response to public comment. Mr. Rankin stated that the courts have been struggling with the effect of a nolo plea for many years and the committee should not decide this question now. Judge Joiner suggested leaving the subdivision without change. ALL AGREED.

It was moved and seconded that Rule 11, as thus amended, be approved. ALL APPROVE.

Judge Wilson asked the committee to reconsider Rule 11(c)(4), whether all constitutional rights were intended to be included in the judge's statement to the defendant and whether this included self-incrimination. Judge Wilson didn't think this is adequate since under the Boykin case a defendant must also be advised that he is not required to testify against himself. Judge Wilson moved that there be added to Rule 11(c)(4)the phrase "right not to take the witness stand". Mr. Segal suggested that the phrase read "and not to testify", and also suggested taking out the last clause "and the right to be confronted with the witnesses against him." Mr. Segal further stated that Judge Wilson's position is correct--to either take out "confronted with the witnesses" or add "right not to testify against himself".

Judge Maris stated that the right to subpoena witnesses is also important, if we are spelling out the rights of a defendant in a tria

Judge Wilson suggested that the provisions following the phrase "he waives the right to a trial" be deleted. Mr. Segal moved that all be stricken after the word "trial" and to put in the Note Judge Wilson's suggestion that the judge might specify the various rights. Judge Wilson withdrew his motion in favor of the Segal motion provided that the Note included reference to the other rights to which a judge should address himself.

The committee, upon reconsideration of Rule 11(c)(4) voted to strike out all following "he waives the right to a trial", namely "by jury or otherwise and the right to be confronted with the witness against him". ALL VOTED APPROVAL OF THIS DELETION.

ALL REAPPROVED RULE 11 AS THUS MODIFIED.

RULE 12. The Note to the Rule is to be updated, otherwise the rule is as approved at the March meeting.

RULE 12.1 Professor Wright had a comment with respect to this rule, the same as that of the New York Bar, namely, whether there is a need for this alibi rule? If there is, then Prof. Wright had certain objections which he stated in his letter and which the committee considered. The indictment or complaint should state where the defendant was at the time of the offense, but if the document is vague, as to this, the information can be obtained by the defendant by a bill of particulars.

Judge Wilson moved to substitute in subdivision (e), in line 3, the word "may" for "shall" after "court" and before "exclude", the phrase to read "the court may exclude". Mr. Rankin seconded and ALL APPROVE.

Mr. Segal moved that the word "shall" be substituted for

"may" in the 4th line of Rule 12.1(b), the phrase to read "shall inform the defendant". Mr. Rankin seconded the motion.

Judge Maris stated this would involve quite a few more changes.

The committee recessed at 1 P.M. for lunch and reconvened at 2 P.M.

Mr. Segal suggested that the committee adopt the form of subdivision (b) of the rule as submitted by the advisory committee in March 1972 with the addition of "in writing" and "specific" in subdivision (b). He accordingly moved that in Rule 12.1(b), 4th line, "shall" be substituted for "may", the first sentence of (b) to read:

> "Upon receipt of notice that the defendant intends to rely upon an alibi defense, the attorney for the government shall inform the defendant in writing of the specific time, date, and place at which the offense is alleged to have been committed."

Mr. Segal further moved that "If the government gives such information," be stricken at the beginning of the second sentence of subdivision (b), the second sentence to begin with "The defendant", and that the word "then" be inserted after "The defendant" the phrase to read:

> "The defendant then shall inform the attorney. . ."

Motion seconded. ALL APPROVE RULE 12.1(b) AS THUS AMENDED.

It was further moved and seconded that in Rule 12.1(e) the word "mandatory" be stricken before "requirements" and the word "may" be substituted for "shall" after "court and before "exclude" the sentence to read, in part:

> "Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony. . ."

ALL APPROVED SUBDIVISION (e) as THUS AMENDED.

It was further moved and seconded that subdivision (f) of the March 1971 draft be added to Rule 12.1 in the following form:

"(f) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of this rule."

