

MINUTES OF THE DECEMBER 1959 MEETING OF THE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The first meeting of the Committee on Rules of Practice and Procedure convened in the Supreme Court Building on December 22, 1959 at 10:30 a.m. The following members, constituting the full membership of the Committee, were present:

Albert B. Maris, Chairman

George H. Boldt

Charles E. Clark

Mason Ladd

James W. Moore

Philip B. Perlman

J. Lee Rankin

Bernard G. Segal

J. Skelly Wright

Also present were Honorable Dean Acheson, Chairman of the Advisory Committee on Civil Rules; Aubrey Gasque, Assistant Director of the Administrative Office; and Mrs. Ada Beckman, Law Clerk to Judge Maris.

The Chairman called the meeting to order and, at the outset, referred to the Agenda (attached) and the topics to be discussed in implementing the rules program.

1. Secretary of the Committee

The first order of business was the appointment of a Secretary of the Committee. Judge Maris suggested that Mr. Gasque be asked to serve as Secretary. Judge Clark so moved. The motion was seconded by Mr. Segal, and Mr. Gasque was unanimously selected to be Secretary of the Committee.

2. Statutory Responsibility of the Judicial Conference

The Chairman, in his opening remarks, stated that Public Law 85-513 had empowered the Judicial Conference of the United States to create a program for improving the rulemaking process in the Federal courts. It was contemplated, in the legislative reports [House Rept. 1670 and Senate Rept. 1744, 85th Congress] that the statutory responsibility of the Judicial Conference would encompass:

(a) "Continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law."

(b) Recommendation to the Supreme Court of "Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."

The Supreme Court of the United States, under existing law, is charged with the responsibility of prescribing rules of practice and procedure in the following instances:

- (a) Civil actions in the district courts (28 U.S.C. 2072).
- (b) Criminal proceedings in the district courts up to verdict (18 U.S.C. 3771).
- (c) Criminal proceedings in the district courts after verdict and on appeal (18 U.S.C. 3772).
- (d) Admiralty and maritime cases in the district courts (28 U.S.C. 2073).
- (e) Bankruptcy cases (11 U.S.C. 53).
- (f) Review of decisions of the Tax Court by the courts of appeals (28 U.S.C. 2074).
- (g) Trial of cases before commissioners and appeals therefrom (18 U.S.C. 3402).

It was recognized that the Act did not alter the responsibility of the Supreme Court for rulemaking. The Chairman noted that, to the contrary, the purpose of the new undertaking is to enable the Judicial Conference to assist the Supreme Court in performing more

effectively the rulemaking function which the Court already has. The Judicial Conference is authorized only to recommend changes. The Supreme Court may adopt, modify, or reject any recommendation.

The Chairman, in his background remarks, noted that the Judicial Conference of the United States, acting pursuant to the authority contained in Public Law 85-513, had authorized the creation of (1) a standing Committee on Rules of Practice and Procedure and (2) five Advisory Committees, one each for Civil, Criminal, Admiralty, Bankruptcy, and Appeals rules.¹ The Chief Justice, as of this date, has appointed the standing Committee of the Conference and the Advisory Committee on Civil Rules, and has named Dean Acheson the Chairman of the latter.

After a general discussion concerning the overall responsibility of the Judicial Conference, the Chairman directed the attention of the Committee to the Advisory Committees.

3. Functions and Operation of the Advisory Committees

The Chairman cited the action of the Judicial Conference in defining the functions of the Advisory Committees;

¹ Resolution of the Judicial Conference, dated September 18, 1958 (attached).

(a) To "carry on a continuous study of the operation and effect of the rules of practice and procedure now or hereafter in use in its particular field."

(b) To "consider, and from time to time propose to the Judicial Conference through the Standing Committee on Rules of Practice and Procedure, such changes in and additions to those rules as the advisory committee may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."

