

MINUTES OF THE AUGUST 1962 MEETING  
OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The third meeting of the standing Committee on Rules of Practice and Procedure convened in the Clift Hotel in San Francisco, California at 9:30 a. m. , August 13, 1962.

All of the members of the standing Committee were present:

Albert B. Maris, Chairman

George H. Boldt

Charles E. Clark

Peyton Ford

Mason Ladd

James Wm. Moore

J. Lee Rankin

Bernard G. Segal

J. Skelly Wright

Others attending the meeting were Senior Judge Walter L. Pope, Chairman of the Advisory Committee on Admiralty Rules, Professor Brainerd Currie, Reporter for the Admiralty Rules Committee, Professor Bernard J. Ward, Reporter for the Advisory Committee on Appellate Rules, Professor Frank R. Kennedy, Reporter for the Advisory Committee on Bankruptcy Rules, Professor Benjamin Kaplan, Reporter for the Advisory Committee on Civil Rules, Professor Edward L. Barrett, Jr. ,

Reporter for the Advisory Committee on Criminal Rules, Mrs. Ada Beckman, Law Clerk to Judge Maris, and Miss Louise Cooper, Secretary to Mr. Gasque, Executive Secretary.

Judge Maris made a formal report for the record that in accordance with leave given to the Chairman at an earlier meeting he had referred to the Advisory Committees matters which the Judicial Conference requested be considered by the Rules organization, as follows:

1. On February 1, 1962, there was referred to the Advisory Committee on Criminal Rules a proposed amendment to Rule 28 with respect to the appointment of interpreters.

2. On the same day there was referred to the Advisory Committee on Civil Rules a similar amendment to Civil Rule 44(a), and

3. A recommendation of the Conference Committee on the use of Land Commissioners that no change be made in the provisions of Rule 71A(h) with respect to the use of commissioners by the district courts in condemnation cases.

4. On July 6, 1962 there was referred to the Criminal Rules Committee a proposal embodied in S. 2617 which provides for the appointment of qualified interpreters to assist defendants who are unable because of deafness to understand proceedings in Federal criminal cases.

5. On July 6, 1962 the Chairman referred to the Civil Rules Committee a proposed amendment to Rule 4 to broaden the right to have

extraterritorial service of process in certain cases. This was a proposal complementary to a bill which the Conference approved extending venue to include the district where the cause of action arose.

The principal business before the Committee was, the Chairman stated, to receive the reports from the advisory committees of their work and of any proposals formulated by them to the point where they ask for action by the standing Committee. Formal recommendations for changes in rules were submitted by the Advisory Committee on Civil Rules and the Advisory Committee on Admiralty Rules had a definite report to present. The other Committees presented progress reports.

Professor Benjamin Kaplan, Reporter for the Advisory Committee on Civil Rules, presented the report on behalf of his committee.

Professor Kaplan made a short statement giving the background of the specific recommendations. In 1955 the former Advisory Committee on Civil Rules presented to the Supreme Court a set of proposed amendments, upon which the Supreme Court took no action through the time when the whole rulemaking process was recast by statute and the present group of rules committees was appointed by the Chief Justice. When the Civil Rules Committee went to work in 1960 it studied these recommendations in the nature of unfinished business. In January 1961 the Civil Rules Committee submitted to the standing Committee a short set of amendments which were subsequently approved by this Committee and the Supreme Court, and have now become part of the Federal Rules.

Professor Kaplan stated that the Civil Rules Committee now puts before the standing Committee a larger set of amendments which to a considerable extent take their inspiration from the work of the former Advisory Committee as reported in 1955. They are the result of extensive correspondence both inside and outside the Committee, and have been vigorously debated at four separate meetings of the Advisory Committee. They have been circulated to the public and criticisms from the public have been reacted to and various changes have been made in the amendments as originally proposed.