ALL APPROVED AMENDMENTS TO RULE 12.1 (b), (e) and (f). ALL APPROVED RULE 12.1 AS THUS AMENDED.

RULE 12.2 There is a change in the title to this rule. Judge Wilson questions whether a defendant may be denied by rule the defense of insanity? Judge Wilson suggested that the last sentence in (a) be stricken. Judge Joiner suggested that the last two sentences in (a) be reversed. After discussion, Judge Joiner moved that the last two sentences in Rule 12.2(a) be reversed. Judge Wilson seconded the motion.

ALL APPROVED THE REVERSAL OF THE SECOND AND THIRD SENTENCES OF RULE 12.2(a).

It was moved and seconded that the word "may" be substituted for "shall" in subdivision (d), line 4, after "court" and before "exclude", the phrase to read "the court may exclude". ALL APPROVED THE MODIFICATION in Rule 12.2(d).

The reporter was requested to make a cross-reference in the Note to 18 U.S.C. §4244 at the end of the first paragraph in the Note.

ALL APPROVED RULE 12.2 AS THUS AMENDED.

Rule 15. The reporter is to add on page 2 of the Note in lieu of the present citation [4 Barron, Federal Practice and Procedure, (Supp. 1967)] the citation "1 Wright, Federal Practice and Procedure: Criminal §241, at 477 (1969)", thus updating the Note.

It was moved and seconded that the words "in writing" be inserted in the 4th sentence of Rule 15(b) after "waives" and before "the", the clause to read "unless the defendant waives in writing the right to be present".

ALL APPROVED THE AMENDMENT TO RULE 15(b) and APPROVED RULE 15 (b) AS THUS AMENDED.

Judge Wright suggested that a reference be made in the Note to the fact that if the defendant is in state custody, a writ of habeas corpus ad prosequendum might be required to secure his presence at the deposition.

With respect to Rule 15(c), Judge Wilson observed that no provision is made for the reporter's expenses. It was pointed out that the rule does not relate to such expenses.

Judge Joiner moved and Mr. Segal seconded that Rule 15 be approved as amended. ALL AGREED.

Rule 16 Professor Remington stated that the only change in this rule was an editorial one in subdivision (a)(1)(E). ALL APPROVED.

It was moved and seconded that the phrase "to agents of the government" be deleted in subdivision (a)(2), to conform with the amended statute, the phrase to read "witnesses except as provided in 18 U.S.C. § 3500.

ALL APPROVED RULE 16 AS THUS AMENDED.

RULE 17 There is no change in this rule. Judge Wilson moved approval of Rule 17. ALL APPROVED.

Rule 20 The advisory committee believed that the word "present" is better than the word "found" and "present" has been substituted. Judge Maris agreed that "found" was ambiguous. Judge Wilson inquired whether this might not encourage forum shopping. Judge Joiner thought "found"

was better. It was pointed out that "present" appeared in the Magistrate's Rules.

JUDGE JOINER MOVED THE APPROVAL OF RULE 20 AS AMENDED BY THE ADVISORY COMMITTEE. ALL APPROVED.

Rule 29.1 Judge Maris read a letter from Richard L. Thornburgh, U.S.Attorney for the Western District of Pennsylvania. Judge Wright thought that Mr. Thornburgh's objection had no sound basis and believed the rule to be correct. The committee considered the comments in Prof.Wright's letter. After discussion, the committee agreed that its previous approval of Rule 29.1 should stand.

RULE 32 Judge Wilson thought a reference should be made in subdivision (a)(2) to the provisions of the Criminal Justice Act, 18 U.S.C.§ 3006A, and moved that this be added at the end of the first sentence following "forma pauperis". There was no second. Judge Maris thought that the sentence was adequate as it was. ALL APPROVED LEAVING THE SUBDIVISION AS IT IS.

