

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of July 18, 1988

The summer meeting of the Judicial Conference Committee on Rules of Practice and Procedure was called to order by its Chairman, Judge Joseph F. Weis, Jr., at the Administrative Office of the United States Courts in Washington, D.C., on Monday, July 18, 1988. All members of the Committee attended the meeting except Judge Amalya L. Kearse and Gael Mahony, Esq., who were unavoidably absent.

Also present were the Chairman and Reporter of the Appellate Rules Advisory Committee and the Reporter of the Bankruptcy Rules Advisory Committee. The Chairman and regular Reporter of the Criminal Rules Advisory Committee attended, as did David A. Schlueter, Associate Dean and Professor at Saint Mary's Law School, who has been appointed to serve as temporary Reporter to the Criminal Rules Advisory Committee while Stephen A. Saltzburg serves at the Department of Justice. Also present were the reporter to the Committee, Dean Daniel R. Coquillette of Boston College Law School; the Secretary of the Committee, James E. Macklin, Jr., Esq., Deputy Director of the Administrative Office; David N. Adair, Jr., Esq., Assistant General Counsel of the Administrative Office; William B. Eldridge, Director, Research Division, Federal Judicial Center; and Patricia S. Channon, Esq., Bankruptcy Division, Administrative Office. Also attending the meeting were Stephen N. Subrin of Northeastern Law School,

consultant to the Reporter, and Mary P. Squiers, Director of the Local Rules Project.

I. Introductory Remarks of the Chairman

The Chairman opened the meeting by welcoming the members of the Standing Committee and the Advisory Committee attendees and introduced the visitors to the Committee meeting. Because of prior commitments of the regular Reporter of the Advisory Committee on Criminal Rules and its Chairman, agenda Item III(B) was taken up first.

III. Report on the Status of Advisory Committee Work

B. Criminal Rules - Judge Leland C. Nielsen

The Reporter of the Advisory Committee reported that amendments to three Criminal Rules were ready for submission to the Standing Committee. All these amendments are technical amendments necessitated by the Sentencing Reform Act of 1984. An amendment to Rule 11(c)(1) would add the requirement of a reference to "terms of supervised release," a sentencing option established by the Sentencing Reform Act, to the Rule 11 guilty plea colloquy. References to supervised release terms must also be added to Rules 32.1 and 40(d). Judge Weis suggested that the Committee recommend that the Judicial Conference approve those amendments to Rules 11, 32.1, and 40 of the Federal Rules of Criminal Procedure and transmit them to the Supreme Court with a recommendation that they be approved by the Court and transmitted to Congress pursuant to law. The suggestion was seconded by Professor LaFave and approved unanimously.

Professor Saltzburg also advised that the Advisory Committee had approved circulation for public comment of amendments to Rules 11 and 32. These amendments are also proposed to reflect changes made by the Sentencing Reform Act. The proposed amendment to Rule 11(c)(1) would add a requirement to the Rule 11 guilty plea colloquy that the court refer to the fact that it must in appropriate cases consider sentencing guidelines but can, in certain circumstances, depart from those guidelines. Judge Keeton moved that this proposed amendment be approved for publication. Professor LaFave seconded the motion and the motion was carried.

The Standing Committee also proposed publication of several amendments to Rule 32. A proposed amendment to Rule 32(a)(1) would remove the requirement of a joint motion to delay sentencing. Judge Pointer moved that the proposed amendment be approved for publication. Judge Lively seconded the motion, and the motion was carried. The second proposal would amend Rule 32(c)(1) to make clear that a defendant could agree in writing to permit the defendant, the Government, and the court to review the presentence report prior to the actual acceptance of the guilty plea. The proposal was approved by acclamation.