He emphasized that the basic function of the Advisory Committees is to keep under study the operation and effect of the rules. It was agreed that the first task of the Advisory Committees is not to concern itself with proposing new rules, or with changes in existing rules, but to determine whether amendments are needed at all. This will entail, initially, a comprehensive review of available materials, including decisions, law review articles, and any amendments proposed by individuals or groups. The Committee was of the opinion that the detailed development of the operation of the Advisory Committees must necessarily depend upon the functions assigned respectively to the Reporter and the standing Committee.

4. Functions and Qualifications of the Reporter and Associate Reporters

The Committee considered at length the functions and qualifications of the Reporter and associate or assistant reporters to be

appointed by the Chief Justice to assist the committees in carrying out their duties. Judge Maris stated that he did not think more than one principal Reporter was needed; that it was questionable whether a separate Reporter should operate for each Advisory Committee. He suggested that one reporter with adequate assistants would simplify, unify and integrate the whole work, and he reiterated that it is not a major task of writing a whole set of rules, but a study of existing rules and proposed changes. In this connection, the Committee could try to get a man full time or, on the other hand, could get a part time man who would take the assignment at his own quarters. The Reporter could be either a practicing lawyer or a law school professor. The experience of former advisory committees indicated that the best procedure is to get the most competent law teacher in the field: it is a scholarly job. It was thought that the Committee could obtain a man with broad experience so that he could perform effective work in both the civil and criminal fields; in admiralty the Reporter might need help.

Mr. Segal informed the Committee that, from the experience of the American Law Institute, it is difficult to get a full time man and stated that they had been most successful with retired teachers

and lawyers.

Professor Moore emphasized the importance of getting the best possible person for Reporter. He stated that the success of a committee depends primarily on two people - the Reporter and the Chairman - and attributed the success of the former Rules Committee to its Chairman, Mr. Mitchell, and to the Reporter, Judge Clark. It will be the Reporter's responsibility to get the cooperation of the bench and bar, and it was Professor Moore's thought that the Reporter should probably be a law teacher.

Judge Clark was of the opinion that a full time individual would be best; that the Committee should try to induce the man wanted for the Reporter's job to get a leave of absence or, at the very least, to take on the job along with a reduced program of teaching.

Dean Ladd stressed the fact that the selection of a reporter will be most important and that he should be a person with ability and a good research background. Dean Ladd strongly favors someone in the law school world who has been teaching procedure and getting the total picture.

Professor Moore commented that, if it were possible to get one man to encompass the whole field, it would be ideal. However,

he doubted whether that would be possible. Professor Moore stated that the rules undertaking would be a tremendous task and very time consuming. For these reasons, he thought that a regular associate would be needed in the criminal field, and one in admiralty. In conclusion, he suggested that if one main Reporter is to be selected, that he be outstanding in the civil rules.

Judge Clark said that he thought it very desirable to have one top Reporter and such associates as are needed. He was certain that 5 associates would not be required -- probably 2 would be enough -- and he suggested going to the law schools to find the right man.

Judge Wright stated that, in his opinion, it was important for one man to have the responsibility, with assistants for the Advisory Committees as needed. He did not think the individual selected should merely be the Reporter for civil rules, but that he should be the Reporter for both the standing Committee and the Advisory Committees, with particular responsibility for civil rules. He was fearful that, if the standing Committee did not have one main Reporter responsible for all associate reporters, the rules program would have no coordination.

Judge Boldt agreed with this statement and urged that a top Reporter be the first consideration and associate reporters left until later.

Mr. Segal reiterated his conviction that, to have reporters in whom the profession would have confidence, it would be necessary to select two men: a top Reporter for civil rules (including admiralty, bankruptcy, and appeals) and a top Reporter for criminal rules.

Dean Ladd was of the view that it would be difficult to find the right person, but that any law school could fairly be depended upon to grant a leave of absence for a year, if asked. However, he thought that a civil procedure man would be the best choice, provided he was also given primary responsibility for the civil rules. He thought that a man assuming an overall job, as stated -- without portfolio -- would not be productive; that productiveness will result from a man assigned to civil, bankruptcy, and so forth.

