Bar file

June 23, 1983

Honorable Edward T. Gignoux
Chief Judge, U. S. District Court
Post Office Box 8
Portland, Maine 04112

Dear Judge Gignoux:

According to my notes, the action taken by the Committee on the Chief's letter regarding testimony before the Congress is as follows:

> "Testimony before Congressional Committees on any rules changes shall be presented by the Chairman of the Standing Committee and the Chairman of the appropriate Advisory Committee, and with the assistance of the reporter or others."

The following action was taken on the proposals in the Kastenmeier bill:

1. Authority to Promulgate Rules

After discussion of the proposal to authorize the Supreme Court to delegate its responsibility, the Committee decided to recommend to the Judicial Conference that the Conference be given this responsibility and to advise Mr. Kastenmeier that such a recommendation would be made to the Conference in September. The recommendation is being made in the light of the Chief's letter to Mr.Kastenmeier. The Committee wants an opportunity to draft the language.

2. Uniform Waiting Period

The Committee voted to recommend against a nine-month waiting period after rules are submitted to Congress, pointed out that submission by March 15th would preclude Conference action at its Spring session, and agreed that a uniform period would be appropriate.

3. Committee Structure and Membership

The Committee voted to advise Mr. Kastenmeier of the need for flexibility, to call attention to the 1958 Conference resolution, and to advise against the inclusion in the statute of provisions relating to membership and terms of service on committees.

4. Operating Procedures

A. In its consideration of the draft of operating procedures, the Committee adopted the following policies:

1. That transcripts of Committee meetings not be required.

2. Initially voted to require one-year for public comment, but later changed that to six months.

3. Decided to advise against a requirement of open meetings.

B. The Committee expressed the view that operating procedures should be flexible and agreed to recommend that they not be incorporated in a statute.

Sincerely,

Joseph F. Spaniol, Jr.
Secretary

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of June 16-17, 1983

The Committee on Rules of Practice and Procedure met in Washington, D.C. on June 16-17, 1983. All members of the Committee were present. Mr. Joseph Spaniol, Secretary to the Committee, and Mr. Leland Beck were also present.

On invitation of the Chairman, Judge Pierce Lively, Chairman of the Advisory Committee on Appellate Rules, and Professor Kenneth Ripple, Reporter to the Committee; Judge Walter Mansfield, Chairman of the Advisory Committee on Civil Rules and Professor Arthur J. Miller, Reporter to the Committee; and Judge Walter E. Hoffman, Chairman of the Advisory Committee on Criminal Rules, also attended the meeting.

Also on invitation of the Committee the following staff members of the Senate and House Judiciary Committees were present during the afternoon of the second day: Arthur Briskman, John Nash, Michael J. Remington, David W. Beier, III, Thomas W. Hutchison, Raymond V. Smietanka, and John Green.

AGENDA I. Opening Remarks

Judge Gignoux welcomed Judge Amalya L. Kearse as a new member of the Committee who was attending her first Committee meeting since her appointment by the Chief Justice.

Judge Gignoux stated that he had invited the Chairman and Reporters of the various Advisory Committees to attend the meeting to report on the status of the work of their Committees and to participate in the Committee's discussion of various

proposals affecting the rules program. He noted, however, that the Advisory Committee on Bankrupty Rules had not met since the last meeting of the Standing Committee and that the Chairman, Judge Ruggero Aldisert, was recuperating from surgery and could not attend.

AGENDA II. Reports on the Status of Advisory Committee Work

A. Appellate Rules

Judge Lively reported that the Committee has been conducting an extensive study of the operation of Appellate Rule 30, pertaining to the record on appeal, including surveys of appellate judges and clerks of the courts of appeals concerning its operation. The Committee has found that the courts of appeals in recent years had made a number of adjustments in their procedures with respect to the record on appeal, including the use of "record excerpts"; that Rule 30 seems to be working well; and that most judges are comfortable with it. Consequently, the Committee has concluded to make no recommendation for a change in the rule at this time, but plans to publish information concerning its operation.

Judge Lively submitted three items which the Committee recommended be published for comment at the appropriate time. These include:

(1) An amendment to Appellate Rule 15 to incorporate a provision now contained in the local rules of almost every circuit requiring the respondent in a petition to enforce an order of the National Labor Relations Board to file initial briefs and to present initial arguments.

(2) Rules pertaining to appeals in bankrupty cases under the new Bankruptcy Code.

(3) Rules pertaining to appeals from decisions of United States Magistrates under the 1979 amendments to the Federal Magistrates Act.

It was suggested, however, that the submission of these proposals to the bench and bar for comment be delayed to await Congressional action on the problems raised in bankruptcy cases by the Marathon decision. When that problem is solved, the Committee hopes to be able to coordinate with the Advisory Committee on Bankruptcy rules in the event the new legislation continues authority for the use of bankruptcy appellate panels.

Judge Lively further indicated that the Committee has other proposed amendments under consideration, none of which is pressing, and that the Committee would meet again in the fall to consider them, although no date for a Committee meeting had been set.

