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Judicial Conferences of the Third Circuit

Joseph A. Katarincic

JUDICIAL CONFERENCES OF THE THIRD CIRCUIT

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INTRODUCTION

Democratic institutions remain vigorous and effective only when governed by free men who willingly submit the structure and processes of government to critical examination. The judicial branch of government has willingly submitted itself to public scrutiny. More than that, members of the bench and bar have diligently and courageously examined and adopted needed changes and reforms in the system which they administer and hold in public trust. They have not been timid; their success is noteworthy. This success is immediately evidenced by the great efforts expended in drafting and revising the Judicial Code of the United States, the Federal Rules of Civil and Criminal Procedure, the Admiralty Rules and the success of the myriad task forces that have emulated these achievements by modernizing state procedures.

The various judicial conferences held throughout the United States have done much to stimulate the critical evaluation and change in the judicial systems.[1] The first judicial conference held in the United States was the Federal Judicial Conference of Senior Circuit Judges which first convened in 1922.[2] Its membership consisted of the Chief Justice of the United States and the Senior Judges (now called Chief Judges) of the various federal circuits, and was the forerunner of the Judicial Conference of the United States. The first Judicial Conference of the Third Circuit was held in 1938, and thus, predated the

* B.S. Duquesne University; LL.B., University of Pittsburgh; Lecturer in Law, Duquesne University. Raymond F. Sekula, a third-year law student at Duquesne University School of Law and Article Editor of the Duquesne University Law Review 1964-65, assisted the author in writing this article.

1. A judicial conference is ordinarily to be distinguished from a judicial council. A council is made up of a small number of judges, while a conference is made up of all the judges of a particular jurisdiction or political entity and practicing lawyers. Glenn R. Winters, *Silver Anniversary of the Judicial Council Movement,* 33 J. Am. Jud. Soc'y. 43, 44 (1949). In recent years Florida, in an apparent first, established the Judicial Council of Florida, a majority of whose members are laymen. Honorable Elewyn Thomas, *The Judicial Council of Florida,* 22 F.R.D. 203 (1959).

2. Act of Sept. 14, 1922, ch. 306, 42 Stat. 837, 838.

1939 congressional enactment which sanctioned and directed that a judicial conference be held annually in each of the circuits.

This work is a review of the twenty-six Judicial Conferences of the Third Circuit. It was prepared largely from a review of official documents and correspondence relating to the conferences and made available to the author by permission of Chief Judge John Biggs, Jr.

STATUTORY BASIS FOR THE CONFERENCE AND RULE 38 OF THE THIRD CIRCUIT

The congressional directive requiring the convening of an annual judicial conference in each of the federal circuits was enacted in 1939.[3] It directed that a conference convene annually at the call of the chief judge, and, as amended, reads as follows:

> The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit.[4]

The congressional directive is clear—the judicial conferences are to consider the business of the courts and to devise means of improving the administration of justice.

The only significant change in the 1939 enactment was contained in a 1950 amendment which provided that the judges of the various territories, including the Virgin Islands, were also to be summoned annually to the respective circuit conferences.[5]

The Senate report which accompanied the 1950 amendment to the floor of Congress recognized the importance of judicial conferences as a means of helping to create a cohesive and well informed judiciary. The report contained the following statement:

> In fact, additional arguments for the inclusion of the federal judges for the territories can be made, one such argument being that being so far distant from the mainland of the United States those judges need the advice and counsel of the judges located within the states.[6]

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3. Act of Aug. 7, 1939, ch. 501, § 307, 53 Stat. 1223.

4. Judicial Code and Judiciary, 28 U.S.C. § 333 (1948), as amended 28 U.S.C. § 333 (Supp. 1963).

5. Act of Dec. 29, 1950, ch. 1185, 64 Stat. 1128.

6. S. Rep. No. 2599, 81st Cong. 2d Sess. (1950).

Rule 38[7] deals with the judicial conference. In addition to stating the purpose of the conferences in the same terms set forth in the statute, the rule provides that each circuit and district judge shall attend each conference unless excused by the chief judge. Rule 38 also provides that the first day of the conference shall be attended by the judges who shall meet in executive session and direct their energies and attention to the matters affecting the state of the dockets and the administration of justice. The judges, together with referees in bankruptcy, members of the conference and invited guests are to participate in the discussions and deliberations on the second and third days.

