

**JUDICIAL CONFERENCE OF THE UNITED STATES COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE**

Minutes of the Meeting of January 29, 1987

The Winter Meeting of the Judicial Conference Committee on Rules of Practice and Procedure was called to order by its Chairman, Judge Edward T. Gignoux, at the Administrative Office of the United States Courts in Washington, D.C., on Thursday, January 29, 1987. All members of the Committee were present except Professor Wade H. McCree, Jr. Also present were the Secretary of the Committee, James E. Macklin, Jr., Deputy Director of the Administrative Office; and David N. Adair, Jr., Assistant General Counsel of the Administrative Office. The Reporter of the Committee, Dean Daniel R. Coquillette of Boston College Law School, was present with Professor Stephen N. Subrin, Northeastern University School of Law, and Mary P. Squiers, Esq., of Boston, Massachusetts. The former Secretary of the Committee, Joseph F. Spaniol, Clerk of the United States Supreme Court; David W. Beier, III, Assistant Counsel, House Judiciary Committee, Subcommittee on Courts, Civil Liberties and the Administration of Justice; and Thomas W. Hutchison, Counsel, House Judiciary Committee, Subcommittee on Criminal Justice, were guests of the Committee.

The Chairman noted that the Chief Justice had been invited but had sent his regrets and informed the Committee that he would be unable to attend.

Agenda II. Resolutions in Memory of the Honorable Walter R. Mansfield and Edward H. Hickey, Esq.

The Committee noted with sadness the death of Judge Walter R. Mansfield on January 7, 1987, and the death of Edward H. Hickey, Esq., on August 31, 1986. The Committee approved, by acclamation, two resolutions to be sent to the respective families:

Judge Walter R. Mansfield

RESOLUTION

It is with sadness that the United States Judicial Conference Standing Committee on Rules of Practice and Procedure notes the death of Judge Walter Roe Mansfield on January 7, 1987, while he was vacationing in New Zealand. During his five years on the United States District Court for the Southern District of New York and his fifteen years on the United States Court of Appeals for the Second Circuit, Judge Mansfield was admired by bench and bar alike. He maintained his reputation for humanity and scholarship even when called upon to decide cases that excited great public passions.

Judge Mansfield was born in Boston and received his undergraduate and legal degrees at Harvard University. His first judicial appointment was to the Southern District of New York, in 1966; in 1971, he was elevated to the Court of Appeals. In 1981, Judge Mansfield took senior status, though he continued to serve the court in virtually a fully active capacity until his death.

Prior to his judicial career, Judge Mansfield practiced law in New York City for nearly thirty years. During those decades he also served for three years as an Assistant United States Attorney and for four years in the United States Marine Corps during the Second World War in Europe and the Far East.

Judge Mansfield also had a long history of service to the Judicial Conference. He was a member of the Advisory Committee on Criminal Rules from 1969 to 1971 and the Advisory Committee on Civil Rules from 1971 to 1984, serving as Chairman of the latter committee from 1978 to 1984. Thereafter, he was appointed to the Standing Committee on Rules of Practice and Procedure. He also was a member of the Ad Hoc Committee on the Media Petition from 1983 to 1984, which dealt with the widely-debated issue of "cameras in the courtroom." In 1984, Judge Mansfield was appointed to the judicial panel responsible for the appointment of independent counsel to investigate allegations of wrongdoing by Federal agencies and officials. Throughout his career he was active in numerous professional associations and organizations for the improvement of the judicial system and the practice of law.

We, the members of the Committee, convey our sympathy to his widow, Elizabeth Mansfield, his children,

Matthew, Trina and Peter, and his nine grandchildren, and ask that this resolution be sent to them as a mark of our profound respect and high esteem.

Washington, D.C.
January 29, 1987

Edward T. Gignoux
CHAIRMAN

Edward Hutchins Hickey

RESOLUTION

The United States Judicial Conference Standing Committee on Rules of Practice and Procedure notes with sadness the death of Edward Hutchins Hickey, Esquire, on August 31, 1986, at the age of 74. Mr. Hickey served a four-year term on the Standing Committee on Rules of Practice and Procedure starting in 1979 and was reappointed to a six-year term in 1983. He brought to the Committee the learning and experience of a long and distinguished career in both Government and private legal practice.

