

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of June 18-19, 1981

The Committee on Rules of Practice and Procedure met at the Administrative Office of the United States Courts in Washington, D.C. on June 18th and 19th, 1981. All members of the Committee and the Committee secretary, Mr. Spaniol, were present. In addition, Judge Walter Mansfield, Chairman of the Advisory Committee on Civil Rules and Charles Horsky, Esq., a member of the Advisory Committee on Bankruptcy Rules, met briefly with the Committee to discuss the work of these two advisory committees. Judge Walter Hoffman, Chairman of the Advisory Committee on Criminal Rules, presented proposed amendments to the Federal Rules of Criminal Procedure for the Committee's consideration. Director A. Leo Levin and Mr. William B. Eldridge of the Federal Judicial Center presented a report on the operation of the Rules program. Judge Charles Joiner gave an oral report summarizing the conference on the rules of evidence held recently at Williamsburg, Virginia.

AGENDA I. Opening Remarks

Judge Gignoux reviewed the various items to be considered by the Committee at this session and listed the following topics for discussion:

1. Should the Supreme Court continue to have the authority to promulgate rules of procedure?
2. Is membership on the Standing Committee and Advisory Committees adequately representative?
3. Is the circulation and distribution of proposed rules amendments adequate and should the process be further opened to public scrutiny?
4. Should public hearings be held on proposed amendments?

5. Is the procedure for congressional review satisfactory and should congressional staff be encouraged to participate in the drafting process?
6. Is liaison with Congress and other groups satisfactory?
7. What additional staff, if any, should be provided to the standing committee and to the various advisory committees?
8. What should be done about the budgetary limitation?
9. Where should the various committees meet?

In addition, Mr. Marshall suggested that the Committee might consider problems relating to the frequency of rules changes and the time allowed for public comment.

AGENDA II. Report of the Federal Judicial Center

Judge Gignoux introduced Professor A. Leo Levin, Director of the Federal Judicial Center, and Mr. William B. Eldridge, the Director of Research who was primarily responsible for the preparation of the Center's report on the rulemaking process.

Mr. Eldridge explained that the study was undertaken because of the suggestion of the Chief Justice that the rulemaking process be reviewed and because of the growing amount of legal literature and comment on the rulemaking process. He indicated that at present the process is too "shrouded", that the public is unaware of how the process operates. In general, people do not know how well it is working. He suggested that there may be a need to announce at an early-stage the matters being considered by the various advisory committees rather than merely seeking reactions to draft rules.

He also suggested that monitoring the operation of rules, a function originally conceived as part of the rules program, has been neglected or perhaps never really implemented. There may be a need to monitor how rules are actually working from an empirical standpoint, rather than just reviewing published opinions.

Judge McGowan pointed out that the Court of Appeals for the District of Columbia Circuit has a representative committee on the local rules of the circuit and

that the process has worked very well. Mr. Hickey indicated that the 7th Circuit has a similar committee.

Mr. Eldridge pointed out that the Center study tried to avoid taking sides on any issue. The purpose of the study was to set out the issues, show some effects, and try to estimate costs. The report does not try to address policy questions. He said that "openness" seems to be tied to "representation" and questioned the extent to which this can be accomplished without lengthening the process.

Director Levin summarized the presentation by suggesting the need for a formal statement of the rulemaking process. He also suggested that giving notice of the problems being considered by the various advisory committees might stimulate comment and may encourage people to write to the Committee and perhaps publish articles. Notice might be given in The Third Branch, in communications to deans of law schools, and in such publications as Legal Times. He indicated that the Federal Judicial Center would be willing to assist any of the rules committees in the conduct of special studies or the monitoring of the operation of various rules.

Judge Gignoux expressed appreciation for the presentation to the Committee and for the work of the Center in preparing its report.

AGENDA III. Procedures Governing the Operation of the Advisory Committees

a. Supreme Court Participation

Judge McGowan suggested that Supreme Court participation is elusive and extends the time required for change. He suggested that the Judicial Conference submit rules directly to Congress and did not believe this would result in a loss of prestige. He did not like the idea of creating a "Commission on the Rules."

The other members of the Committee expressed the view that it was important to have the Supreme Court promulgate rules. Most members felt the creation of a Commission would "politicize" the process. Mr. Marshall was concerned that three

Justices do not like the process, but felt that the Court's participation was not completely idle.

It was agreed that Judge Gignoux should contact the Chief Justice to discuss this matter. Judge Gignoux asked Judge McGowan and Mr. Spaniol to accompany him.

b. Procedures of the Committee

Mr. Marshall suggested the preparation of a brief formal statement on the procedures of the various rules committees to be published perhaps in the ABA Journal. Mr. Hickey suggested that such a draft statement be reviewed by the Advisory Committee Chairmen.