The membership of a conference is to consist of the following:

(1) Presidents of the bar associations of Pennsylvania, New Jersey and Delaware, and for bar associations having more than 500 members—one delegate for each additional 500 members, such delegates to be appointed by the president of the respective bar association;

(2) United States Attorneys of the districts within the circuit;

(3) The dean or a faculty substitute of law schools located within the circuit;

(4) One or more lawyers to be appointed annually by the Chief Judge of the circuit, and one lawyer to be appointed annually by each circuit and each district judge;

(5) Lawyers designated by the Conference or the Judicial Council of the Third Circuit as life members.

All lawyers who have attended a conference for three successive years may attend all future conferences provided they are not absent from two successive conferences.[8]

The Clerk of the Court of Appeals is to act as the Secretary of the Conference and is to make and preserve an accurate record of the proceedings.[9]

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7. 3 Cir. Rule 38.

8. As a matter of practice, a delegate's absence may, for good cause, be excused by the Chief Judge.

9. With a few exceptions, most of the United States Courts of Appeal have a local rule providiing for an annual judicial conference. The Second, Fifth and Eighth Circuits have an annual judicial conference, but have no applicable rule.

The consensus of the local rules is that the conferences are to be held for the purpose of considering the state of business of the courts and to advise ways and means of improving the administration of justice within the circuits.

THE FIRST CONFERENCE

The first Judicial Conference of the Third Circuit was convened on November 25 and 26, 1938 at Haddon Hall, Atlantic City, New Jersey. Those who contributed to the program and the format of the Conference well envisioned the form and pattern that would be followed in subsequent years. The Conference was called to order by the Senior

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Participation in the conferences varies, and although it is quite obvious that the circuit and district judges will attend their respective judicial conferences, the local rules of the First, Third, Fourth, Sixth and Seventh Circuits provide in explicit language that it is the duty of the circuit and district judges to attend their respective judicial conferences.

The United States Attorneys are made members of their respective judicial conferences by the local rules of the First, Third, Fourth and Ninth Circuits. The United States Attorneys of the other circuits may, as a matter of practice, be members of the judicial conferences.

The First, Third, Fourth, Sixth and Ninth Circuits provide in their local rules that a representative from the "Grade A" law schools within their circuit shall be members of the circuit judicial conference. The Third and Sixth Circuits are more specific in their rules in that they require a dean or a member of the faculty to represent the law school.

The attendance of the members of the bar varies within the circuits from a very limited number to no limitation at all. For example, the District of Columbia and the Seventh Circuit both have a local rule which provides that the chief judge of the circuit annually appoint a committee of judges to determine representation by members of the bar.

In contrast, some of the local rules are quite meticulous in respect to participation of members of the bar. The First Circuit local rules provides for the presidents of the bar associations within the circuit plus two delegates of each bar association and two lawyers appointed annually by each circuit judge and one lawyer appointed annually by each district judge to attend the judicial conference. The Fourth Circuit provides for the attendance of the presidents of the bar associations of the states of the circuit and five delegates of each bar association along with three lawyers appointed by each judge. The presidents of the bar associations of the states of the circuit, two lawyers of prominence and experience appointed by the chief judge, and two lawyers appointed by each district judge are provided for in the local rules of the Sixth Circuit to attend its judicial conference. The Ninth Circuit local rule provides for the attendance of the presidents of the bar associations of the circuit and one delegate along with one lawyer to be appointed annually by the chief judge of the circuit and by the chief judge of each of the circuit's district courts and by the judge of the District Court of Guam. The chief judge of the circuit, however, does have the power to invite additional members of the bar at the suggestion of the Committee on Agenda.

Three of the circuits have a unique form of membership to their judicial conference for members of the bar. The Third, Fourth and Sixth Circuits provide in their local rules that all lawyers who have attended three prior annual sessions are life members in the conferences to follow.

