

Agenda G-7
Rules of Practice
and Procedure
March 1987

SUMMARY

**REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE**

This report is for informational purposes only and does not require any Conference action.

**REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN, AND THE MEMBERS
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES**

The Standing Committee on Rules of Practice and Procedure met in Washington, D. C. on January 29, 1987. All members of the Committee attended the meeting except Professor Wade H. McCree, Jr. The Secretary of the Committee, James E. Macklin, Jr., Esquire, Deputy Director of the Administrative Office; David N. Adair, Jr., Esquire, Assistant General Counsel of the Administrative Office; and the Reporter to the Committee, Dean Daniel R. Coquillette of Boston College Law School, were also present, as were Professor Stephen N. Subrin of Northeastern University School of Law, and Mary P. Squiers, Esquire, Boston, Massachusetts. Joseph F. Spaniol, Jr., Esquire, Clerk of the United States Supreme Court, and formerly Secretary to the Committee; David W. Beier III, Esquire, Assistant Counsel, House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice; and Thomas W. Hutchison, Esquire, Counsel, House Judiciary Subcommittee on Criminal Justice, were also in attendance.

Your Committee noted with sadness the death of Judge Walter R. Mansfield on January 7, 1987, and the death of Edward H. Hickey, Esquire, on August 31, 1986. Judge Mansfield and Mr. Hickey both served as valued members of the Committee. The Chairman has forwarded to Mrs. Mansfield and Mrs. Hickey copies of resolutions adopted by your Committee expressing our appreciation of their services and conveying our sympathy.

I. Legislation

Your Committee has been advised that H.R. 3550, 99th Cong., 1st Sess., the "Rules Enabling Act of 1985," introduced by Congressman Kastenmeier and passed by the House of Representatives on December 9, 1985, failed of Senate action prior to the 1986 adjournment of Congress. It is anticipated that Mr. Kastenmeier will reintroduce the legislation in the current Congress. In accordance with normal practice, a further hearing probably will be held.

II. Status of Advisory Committee Work

A. Bankruptcy Rules

The Chief Justice has appointed the Honorable Lloyd D. George as Chairman of the Advisory Committee on Bankruptcy Rules to replace the Honorable Morey L. Sear, who has been appointed as Chairman of the Judicial Conference Committee on the Administration of the Bankruptcy System. The Advisory Committee met on November 20, 1986, to consider amendments to the bankruptcy rules and official forms to accommodate the "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986," which became effective November 26, 1986. The Act makes several significant changes in the Bankruptcy Code, including the addition of a new Chapter 12 dealing with family farmer debt adjustment. In order to provide the bench and bar with guidance pending completion of the rulemaking process, the Advisory Committee has drafted interim rules which it has recommended for adoption as local rules by the district courts.

B. Appellate Rules

The Honorable Pierce Lively, Chairman of the Advisory Committee on Appellate Rules, called an organizational meeting on December 3, 1986, with the new Reporter, Professor Carol Ann T. Mooney of Notre Dame Law School, and a largely reconstituted Committee. The Committee's agenda includes consideration of a uniform corporate affiliate rule, an appellate rule to accommodate the 1984 amendments to the

Bankruptcy Code, a uniform rule to govern review of fee awards under the Equal Access to Justice Act, and several minor items.

C. Civil Rules

The Chief Justice has appointed the Honorable Joseph F. Weis, Jr. as Chairman of the Advisory Committee on Civil Rules to replace the Honorable Frank Johnson, who has resigned. Dean Paul D. Carrington of the Duke University Law School is the Reporter. Judge Weis scheduled a meeting for February 12-13, 1987. At that meeting, the Committee considered proposals to amend Civil Rules 4, 45, and 69 and Admiralty Rules C and E to reduce the role of United States Marshals in the service of process; proposed amendments to Rules 4, 28, and 44 to reflect Hague Convention provisions; suggested revisions of Rule 56 to simplify, clarify and make more useful the summary judgment procedure; proposed amendments to Rule 50 (directed verdict and judgment n.o.v.), Rule 63 (disability of judges) and Rule 47(b) (peremptory challenges); and several minor items.