Professor Ward also noted the lack of any written procedures to be followed by the reporters to the Committee and suggested the need of a handbook. He also suggested that the reporters keep a log of activities and report semi-annually on the cases involving the rules, literature on the subject of rules, and suggestions received.

Mr. Spaniol was requested to prepare a draft formal statement of procedures for the consideration of the Committee at its next meeting.

c. Distribution of Proposed Amendments

Mr. Marshall suggested that the distribution of proposed amendments was one of the weakest parts of the system and suggested that proposed amendments be sent to local legal newspapers which are generally read by lawyers. He also suggested that the formal statement include a list of those who receive copies of draft amendments.

d. Time Allowed for Public Comment

Judge Gignoux pointed out that if the time allowed for public comment is less than one year, draft amendments may not be considered at the various circuit conferences and that the ABA may not have an opportunity to act on proposed changes at its annual meeting.

Judge McGowan suggested that the Advisory Committees be required to report periodically on their schedules and agreed with Judge Gignoux that the report include the proposed distribution and the proposed time frame for the discussion of any proposed amendments. Professor Ward called attention to the problem of too many changes too frequently.

It was agreed that if substantial changes in rules are being proposed, that the time for public comment should be one year, but that the period should be flexible to take into consideration emergency situations.

Professor Remington asked whether incidental changes in rules required by new statutory enactments could be made without going through the entire process. Mr. Spaniol was requested to seek an opinion from the General Counsel's office as to whether this could be done under existing law. Mr. Marshall suggested that the rules authorization statute might be amended to expedite consideration of conforming amendments.

e. Public Access to Reporters Notes, Drafts of Proposed Rules, Comments Received and Dissenting Views

Mr. Marshall suggested that everything should be made available.

It was agreed that the so-called "gap" report is essential and should be continued and expanded. Committee files should be made available to those who show need for them. The Administrative Office was requested to prepare a statement of the process under which rules materials may be made available to the public.

f. Attendance at Advisory Committee Meetings

It was agreed that congressional representatives should be encouraged to attend advisory committee meetings and that the question of who should attend be left to the discretion of the Chairman of the Advisory Committee. It was also agreed that other observers with a special interest in amendments to particular rules may, in the discretion of the Advisory Committee Chairman, be invited to attend.

AGENDA IV. Procedures of the Standing Committee

The Committee generally agreed with the following procedures:

1. That minutes be kept of all Standing Committee meetings
2. That there was no need for outside attendance at Standing Committee meetings but it would remain at the discretion of the Committee to require further hearings or comments before the Standing Committee acts on any particular rules changes.
3. That the committee will receive suggestions for rules changes at any time and will distribute them to the appropriate advisory committees.
4. That periodic status reports will be required from the various Advisory Committees.

AGENDA V. Membership on the Standing Committee and Advisory Committees

It was agreed that the Standing Committee and the Advisory Committees should have as wide a representation as possible. Wade McCree and Sam Williams of California were suggested as possible candidates for committee membership.

AGENDA VI. Appropriations for the Rules Program

Mr. Spaniol advised the Committee that the limitation on the funds available for the rules program will probably be deleted by the Appropriations Committees of the Congress beginning in the fiscal year 1982.

AGENDA VII. Reports from Advisory Committees

a. Civil Rules

Judge Mansfield reported briefly on the activities of the Advisory Committee on the Rules of Civil Procedure. He indicated that the proposed amendments recently released to the bench and bar for comment dealt with questions of case management, abusive process, discovery abuse, and the updating of the rules to conform them to the recent amendments to the Federal Magistrates Act.

In the future the Advisory Committee plans to review Rule 68, pertaining to an offer of judgment, and Rule 83 pertaining to local rules of the district courts. The Advisory Committee will look into the question of whether local rules are consistent with national rules. He also indicated that the Committee would consider a "fast track litigation rule" for small cases and would review the rules with respect to the libel of ships. The Advisory Committee has not given any recent consideration to Rule 23, class actions, but may look into that rule again.

Professor Remington inquired about the pro se rules and Judge Mansfield indicated that this matter has been left to the Criminal Rules Advisory Committee in conjunction with their responsibility for the rules in Section 2254 and 2255 cases.