D. C. Cir. Rule 40; 1 Cir. Rule 40; 3 Cir. Rule 38; 4 Cir. Rule 32; 6 Cir. Rule 32; 7 Cir. Rule 30; 9 Cir. Rule 36; 10 Cir. Rule 35.

Judge of the Circuit, the Honorable J. Warren Davis. The Honorable Owen J. Roberts, Associate Justice of the Supreme Court, attended as Circuit Justice.

The Conference considered the recently enacted Federal Rules of Civil Procedure. The Rules constituted the subject of an address by the Honorable William D. Mitchell[10] and Charles E. Clark.[11] Judge John Biggs, Jr., the present Chief Judge, led a discussion on new legislation dealing with bankruptcy, and another recently appointed Circuit, Judge, the Honorable Albert B. Maris, led a round table discussion in an area where his contributions have been pioneering—the Federal Rules of Civil Procedure.

WHERE THE CONFERENCES CONVENED

Atlantic City served as the meeting place for the first and twenty later conferences. The only apparent attempt to permanently change the place of meeting is evidenced by a decision to hold the 1949 Conference at Shawnee-on-Delaware, Pennsylvania. The conferences, however, returned to Atlantic City in 1950. Because of governmental restrictions and difficulties encountered in transportation, various conferences held throughout the period of World War II convened at a point closer to Philadelphia. The 1942 Conference was held at the Hotel Hershey in Hershey, Pennsylvania, while in 1943 the Conference convened at Buck Hill Falls, Pennsylvania. In 1945 and 1946 the Conferences were called to order in the courtroom of the Court of Appeals in Philadelphia.

CONFERENCES HELD DURING WORLD WAR II

The conflagration had little impact on the scope of the various conferences that convened from 1942 to 1946. It is true that conferences held during those years were conducted at a point nearer to Philadelphia, yet the programs and the attendance seemed unequaled. Only the 1945 Conference was severely restricted by the war. It was limited to one day and convened on June 29 in the courtroom of the Court of Appeals in Philadelphia. The morning was devoted to an executive session attended by the judges and representatives of the

10. Former Attorney General of the United States and Chairman of the Supreme Court's Advisory Committee.

11. Dean, Yale University School of Law, Reporter of the Supreme Court's Advisory Committee, and later appointed judge of the United States Court of Appeals for the Second Circuit.

Administrative Office of the United States Courts, while the afternoon session centered around an address by the Honorable Herman E. Moore, judge of the District Court of the Virgin Islands, entitled "The Virgin Islands and Its Judicial System." Membership of the 1945 Conference was limited to the circuit and district judges, presidents of the Delaware, New Jersey and Pennsylvania Bar Associations and United States Attorneys.

THE CIRCUIT JUSTICES

The 1938 Conference was addressed by Mr. Justice Owen J. Roberts, who attended various conferences as Circuit Justice from 1938 to 1945. In 1946, Mr. Justice Harold H. Burton assumed the role of Circuit Justice and attended every conference as Circuit Justice until he retired from the Supreme Court and was replaced by Mr. Justice William J. Brennan, Jr., who made his first appearance at the 1957 Conference.

Among the various presentations by Mr. Justice Roberts, the most memorable was his address delivered on September 25, 1942, entitled "The Japanese Attack on Pearl Harbor." Mr. Justice Burton was well-known to the conferees as a prolific and knowledgeable historian. His presentations dealing with various aspects of judicial history were erudite. One of his more interesting presentations was entitled "John Marshall at the Trial of Aaron Burr" and delivered at the 1952 Conference.

The diversity of talent and breath of historical knowledge possessed by Mr. Justice Burton came forth again in his dramitization of the *Dartmouth College* case at the 1952 Conference. It was a masterpiece of living history where events of the past were reduced to a telling and picturesque narrative. The dramatization was highlighted by the following statement:

> The court-room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall and gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheeks expanded with emotion, and eyes suffused with tears; Mr. Justice Washington at his side, — with his small and emaciated frame, and countenance . . . like marble . . . leaning forward with an eager, troubled look; and the remainder of the Court, at the two extremities, pressing, as it were, toward a single point, while the audience below were wrapping themselves round in closer folds beneath the bench to catch each look,

> and every movement of the speaker's face. If a painter could give us the scene on canvas, — those forms and countenances, and Daniel Webster as he then stood in the midst, it would be one of the most touching pictures in the history of eloquence . . . the pathetic depends not merely on the words uttered, but still more on the estimate we put upon him who utters them. There was not one among the strong-minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument, melted into the tenderness of a child.