Judge Maris stated that he considers the civil rules to be the main problem. They involve a vast amount of litigation in the courts and, consequently, concern a greater number of lawyers. The main Reporter, Judge Maris was confident, could be an authority in civil rules but, with associates, could handle the other subjects as well.

Mr. Perlman suggested that, since the Advisory Committee on Civil Rules was the largest committee, that the main Reporter should be lodged there. In any event, he was certain that there could be no disagreement as to the need to get the most competent man available for the work in civil rules.

Mr. Rankin expressed similar concern with the civil rules and urged that every facility possible be made available to Mr. Acheson and his Advisory Committee. Mr. Rankin stated that he would give the Advisory Committee on Civil Rules the broadest authority to get their job done. Specifically, he would encourage Mr. Acheson and his Committee to examine what has happened with respect to the civil rules -- how effective have they been and what additions or changes should be made? If additional help, other than the main Reporter, is needed, the Committee should authorize the hiring.

Mr. Acheson expressed his gratitude. He thought, however, that the job of coordinating everybody would not be so difficult as it might look. Judge Maris' presence itself will coordinate. Mr. Acheson commented that the Committee would appreciate that we are all trying to do a job; that the Advisory Committee takes the first look at it, and then the product comes to the standing Committee.

He was of the view that, if the Reporter was a mischoice, the Committee could get another. However, he did emphasize that to over-organize at this stage is a mistake.

At this point, the consensus of opinion relating to the Reporter was expressed by the Chairman and agreed to by the Committee:

- (1) That one principal Reporter qualified to undertake the overall rules study should be selected and recommended to the Chief Justice by Judge Maris and Mr. Acheson.
- (2) That such an individual, if one is available, should be an expert in the civil rules, but may come from the ranks of practicing attorneys or law professors.
- (3) That the Reporter should be employed on either a full-time or part-time basis, depending entirely upon his availability, and that his salary should be left to the judgment of Judge Maris and Mr. Acheson.
- (4) That the Chairman should be authorized, after consultation with the Chairmen of the respective Advisory Committees and the Reporter, to recommend to the Chief Justice the employment of such associates or assistants as needed.

5. Duties of the Standing Committee

The Committee examined and discussed the following duties imposed upon it by the resolution of the Judicial Conference:

- (a) "to coordinate the work of the several advisory committees."

(b) "to make suggestions to them of proposals to be studied by them."

(c) "to consider proposals recommended by the advisory committees and to transmit such proposals with its recommendations to the Judicial Conference or to recommit them to the appropriate advisory committee for further study and consideration."

(d) "to make recommendations to the Judicial Conference with regard to any other matters in the field of practice and procedure as to which the Conference may be called upon to act."

The Chairman pointed out that this Committee would be the active arm of the Conference between meetings; that the rules program will be a permanent feature of the Judicial Conference -- not a "crash project" in any sense. This is a permanent assistance to the Supreme Court in carrying on its rulemaking responsibilities. The basic project is study of the operation and effect of the rules, and only incidentally the proposing of amendments. What is needed more than proposing amendments is to have a body continuously concerned with the operation of the rules and bringing forward the areas in which it appears as though some change might be needed.

Dean Ladd agreed that this was a fair statement but added that there were areas where there may be a lack of rules.

Professor Moore pointed out, in this connection, that none have been promulgated for Tax Appeals.

The Chairman mentioned another area - admiralty - where a complete overhauling is long overdue. He stated that, as a fair appraisal, the country generally is satisfied in the civil and criminal fields, although members of the Committee may see some small changes that could be made. However, no one is interested in a frontal attack on the civil rules; on the contrary, they have been followed in many states; and he pointed out that this is a factor which must always be kept in mind: that anything done in the civil rules field has its necessary effect in the twelve to fifteen states which have adopted them.