The proposed amendments to Rule 32(c)(3)(A) would add a reference to the 10-day disclosure requirement set out in 18 U.S.C. § 3552(d) and would provide that both the defendant and defendant's counsel be provided with a copy of the presentence report. Rule 32(c)(3)(E), which requires that the presentence

report be returned to the court, would be deleted. This change, Professor Saltzburg explained, was dictated by the requirements of guideline sentencing and also by the recent Supreme Court case, United States Department of Justice v. Julian, __ U.S. ___, 108 S. Ct. 1606 (1988), which provides that the Freedom of Information Act permits a defendant to receive a copy of the presentence report if the report is in the custody of the Bureau of Prisons or the United States Parole Commission. Judge Pointer suggested that the provision permitting the waiver of the 10-day disclosure requirement contained in 18 U.S.C. § 3552(d) be included in the restatement of that requirement in Rule 32. Judge Nielsen moved to approve the publication of the amendments, with the change suggested by Judge Pointer. Judge Pointer seconded the motion, and the motion was carried.

Professor Saltzburg reported that the Advisory Committee is also proposing an amendment to Rule 41(e) that would permit a property owner to obtain the return of lawfully seized property, but would also permit the Government to protect its legitimate law enforcement interest in such property. The publication of the proposed amendment was approved by acclamation.

Professor Saltzburg also reported a proposed amendment to Rule 41(a) that would provide for the issuance of a search warrant for moving persons or property, or property located outside the United States. Judge Pointer suggested that the amendment as drafted might not deal with the situation in which property was not in the district in which the warrant was sought

at the time of the application for the warrant. At the request of Judge Nielsen, the Standing Committee unanimously agreed to remand the proposed amendment to the Advisory Committee for further consideration of the problem raised by Judge Pointer.

Finally, Professor Saltzburg reported that the Advisory Committee has proposed publication of amendments to Fed. R. Evid. 609. The amendments would clarify the approach to impeachment of witnesses in civil cases and Government witnesses in criminal cases. The first change would remove from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that most circuits have found to be inapplicable. Another change would resolve an ambiguity as to the relationship of Rules 609 and 403, with respect to impeachment of witnesses other than the criminal defendant. The amendment would not disturb the special balancing test for the criminal defendant who chooses to testify. A motion that the proposed amendment be approved for circulation was seconded by Judge Keeton and the motion was carried. Judge Pointer dissented in favor of making more extensive changes to Rule 609 and making concomitant changes to Rule 403.

II. Status Report on the Study of Local Court Rules

The Reporter of the Standing Committee, Dean Daniel R. Coquillette, reported on the status of the Local Rules Project, authorized by the Conference in September 1984. Dean Coquillette reported that the project had completed work on local rules concerning civil practice. This project is the first exhaustive Federal study of local rules since the 1940 Knox Committee Study. The first phase of the project was a request to all 94

Federal district courts to submit their local rules, including standing orders and other local rule equivalents, to the Local Rules Project. There are approximately 5,000 local rules, not including many "subrules," standing orders and standing operating procedures. Some district courts have hundreds of rules and subrules; others have few. These rules are extraordinarily diverse, and their numbers continue to grow rapidly. They literally cover the entire spectrum of Federal practice, from attorney admission and attorney discipline to the various stages of trial, including pleading and filing requirements, pretrial discovery procedures, and taxation of costs.

Many of these local rules materially supplement or expand the existing uniform Federal Rules of Civil Procedure and other Federal law. Other local rules repeat Federal law, often in an incomplete or altered manner. Still others are inconsistent with Federal law.

Subsequent to an interim report to the Committee on Rules of Practice and Procedure, and on that Committee's instruction, the Project organized all of the civil local rules into topics and analyzed them. In addition to devising a uniform numbering system for local rules, the Project has analyzed the civil local rules by asking the following questions:

1. Do the local rules repeat existing law?
2. Do the local rules conflict with existing law?
3. Should the local rules form the basis of a model

local rule for all of the jurisdictions to consider adopting?

4. Should the local rules remain subject to local variation?
5. Should the subjects addressed by the local rules be considered by the Advisory Committee on Civil Rules for inclusion in the Federal Rules of Civil Procedure?

Dean Coquillette reported that the Project had prepared four documents which summarize its analysis and which will enable each district court to review and, when appropriate, revise its own local rules:

1. **Questionable Local Rules.** This document will discuss by topic those local rules that the project determined to be either repetitive or inconsistent with existing law.

2. **Suggested Local Rules, Including Model Local Rules and Rules that Should Remain Subject to Local Variation.** This document will discuss rules that should remain purely local in nature, and will suggest model local rules on some topics that all of the district courts should consider adopting.