One of Mr. Justice Burton's other fascinating reviews of historical events took place at the 1949 Conference when he traced the development of the presidential power to appoint the Chief Justice of the United States as distinguished from the practice in England of succession based on seniority.

In addresses to several conferences, Mr. Justice Burton and Mr. Justice Brennan gave comprehensive and pervasive meaning to the role of the Supreme Court as a branch of our government. Both demonstrated their sense of attachment to the Court as a jural entity, and their remarks established the meaningful significance inherent in its decisions. In 1949, Mr. Justice Burton, referring to the Court, said:

> It is a small body. It is smaller as a whole—from 1789 to date — than the United States Senate is today. It may well be regarded as a unit. It performs the service of an umpire and it needs stability for that service. With your help we hope to contribute to its stabilizing value in the structure of our Government. One reason that our Government has survived is that it has a written Constitution and it has an umpire to protect the minority and the majority alike in the observance of that Constitution. We have the Executive and Legislative branches of the Government but those branches each must govern in the interest of all the people all the time. They must protect and foster not only their partisans but also their opposition. In this way, there come changes in governmental policies through the changes of political control without revolution. To that end, the Constitution prescribes freedom of the press, speech and assembly. But those freedoms, in turn, depend upon the umpire who applies the Constitution to the specific cases. The independence and fairness of that umpire are essential. The federal courts in their duties of constitutional umpires have a responsibility for freedom equaled only by its op-

> portunity for service. Upon faith in them depends much of the faith of our people in the feasibility of free self-government.

Though the Supreme Court, as Mr. Justice Burton said, is a "small body," its great National significance was set forth by Mr. Justice Brennan in his address to the 1957 Conference, when, in directing the conferees' attention to their noble profession and to the role of the Court, he said:

> Our profession has the noble assignment of guarding human rights and liberty in our society. We do not work with the implements of the mechanic, the formulas of the scientist, or the tools of the artist. Our daily lives are given to the protection and assertion of the rights under law of life, liberty and pursuit of happiness of individual human beings. We deal with the whole pattern of human relationships under a government that derives its just powers from the consent of the governed. In the matter of the service to the individual, we take our place among the men of the church and of medicine who are concerned with his spiritual welfare and his physical well-being. We are concerned with the things that may be as important to him as either — his life, his liberty, his rights.

IMPROVING THE ADMINISTRATION OF JUSTICE

I. RULES OF PROCEDURE AND THE JUDICIAL CODE

A. *Federal Rules of Civil Procedure and the Judicial Code*: Both the formulation and implementation of the Rules have absorbed the attention of numerous conferences. The Rules, adopted in 1938, were the subject of learned and extended addresses at the 1938 Conference by the Honorable William D. Mitchell and Dean Charles E. Clark. In his address, Dean Clark set forth the technical difficulties encountered in formulating the Rules and the problems incidental to reconciling conflicting interests. He foretold the extent to which the Rules would leave an imprint on the development of substantive law, particularly in the area of tort law.

The 1939 Conference commenced with both the bench and bar having worked with the Rules for the preceding twelve months. The Honorable Alexander Holtzoff, then Special Assistant to the Attorney General of the United States, and now a district judge of the United States District Court for the District of Columbia, delivered an address appropriately entitled "Twelve Months Under the New Rules of Civil Procedure."