B. Civil Rules

Judge Mansfield, on behalf of the Advisory Committee, submitted proposed amendments to various rules of civil procedure and requested that they be published for public comment. The Committee agreed to publication after August 1, 1983, or after the rules amendments approved by the Supreme Court in April become effective.

C. Criminal Rules

Judge Hoffman, on behalf of the Criminal Rules Advisory Committee on Criminal Rules, submitted proposed amendments to the criminal rules and requested that they be circulated for public comment. The Committee agreed to publication after the first of August or after the amendments to the criminal rules approved by the Supreme Court in April become effective.

D. Bankruptcy Rules

Judge Gignoux advised that the Advisory Committee on Bankruptcy Rules had not met since the Supreme Court approved the new bankruptcy rules in April. After the rules become effective, the Committee will meet to consider any changes required in the rules as the result of any new legislation enacted by Congress in response to the Marathon decision.

E. Evidence Rules

Judge Gignoux stated that no action had as yet been taken on the recommendation of the Committee that a new Advisory Committee on the Federal Rules of Evidence be appointed.

AGENDA III. The Rule-Making Process

On June 17, 1983 the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, under the chairmanship of Congressman Robert W. Kastenmeier, conducted oversight hearings on the operation of the Judicial Conference rules program. Judge Gignoux testified on behalf of the Committee. Mr. James F. Holderman, representing the American Bar Association, and Mr. Alan B. Morrison of the Public Citizens Litigation group also testified. Judge Gignoux summarized the presentations made at the hearing and the recommendations made by Messrs. Holderman and Morrison.

Subsequently Mr. Kastenmeier transmitted to Judge Gignoux a draft bill to amend the rules enabling acts and requested Committee comments thereon "prior to introduction." The Committee considered the various proposals contained in the bill and took the following action:

A. Authority to Promulgate Rules

The Kastenmeier draft bill proposed that the authority to promulgate rules be transferred from the Supreme Court to the Judicial Conference. Alternatively, the American Bar Association had suggested that the Supreme Court be authorized to delegate its rule-making responsibility to the Judicial Conference.

After discussion of the proposal to authorize the Supreme Court to delegate its responsibility, the Committee decided to recommend to the Judicial Conference that if a

change is to be made, whether by direct statutory delegation or by authorizing the Supreme Court to delegate its responsibility to the Conference, the Conference be given responsibility for the rules program. This recommendation is being made in the light of the Chief Justice's letter to Mr. Kastenmeier stating that "The members of the Court see no reason to oppose legislation to eliminate this Court from the rule-making process." The Committee, however, would like to have an opportunity to draft the language.

B. Uniform Waiting Period

The Kastenmeier bill proposed that rules, and rules amendments, be transmitted to the Congress by March 15th to become effective on December 15th of the year in which they are transmitted unless Congress takes further action. After discussion the Committee voted to recommend against a nine-month waiting period following submission to Congress, since submission by March 15th would preclude Judicial Conference action at its Spring session. At the present time the period is 90 days, except that the waiting period for evidence rules is 180 days. Some members of the Committee expressed the view that a 180 day period should be sufficient. The Committee agreed, however, that a uniform period would be appropriate, but that this matter should be left for decision by Congress.

C. Committee Structure and Membership

The Kastenmeier proposed bill contained detailed instructions regarding the membership of the Judicial Conference Advisory Committees including the appointment and terms of service of its members. To a great extent the provisions of the draft bill parallel the exisiting Committee structure set out in the 1958 Judicial Conference Resolution establishing the rules program.

After discussion the Committee voted to advise Mr. Kastenmeier of the need for flexibility, to call attention to the 1958 Conference Resolution, and to advise against the inclusion in the statute of provisions relating to membership and terms of service on Conference Rules Committees.

D. Operating Procedures

The draft Kastenmeier bill includes procedures to be followed by all rules committees in their operation. These include requirements for public notice of all meetings, formal minutes, transcripts of all committee meetings, meetings open to the public, and publication of minority views. The Committee concluded that its operation should be governed by its own procedures rather than by inflexible statutorily mandated procedures. In order that the bench and bar, and public generally would be aware of how the Committee operates, the Committee decided to publish its own internal operating procedures.

E. Reply to Mr. Kastenmeier

Judge Gignoux was authorized to prepare a response to Mr. Kastenmeier's letter and to submit it to the members of the Committee for comment prior to release.

F. Operating Procedures

Judge Gignoux submitted to the Committee a draft of proposed operating rules which were reviewed by the Committee paragraph by paragraph. The Chairmen and Reporters of the Advisory Committees, who would be affected by these operating procedures, were invited to comment.

After a full discussion the Committee adopted the following sugggestions:

1. That the advisory committees publish proposed amendments to the various rules, but only with the approval of the Standing Committee or its Chairman.
2. That there is no need for transcripts of committee meetings.
3. That a minimum period of one year be provided for comments on any rules changes. Subsequently, at the suggestion of Judge Mansfield, this period was changed from one year to six months.
4. That the word procedures be used in the title of the document rather than "rules."