Professor Moore suggested that there should be a reference in the Note to Appellate Rule 24. The reporter was directed to add such a reference to the Note.

Judge Wilson suggested the addition to Rule 32(c)(1) a new (E) reading "If the court is of the opinion that adequate information for sentencing appears in the trial record." Judge Wright suggested adding "for reasons stated".

It was moved and seconded that subdivision (c)(1) be amended by deleting therefrom paragraphs (A), (B), (C) and (D) and by striking from the end of the first sentence of (c)(1) all following the word "probation", and inserting in lieu thereof "unless the court otherwise

directs for reasons stated of record", the first sentence of (c)(1) to read:

> "The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation, unless the court otherwise directs for reasons stated of record."

It was moved and seconded that the second sentence of subdivision (c)(1) be amended by inserting "or nolo contendere" after "guilty" and before "or" in the 3rd line and to insert the word "written" in the 4th line after "the" and before "consent", the sentence to read:

> "The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time."

ALL APPROVED THE AMENDMENTS.

RULE 32, AS THUS AMENDED, WAS APPROVED.

Judge Wright requested reconsideration of Rule 32(f), Revocation of Probation, and suggested that the defendant's right to have counsel should be added. Following discussion, Judge Wright withdrew his suggestion.

RULE 43. Professor's Wright's comments were read as to whether a defendant must be present at the entry of a plea of not guilty. Discussion. IT WAS AGREED THAT THERE SHOULD BE NO CHANGE IN SUBDIVISION (a).

Judge Joiner suggested that subdivision (c)(3) might be left out. After discussion it was agreed to delete "between counsel" from Rule 43(c)(3) so as to read:

> "At a conference or argument upon a question of law."

IT WAS MOVED AND SECONDED THAT RULE 43(c)(3) BE APPROVED AS THUS AMENDED. CARRIED.

The reporter was requested to delete "between counsel" from the next to last paragraph of the Note and to rewrite that paragraph.

APPELLATE RULE 9. Professor Wright had objection to subdivision (d). It was agreed that he was correct in his view. The Judicial Conference had received this rule from its Committee on the Administration of the Criminal Law and had referred it to our committees for consideration. This committee should consider whether this rule is wise. Judge Wright said that the last three sentences are objectionable. Prof. Remington said he would put a period after "Rule 4" and would reinstate the in forma pauperis language and add "in good faith" language. Judge Wilson suggested that wilful delay should be grounds to dismiss appeal.

Judge Maris suggested that since this is an appellate rules matter it should be referred to the Advisory Committee on Appellate Rules when it is appointed.

Judge Wilson suggested that in Rule 9(b) the word "only" in the phrase "only to the court of appeals" should be stricken. Judge Wright agreed to the deletion of "only" saying that this is a policeing of bonds and should not be in the court of appeals but should be in the district court.

The chairman was authorized to report to the Judicial Conference that the proposed amendments to Appellate Rules 9 and 10, in the opinion of the standing committee require further study by the Appellate Rules Committee, when constituted, and this committee is not prepared to recommend Rules 9 and 10 in their present form at this time but suggests that it will refer them to the Appellate Rules Committee when it is reconstituted.

APPELLATE RULE 10. SEE APPELLATE RULE 9 ABOVE.

PROPOSED AMENDMENT TO CRIMINAL RULE 50(a)

All Approved designating the first paragraph of the rule as subdivision (a) in view of the recent addition of subdivision (b) to the rule.

RULE 41.1

This rule was returned to the Advisory Committee in March 1972 for further consideration but it was resubmitted without any change.

Mr. Segal inquired whether the Restatement covers this subject.

This rule would permit one not already presumably lawfully in custody to be required to stand in a lineup. Judge Wright described the so-called Adams orders entered in the District of Columbia and said (b) is strictly a District of Columbia matter and not for a federal court, and that under Rule 41.1 a person not under arrest or custody could be brought in to appear in a lineup. Judge Wright thought it would be better to wait until the Supreme Court has passed on the constitutional questions involved and then it can be formalized into a rule, if needed.

