COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 12-13, 1996
Los Angeles, California

Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Los Angeles, California on Thursday and Friday, January 12-13, 1996. All committee members were present:

Judge Alicemarie H. Stotler, Chair
Judge Leroy J. Contie, Jr.
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Deputy Attorney General Jamie Gorelick was unable to be present because of weather and transportation conditions. Ian H. Gershengorn, Special Assistant to the Deputy Attorney General, participated in the meeting as the representative of the Department of Justice.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, senior attorney in the rules office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Patrick E. Higginbotham, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Ralph K. Winter, Chair
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office; and William B. Eldridge, Director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Jensen reported that he had represented the committee at the September 1995 meeting of the Judicial Conference. He stated that the committee had proposed to the Conference two changes to Rule 16 of the Federal Rules of Criminal Procedure. The first would have amended Rule 16(a)(1)(F) to require the government to disclose the names of its witnesses to the defendant seven days before trial, unless the United States attorney were to file with the court an *ex parte*, non-reviewable statement that the government believed that disclosure would threaten a person's safety or lead to an obstruction of justice. The second change would have amended Rule 16(b)(1)(C) to require the defense to disclose to the government a written summary of the testimony of its witnesses when it intended to rely on expert testimony to show the defendant's mental condition.

Judge Jensen stated that the Judicial Conference, on a close vote, had failed to approve a motion to adopt the proposed changes to Rule 16. He added that the Advisory Committee on Criminal Rules had concluded that the Conference's action must be read as a rejection of the committee's entire Rule 16 proposal, including the provision that would have amended rule 16(b)(1)(C) to require disclosure of expert testimony by the defense. He added that the Advisory Committee on Criminal Rules would be pleased to consider this latter proposal again.

Judge Jensen also reported that the Judicial Conference had rejected a motion to prevent publication of the proposed amendments to the civil and criminal rules that would require attorney participation in voir dire. Accordingly, the voir dire proposals, which had been sponsored jointly by the Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules, were published immediately following the Conference's meeting.

Some members and participants suggested that the committee's recommendations and supporting material may not have been given adequate consideration by the members of the

Judicial Conference. One participant suggested that the motion to prevent publication of the voir dire proposals was purely procedural in nature and had been made at the last minute. He stated that in the future the committees should be provided with greater advance notice of proposed objections to their reports. Some members recommended that consideration be given to changing the presentation and format of the committee's reports to the Conference to ensure that Conference members are fully informed about the materials and that the committees be given an adequate opportunity to present and defend their proposals on the merits.

Judge Stotler reported that she and Professor Coquillette had attended part of the December 1995 meeting of the Committee on Court Administration and Case Management. At the meeting, they discussed the Judicial Conference's obligations under the Civil Justice Reform Act to file a report and recommendations with the Congress by December 31, 1996. She stated that she and the reporter had emphasized that the Rules Enabling Act process is very participatory and lengthy. The RAND report, providing empirical data on the results of the CJRA pilot program, would not be ready even on a preliminary basis until the end of June 1996, and in final form by the end of September 1996. Under this schedule, there would not be enough time for the Conference and its committees to review the RAND report, make appropriate recommendations regarding the adoption of litigation principles and guidelines, and initiate proposed rules changes to implement the recommendations. The Committee on Court Administration and Case Management was urged to take the rulemaking process into account in coming to its recommendations.

Judge Higginbotham reported that the RAND Corporation and the American Bar Association were eager to obtain reactions by bench and bar to the findings and recommendations in the report. He noted that the ABA was planning to hold a national conference to consider the report, possibly in March 1997. He added that Judge Ann C. Williams, chair of the Court Administration and Case Management Committee, had been very receptive to receiving input from bench and bar and had asked to be included in the ABA conference.

Judge Stotler reported that she, Professor Coquillette, and Judge Robert E. Keeton, former chairman of the committee had met with the Chief Justice on December 13, 1995, to discuss: (1) the style revision project; (2) the appropriate length of terms for rules committee members and chairs; and (3) inviting the chairs of other Judicial Conference committees to attend the committee's January 1996 special study conference on attorney conduct. She stated that the Chief Justice was very interested in, and very knowledgeable about, the rules process. She added that he approved of the committee's proceeding with its plans for revising the Federal Rules of Appellate Procedure for style and for using the appellate rules as the bellwether for the style revision project. She added that style revision of the other federal rules of procedure should be delayed until revision of the appellate rules has concluded. Judge Stotler emphasized that attorney conduct issues cut across the jurisdictional lines of several Judicial Conference committees and had to be coordinated closely with the other committees.