The Reporter acknowledged the help that had been received from the work of the former committee. He also expressed thanks to the Commission and Advisory Committee on International Rules of Judicial Procedure which sponsored two of the basic amendments relating to service of process in foreign countries and the proposal in regard to the taking of depositions abroad. He pointed out that the recommendations do not in any respect work any radical innovation upon the present rules.

Professor Kaplan then proceeded, at the request of the Chairman, to describe and explain briefly the proposed amendments as set out in the July 18, 1962 statement on behalf of the Advisory Committee on Civil Rules, as follows:

1. Amendments to Rule 4, and of related rules affecting service of process (12, 13, 30, 71A). The Reporter said that he believes there

will come a time when Rule 4 will have to be fairly thoroughly recast when the related subjects of jurisdiction and venue are reconsidered by the Congress; and also pointed out that the Chief Justice of the United States had requested that the American Law Institute make a study on the division of judicial jurisdiction between the United States and state courts.

The Reporter said that for the first time the Committee has rationalized to some degree the problem of effecting service upon a person in a foreign country. Dean Ladd pointed out that at the recent Conference of Commissioners on Uniform State Laws at Monterey there were a few minor changes made in the proposed uniform statute which embodies these same proposals. The Reporter stated that he and the Chairman would look at the final product of the conference at Monterey and endeavor to bring the amendments to Rule 4 in line with them.

A motion was made and passed that when the Committee comes to the approval of these rules, this particular rule, (Rule 4) will be subject to further minor modifications to make it if possible completely uniform with the action of the Commissioners, such uniformity to be worked out between the Chairman of the Advisory Committee and its Reporter, and the Chairman of the standing Committee.

There was an extended discussion of a further extension of the proposed 100 mile territorial range for service of process. Judge Wright said that there should be a study looking toward changing venue

requirements and extending service of process so that multi-party, multi-state cases can be brought in one litigation in the federal courts, something analagous to the long-arm statutes which the states have adopted.

The rules amendment covering matters collateral to the amendments to Rule 4 relating to service of process were briefly discussed. Rule 12 is amended to change the time for making answer to correspond with the times provided in the federal statute or in the statute or rule of court absorbed into the federal rules. Rule 13 takes account of the fact that we have now absorbed state statutes or state rules of the quasi in rem type. Where by reason of the use of a state statute or rule of the quasi in rem type an action is initiated and the court does not acquire jurisdiction over the person by means of that service, the compulsory counterclaim requirement is released. Mr. Segal suggested the omission of the word "other" before "counterclaim" in Rule 13. It was agreed that this would be part of the editing process and was left to the discretion of the Reporter and Chairman.

Professor Moore was opposed to the philosophy of the amendment to Rule 13. He did not think any amendment was needed to cover the case of attachment because if a defendant comes in on an attachment case and defends then he ought to be required to submit any counterclaims that he has.

The Reporter explained to the Committee the minor amendments to Rules 30 and 71A.

A motion was made that Rule 13 be referred back to the Advisory Committee for further consideration of the aspect of compulsory counterclaims in attachment cases. The motion was lost by a vote of 2 to 7.

Judge Wright made a motion that service should run throughout any contiguous district or for 100 miles.

Judge Wright's motion, which was seconded by Judge Clark, was lost by a vote of 3 to 6.

A motion was then made to approve the amendments to the rules dealing with process (Rules 4, 12, 13, 30, and 71A) and was unanimously passed.

Mr. Rankin made a motion that this Committee go on record that it does not believe that the 100 mile limitation is a desirable final limit for service, but that the objective should be as soon as possible to have nationwide service in certain categories of cases.

Judge Wright seconded Mr. Rankin's motion and it was carried unanimously.

(The report of Professor Kaplan was interrupted at this point to allow Judge Pope to present the report of the Advisory Committee on Admiralty Rules. It will be included in these minutes following completion of the report on Civil Rules)

2. The Reporter explained the proposed amendments concerning third-party practice (impleader) (Rules 5, 7, 14, 24, 77(d), Forms 22A and 22B). A motion was made to approve the proposed amendments and was unanimously carried.