Judge Clark questioned how the various committees will divide up activities and expressed the opinion that there must be a definite liaison between committees. He felt that the Advisory Committee on Appellate Procedure would not have very much to do. The Chairman agreed, and stated further that there might be a question as to whether there is enough of a function in formulating rules to govern tax appeals to call for appointment of a special advisory committee in the field since it is an area which is limited. He thought it might very well be delegated to the Advisory Committee on Civil Rules.

The Chairman emphasized that it is the function of this standing Committee to coordinate the work of the various Advisory Committees and to act as the arm of the Judicial Conference in this field in carrying out the project.

Mr. Acheson proposed that the Chairman of the standing Committee sit in on meetings of the Advisory Committees and considered that such a practice would be very useful. It is the pattern followed by the American Law Institute. Mr. Acheson commented that, if the Chairman could sit with the Advisory Committees, he could see for himself the developments and could report to the standing Committee the action that is necessary to be taken at any particular time. By sitting in, the Chairman will know what each of the advisory committees is doing. The whole undertaking will then be coordinated through this supervising Committee. Everyone would know who was asking for help from whom. Judge Maris responded by saying that he thought it would be very useful, also, if the Chairmen of the Advisory Committees were invited to attend regular meetings of this Committee depending, of course, upon the subject matter up for discussion.

The Committee then turned to the consideration of the general method of carrying on the work.

6. Supporting Staff in the Administrative Office

The Chairman informed the Committee that the staff to assist in this work would be here in the Administrative Office, other than

perhaps the Reporter, and would be providing assistance to all the committees simultaneously.

Judge Maris stated that from the very beginning the standing Committee, as well as the Advisory Committees, would need sufficient staff assistance to handle the budget and see to appropriations; set up and maintain central files; serve as a clearing house for correspondence; handle contacts, as requested, with bar associations, state committees, circuit conference committees, members of the Judiciary, Congress, and so forth; direct correspondence relating to revisions to the Reporter and, as requested, to members of the various Committees; make arrangements for meetings and provide a reporter, if a verbatim record is desired, and otherwise to prepare and circulate minutes; arrange for printing and distribution of any publications of the Committees, and to perform related responsibilities.

Judge Maris advised the members that it was important for the Committee to make some very definite recommendations as to staff, since the appropriations hearings would get underway early in January.

Mr. Acheson inquired whether there would be any problem involved in hiring a Reporter - whether sufficient funds were currently available and, also, whether funds for carrying on the rules program were being

requested of Congress.

Mr. Gasque informed the Committee that sufficient funds were available to meet the immediate needs of this fiscal year, and that a request was included in the Judiciary Budget for additional funds. Specifically, Congress is being asked to provide three professional positions, GS-15 at \$12,771, and one secretarial position, GS-7 at \$4,992, for a total of \$43,300. The sum of \$17,500 is being asked to pay the Reporter or Associate Reporters, as experts.

Judge Maris, in referring to the latter item, informed the Committee that the Administrative Office, under Public Law 86-370, has the authority to employ experts on a per diem basis, not exceeding \$75.00, if special work is needed.

In addition to the funds for personal services, Mr. Gasque informed the Committee that Congress is being asked to appropriate sufficient funds to cover the expenses of travel, printing, communications, and related items.

Judge Maris reiterated the need to employ at the earliest possible date some additional help in the Administrative Office to help with the work of the Rules Committees.

It was agreed, after careful discussion, that the immediate minimum need is for a well qualified attorney and an efficient

stenographer to serve in the Rules Secretariat in the Administrative Office.

Mr. Perlman moved that the Chairman be empowered to seek the employment of an attorney, a stenographer, and any additional assistants, as he may think advisable, and to act on these matters at such time as he chooses. Mr. Rankin seconded the motion.

The Chairman put the formal motion, and the Committee unanimously approved, as follows:

The Committee on Practice and Procedure requests the Administrative Office, with the approval of the Chairman of this Committee, to employ at the earliest practical time an attorney, with supporting clerical staff, to function in the Rules Secretariat.