3. **Local Rule Topics Which are Being Referred to the Advisory Committee on Civil Rules.** This document will discuss those rule topics that are being referred to the Advisory Committee on Civil Rules for possible incorporation into the Federal Rules of Civil Procedure.

4. **Lists of Local Rules by Jurisdictions.** This is a list for each district court of the local rules, by each court's own

numbering system, that were discussed in one or more of the three previously described documents. Each rule is numbered and identified as a repetitive local rule, an inconsistent local rule, a potential model local rule, a rule that should remain subject to local variation, or a rule that merits consideration for incorporation into the Federal Rules of Civil Procedure. There is also a designation next to each of these local rules indicating where in the materials the discussion can be found on the particular rule.

The Reporter suggested that the Committee on Rules of Practice and Procedure circulate the documents from the Local Rules Project for review by the individual district courts. The concerns of the Project could then be considered by each of the district courts when each court next undertakes a review of its local rules and when each court adopts the uniform numbering system, which the Reporter recommended for adoption to the various district courts.

With respect to the uniform numbering system, the Reporter noted that there is currently no uniform numbering system for Federal district court rules. Some of the jurisdictions have local rules that are simply numbered sequentially beginning at "1." E.g., Southern District of Alabama; Northern District of Illinois. Other jurisdictions have local rules that are arranged by topic, designated "100," "200," or "300," followed by a hyphen and the actual rule number. E.g., District of Hawaii; Southern District of California. Still other jurisdictions have local

rules that are arranged by topic, designated "1," "2," or "3," followed by a decimal point and the actual rule number. E.g., Central District of California; Middle District of Florida.

The Reporter recommended that the Committee on Rules of Practice and Procedure suggest to the Judicial Conference that it recommend for adoption a uniform numbering system to standardize the numbering of all local rules. Such a uniform system would have many advantages. A primary benefit would be to help the bar in locating rules applicable to a particular subject, which is especially important for those attorneys with multi-district practices. It would also assist an attorney needing to locate a particular rule or to learn whether a local rule on a specific topic exists in the first instance. At present, it is often difficult to find any case law relating to a particular local rule, in part because there is no uniform numbering. The uniform system would also ease the incorporation of local rules into the various indexing services and the Westlaw and LEXIS computer services.

The proposed numbering system would track the numbering system of the Federal Rules of Civil Procedure, which is already familiar to the bar. Each local rule number corresponds to the number of the related Federal Rule of Civil Procedure. For example, the designation "LR15.1" refers to the local rule entitled: "Form of a Motion to Amend and Its Supporting Documentation." The designation "LR" indicates that it is a local rule. The number "15" indicates that the local rule is

related in substance to Rule 15 of the Federal Rules of Civil Procedure; the number ".1" indicates that it is the first local rule concerning Rule 15 of the Federal Rules of Civil Procedure. The same system applies with respect to those Federal Rules of Civil Procedure with a ".1" or a ".2" after the initial rule number, such as Rule 65.1, entitled, "Security; Proceedings Against Sureties." Thus, for example, the first local rule concerning Federal Rule 65, "Injunctions," would be designated "LR65.1," and the first local rule concerning Federal Rule 65.1, "Security; Proceedings Against Sureties," would be designated "LR65.1.1." Local rules which apply solely to criminal procedure or bankruptcy appeals in the district courts would be numbered to correspond with the appropriate Federal Criminal and Bankruptcy Rules.

The Reporter pointed out that there was a rule number in the uniform numbering system, "83," that would accommodate local rules that did not have corresponding numbers in the Federal rules. Judge Pointer moved that hyphens be substituted for decimal points in the uniform numbering system. The motion was defeated.

Judge Weis suggested that the proposal that the Judicial Conference recommend the adoption of the uniform numbering system be approved, with the additional proposal that the letter transmitting the uniform numbering system to the courts point out that uniform numbering systems for the Criminal and Admiralty Rules will be prepared by the Project. The proposal was approved.