Mr. Hickey was born in Boston and received his undergraduate and law degrees at Harvard University, the latter in 1936. He practiced law in Boston for two years before moving to Washington, D.C., to serve as a special assistant to the Attorney General of the United States. During the Second World War, Mr. Hickey served as a Combat Intelligence Officer in the United States Navy and received the Presidential Unit Citation. He returned to the Department of Justice as the Chief of General Litigation of the Civil Division; in 1957, he entered the private practice of law in Chicago, where he remained for the rest of his career.

In addition to his contributions to the Committee on Rules of Practice and Procedure, Mr. Hickey participated in many professional organizations, both scholarly and service-oriented. He was President of the Bar Association for the Seventh Federal Circuit, 1974-1975, and became a Fellow of the American College of Trial Lawyers in 1977. He served as Chairman of the Legal Aid Committee and of the Family Financial Counseling Committee of the United Charities of Chicago. Mr. Hickey was Chairman of the Chicago Bar Association's Legal Aid Committee, 1968-1970, and of its Urban Affairs Committee, 1970-1971. He was formerly a member of the Board of Directors of the Legal Assistance Foundation of Chicago and was a member of the American Law Institute. He was very active in civic and alumni affairs.

We, the members of the Committee, convey our sympathy to his widow, Ragnhild, their three children, Shelagh Covington, Karen and John, and to their five grandchildren, and ask that this resolution be sent to them as a mark of our profound respect and high esteem.

Washington, D.C.
January 29, 1987

Edward T. Gignoux
CHAIRMAN

Agenda I. Introductory Remarks of the Chairman

The Chairman began the business portion of the meeting by advising the Committee as to the action of the Judicial Conference at its September 1986 meeting on actions requested by the Committee on Rules of Practice and Procedure. Judge Gignoux noted that the Conference had formally approved the proposed amendments to the Bankruptcy Rules, which were promulgated to conform to amendments to the Bankruptcy Code. The Conference also approved amendments to Civil Rule 51, and Criminal Rules 6(a) and 30. The gender-neutralizing amendments to the Criminal, Civil and Evidence Rules were also approved by the Conference, with two minor amendments.

The Chairman advised the Committee that the Chief Justice had been requested to appoint replacements for Mr. Hickey and Judge Mansfield. The Chief Justice responded that no appointments were being made at this time pending the current study of the committee structure of the Judicial Conference.

Judge Gignoux next advised the Committee of the developments regarding the "Rules Enabling Act of 1985." This legislation was enacted by the House of Representatives on December 9, 1985, as H.R. 3550. The Senate took no action prior to the October 1986 adjournment of Congress. It is anticipated that Congressman Kastenmeier will reintroduce the bill in this session. The bill will be reintroduced with the addition of an amendment to the provision regarding the supersession of rules. David Beier noted that there will be more interest in the passage of the bill in the Senate this Congress.

The Chairman advised the Committee that the gender-neutralizing amendments sent to the Supreme Court did not include gender-neutralizing amendments to rules governing section 2254 and section 2255 and rules for the trial of misdemeanors before U.S. magistrates, but that such amendments would be submitted to the Court when substitute amendments were being sent forward.

The Chairman also advised the Committee of the status of the Advisory Committee work. Judge Lloyd D. George was appointed to replace Judge Morey L. Sear as Chairman of the Advisory Committee on Bankruptcy Rules. The Advisory Committee met on November 20 to consider amendments to the Bankruptcy Rules and official forms necessary to accommodate the "Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986," effective November 26, 1986. This legislation establishes a permanent United States Trustee System and adds a new chapter 12 to the Bankruptcy Code. The Chairman of the Advisory Committee anticipates a Spring meeting to approve amendments necessary to accommodate chapter 12 and the United States Trustee System. It is anticipated that, after circulation for comment, the amendments will be sent for Standing Committee approval in July 1988 and Conference approval in September 1988. In the meantime, the Advisory Committee is proposing uniform local rules for chapter 12 cases.