D. Criminal Rules

The Honorable Leland C. Nielsen, Chairman, has scheduled a meeting of the Advisory Committee on Criminal Rules for May 8-9, 1987. Professor Stephen A. Saltzburg of the University of Virginia Law School is Reporter to the Committee. The preliminary draft of a proposed new Criminal Rule 12.3 (public authority defense) has been circulated to the bench and bar for comment. Comments will be received until March 30. The Committee contemplates submission to the Standing Committee at its meeting next summer for approval and transmission to the Judicial Conference in September. Other matters on the Committee's agenda include: revision of Evidence Rule 609(a) (impeachment by conviction of crime) to clarify its application to government witnesses and in civil cases; amendment of Rule 24 (trial jurors);

amendments to Rule 32 (sentencing) that may be required to accommodate forthcoming sentencing guidelines to be promulgated by the United States Sentencing Commission; and several minor items.

III. Standing Committee Study of Local Court Rules

In September 1984, the Conference authorized the Standing Committee to conduct a study of local court rules, which have proliferated in recent years and many of which appear to be inconsistent with the general rules of practice and procedure. In January 1986, the Standing Committee authorized Dean Daniel R. Coquillette of Boston College Law School, whom the Chief Justice has appointed as Reporter to the Standing Committee, to proceed with Phase I of a study of local district court rules (deferring for the present any study of circuit court rules) by obtaining from the clerks of the 94 district courts copies of all local rules, standing orders, and their equivalents. Dean Coquillette, assisted by Professor Stephen Subrin and Mary P. Squiers, Esquire, as Project Director, has now assembled and completed a preliminary analysis of these materials from all the district courts. The Project also has compiled and reviewed the statutes, judicial opinions and literature relating to local rules.

Your Committee has authorized Dean Coquillette to proceed with the next phase of the study of local district court rules by preparing working papers identifying and analyzing local rules that conflict with the letter or spirit of statutes or uniform federal rules, local rules that possibly should be uniform federal rules, local rules that are superfluous because they restate statutes or uniform rules, and local rules that should more appropriately be treated as internal court operating procedures. The Project also will develop a uniform numbering system and format for local rules, and, where appropriate, proposed model local rules. It is contemplated that the Project will seek input from academicians interested in local rulemaking and that any proposals developed by the Project will be widely circulated for comment before a final report is approved by your Committee and submitted to the Conference. In the meantime, Dean Coquillette

will take steps to inform the bench and bar of the magnitude of the problems presented by local rules and the efforts being taken to resolve them.

Respectfully submitted,

Amalya L. Kearse
Walter E. Hoffman
Wade H. McCree, Jr.
Wayne R. LaFave
Gael Mahony
Edward T. Gignoux, Chairman

February 13, 1987

100TH CONGRESS
1ST SESSION

H. R. 1507

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 10, 1987

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Rules Enabling Act of
5 1987".

1 SEC. 2. RULES ENABLING ACT AMENDMENTS.

2 (a) IN GENERAL.—Title 28 of the United States Code
3 is amended by striking out section 2072 and all that fol-
4 lows through section 2076 and inserting in lieu thereof
5 the following:

6 “§ 2072. Rules of procedure and evidence; power to
7 prescribe

8 “(a) The Supreme Court shall have the power to pre-
9 scribe general rules of practice and procedure and rules of
10 evidence for cases (including all bankruptcy matters) in the
11 United States district courts (including proceedings before
12 magistrates thereof) and courts of appeals.

13 “(b) Such rules shall not abridge, enlarge, or modify any
14 substantive right or supersede any provision of a law of the
15 United States except any rule of practice or procedure or
16 evidence—

17 “(1) in effect on the day before the date of the
18 enactment of the Rules Enabling Act of 1987;

19 “(2) prescribed under this chapter; or

20 “(3) consisting of an amendment made by Act of
21 Congress to a rule described in paragraph (1) or (2) of
22 this subsection.

1 **“§ 2073. Rules of procedure and evidence; method of**
2 **prescribing**

3 “(a)(i) The Judicial Conference shall prescribe and pub-
4 lish the procedures for the consideration of proposed rules
5 under this section.