Federal pre-trial procedure and practice were in their embryonic stages as late as 1944. Congested trial court dockets were, with few exceptions, an unknown phenomena. Increasingly complex and protracted litigation became of concern only later in the decade. The various conferences are notable, however, for their persistent and inquiring concern for effective pre-trial. The review of pre-trial procedure at the 1944 Conference was highlighted by a detailed analysis of the "Report of the Pre-trial Procedure Committee of the Conference of Senior Circuit Judges." The deep interest of the bench and bar of the district courts of the Third Circuit in pre-trial procedure was further evidenced by the extensive discussions that took place at the 1946, 1949, 1950, 1956, 1958, 1959 and 1963 Conferences.

Beginning with 1955, the Conference, looking back with pride at the progress made by the district courts of the Third Circuit, in adopting pre-trial rules, turned its attention to pre-trial procedures followed by district courts throughout the United States.[12] At the 1958 Conference, the Honorable Alfred P. Murrah, Judge of the United States Court of Appeals for the Tenth Circuit, and Chairman of the National

12. The local pre-trial rules of district courts within the Third Circuit are among the most comprehensive and detailed in the federal system, *e.g.*, Rule 5 II of the United States District Court for the Western District of Pennsylvania.

Committee on Pre-trial Conferences, discussed the administration of pre-trial in the district courts.

The various conferences have intermingled discussions by jurists and members of the bar of means for improving the administration of justice with learned presentations by distinguished academicians. At the 1956 Conference the need for amendments to the Rules was discussed by Professor Clare B. McDermott, Jr., of the University of Pittsburgh School of Law, while Professor Bertram K. Wolfe of the Temple University School of Law spoke on the transfer of actions. It was also at the 1956 Conference that Professor Gerard R. Moran of Rutgers University School of Law and Professor Paul J. Miskin together with Dean Jefferson B. Fordham of the University of Pennsylvania Law School spoke on various aspects of the interplay between federal and state procedure and substantive law. Professor Maurice Rosenberg of Columbia University School of Law addressed the 1959 Conference on the general subject of pre-trial techniques. The 1962 Conference was addressed by Professor Shelden D. Elliott, Director of the Institute of Judicial Administration of New York University, whose presentation was entitled "The Influence of the Federal Rules on State Procedural Development." At the same Conference, Professor Gerald Abraham of Villanova University Law School spoke on "Constitutional Limitations upon Territorial Scope of the Service of Federal Process," and Professor Curtis Randall Reitz of the University of Pennsylvania Law School addressed the conferees on "Federal Habeas Corpus and State Prisoners." Professor Charles Alan Wright of the Law School of the University of Minnesota presented an address at the 1955 Conference entitled "Proposed Amendments to the Federal Rules of Civil Procedure."

Two landmark decisions of the United States Court of Appeals for the Third Circuit formed the basis for provocative and interesting discussions at the 1946 and 1962 Conferences. The decision in *Hickman v. Taylor,* 153 F.2d 212 (1945), *aff'd,* 329 U.S. 495 (1946), a milestone in the then uncharted sea of discovery, attracted much interest and fortified the conclusion already held by many that the judges of and lawyers practicing in the various district courts of the Third Circuit were keenly alert to the labyrinth of procedural problems that modern discovery would generate. The symposium discussion of *Hickman v. Taylor* was presided over by Professor J. William Moore of the Yale University School of Law. Other participating members of the symposium included Samuel B. Fortenbaugh, Jr., Thomas E. Byrne, Jr., Harrison G. Kildare, Abraham E. Freedman and Harold Burtt, all of whom acted as counsel in *Hickman.* Concerned with the implications of Hickman, the conferees at

the 1945 Conference discussed a proposed addition to Rule 30(b), which proposal read as follows:

> The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court is satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

The other decision was the more recent pronouncement in *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729, *cert. denied sub. nom., United States District Court For the Eastern District of Pennsylvania v. Mahoney,* 371 U.S. 888 (1962), where a divided court held that a district judge lacked power to impose pecuniary sanctions on an attorney for unintentional failure to comply with a standing pre-trial order requiring the filing of a pre-trial memorandum.

The conference has, on innumerable occasions, turned its attention to more specific procedural questions. As an example, the following matters, of frequent concern to trial counsel, were discussed at the 1951 Judicial Conference:

(a) Should corporations be required to answer interrogatories which necessitate resort to information known to employees only, even though not binding upon and hearsay as to the answering employer?