The Honorable Pierce Lively, Chairman of the Advisory Committee on Appellate Rules, called an organizational meeting on December 3 with its new Reporter, Professor Carol Ann T. Mooney of the Notre Dame Law School, and a largely new committee. The Advisory Committee's current 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 FOIA awards under the Equal Access to Justice Act, and several minor items. The Chairman of the Advisory

Committee does not anticipate circulating rules until there is a more substantial number of rules for action.

Judge Gignoux reported that the Chief Justice has appointed Judge Joseph F. Weis, Jr., as Chairman of the Advisory Committee on Civil Rules to replace Judge Frank Johnson. Dean Paul D. Carrington of Duke University Law School is now the Reporter of the Committee and Professor Arthur Miller, former Reporter, remains as a Committee member. The next meeting of the Advisory Committee has been scheduled for February 12-13, at which time the Committee will give further consideration to proposals to amend Civil Rules 4, 45, and 69, and Supplemental Admiralty Rules C and E. The Advisory Committee will also consider amendments to Rules 4, 28, and 44 to reflect procedures under the Hague Convention; a revision of Rule 56 to simplify, clarify and make more useful summary judgement procedures; and several minor items. In addition, the Advisory Committee will reconsider Rule 63 and Rule 47(b), which were returned to the Advisory Committee by the Standing Committee last June for further consideration. It is not anticipated that any rule amendments will be circulated until there are more amendments for action.

The Chairman of the Advisory Committee on Criminal Rules, Judge Leland C. Nielsen, has scheduled a committee meeting for May 7-8. The proposed new Criminal Rule 12.3 (public authority defense) was circulated in October, public hearing is scheduled for February 13 in Washington, and comments are due by March 30. If the Rule is approved at the May meeting of the Committee, it will likely be submitted to the Standing Committee in June for Conference approval in September. The Committee also has on its agenda the revision of Evidence Rule 609(a) and Criminal Rule 32. Finally, the Advisory Committee is considering requesting the Chief Justice to change the practice of appointing each new Assistant Attorney General of the Justice Department's Criminal

Division to simply appointing the Assistant Attorney General for the Criminal Division ex officio.

Agenda III. Consideration of the Report on the Study of Local Court Rules

Before introducing the Reporter of the Committee, the Chairman related the background of the study of local court rules. In September of 1984, the Conference authorized the Chief Justice to appoint a Reporter to the Standing Committee to conduct a study of local rules. This authorization was made pursuant to the recommendation of the Standing Committee based on the proliferation in recent years of local rules and the apparent inconsistency of some local rules with the national Rules of Practice and Procedure. In the Fall of 1985, the Chief Justice appointed Dean Daniel R. Coquillette, Boston College Law School, as the Reporter to the Standing Committee. In January 1986, the Standing Committee authorized Dean Coquillette to proceed with Phase I of a local rules study directed at identifying and analyzing the most troublesome and significant legal problems associated with the local rules of the district courts; a study of the local rules of the courts of appeals was to be deferred until the completion of the study of local district court rules. Also to be deferred was an empirical study of local rules. The Standing Committee also authorized Dean Coquillette to retain Professor Steven Subrin of Northeastern University School of Law as Consultant to the Reporter and, subject to the availability of resources, to obtain such professional and clerical assistance as would be necessary to complete the study. The Committee was advised that, pursuant to this authorization, the Reporter has appointed Mary P. Squiers, Esq., of Boston, Massachusetts, as Project Director.