Professor Moore questioned whether this rule is needed in the federal court. Wouldn't it be better to be a Superior Court rule in the District? Discussion followed:

Professor Moore insisted that the principle should be tested out in a Superior Court rule.

Judge Wilson said that the analogy here was with the Administrative subpoena and the question is whether this can be done by rule.

Judge Wright said that the Rules Committees should not make law but that we should let the substantive law be made and then a procedure could be set up.

At 5.45 P.M. the committee adjourned until tomorrow at 9 A.M.

Saturday, October 7, 1972 9 A.M.

The committee reconvened in the Conference Room of the Administrative Office and continued its discussion of Criminal Rule 41.1.

Judge Wright believed that there is not much experience in lineups in federal courts and doubted seriously whether a court could force a citizen to stand in a lineup without probable cause for arrest and make discovery of his physical being.

Mr. Rankin did not believe that even the grand jury could require him to come in under these circumstances.

Judge Joiner was in favor of the rule, suggesting the change of "order" to "summons"; and the elimination of the arrest provision. Judge Wright still insisted this was not a federal matter. Judge Wilson suggested that there are drafting problems in (b), and he had not had any occasion to know of the need for this rule.

Mr. Rankin was disturbed about putting the problem to the Supreme Court to determine the constitutionality of this rule--- it questions the propriety of our system.

Judge Maris did not believe it is a good time to bring in such a controversial rule. Judge Wilson would send the rule back a second time with the suggestion of redrafting it along administrative enforcement procedure lines. Judge Maris stated the alternatives, the committee could approve the rule, could return it with suggestions, or disapprove it as really not needed by the federal courts and as a matter in which the district court can made its own rules.

Judge Wright agreed that some experience in the federal or state courts is needed in this area. He thought that we should not authorize a rule involving a novel procedure of doubtful constitutionality.

Mr. Kyle had great reservations about putting a stamp of approval on this rule.

Judge Maris stated that it is clear that this rule should not be sent to the Judicial Conference at this time. The question was what to do with it--disapprove it on the theory that there should be more experience around the country or send it back to the Advisory Committee?

Judge Wright moved to disapprove the rule in the present form and remand it to the Advisory Committee for the purpose of further study of similar procedures in state and federal courts throughout the country. Mr. Rankin would amend the motion by disapproving the rule at this time on the ground that we do not think it necessary for the federal system.

Prof. Moore suggested that the committee merely table the rule and state its reasons and that as experience develops in this field it will be taken off the table for further consideration. Judge Wright accepted Prof.Moore's suggestion.

The chairman stated the motion to be that Criminal Rule 41.1 be laid on the table pending further experience in the country and further adjudication of the issues of constitutional validity which are involved subject to be taken up at a later time if the committee finds it advisable

ALL WERE IN FAVOR OF THE MOTION AND CRIMINAL RULE 41.1 WAS LAID ON THE TABLE UNTIL FURTHER ACTION BY THE COMMITTEE.

AGENDA ITEM V. RULES OF BANKRUPTCY PROCEDURE

The committee considered the definitive draft of rules and forms for ordinary bankruptcy proceedings under the Bankruptcy Act which were recommended by the Advisory Committee on Bankruptcy Rules for approval.

Professor Kennedy recounted the second paragraph of his memorandum of September 29, 1972 in which he stated that these rules and forms, if approved for promulgation, would abrogate the General Orders he listed. He said that these rules and forms may possibly apply to some General Orders but will not presently apply to proceedings under section 77 and Chapters IX, X, XI and XII to which some of the present General Orders will apply until rules are adopted for those proceedings.

Judge Maris asked why these rules cannot be made applicable to the other areas until the new material is completed. Professor Kennedy replied that this would be too difficult. Chapter X Rules have been drafted for circulation to the bench and bar and Chapter XI rules are in galley and should be ready for circulation to the public in six or seven weeks. Chapter XII rules are being worked on. Railroad reorganization rules under section 77 and Chapter IX rules for taxing units compositions are for the future.