With respect to the suggestion of the Reporter that a list of local rules identifying problem areas be sent to the courts, the Chairman suggested that a subcommittee be appointed to delete discussions of those local rules that are particularly troublesome and for which there is a great deal of local variation, such as arbitration, cameras in the courtroom, and attorney admissions. These specific areas should be treated in more detail at another time. Dean Coquillette noted that three areas had already been eliminated from treatment by the Project because of these concerns. These are bar admissions, magistrates, and professional discipline. Several members of the Committee suggested that the letter accompanying the list of local rules be carefully drafted to assure the district courts that the Committee was not finding rules invalid but was simply identifying problems that appeared on the face of the rules. The letter should point out that, without empirical knowledge of how these rules worked, there could be no decision as to their validity.

The Committee agreed to circulate the documents from the Local Rules Project for review by individual district courts. It was also agreed that the Judicial Conference be advised of this undertaking.

III. Report on the Status of Advisory Committee Work

A. Appellate Rules - Judge Jon O. Newman

Judge Newman reported that three Appellate Rules were ready for submission to the Standing Committee. The proposed amendment

to Rule 26 is a technical and conforming amendment regarding exclusion of certain days from time computations. Since the amendment would not be substantive, it was agreed that publication of the amendment for public comment was unnecessary. With no objection, the Committee approved the rule for submission to the Conference with a recommendation that the amendment be approved and transmitted to the Supreme Court for its consideration for transmission to Congress pursuant to law.

The proposed amendment to Rule 27 would change a word in the caption to conform with the body of the rule. Since the amendment would be technical, it was agreed that publication for comment was unnecessary. Without objection, the Committee approved submission of the proposed amendment to the Judicial Conference with the recommendation that it be approved and transmitted to the Supreme Court for its consideration and transmittal to Congress pursuant to law.

The Advisory Committee also submitted a proposed amendment to Appellate Rule 4. This amendment would permit and set the time for cross-appeals in criminal cases and is necessitated by the provision for appeals in criminal cases enacted by the Sentencing Reform Act (18 U.S.C. § 3742). Judge Newman reported that the Department of Justice had indicated in a letter to the Advisory Committee dated May 6, 1988, that it had no objection to this amendment. Because of the absence of objection and because the amendment was necessitated by the Sentencing Reform Act,

which became effective for offenses occurring after November 1, 1987, it was proposed that the amendment not be circulated for public comment but be sent directly to the Judicial Conference for action. The Committee, without objection, approved the amendment for submission to the Judicial Conference with a recommendation that it be approved and transmitted to the Supreme Court for its consideration to be transmitted to Congress pursuant to law.

Judge Newman also suggested a correction to an Advisory Committee Note to the 1986 amendment to Rule 30(b). The error consists of a citation to a case that immediately precedes the case that was intended to be cited in volume 709, Federal Reporter Second. The Committee agreed to authorize the Chairman to take appropriate action to correct the error.

Judge Newman reported that the Advisory Committee had agreed to submit for publication an amendment repealing current Rule 6 and replacing it by a rewritten Rule 6. Rule 6 has not been amended since before the 1978 Bankruptcy Reform Act. In 1981 and 1982 the Committee prepared amendments to Rule 6, but that work was mooted by the Marathon case and subsequent statutory amendments. Professor Resnick, Reporter of the Bankruptcy Advisory Committee, indicated that the Bankruptcy Committee had reviewed the rule and had no objection to its promulgation as proposed. Judge Weis suggested that proposed Rule 6(b)(2)(iii) be changed to permit the transmission of a partial record on appeal, consistent with Federal Rule of Appellate Procedure 11(e).

The Committee approved the publication of the new rule for comment after the addition of a record retention provision.

Judge Newman also proposed for circulation a new Appellate Rule 26.1 that would require a party to disclose its corporate affiliates so that a judge may ascertain whether he or she has any interest in any of the party's related entities that could disqualify the judge from hearing the appeal. Judge Newman noted that the proposed rule was very like rules adopted by a number of courts of appeals and that it had presented no difficult problems of interpretation for those circuits. Judge Weis suggested that a similar rule be considered for the Civil and Bankruptcy Rules. The Committee agreed that the proposed Rule 26.1 be circulated for comment.