(b) In the interest of uniformity, should the Rules be amended to set forth recognized good causes for making papers, documents and investigation available in order to avoid the necessity for applicaton for an order in cases of recognized good cause?

(c) Should a method of appeal be provided from an order directing the production of papers and documents instead of requiring the humiliating and degrading procedure of a refusal of compliance in a citation for contempt?

(d) Shall testimony on depositions, subject to the usual rules of admissibility, materiality, etc., be admitted as

substantive proof and not be limited to purposes of impeachment, etc.?

Section 1404(a) absorbed the attention of the 1951 and 1956 Judicial Conferences, where the questions asked were (1) whether section 1404(a) should be amended to prohibit change of venue by transfer if an action is brought under any Act of Congress vesting in the plaintiff a choice of forum, unless the enactment specifically provides authority for transfer; and (2) whether section 1404(a) should be amended to make it obligatory to institute civil actions in a forum where the cause of action arose if jurisdiction over the defendant can be there obtained.

B. *Federal Rules of Criminal Procedure*: With the realization that one of the primary functions of the bench and bar is the protection of individual liberty, the judicial conferences early took up the formulation and critical examination of the Federal Rules of Criminal Procedure. As early as 1941, the Conference was addressed by Professor James J. Robinson, Reporter to the Advisory Committee on Rules of Criminal Procedure for the Supreme Court on "The Proposed New Rules of Federal Criminal Procedure." Following Professor Robinson's address, the practitioners' viewpoint of the proposed Criminal Rules was given by the Honorable Martin W. Littleton, in an address entitled "The Proposed New Rules of Federal Criminal Procedure From the Viewpoint of the Practising Attorney."

The 1942 Conference reaffirmed the interest of the bench and bar in the proposed Criminal Rules. Professor Robinson gave an address entitled "The Proposed Rules of Federal Criminal Procedure." A discussion of the Criminal Rules followed, and in an apparent first, Professor Robinson disseminated, in advance of the discussion, a statement of questions to be discussed together with a preliminary draft of the proposed rules. Professor Robinson returned to the 1944 Conference where he again spoke at length on proposed changes to the Criminal Rules. An extensive review by the Conference of the Criminal Rules occurred in 1949 when the following members of the bench gave forth generously with their experiences:

Circuit Judge Albert B. Maris

District (now Circuit) Judge William F. Smith

Chief Judge William H. Kirkpatrick

District Judge Frederick V. Follmer

II. The Accused Is Presumed Innocent, and the Punishment Is to Fit the Individual

The problems incidental to the adjudication of the innocence or guilt of the individual criminal defendant and the imposition of a proper and equitable punishment have, next to matters relating to the Rules of Civil Procedure, most frequently, and, most fervently, dominated various conferences.

The concern of the conferees for speedy disposition of criminal matters was evidenced forcefully at the 1939 Conference when the Honorable William Clark presented a stirring address entitled "The Courts and the Administration of the Federal Criminal Law." His presentation was followed by a symposium presented by a number of federal prison officials and entitled "The Warden Views the Courts."

The 1941 Conference was devoted to a discussion of various aspects of federal law enforcement, and to an extensive review of the proposed Rules of Criminal Procedure. The concern of the United States Government in the area of law enforcement was set forth by the United States Attorneys for the Eastern District of Pennsylvania and the Districts of Delaware and New Jersey who addressed the 1941 Conference on various aspects of criminal law enforcement, including the rapid disposition of criminal charges.

The 1949, 1950 and 1952 Conferences bear strong and convincing proof of the fact that the various district courts within the Third Circuit are concerned not only with adjudicating the innocence or guilt of the accused criminal defendant, but possess a strong desire to inquire into the treatment and disposition of the convicted criminal defendant. At the 1952 Conference, one of the presentations was entitled "The Verdict was Guilty: Now What?" The "Now What" was inquired into not only at the 1952 Conference, but at the 1949 Conference as well. That Conference witnessed a penetrating analysis and evaluation of the federal probation system by the chief probation officers of the Third Circuit. During the course of the 1950 Conference, various judges and lawyers took part in a panel program entitled "Pre-Sentence Conference in Criminal Cases." Obviously, the various members of the Conference were interested in placing before the judge information to serve as the basis for sentencing. It was not an attempt to intrude on the prerogative of the sentencing judge, but to assist him in exercising powers already possessed.