3. A proposed amendment to Rule 15, providing that the court may grant permission to file a supplemental pleading even though the original pleading is defective in its statement of a claim or defense, on a motion of Mr. Segal, seconded by Mr. Ford, was unanimously adopted by the Committee.

4. Judge Boldt made a motion to approve the proposed amendments regarding substitution of parties upon death (Rules 6(b), 25, Form 30). Mr. Ford seconded, and the Committee voted unanimously to approve.

5. Proposed amendments to Rules 26 and 28 regarding depositions in foreign countries were considered by the Committee, and upon a motion to approve made by Judge Wright seconded by Mr. Rankin, the amendments were unanimously approved.

6. The Committee considered the proposed amendment to Rule 41, motion for involuntary dismissal at close of plaintiff's evidence. Professor Moore suggested that as a matter of form it would be better to say that a motion for dismissal in a jury case shall be treated as a motion for a directed verdict. After discussion, Mr. Segal moved for approval of the amendment to Rule 41, seconded by Judge Boldt, and the motion was carried, Professor Moore and Mr. Ford not voting.



7. Another amendment to Rule 41, adding a statement to the effect that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits, was discussed. Upon motion of Mr. Rankin, seconded by Judge Clark, the amendment was unanimously approved.

8. An amendment to Rule 50(a) on directed verdict eliminating the formal practice of requiring the jury to signify assent to such a verdict was unanimously approved by the Committee.

9. Amendments to Rule 50(b), (c), (d), regarding motion for judgment n. o. v. , and conditional rulings accompanying grant or denial of this motion, were discussed. Upon motion of Mr. Ford, the proposed amendments were unanimously approved.

10. The Reporter summarized the amendments to Rule 56, one of which corrects the omission to provide that answers to interrogatories may be used in supporting or opposing a motion for summary judgment, and the other of which overrules decisions holding that a party may avert summary judgment by merely standing upon the averments of his own pleadings without bringing forward opposing facts. Mr. Segal moved for approval of the proposed amendments and the Committee unanimously voted approval.

11. The Committee next considered proposed amendments to rules concerning entry of judgment (Rules 49, 52, 58, 79, Forms 31, 32). In

the discussion of Rule 58, the Reporter pointed out that the draft submitted to the Committee had been changed from the form as promulgated to the public. In the October 1961 draft of the Advisory Committee the last sentence of the proposed amendment to Rule 58 read -- "Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." Judge Clark stated that he thought the original draft as set out in the printed proposed amendments was better than the present suggestion. Judge Wright agreed.

A motion was made that in consideration of this Rule (Rule 58) the last sentence as now proposed be stricken out and the last sentence as originally submitted to the public in October 1961 be inserted in lieu thereof. The motion was unanimously carried.

A motion was then made that the rule (Rule 58) be approved as thus amended. The motion was unanimously carried.

A motion was made to approve the conforming amendments to Rules 49, 52, and 79, and was carried unanimously.

12. The Committee considered the rules regarding Saturday closing of clerks' offices; computation of time (Rules 6(a), 77(c)). On motion of Mr. Ford the proposed amendments were unanimously approved.

13. Technical corrections in Rule 81(a) and (f), proceedings to which Rules are applicable, reference to officer of the United States, were approved unanimously by the Committee.

14. Amendment to Rule 81(c), jury demands in removed cases.

Mr. Ford moved that the amendments be approved, seconded by Mr. Segal, and the motion was unanimously adopted.

15. Correction of Official Forms as to the amount of damages alleged (Forms 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 21), and

16. Official Form of complaint for patent infringement (Form 16).

Mr. Segal moved the adoption of the amendments proposed in items 15 and 16, seconded by Judge Wright. The motion was unanimously carried.

The Reporter then outlined the three principal matters now being studied by the Advisory Committee on Civil Rules:

1. Study of the Rules on joinder of parties.

2. Study of the Rules on discovery (and related study of the pretrial conference).

3. Cooperation with the Admiralty Committee and others.

The standing Committee expressed its appreciation for the very excellent presentation given by Professor Kaplan.