For that reason, she had wanted to inform the Chief Justice directly of the committee's intention to invite other Judicial Conference chairs to the special study conference and to ascertain whether the proposal met with the Chief Justice's approval.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved unanimously the minutes of the July 6-7, 1995 meeting.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office had just installed the hardware and software for its new electronic document management system that will support the rules committees. Customization of the software and training of the staff were underway, and dual operation of the manual and automated systems would follow. Judge Stotler recommended that the office invite the committee to an on-site demonstration of the system in conjunction with the June 1996 meeting.

Mr. Rabiej stated that Senator Thurmond had introduced S. 1426, a bill that would amend the Federal Rules of Civil and Criminal Procedure to eliminate the requirement of unanimous consent for a verdict and require that a verdict in a civil or criminal case be made only by a 5/6 vote of the jury.

Several of the participants expressed objection to the legislation on the merits and recommended that the Judicial Conference be heard on the matter. Concern was also expressed that the bill would violate the Rules Enabling Act process by amending federal procedural rules directly by statute. One member recommended that work begin immediately to consider the implications of the legislation and obtain empirical data.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the chair had recently selected him to serve as chair of the style subcommittee. He stated that the role of the subcommittee would necessarily be limited because further work on revision of the civil, criminal, and bankruptcy rules would likely be held in abeyance until after completion of the revision process for the appellate rules.

Mr. Garner reported that his codification of the style conventions used by the style subcommittee was about to be published by the Administrative Office under the title *Guidelines for Drafting and Editing Court Rules.* He stated that the conventions are easy to

apply and that they would be of substantial assistance in teaching and drafting. He agreed to eliminate references to the Federal Rules of Evidence in the work before it is published.

Judge Stotler asked whether any member had an objection to having the *Guidelines* published in the Federal Rules Decisions. No objection was voiced.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum of December 12, 1995. (Agenda Item 7)

Amendments for Publication

Judge Logan reported that the advisory committee was proposing substantive amendments to three appellate rules, Rules 27, 28, and 32. He added that the advisory committee recommended that these three rules be amended regardless of the outcome of the rules restyling project.

FED. R. APP. P. 27

Judge Logan stated that Rule 27, dealing with motions, had been entirely rewritten by the advisory committee. As amended, the rule would require that any legal argument in support of a motion be contained in the motion. No separate brief would be permitted. He explained that this provision had been derived from the rules of the Supreme Court.

The time for responding to a motion would be expanded from 7 days to 10 days. This change had been made in response to comments received during the publication period. The rule would be amended to make it clear that a reply to a response may be filed. A motion could not exceed 20 pages, and a response could not exceed 10 pages. A motion would be decided without oral argument unless the court ordered otherwise. In addition, the format requirements for a motion would be moved from Rule 32(b) to Rule 27(d).

FED. R. APP. P. 28

Judge Logan stated that the proposed amendments to Rule 28 were necessary to conform the rule to the proposed amendments to Rule 32. Subdivision (g), governing page limits of briefs would be deleted and moved to Rule 32. Rule 28 would also be amended to require a brief to contain a certificate of compliance with the length limitations established in Rule 32.

FED. R. APP. P. 32

Judge Logan stated that the advisory committee had adopted a draft revision of Rule 32 prepared by Judge Easterbrook. He asked Judge Easterbrook to summarize the changes.

Judge Easterbrook stated that most of the features in the rule had been discussed by the Standing Committee at prior meetings. He had attempted to redraft the rule in light of various concerns expressed by committee members at the July 1995 meeting. He stated that the advisory committee's goal was to write a rule that would facilitate good practices by attorneys. The revised rule strived for both simplicity and equality. It used simpler terms than earlier drafts, although printers' terms could not be eliminated completely. The revision also achieved equality between those who use computers and those who use typewriters.