Judge Boldt moved that the Administrative Office be prepared to employ a Reporter, and associate reporters, and clerical assistants as they may be required. Dean Ladd seconded the motion.

The Chairman put the formal motion, and the Committee unanimously approved, as follows:

The Committee on Practice and Procedure requests the Administrative Office, with the approval of the Chairman of this Committee, to employ a Reporter, associate or assistant reporters, and supporting clerical staff, at such times and at such places as they may be needed in the conduct of the rules program.

Mr. Segal stressed the importance of having someone in the Administrative Office to act as executive secretary, serve as liaison with the Chief Justice, and handle the inquiries and correspondence which will inevitably come from all parts of the country, as well as from the Congress. Mr. Gasque was suggested as the ideal person, provided he had the time. If not, Mr. Segal would like, if sufficient funds are available, to get another man of real stature to assume the responsibility.

7. Standing Committee Procedure

After thoroughly discussing Committee procedures, it was the consensus of opinion,

- (a) that the Chairman of the standing Committee should exercise the responsibility of assigning matters, including proposals, to the Advisory Committees, but that he should reserve for the action of the full Committee such matters as were deemed to be of unusually broad or serious import.
- (b) that, with respect to coordinating the work of the Advisory Committees, the Chairman of the standing Committee should serve ex officio as a member of all Advisory Committees and attend as many of their meetings as possible. In addition, the Chairmen of the Advisory Committees should be invited to attend meetings of the standing Committee when the agenda includes matters within their respective areas of responsibility.

- (c) that all proposals submitted by the Advisory Committees should be considered at a meeting of the full standing Committee. It was understood, in this connection, that such proposals would be distributed to the members of the standing Committee in advance of any meeting at which they were to be considered.
- (d) that the Chairman of the standing Committee should supervise the work of the Reporter, his associates and assistants, and the Committee Secretary and supporting staff.
- (e) that the standing Committee should meet twice annually -- prior to the meetings of the Judicial Conference in March and in September. However, it was agreed that no meeting should be held prior to the March 1960 session of the Judicial Conference, but that Chairman Maris should report the actions taken at this meeting of the standing Committee.

8. Steps to Enlist the Cooperation and Active Participation of Bench and Bar

The Chairman invited comment from members of the Committee as to the best method of enlisting the cooperation of the judicial conferences and councils of the circuits (through suitable committees) and of national, state and local bar associations. In this connection he emphasized that there are at least 16 states vitally interested in the rules project for the reason that they have substantially adopted the Federal Rules of Civil Procedure.

Mr. Rankin thought there were even more, and indicated that in Pennsylvania large parts -- though not all -- have been adopted.

Dean Ladd commented that in Iowa the Federal rules were adopted practically unchanged by the State. He observed that -- with regard to method of approach -- the preliminary exploration should be accomplished through the Reporter, and the study of the Committees, but that at such time as it becomes evident where this is pointing in terms of a concrete proposal, it is essential that the study get close to the bar -- on Federal, state, and local levels.

Judge Boldt agreed with Dean Ladd that it is necessary to have general acceptance by the profession and this is tremendously important for the acceptance of the rules and their promulgation by the Supreme Court.

Judge Maris said the question arises as to whether the Committee should invite suggestions from all sides before anything is done, or whether it should get the information that is available, propose something tentatively, and send it out for discussion? Judge Boldt and Judge Clark favored the latter course - invitation to comment on specific proposals.

Mr. Segal agreed and stated that, drawing upon more than 30 years of American Law Institute work and the previous Advisory

Committee, it was found that to solicit suggestions for change excites a lot of comment and criticism prematurely. It is much the wiser course to wait until there is a finished product and a knowledgeable report in hand, and then the reactions and suggestions from the bench and bar are much better.

Professor Moore stated that he had recently received a report of the Ninth Judicial Circuit Conference which perhaps Judge Boldt could comment on. Judge Boldt informed the Committee that the Ninth Circuit has its own committee which considers proposals for modification of the rules and added that the Ninth Circuit had adopted a formal resolution requesting that it be heard from before changes in the Rules are recommended by the Judicial Conference.