Professor Ward suggested that the period for public comment on the proposed amendments to the civil rules now in circulation be extended. After full discussion the Committee agreed to the schedule adopted by the Advisory Committee for this set of proposed amendments.

b. Bankruptcy Rules

Charles Horsky, Esquire, a member of the Advisory Committee on Bankruptcy Rules, reported on the work of that Committee in drafting new rules under the Bankruptcy Code. He stated that the Committee had planned seven more plenary meetings of the full committee, two to be held during the current fiscal year, plus four meetings of a style committee, one of which will be held during this fiscal year. The Committee hopes to submit a final draft for public comment by May 1982. A six-month period for public comment is planned, but the Advisory Committee has made no arrangements for public hearings.

c. Criminal Rules

Judge Walter Hoffman, Chairman of the Advisory Committee on Criminal Rules, and Professor Wayne LaFave, Reporter to the Committee, submitted proposed changes to

various rules of criminal procedure with a recommendation that these rules be transmitted to the Judicial Conference.

The Standing Committee carefully reviewed each proposed change and decided to report to the Judicial Conference only those rules which were technical in nature or non-controversial. The other proposed amendments, particularly the amendments to rules 23 and 24, are to be republished along with proposed amendments to other rules which the Committee is preparing for submission to the bench and bar. The new package of proposed amendments to the criminal rules will be published some time after the first of October.

d. Appellate Rules

A written status report submitted by the Chairman of the Advisory Committee on the Appellate Rules, Judge Robert A. Ainsworth, was discussed briefly and authorized to be included in the records of the Committee.

AGENDA VIII. Pending Legislation

a. H.R. 3026, 97th Congress, a bill to amend the rules of criminal procedure and the appellate rules has been referred to the appropriate advisory committees. No further action was required at this time.

b. Proposals to authorize the Judicial Conference to prescribe rules of practice and procedure were previously discussed.

c. Printing of official forms on lettersize paper. This matter was put over for consideration at the next Committee meeting in the light of any action that may be taken by the Judicial Conference at its next session on a proposal of the Committee on Court Administration.

AGENDA IX. Report of the Williamsburg Conference on Rules of Evidence

Judge Charles Joiner, accompanied by Professor Levin, summarized the discussions at the recent Williamsburg Conference on the Federal Rules of Evidence

which had been sponsored by the Federal Judicial Center. Judge Joiner indicated that the conferees felt that the rules were working extremely well, that as a result of the adoption of the rules lawyers know more about evidence than ever before; and that a crash program to redraft any of the rules is not warranted. Yet problems are cropping up which should be addressed. As a result the conferees, on motion of Judge Tamm, adopted a resolution recommending the formation of a new Advisory Committee on the Federal Rules of Evidence to begin a study of any desirable amendments.

Judge Joiner also indicated a need to develop a document or manual on the federal rules of evidence that would be similar to the manual on multi-district litigation.

Judge Joiner then reviewed some of the specific issues that were discussed at Williamsburg. He indicated that some rules contain incomplete statements or omissions, that there are problems of ambiguity in other rules, and in some instances there have been improper applications of the rules. Also in a few instances there were some disagreements among the conferees on the policies set forth in the rules.

Professor Levin stated that a written report of the Williamsburg Conference is in preparation and that a copy would be sent to each member of the Standing Committee.

Based on this presentation, the Standing Committee agreed that the time had arrived to reactivate an Advisory Committee on the Federal Rules of Evidence and voted to recommend to the Judicial Conference that this be done.

The Standing Committee also agreed that a training or other evidence manual would be helpful, but left this matter for the consideration of the Federal Judicial Center and its Board.

Two suggestions were made for membership on the new evidence committee. Mr. Marshall suggested Charles Renfrew, and Professor Ward suggested Judge Mary Schroeder.

AGENDA X. New Business

The Committee discussed the prospects of conducting a study of the operation of the local rules of the district courts and their relation to the general rules of practice and procedure. The Administrative Office was asked to develop background information for the consideration of the Committee at its next meeting and to submit suggestions and recommendations. It was also agreed that the initiation of this study should be mentioned in the Committee's report to the Judicial Conference.

AGENDA XI. Report to the Judicial Conference

Mr. Spaniol was authorized to draft the Committee's report and to submit it forthwith to the Committee members for their consideration and approval.

AGENDA XII. Next Meeting of the Committee

Judge Gignoux stated that the principal item for consideration at the next committee meeting would be a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure pertaining to service of process in private civil litigation, which is currently being considered by the Civil Rules Committee on a priority basis. The Committee decided that the next meeting of the Committee would be held in Washington, D.C. on Thursday and Friday, January 28th and 29th. If it appears that the agenda can be covered in one day, the meeting will be held on Friday, January 29th.

Respectfully submitted,

Joseph F. Spaniol, Jr.
Secretary

August 28, 1981