The 1955 Conference featured a general discussion concerning the matter of sanity of the criminal defendant. The program was entitled "Insanity as a Defense in Criminal Cases," and the panel discussion

that followed, included a most knowledgeable group. Chief Judge John Biggs, Jr., headed the panel, which also included such individuals noted for the practice and study of the law as Thomas D. McBride of Philadelphia and Professor Herbert A. Wechsler, who at that time was Chief Reporter of the American Law Institute Model Penal Code Study Group and later became the Director of the American Law Institute.[13]

The 1956 and 1957 Conferences again turned from the matter of adjudicating guilt and focused attention on the sentencing problem, which was discussed in detail at the 1956 Conference by Dr. Shelden Glueck of the Harvard Law School.

In the course of the 1957 Conference, the conferees took up the matter of appellate review of sentences, while the attention of the 1963 Conference was directed to the obligations of the bench and bar in representing indigent criminals. Representatives of the various bar associations, district judges and Mr. Justice William J. Brennan, Jr., participated in a vigorous and far-reaching review of the right of indigent defendants to representation. The second part of the program consisted of a panel discussion concerning appellate review of criminal sentences, and moderated by Circuit Judge William F. Smith. The other members of the panel included distinguished appellate and trial judges including the Honorable Simon E. Sobeloff, Chief Judge of the United States Court of Appeals for the Fourth Circuit. The overriding concern of the conferees was the determination of a proper sentence, a sentence that fit the defendant, a sentence that was not vindicative.

III. Improving the Dispatch of the Business of the Courts

A. *Use and Selection of the Jury*: Both the 1950 and 1954 Conferences took up the question of jury selection and evidenced the concern of the conferees for selecting a jury representative of the community. More than that, however, the Conferences were concerned with whether an adequate factual basis existed for the intelligent selection of a panel of prospective jurors by the jury commissioners. Thus, the 1950 Conference probed into such matters as what information should be obtained from jurors for inclusion on jury lists and to what extent the litigants should be permitted to conduct private

13. Judge Biggs has made numerous presentations throughout the United States regarding psychiatry and the law. *E.g.*, he participated in a panel discussion that considered the question of "Psychiatry and The Law" at the Judicial Conference of the Tenth Circuit, 32 F.R.D. 482, 547; See United States v. Currens, 290 F.2d 751 (3 Cir. 1961).

background investigations of prospective jurors. The 1950 Conference was also concerned with a question that has come to the forefront increasingly, that is, whether preliminary instructions should be given to jurors, and the need for such instructions was considered in connection with the publication of a manual for jurors. The 1954 Conference was assiduously concerned with the matter of "Our Diverse Methods and Procedures for Selecting Persons for Jury Duty." The present practice of selecting juries was set forth by the Honorable Will Shafroth, a representative of the Administrative Office of the United States Courts.

Closely related to the problem of jury selection was the question of what former members of a jury think of the jury system as a means of disposing of private disputes. In 1947, the Conference launched a novel program entitled "Improving The Administration Of Justice In Federal Court." The first part of the program was captioned "The Grand Jury," and witnessed a former grand jury foreman and the United States Attorney for the Middle District of Pennsylvania disect and critically examine the functions and operation of the grand jury system. Thereafter, "The Trial Court" was examined and presentations were made by former members of a jury, representatives of the bar that had sat at counsel table during numerous trials and by a district judge. Lastly, a qualitative evaluation of the jury system was made from the point of view of the community by the editor of the *Trenton Times,* Mr. James Kerney, Jr.