Prof.Moore asked whether it would not be helpful is the Supreme Court order stated that certain General Orders were abrogated except for certain titles. Prof.Kennedy said this would be an aid.

Judge Maris asked whether it could be worked out in the order of the Supreme Court to abrogate the rules except certain rules and forms.

Judge Maris further stated that this is a purely technical problem and generally the proposed rules and forms are an excellent job.

Prof.Kennedy outlined the work which the advisory committee is now contemplating. The advisory committee was pleased with the reaction of the bench and bar and the moderate objections raised, the referees in bankruptcy are very anxious that the rules go into effect at the earliest possible date. Prof.Kennedy discussed the Commission on Bankruptcy Laws of which he is the executive director. The Commission is not dealing with procedure but is accepting the rules and forms which have been prepared by the Advisory Committee. The Commission would like the rules to go into effect by July 1,1973. The draft was written on the basis that the Federal Rules of Evidence will be in force. Prof.Kennedy has alternate rules on evidence and Notes if the Rules of Evidence are not in force when the Bankruptcy Rules are adopted.

Mr. Rankin requested Prof.Kennedy to submit first the controversial rules.

BANKRUPTCY RULE 208,p.69 Rule on Proxies. This rule imposes severe requirements on those who want to vote multiple proxies at creditors meetings. The Bankruptcy Bar thought this made too difficult representation of two or more creditors, it requires information as to solicitation, process and connnection with other parties.

Mr. Rankin inquired what about conflicts of interest. This is Rule 505, Nepotism, p.153.

Mr. Rankin said he had in mind the nondisclosure of representations in the proxy rule. Prof.Kennedy said that the disclosure require-

ment was objected to as burdening creditors.

RULE 920. Contempt Rule, p.287 Allows referee to impose a fine.

Judge Wilson inquired as to Rule 810, p.256, which authorizes a district judge to send the case back; the rule keeps the district judge in an appellate role.

RULE 409, p.146, lines 43-78, trial of issue Where creditor is seeking judgment in nondischargable debt, local rule could provide for trial by referee.

Note on pp.147-148 to Rule 409

IT WAS MOVED AND SECONDED THAT THE WORDS "FOR TRIAL BEFORE A DISTRICT JUDGE" BE INSERTED ON THE FIRST LINE OF THE NOTE ON PAGE 148, THE LINE TO READ:

"on the jury calendar of the district court for trial before a district judge when the issue:

ALL APPROVED THE ADDITION TO THE NOTE

Judge Wright said he would like to explore again the contempt rule, how does it work in fines?

Judge Wilson asked what is the current law on the $50 filing fee? Prof.Kennedy stated that the statute is clear that the bankrupt must pay this before discharge, the question is now before the Supreme Court. Prof.Kennedy further stated that a lawyer cannot be paid until the filing fee is paid.

RULE 122, p.45a This is a new rule which has not been circulated to the bench and bar and deals with a gap when a Chapter X reorganization fails.

Judge Wilson inquired about Rule 401, p.127, automatic stay.

How can a judge be advised of the stay of a case before him? There is no procedure for notifying a judge. Should the Note suggest that the judge be notified of a stay since it acts as an injunction against all parties. Prof.Kennedy suggests as an alternative possibility of a procedural form through the Administrative Office.

Judge Maris suggested that perhaps the Note could indicate that as a matter of comity, if a state court is involved, the bankruptcy court give notice to the clerk of the state court.

Rule 704, p.195 Nationwide service of process and transfer to a more convenient forum.

Lines131 et seq. pages 198-199- There have been no objections to this provision. Anciliary receivers have been abolished in reorganizatio

Rule 782, p.246 Transfer Where a no-asset bankruptcy, no need to file claims. Judge Wilson inquired what if assets appear later? There is a provision for 60 days notice to creditors.