Judge Easterbrook stated that uniformity was also an important objective of the rule. As revised, it would abrogate local rules that impose requirements not set forth in the national rule. Therefore, a brief that complied with the national rule would be acceptable in every court. On the other hand, the rule would allow the circuit courts to *reduce* requirements and accept documents not in full compliance with certain aspects of the national rule. For example, a brief in 14-point typeface would be acceptable everywhere, but a particular circuit court could authorize a brief printed in 12-point type.

Judge Easterbrook stated that the advisory committee had deferred consideration of a proposed amendment to require attorneys to file with the court a copy of the computer disk used to prepare their brief.

As amended, the rule would also require an attorney certificate of compliance with the length limitations. The certificate would serve two practical functions: (1) It would make it clear to the clerk's office that the lawyer is aware of the requirements of the rule and has tried to comply with them. (2) The court could rely on the lawyer's certificate and the word count or character count of the word-processing system used to prepare the brief.

The revised rule also contains a safe harbor provision providing that a certificate of compliance is not required for a principal brief that does not exceed 30 pages in length.

Style Revisions

Judge Logan stated that the advisory committee had completed a draft of the style revisions of all 48 appellate rules. He noted that the proposed amendments had been reviewed seven times, by: (1) the style consultant, (2) the style subcommittee, (3) a subcommittee of the advisory committee, (4) the full advisory committee, (5) the style consultant again, (6) the

subcommittee of the advisory committee again, and (7) the full advisory committee again. He stated that the committee now had before it a finished product, except for some final editing.

Judge Logan pointed out that the advisory committee had prepared a standard committee note to follow each rule declaring that the proposed changes were intended to be stylistic only. In a few cases, however, proposed amendments exceeded purely stylistic change to resolve ambiguities in an existing rule or remove poor language from a rule. These particular amendments were clearly identified as more than stylistic in the advisory committee notes. Judge Logan elaborated on each amendment that would make more than stylistic changes.

FED. R. APP. P. 3

Under the current Rule 3(b), it is not clear whether appeals may be consolidated without court order if the parties stipulate to the consolidation. The revised rule would resolve the ambiguity by requiring a court order for consolidation. The rule would also make it clear that the court may order consolidation on its own motion.

Rule 3(d) would be amended to conform to a proposed revision in Rule 4(c). It would provide that when a prison inmate files a notice of appeal by depositing it in the prison's internal mail system, the clerk must note on the notice of appeal the date it is docketed, rather than the date the clerk receives it.

FED. R. APP. P. 4

Current Rule 4(a)(6) permits a district court to reopen the time to file an appeal if it finds that a party did not receive notice of the entry of judgment or order from "the clerk or any party" within 21 days of its entry. The revised rule would broaden the type of notice that can preclude reopening the time for appeal by including a notice from the court. The advisory committee substituted the term "the district court" for "the clerk," believing that the change was within the scope and intent of the rule.

Mr. Perry expressed concern over the proposed change. He stated that a judge may issue instructions in open court that are never reduced to writing. He noted that sometimes a judge states that a judgment will be entered, but it is not in fact entered on the record by the clerk. This practice produces confusion, and lawyers may have to act with peril when a judge makes an oral decision from the bench. He stated that lawyers want to receive written confirmation of a judge's oral decision, either by the judge or the clerk.

Mr. Perry suggested that the problem with the rule was highlighted in the next to last sentence of the fourth paragraph of the committee note, reading: "Under the new language such notice would continue to bar reopening, but the Advisory Committee believes that if a district judge announces the judgment in open court in the presence of the parties that announcement

should also be sufficient notice to preclude later reopening of the time for appeal." **He moved to eliminate this sentence from the note, and Judge Logan agreed to strike the sentence.**

Judge Logan noted that Rule 4(b)(4) permits the court to extend the time to file a notice of appeal if there is a "showing of excusable neglect." The advisory committee would permit the court to extend the time for "good cause," as well as for "excusable neglect." He stated that good cause should be sufficient to extend the time in criminal cases as well as civil cases.

The rule, would also be amended to require a "finding," rather than a "showing," of excusable neglect or good cause.

Rule 4(c) would be amended to require that a prison inmate use the internal mail system designed for legal mail, if there is one, in order to receive the benefit of the subdivision. Companion changes would be made in Rules 3(d) and 25(a). The current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The advisory committee would amend the rule to provide that the time for other parties to appeal begins to run when the district court "dockets" the inmate's notice of appeal.