#### REPORT OF THE ADVISORY COMMITTEE ON ADMIRALTY RULES

Judge Pope prefaced his report by an expression of appreciation of the work of Professor Currie to whom he credits much of the success of the Committee.

Judge Pope in his progress report stated that initially the Committee on Admiralty Rules was set up to consider the question of whether there should be a unification of the Civil and Admiralty Rules. At its meeting

in June, 1962 the Committee resolved that this can be done, that it is feasible and desirable that there should be such unification.

Professor Currie raised the question whether the existing enabling legislation sufficiently authorizes the Supreme Court to unite the civil and admiralty rules as we now contemplate, and after discussion, the Committee reached the conclusion that sufficient statutory authority exists for this purpose.

Judge Clark made a motion that the Committee accept with thanks the resolution passed by the Admiralty Committee as it appeared on page 2 of its report, and that the standing Committee pass on the recommendation with its approval to the Judicial Conference.

The motion adopted by the Advisory Committee on Admiralty Rules is as follows:

"That it is the sense of this Committee that unification is both feasible and desirable, with the inclusion of certain rules for dealing with special admiralty proceedings; that we so report to the standing Committee; that we further report to that Committee that we now conceive our future task to be the effectuation of that unification. "

Judge Clark's motion was seconded by Judge Wright and was unanimously adopted by the standing Committee.

(As noted on page 7 of the minutes, Judge Pope's report preceded the second item in the report of Professor Kaplan. After Judge Pope's report the Committee adjourned for lunch at 12:30 and returned at 1:30. Judge Pope left the meeting shortly after lunch.)

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Kennedy presented the progress report for the Advisory Committee on Bankruptcy Rules.

The Bankruptcy Committee has had only two meetings, a third one being cancelled due to the deficiency in the appropriation.

Six matters have been referred to the Advisory Committee as follows:

1. The improvement of procedures in installment fee cases under General Order 35(4).
2. Elimination of the oath on proofs of claim.
3. Revision of Schedule B-4 in conformity to a proposed amendment of section 60d of the Bankruptcy Act.
4. The proposal of the Bankruptcy Division of the Administrative Office to establish panels of standing trustees to handle small cases.
5. The question whether referees should preside over jury trials in proceedings authorized by the Bankruptcy Act.
6. A proposal to amend General Order 45 to make employees of the Judicial Branch and the Department of Justice of the United States, ineligible for appointment or employment as auctioneers, appraisers, or accountants in bankruptcy cases.

Professor Kennedy stated orally the progress that has been made on the matters listed above as they were set out in the formal progress

report dated July 13, 1962.

The Reporter stated that Mr. Horsky had resigned from the Bankruptcy Committee.

#### REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Professor Barrett presented the report of the Advisory Committee on Criminal Rules.

At its first meeting in 1960 the Committee concluded that it wanted to take a look at all of the rules before it promulgated anything to the public, unless there was some special situation that demanded emergency treatment.

The Committee has taken the relatively non-controversial rules and they are now nearly ready to go. These rules are included in the draft attached to the written progress report which was prepared on May 16, 1962.

The Reporter said that it is hoped that the Committee will be ready in the fall with a substantial draft to be circulated to the public.

At the end of the report of the Criminal Rules Committee the meeting recessed at 4:40 p. m.

The meeting reconvened on Tuesday, August 14, at 9:30 a. m.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Professor Ward presented the report of the Advisory Committee on Appellate Rules.

The Reporter stated that the Appellate Committee had two assignments from the standing Committee;

1. Preparation of a set of rules for the review of decisions of the Tax Court of the United States; and

2. The general assignment of a study of the whole of appellate practice with a view to making recommendations to the standing Committee with respect to desirable changes.

With respect to the first assignment, two preliminary drafts have been submitted to this Committee and circulated to the bench and bar. A final proposed draft will be submitted at the next meeting of the Advisory Committee.