Mr. Rankin asked how frauds would be handled? Prof.Kennedy stated there is nothing new in this area, they would be prosecuted as federal crimes.

CHAPTER XIII Professor Countryman discussed the rule for proceedings under Chapter XIII, appearing as Title VII of the Bankruptcy Rules.

RULE 13-401, p.90,stay Prof. Countryman will put into the Note to this rule the same matter of comity which Prof.Kennedy will add to his Note, that if a state court is involved, the Bankruptcy court give notice to the clerk of the state court of the stay.

RULE 13-407, p.107, Dischargeability rule Professor Countryman will conform the Note to this Rule in accordance with the amendment to the Note to Bankruptcy Rule 409. The Advisory Committee's Note to Rule 13-407 will be amended by inserting the words "for trial before a district judge" after "district court" and before "when" in the 12th line from the bottom, the line to read:

"jury calendar of the district court for trial before a district judge when the issue is ready:

Mr. Rankin asked what happens if the value of the debtor's property subject to a lien increases before liquidation? Prof. Countryman stated that the assets of a wage earner under this chapter are usually very limited, an old automobile, household goods, and other depreciating assets.

A discussion followed with respect to various forms and rules.

RULE 13-302, p.64 All claims must be proved to participate. There were no objections to this rule.

JUDGE WRIGHT MOVED APPROVAL OF THE BANKRUPTCY RULES AND FORMS. JUDGE JOINER SECONDED THE MOTION. PROFESSOR MOORE ALSO SUPPORTED THE MOTION.

Prof. Moore stated that the Bankruptcy Rules Committee deserves tremendous commendation for its work and the excellent result it achieved.

Judge Forman expressed pride in the result of the great effort and he described the dedication of all the members of the committee. There were 27 meetings and the number of man-days was formidable but a full body appeared at almost all these meetings,

including Judge Maris and Professor Moore,who also attended almost all the meetings, and who were very helpful in their suggestions.

The chairman stated the motion to be to approve the Bankruptcy Rules and Forms and the Chapter XIII Rules and Forms and to report on them to the Judicial Conference with the recommendation that they be approved and submitted to the Supreme Court for adoption.

ALL WERE IN FAVOR AND THE MOTION WAS UNANIMOUSLY CARRIED.

Judge Wilson requested that the full report, plus the Notes, be published by West Publishing Company. Mr. Foley stated that he has a letter of May 22d notifying West that the Notes should be included in the published rules.

Judge Maris stated there is another matter he wanted to discuss, namely the problem of finances. The Budget Committee is asking for an increase in the appropriation limit to $100,000. Judge Maris suggested that Congress should be asked to eliminate the limiting proviso of $90,000 now contained in the Appropriation Act. He would like the committee to recommend to the Conference that the Judicial Conference Budget Committee eliminate this limitation on the appropriation.

Mr. Foley thought it would be appropriate for Judge Maris to speak on this matter at the Judicial Conference.

Mr. Rankin suggested that Judge Maris explore the chances of successfully eliminating the limiting proviso.

Mr. Foley suggested that Judge Maris communicate with the

chairman of the Budget Committee on the Conference on the subject.

JUDGE JOINER MOVED THAT THE COMMITTEE RECOMMEND THAT THE JUDICIAL CONFERENCE SEEK THE REMOVAL OF THE PROVISO LIMITING APPROPRIATIONS FOR THE RULES PROGRAM. ALL APPROVE THE MOTION.

Judge Wright moved that the meeting be adjourned.

Judge Maris observed that if the Conference approves our collaborating with the McClellan subcommittee, perhaps we will require a joint meeting with the Advisory Committee on Criminal Rules in the winter. Judge Joiner requested that the next meeting not be during the middle two weekends of January, the 13-14 [including 15-16] or 21-22, as he has committments for those dates.

The meeting then adjourned.