6 “(2) The Judicial Conference may authorize the ap-
7 pointment of committees to assist the Conference by recom-
8 mending rules to be prescribed under section 2072 of this
9 title. Each such committee shall consist of a balanced cross
10 section of bench and bar, and trial and appellate judges.

11 “(b) The Judicial Conference shall authorize the ap-
12 pointment of a standing committee on rules of practice, pro-
13 cedure, and evidence under subsection (a) of this section.
14 Such standing committee shall review each recommendation
15 of any other committees so appointed and recommend to the
16 Judicial Conference rules of practice, procedure, and evi-
17 dence and such changes in rules proposed by a committee
18 appointed under subsection (a)(2) of this section as may be
19 necessary to maintain consistency and otherwise promote the
20 interest of justice.

21 “(c)(1) Each meeting for the transaction of business
22 under this chapter by any committee appointed under this
23 section shall be open to the public, except when the commit-
24 tee so meeting, in open session and with a majority present,
25 determines that it is in the public interest that all or part of
26 the remainder of the meeting on that day shall be closed to

1 otherwise provided by law. The Supreme Court may fix the
2 extent such rule shall apply to proceedings then pending,
3 except that the Supreme Court shall not require the applica-
4 tion of such rule to further proceedings then pending to the
5 extent that, in the opinion of the court in which such pro-
6 ceedings are pending, the application of such rule in such
7 proceedings would not be feasible or would work injustice, in
8 which event the former rule applies.

9 “(b) Any such rule creating, abolishing, or modifying an
10 evidentiary privilege shall have no force or effect unless ap-
11 proved by Act of Congress.”

12 (b) **ADVISORY COMMITTEES FOR COURTS.**—Section
13 2077(b) of title 28, United States Code, is amended—

14 (1) by striking out “of appeals” the first place it
15 appears and inserting “, except the Supreme Court,
16 that is authorized to prescribe rules of the conduct of
17 such court’s business under section 2071 of this title”
18 in lieu thereof; and

19 (2) by striking out “the court of appeals” the
20 second place it appears and inserting “such court” in
21 lieu thereof.

22 (c) **CLERICAL AMENDMENT.**—The table of sections at
23 the beginning of chapter 131 of title 28 of the United States
24 Code is amended by striking out the item relating to section

1 2072 and all that follows through the item relating to section
 2 2076 and inserting in lieu thereof the following:

“2072. Rules of procedure and evidence; power to prescribe.

“2073. Rules of procedure and evidence; method of prescribing.

“2074. Rules of procedure and evidence; submission to Congress; effective date.”.

3 **SEC. 3. COMPILATION AND REVIEW OF LOCAL RULES.**

4 (a) **COMPILATION.**—Section 604(a) of title 28 of the
 5 United States Code is amended by adding at the end the
 6 following:

7 “(18) Periodically compile—

8 “(A) the rules which are prescribed under
 9 section 2071 of this title by courts other than the
 10 Supreme Court;

11 “(B) the rules which are prescribed under
 12 section 372(c)(11) of this title; and

13 “(C) the orders which are required to be
 14 publicly available under section 372(c)(15) of this
 15 title;

16 so as to provide a current record of such rules and
 17 orders.”.

18 (b) **REVIEW.**—Section 331 of title 28 of the United
 19 States Code is amended by inserting after the fifth paragraph
 20 the following:

21 “The Judicial Conference shall review rules prescribed
 22 under section 2071 of this title by the courts of appeals for
 23 consistency with rules prescribed under section 2072 of this
 24 title. The Judicial Conference may modify or abrogate any

1 such rule prescribed by a court of appeals found inconsistent
2 in the course of such a review.”.

3 **SEC. 4. RULES BY CERTAIN COURTS AND ORDERS BY CIR-**
4 **CUIT JUDICIAL COUNCILS AND THE JUDICIAL**
5 **CONFERENCE.**

6 (a) **RULES BY CERTAIN COURTS.**—(1) Section 2071 of
7 title 28 of the United States Code is amended—

8 (A) by inserting “(a)” before “The”;

9 (B) by striking out “by the Supreme Court” and
10 inserting “under section 2072 of this title” in lieu
11 thereof; and

12 (C) by adding at the end the following:

13 “(b) Any rule prescribed by a court, other than the Su-
14 preme Court, under subsection (a) shall be prescribed only
15 after giving appropriate public notice and an opportunity for
16 comment. Such rule shall take effect upon the date specified
17 by the prescribing court and shall have such effect on pending
18 proceedings as the prescribing court may order.