Judge Newman also reported that the Advisory Committee had considered a proposed rule dealing with fee applications under the provisions of the Equal Access to Justice Act. After discussion, it was decided that, while uniformity is desirable, placement of such a rule in the national rules might not be desirable. It was suggested that the rule be distributed to the various circuits for consideration as a local rule. Professor Wright moved that this issue be referred to the Local Rules Project for its consideration. The motion passed unanimously.

C. & E. Bankruptcy Rules - Judge Lloyd D. George and
Professor Alan N. Resnick

In the absence of the Chairman of the Bankruptcy Rules Committee, its Reporter, Professor Resnick, reported that, although most of the Advisory Committee's time was being spent on

issues relating to the United States trustee system, the Advisory Committee had begun testing revised Official Forms 16 and 19 and is looking into the possibility of funding for a bankruptcy local rules project. Of primary concern to the Advisory Committee, however, was the provision of Bankruptcy Rule 9006(a) dealing with time computation. The Advisory Committee had previously proposed an amendment to that rule to provide that intermediate weekends and holidays be excluded from time computations only when the time period is "less than 7 days" instead of the current 11 days. The Advisory Committee suggested that this computation rule created serious difficulties in bankruptcy cases because many transactions depend on finality of confirmation and other orders, and the current rule greatly extends the time period. For example, the filing of a notice of appeal in a bankruptcy case can be extended up to 16 days by operation of the rule.

In the interest of consistency in the various Federal Rules of Practice and Procedure, the Standing Committee tabled approval of such amendment pending consideration by the other Advisory Committees of similar amendments. None of the Advisory Committees objected to such amendment of their respective rules except the Advisory Committee on Criminal Rules, which proposed that the computation rule apply to time periods of less than 8 days. The other Advisory Committees acceded to the 8-day period.

Judge Newman suggested that the time computation rules be amended to delete any reference to intervening days, except in cases where the last day on which an act is required to be done falls on a weekend or holiday. Each Advisory Committee would then be required to study time limits in the various rules to determine whether any of those limits would need to be adjusted in light of the deletion of the provision dealing with intervening times, weekends and holidays. Judge Weis suggested that the Advisory Committees consider Judge Newman's proposal.

The Committee agreed to submit for public comment the amendments from 11 days to 8 days contained in Appellate Rule 26(a), Civil Rule 6(a), Criminal Rule 45(a), and Bankruptcy Rule 9006(a). Professor Resnick pointed out that the Advisory Committee on Bankruptcy Rules had long requested this change and asked that consideration be given to expediting the public comment period. The Committee agreed that the public comment period for this amendment would be reduced to four and one-half months so that the Standing Committee could consider the amendments at its next meeting in January and submit those amendments to the Judicial Conference at its March 1989 meeting. The Committee also agreed that, since most of the other amendments were largely technical, the public comment period would be reduced to four and one-half months for all.

D. Report on Official Forms - Judge Robert E. Keeton and Professor Charles Alan Wright

Professor Wright reported that the Advisory Committee on the Federal Rules of Civil Procedure had previously proposed the abrogation of Civil Rule 84, which provides for official forms for use in civil cases. Professor Wright, as a member of the subcommittee, with Judge Robert E. Keeton, appointed by the Chairman to study this question, recommended that the official forms be retained. Professor Wright suggested that the forms serve a useful purpose and it would be a mistake to abandon them.

Judge Pointer suggested that Rule 84 be amended to provide for approval by the Judicial Conference, since Rule 84 currently requires that any amendment to the forms be promulgated by the Supreme Court. Judge Wiggins commented that Congress would not object to being taken out of the process of approving official forms. The Committee approved, in principle, provisions in all the rules of practice and procedure to permit official forms to be prescribed by the Judicial Conference, similar to the provisions in Bankruptcy Rule 9009, except that there would be no authority for the Director of the Administrative Office to issue additional forms, as provided in Rule 9009. The matter was referred to the appropriate Advisory Committees for study.

IV. New Business

Judge Weis reported on the current status of the Rules Enabling Act amendments legislation.

V. Time and Place of Next Committee Meeting

It was agreed that the next meeting of the Standing Committee would be held in San Francisco on January 19 and 20, 1989.

Respectfully submitted,

James E. Macklin, Jr.
Secretary