The Chairman asked Judge Clark whether the former Advisory Committee had depended upon formal hearings to any extent. Judge Clark replied that it had not, and said that experience had proved that it was undesirable to have a great many formal hearings as such. However, he did remind the Committee that the rules were discussed at meetings each year of the American Bar Association.

Judge Boldt suggested that, since the standing Committee has over-all responsibility for the rules, the Committee should at least

prepare some sort of communication to the chief judges of the circuits, bar associations, and advisory committees in the states and inform them that the standing Committee and the various Advisory Committees were organized and underway.

Judge Maris stated the consensus of the group, i.e., that there should be general notice given to all concerned that these committees are functioning and are prepared to receive suggestions, but that active steps to enlist the collaboration of the bench and bar would probably be more usefully taken after tentative proposals have been formulated.

9. Specific Matters Referred to the Standing Committee by the Judicial Conference

- (a) Consideration of uniform rules for the abbreviation of the record on review or enforcement of orders of administrative agencies under 28 U.S.C. § 2112.

It was agreed that this should be referred to the Committee on Appellate Procedure, in the event that Committee is eventually appointed by the Chief Justice.

- (b) Amendment of rules of procedure so as to authorize closing of clerks' offices on Saturday.

It was agreed that this should be referred to the Advisory Committee on Civil Rules.

- (c) Amendments proposed to Supreme Court by former advisory committee in October 1955.

It was agreed that these should be submitted to the Advisory Committee on Civil Rules.

- (d) Proposal to formulate federal rules of evidence.

It was agreed that this matter should await further action.

- (e) Formulation of rules for the review of Tax Court decisions.

Judge Maris stated that item (e) would logically be referred to the Advisory Committee on Appellate Procedure, but he wondered if the Committee is really justified and whether it should be recommended to the Chief Justice that the questions be referred to the Advisory Committee on Civil Rules. Judge Clark said he thought there was danger of embarrassment in establishing a Committee on Appellate Procedure; that it will conflict with Civil Rules in that the latter so thoroughly cover the main questions.

Mr. Segal asked if the Chief Justice was not concerned expressly with tax appeals. He said he saw no reason why the Advisory Committees could not deal with rules in district courts and courts of appeals.

There could be joint meetings of Advisory Committees on civil and criminal rules to consider appellate procedure.

Mr. Rankin wondered whether the tax bar is represented on the Civil Rules Committee. Mr. Segal said he doubted it, because the Chief Justice expects to have a Committee on Tax Appeals. Mr. Rankin said he thought it important that the tax bar participate in the work of drafting rules for tax appeals. Mr. Gasque pointed out, at this point, that there is no appellate judge on the Advisory Committee on Civil Rules. Mr. Acheson read to the Committee the membership of the Advisory Committee on Civil Rules.

It was the consensus of opinion that no request should be transmitted to the Chief Justice that tax appeals be assigned to the Advisory Committee on Civil Rules.

The Chairman invited comment on any action the standing Committee might appropriately take, or any recommendation it might make, by way of a directive to the Advisory Committee on Admiralty as to the extent it should integrate the admiralty rules into the general rules of civil procedure.

After extensive discussion, it was the unanimous opinion of the members that the standing Committee should request the Advisory Committee on Admiralty Rules to conduct a preliminary study with respect to the advisability of adopting the proposal that the admiralty

procedure be integrated into the civil procedure and to report thereon before proceeding to draft admiralty rules.

In order to assist the Chief Justice, Judge Maris requested Mr. Gasque to read the names of various men who have been suggested for appointment to the Advisory Committee on Admiralty and to record the comments of the members of the Committee. With this accomplished, the Chairman stated that the Committee had completed the matters on the Agenda and asked if there were any further items of business. Hearing none, the meeting of the Committee was adjourned at 4:30 p.m., subject to the call of the Chairman.