The Chairman then introduced Dean Coquillette, who advised the Committee of the progress of the project to date and the plan for future action. Dean Coquillette advised that the project has now assembled the local rules, standing orders, and their

equivalents of all 94 United States district courts. There was a total of 4,998 local rules, not including standing orders or sub-parts of rules. The project has also compiled and reviewed all statutes, legislative histories, judicial decisions, and scholarly articles relating to local court rules. The project has also completed analysis of some of the major topics of controversy concerning local rules, including proliferation, procedural difficulties in rulemaking, and conflict with the letter and spirit of the national rules. Dean Coquillette explained that, although the original plan of the project was to complete a limited empirical study of selected rules in selected jurisdictions before issuing a report, the plan had been revised to begin with the preparation of a legal analysis and report, and any empirical study would be deferred and reconsidered after the report.

Dean Coquillette proposed the following schedule for the preparation of the report:

1. During the period between now and July 1987, the project will commence work on developing a uniform numbering system for local rules, a proposed set of model rules, an identification and analysis of rules that should be made the subject of uniform Federal rulemaking, an identification and analysis of local rules that would more appropriately be treated as internal operating procedures, and an identification and analysis of rules that conflict with the letter or the spirit of statutory law or uniform Federal rules. The project will also consider the problem presented by the extensive restatement and repetition in local rules of existing Federal statutes and uniform Federal rules. The project will consider the preparation of an attorneys' manual that would include a citation of Federal statutes and uniform rules thought most important for practitioners before the United States district courts.

2. At the July 1987 meeting of the Committee, the Reporter will present sample working papers on the topics outlined in paragraph 1, above, to gain the benefit of the Committee's criticisms and suggestions.

3. By October 1987, the project will have completed working papers dealing with each of the objectives noted in paragraph 1. Using these papers as a point of departure, the Reporter will invite a small number of leading experts on Federal rulemaking to a workshop for the purpose of examining and fully discussing the proposals. Among the individuals mentioned for consideration were Judge Jack Weinstein, Professor Steven Burbank, Professor Maurice Rosenberg, Professor Arthur Miller, Alan Morrison, Tom Hutchison, David Beier, and Professor Geoffrey C. Hazard, Jr. Judge Gignoux and interested members of the Standing Committee would also participate in that workshop.

4. At the January 1988 meeting of the Standing Committee, the Reporter will submit a now substantially complete set of working papers which will reflect the comments, criticisms, and analyses of the experts at the Fall workshop. The meeting will provide a final opportunity for the members of the Committee to review and modify the conclusions of the project.

5. At the July 1988 meeting of the Standing Committee, the Reporter will submit a final report of the project containing concrete recommendations dealing with each of the objectives outlined in paragraph 1. It is contemplated that this report will be widely circulated for comment and criticism by all interested constituencies.

Dean Coquillette noted that only standing orders that deal with subjects common to local rules would be studied during this phase. He also suggested that a study of local appellate rules would be deferred until the completion of the study of the local district court rules. The project expects to seek the advice of the respective advisory committees with respect to local bankruptcy, criminal, and admiralty rules.

David Beier remarked that, given the preliminary findings of the study, it appears that some of the most important rulemaking governing practice and procedure was being done in the form of local rules. Mr. Beier suggested that this fact is probably not understood by the public, including the bench and bar. Mr. Beier further noted that local rulemaking generated certain costs to the public and that, therefore, the public should be aware of the local rulemaking process.

Tom Hutchison suggested that in order to facilitate the implementation of the recommendations of the Committee, it would be essential to engage in public education prior to the publication of the final report. To that end, he suggested that persons working on the project publish articles discussing the preliminary findings of the project in sources accessible to individuals interested in the problem. Dean Coquillette agreed that this would be done.

It was also suggested that Judge Gignoux write a letter advising the chief judges of the various district courts of the preliminary findings of the project and requesting continued cooperation.

Judge Hoffman moved to accept the plan as outlined by Dean Coquillette. Professor LaFave seconded the motion and the motion was carried unanimously.

Agenda IV. New Business

The summer meeting of the Standing Committee was set for Thursday, July 9, 1987, in Washington, D.C., at 9 a.m.

Respectfully submitted,
For the Committee on Rules
of Practice and Procedure



James E. Macklin, Jr.
Secretary

January 29, 1988⁷