19 “(c)(1) A rule of a district court prescribed under subsec-
20 tion (a) shall remain in effect unless modified or abrogated by
21 the judicial council of the relevant circuit.

22 “(2) Any other rule prescribed by a court other than the
23 Supreme Court under subsection (a) shall remain in effect
24 unless modified or abrogated by the Judicial Conference.

1 “(d) Copies of rules prescribed under subsection (a) by a
2 district court shall be furnished to the judicial council, and
3 copies of all rules prescribed by a court other than the Su-
4 preme Court under subsection (a) shall be furnished to the
5 Director of the Administrative Office of the United States
6 Courts and made available to the public.

7 “(e) If the prescribing court determines that there is an
8 immediate need for a rule, such court may proceed under this
9 section without public notice and opportunity for comment,
10 but such court shall promptly thereafter afford such notice
11 and opportunity for comment.

12 “(f) No rule may be prescribed by a district court other
13 than under this section.”.

14 (2) Section 332(d) of title 28 of the United States Code
15 is amended by adding at the end the following new
16 paragraph:

17 “(4) Each judicial council shall periodically review the
18 rules which are prescribed under section 2071 of this title by
19 district courts within its circuit for consistency with rules pre-
20 scribed under section 2072 of this title. Each council may
21 modify or abrogate any such rule found inconsistent in the
22 course of such a review.”.

23 (b) **ORDERS BY CIRCUIT JUDICIAL COUNCILS.**—Sec-
24 tion 332(d)(1) of title 28 of the United States Code is amend-
25 ed by inserting after the first sentence the following new sen-

1 tence: "Any general order relating to practice and procedure
2 shall be made or amended only after giving appropriate
3 public notice and an opportunity for comment. Any such
4 order so relating shall take effect upon the date specified by
5 such judicial council. Copies of such orders so relating shall
6 be furnished to the Judicial Conference and the Administra-
7 tive Office of the United States Courts and be made available
8 to the public."

9 (c) **RULES BY JUDICIAL CONFERENCE AND CIRCUIT**
10 **JUDICIAL COUNCILS.**—Section 372(c)(11) of title 28 of the
11 United States Code is amended by inserting before "Any rule
12 promulgated" the following new sentence: "Any such rule
13 shall be made or amended only after giving appropriate
14 public notice and an opportunity for comment."

15 **SEC. 5. CONFORMING AND OTHER TECHNICAL AMENDMENTS.**

16 (a) **CONFORMING REPEAL OF CRIMINAL RULES EN-**
17 **ABLING PROVISIONS.**—(1) Title 18 of the United States
18 Code is amended by striking out chapter 237.

19 (2) The table of chapters for part II of title 18 of the
20 United States Code is amended by striking out the item relat-
21 ing to chapter 237.

22 (b) **CONFORMING REPEALS RELATING TO MAGIS-**
23 **TRATES.**—(1) Section 3402 of title 18 of the United States
24 Code is amended by striking out the second paragraph.

1 (2) Section 636(d) of title 28 of the United States Code
2 is amended by striking out “section 3402 of title 18, United
3 States Code” and inserting “section 2072 of this title” in lieu
4 thereof.

5 (c) **CROSS REFERENCE TECHNICAL AMENDMENT.**—
6 Section 9 of the Act entitled “An Act to provide an adequate
7 basis for the administration of the Lake Mead National
8 Recreation Area, Arizona and Nevada, and for other pur-
9 poses” approved October 8, 1964 (Public Law 88-639) is
10 amended by striking out the sentence beginning “The provi-
11 sions of title 18, section 3402”.

12 **SEC. 6. SAVINGS PROVISION.**

13 The rules prescribed in accordance with law before the
14 taking effect of this Act and in effect on the date of such
15 taking effect shall remain in force until changed pursuant to
16 the law as modified by this Act.

17 **SEC. 7. EFFECTIVE DATE.**

18 This Act shall take effect December 1, 1988.