In accordance with the second assignment the Committee is writing an entire set of rules complete with notes of the Advisory Committee, just as the Civil and Criminal Rules are produced. An outline of titles indicating the general scope of the Committee's work is set out in its formal report dated July 1962.

At the conclusion of Professor Ward's progress report Judge Clark discussed two provisions which it appears the Appellate Rules

Committee has tentatively approved and of which he strongly disapproves. One was the proposal that an appellant must file copies of his notice of appeal in addition to the original. The other and more important is the proposal for the compulsory adoption of the reproduction of the record in the form of a joint appendix instead of the separate appendices now used in many circuits. Since these proposals are not now before us Judge Clark did not suggest any action thereon at this time.

Following a full discussion Mr. Segal made a motion, seconded by Mr. Ford, as follows:

Resolved that the Advisory Committee on Appellate Rules be requested to submit to the standing Committee on Rules of Practice and Procedure drafts of rules in related or integrated groups as such rules are approved by the Advisory Committee rather than to postpone submission until the full draft of all the rules has been completed and approved by the Advisory Committee.

The motion was unanimously carried.

#### REPORT OF THE SPECIAL COMMITTEE ON EVIDENCE

Professor Moore presented a progress report of the special Committee on Evidence, and stated that the preliminary report which was circulated in February 1962 to 8,000 members of the bench and bar, recommended that uniform rules of evidence for the federal courts be formulated and adopted, this action being both desirable and feasible. The public has been given until January 1, 1963 to give suggestions. It is proposed as soon as the deadline is past to have a committee meeting



promptly and make final recommendations to the standing Committee. Professor Moore reported that about 40 or 50 letters have been received overwhelmingly in favor of the project.

Mr. Segal said that he expects that following the meeting of the American Bar Association there will be a more vigorous series of comments coming from some of the members of the College of Trial Lawyers.

After a discussion of the question of the circulation to the members of this Committee of material circulated between Reporters and the Committees, the following motion was made:

That the members of this Committee be furnished with copies of the material which circulates in the Advisory Committees so that the members of the standing Committee will be kept currently advised.

The motion was unanimously carried.

The Committee next considered the delimitation of the jurisdiction of the Advisory Committee on Appellate Rules on the one hand and the Advisory Committees on Civil, Admiralty, Bankruptcy and Criminal Rules on the other hand with respect to appellate procedure in the district courts.

After full discussion, Judge Wright moved the adoption of the following statement for the guidance of the Advisory Committees:

The advisory committees in the fields of criminal, civil, admiralty and bankruptcy procedure should take primary responsibility for the study of all such procedure in the district courts up to but not including the filing of a notice of appeal, or the form and manner of making up and transmitting the record on appeal or the procedure in the court of appeals after the appeal is lodged there, for all of which procedure the Advisory Committee on Appellate

Rules would bear primary responsibility. With respect to matters within its primary responsibility as defined each committee should, of course, welcome such suggestions as the other committees may desire to make as a result of their own studies. It is also to be understood that all proposals with respect to procedure between the filing of the notice of appeal and the docketing of the appeal in the appellate court are to be submitted by the Advisory Committee on Appellate Rules to the appropriate other advisory committees and their views obtained before any proposal in that area is submitted to the standing Committee.

Mr. Rankin seconded the motion.

The motion was approved by the Committee, Judge Clark voting in the negative.

There was a general discussion of the general philosophy of the style and manner in which rules are to be prepared -- whether they should be brief and general in scope, or whether they should attempt to spell out in detail the procedure to be followed in all situations.

Mr. Rankin moved that the advisory committees be encouraged to continue following the practice, which was followed in the formulation of the Federal Rules of Civil Procedure, of making their proposed rules amendments brief and general in scope, leaving large areas of discretion to the judges to deal with particular situations.

The motion was unanimously approved.

The time of the next meeting of the standing Committee was discussed and it was tentatively set for some time in February 1963. Mr. Segal suggested it might follow the mid-winter meeting of the American Bar Association to be held in New Orleans.

The meeting was adjourned at 12:30 p. m.