5. That all suggestions and recommendations and comments on proposed rules be acknowledged by the secretary and that the secretary advise those making suggestions or comments of the advisory committee's disposition of them.

6. That the files and documents of the Standing Committee be publicly available at the Administrative Office during normal working hours.

7. That there is no need for Committee meetings to be open to the public, although Judge Mansfield suggested that perhaps no harm may be done. It was pointed out that most meetings are merely drafting sessions.

8. That transcripts of public hearings be available to the public.

9. That minutes of all committee meetings be kept.

10. Reporter for the Standing Committee.

The Committee decided to defer action on a proposal to request the appointment of a reporter for the Standing Committee. This matter will be added to the agenda for the next committee meeting.

AGENDA IV. LOCAL RULES OF CIRCUIT AND DISTRICT COURTS

The Kastenmeier bill contained a provision requiring the Judicial Conference to compile the local rules of the courts of appeals and district courts to provide a current record of these rules. It would also provide for a preliminary review of all

rules by the judicial councils of the circuits for consistency with rules prescribed for all courts.

Judge Lively indicated that the Advisory Committee on Appellate Rules would be reviewing the local rules of the courts of appeals and Judge Mansfield stated that the Advisory Committee on Civil Rules would also be looking at the local rules of the district courts.

It was the view of the Committee that this whole problem of lcoal rules of court should be studied further and that this should be a principal item on the next agenda of the Committee. Requirements with respect to local rules, in the view of the Committee, should not be included in a statute at this time until the Committee's study has been concluded.

Mr. Remington suggested that a proposal be prepared for the Committee's consideration and a letter be written to the reporters asking for their suggestions. The Committee agreed with this suggestion.

AGENDA V. Testimony before Congress

After discussion the Committee adopted the following resolution:

> Testimony before Congressional committees on any rules changes shall be by the Chairman of the Standing Committee and the Chairman of the appropriate Advisory Committee, and with the assistance of the reporter or others.

Mr. Remington suggested that all testimony be subject to approval by the Standing Committee or its Chairman.

AGENDA VI. New Business

On the afternoon of the second day of its meeting, the Committee discussed with members of the staff of the House and Senate Judiciary Committees questions concerning the operation of the rules program that had been considered or discussed in the Congress

A. Mr. Hutchinson noted that Congressional interest in rule-making was sparked by the problems encountered with the Evidence Rules, but that since then the urge for greater scrutiny has lessened. Communication is one basic problem. The bar complains that notice of changes made after publication is not given, although this problem has receded. Policy problems remain, particularly whether rules should be promulgated by the Supreme Court. There is also the problem of the proliferation of local rules.

Mr. Hutchinson commented that the proposed legislation would alleviate some of these problems. If the procedure is open - and there is ample opportunity for comment - then Congressional interest that everyone have a "day in court," even if they lose, would be satisfied. He pointed out that open Congressional drafting sessions have worked well. After an initial surge, few outsiders attend and there have been no disruptions.

Mr. Hutchinson thanked the Committee for the invitation to attend both this meeting and the Advisory Committee meetings, as an observer. He believed that no greater role for Congressional staff was appropriate. Judge Gignoux said that as a matter of policy, Congressional staff would be invited to Advisory Committee meetings.

B. Mr. Nash indicated that from the Senate side there is a perception that those who have commented on proposed rules changes sometimes seek to circumvent the process by going to Congress. He also believed that the Criminal Rules Committee was too prosecution oriented.

C. Mr. Briskman indicated that hearings may be held in July on the civil rules proposals. Questions have arisen concerning the proposed amendments to Civil Rules 7 and 11, and to a lesser extent with respect to Rule 16.

D. Mr. Smietanka had no comment other than to say that no real problems concerning the current proposed rules changes had been communicated to him.

E. Mr. Beier reviewed the pending legislation, and the results of the oversight hearings previously held - the first oversight since 1934. The legislation addresses the problems raised in published critical comment on the process. Its purpose is to generate discussion. He pointed to several items: (1) Should the Supreme Court continue to promulgate rules; (2) Should the time period

for Congressional review be uniform; (3) Should meetings be open to the public; and (4) What should be done about local rules.

F. Mr. Remington, Mr. Beier and Mr. Nash suggested there be state court representatives on the Committees. Mr. Beier also indicated that the Department of Justice should not vote by proxy.

Judge Gignoux thanked everyone for attending and indicated that their observations were very helpful.

AGNDA XII. Report to the Judicial Conference.

Judge Gignoux, with the assistance of Mr. Spaniol, was authorized to prepare the Committee's report to the Judicial Conference.

AGENDA XIII. Time and Place of Next Committee Meeting.

The Committee tentatively decided to meeting in Washington, D.C. on Thursday and Friday, January 12-13, 1984.

Respectfully submitted:

Jospeh F. Spaniol, Jr.
Secretary