B. *Rules of Evidence and the Federal Courts*: On at least two occasions the conference has considered the matter of what rules of evidence would be applicable in a proceeding in a federal court, particularly where jurisdiction is based on diversity of citizenship. As early as 1942, an address entitled "Code of Evidence as Proposed by the American Law Institute" was presented by Edmund M. Morgan of the Harvard Law School. In 1957, the Conference, turning its attention to uniformity of rules in federal practice, was addressed by Professor Charles W. Joiner, of the University of Michigan Law School. His address was entitled "Uniform Rules of Evidence for the Federal Court," and predicted a trend in recent federal decisions where jurisdiction was based on diversity and federal rather than state rules of evidence were found to be controlling.

C. *Scheduling of Trial*: One of the obviously difficult problems in the administration of justice is the scheduling of trials, *i.e.,* on what date will what judge sit and hear a case to be presented by lawyers busily occupied in a variety of legal duties. Difficulty, of course, arises from the fact that it is impossible to predict when a

particular trial will end, and even though predictable, surprise may well accelerate or extend the date when the trial of a particular case will commence. That being so, the bench and bar of the district courts within the Third Circuit have on several occasions considered the matter of scheduling of trials. At the 1950 Conference, the conferees took up such questions as integration of federal and state court trial dockets and reciprocity between the two systems so as to avoid conflict. As part of speeding up the disposition of cases, the 1958 Conference considered two interesting questions: "What's Wrong With the Lawyers?" and "What's Wrong With the Judges?"

The 1960 Conference featured a discussion of the "Impartial Medical Plan" by a panel chaired by Judge Francis L. Van Dusen of the United States District Court for the Eastern District of Pennsylvania. The presentation gave insight to both the administrative and tactical problems incidental to use of an impartial medical expert.

In 1952, the members of the Conference were the beneficiaries of practical words of wisdom from two clerks, Mrs. Ida O. Creskoff of the Court of Appeals and Mr. Edward Pollard of the United States District Court for the District of Delaware. The program was appropriately entitled "Wise Words from the Clerk's Office." The wise words placed particular emphasis on perfecting an appeal both under Rule 73 of the Federal Rules of Civil Procedure and the various applicable rules of the Court of Appeals.

One of the more comprehensive studies ever conducted by any of the committees appointed by the conference was contained in the report filed at the 1948 Conference, which report formed a basis for a symposium entitled "Should the Number of Published Opinions be Reduced." The committee had been appointed by Circuit Judge John J. O'Connell, and its members represented each of the district courts within the Third Circuit. The committee made a detailed and exhaustive study of opinions that have been published, with the objective of recommending whether the number of published opinions could be reduced. The specific problems confronting the committee involved the establishments of criteria for selecting opinions that are to be reproduced and in determining who will make the selection. The committee laid down some very simple yet positive guide lines. Where the decision determined an unsettled or important question of law or modified or reversed an established principle, the opinion should be published. Also, the opinion should be printed where it construed a federal or state constitutional provision or the decision turns on state law. The last criteria inquired whether the opinion was otherwise a matter of public interest, that is, whether the decision is of significant importance to the public at large. The committee went on to make a

number of other interesting and significant recommendations, all of which were directed at reducing the number of published opinions that have caused dismay to judges, lawyers and law librarians. The report of the committee was printed in the same format used in publishing the slip opinions of the Court of Appeals.

CONCLUSION

The Judicial Conferences of the Third Circuit have contributed steadily and importantly to improving the administration of justice. The conferences, taking on the form and characteristics of an institution, have with renewed emphasis alerted members of the bench and bar to the need for critical appraisal of our legal system. They have served other purposes. Most importantly, the conferences have provided a channel for the exchange of ideas and information between the bench and bar, and, on occasion, between those groups and the public.

One thing is certain—the judicial conferences have, from an early date, directed the attention and energies of the conferees to current and important questions directly involving the effectiveness of our legal system. The conferences have ranged from a microscopic examination of the Rules of Civil and Criminal Procedure to an attack on the wisdom of preserving the jury system as a vehicle for adjudicating disputes. The inquiry has moved from consideration of the specifics of sentencing to an esoteric examination of insanity. The beneficial results of the conferences are not measured by the number of resolutions passed at the various sessions. The measurement problem is more difficult, for it is only in the day-to-day activities of the members of the bench and bar as they return to the courtroom that the full force of what is said and done at the conferences becomes evident.