FED. R. APP. P. 17

Judge Logan stated that the current Rule 17(b) requires an agency to file with the court the entire record or such parts of it as the parties may designate by stipulation filed with the agency. The advisory committee would revise the language to allow the agency to file the entire record or "parts designated by the parties." A stipulation would no longer be necessary. The agency could file less than the entire record, even without a stipulation, by forwarding only those portions designated by each party.

FED. R. APP. P. 23

Judge Logan stated that the current Rule 23(d) provides that an initial order regarding custody of a prisoner in a habeas corpus proceeding "shall govern review" in the court of appeals and in the Supreme Court. The advisory committee would revise the language to provide that the court's initial order "continues in effect pending review." Judge Logan explained that the advisory committee's proposed change in Rule 23 was made to conform to a revision in the pertinent Supreme Court rule.

FED. R. APP. P. 25

Judge Logan stated that the proposed change in Rule 25(a), dealing with prison mail systems, was a companion to the proposed change in Rule 4(c). The advisory committee recommended amending the rule to require that an inmate use the system in prison designed for legal mail, if there is one, in order to receive the benefits of the rule.

Mr. Perry moved to delete the word "calendar" from proposed Rule 25(a)(2)(B)(ii). The motion was approved by the committee on a voice vote with one objection.

FED. R. APP. P. 26

The proposed amendment to Rule 26(a), governing computation of time, would apply the computation method prescribed within the rule to any time period imposed by a local rule of court.

FED. R. APP. P. 31

Judge Logan stated that the advisory committee would amend Rule 31(b) in two respects. First, the provision of the rule authorizing parties who file "typewritten ribbon and carbon copies" of the brief to file fewer copies of the brief would be modified to make it clear that it applied only to parties who proceed in forma pauperis. Second, parties represented by counsel would not be authorized to file fewer copies of the briefs.

Judge Logan accepted Judge Wilson's suggestion that the word "should" on the last line of the committee note be changed to "must."

FED. R. APP. P. 34

Judge Logan stated that Rule 34 currently requires every circuit to establish a local rule on oral argument that conforms to criteria specified in the national rule. The advisory committee would amend the rule by specifying in the national rule itself the criteria that the current rule requires the local rules to contain, thus eliminating the need for the local rules..

FED. R. APP. P. 15

Judge Parker distributed a draft of proposed style changes in the advisory committee's proposed Rule 15(b) that would: (1) substitute "a party opposing review" for "the respondent," (2) substitute "after the date when the application for enforcement is filed" for "thereafter," and (3) reverse the order of paragraphs (2) and (3).

Justice Veasey moved to adopt the changes proposed by Judge Parker. The committee approved the changes unanimously.

Title and Format of the Revisions

The committee spent considerable time deciding upon the appropriate title for the publication that would contain the body of revised appellate rules. Much of the discussion addressed whether to designate the style conventions as "guidelines" or "standards."

The committee decided to approve the following title: "Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules."

Judge Logan stated that the document would be published in the same side-by-side format set forth in Agenda Item 7. Each appellate rule in effect at the time of publication would appear on the left side of the page. Opposite it on the right side of the page would appear the corresponding restyled rule. Any proposed substantive changes that are still in the midst of the rules revision process—including amendments pending before the Supreme Court or Congress and amendments published for public comment—would appear in italics immediately following each pertinent rule.

The committee discussed the appropriate length of time that should be given for public comment on the proposed style amendments. Judge Logan said that the advisory committee could complete its final editing of the rules by April 1996. The rules could then be published immediately, and the public could be given until the end of 1996 to comment on them. This schedule would permit consideration of the rules by the Standing Committee at its June 1997 meeting.

Judge Stotler called for the vote to authorize publication of the proposed style revisions of the appellate rules using the proposed side-by-side format and including the proposed substantive changes to Rules 27, 38, and 32. The committee approved publication by voice vote without objection.

Local Appellate Rules

Judge Logan stated that local rules project had been very successful in improving appellate rules at both the national and local levels. He pointed out that the project had reviewed the local rules of each of the courts of appeals and had identified several court rules that conflicted with, or repeated, the national rules. The project also recommended the renumbering of local rules to follow the numbering of the national rules. The courts of appeals had taken the recommendations seriously and made appropriate changes in their rules. Significantly, the project also identified a number of good local rules that were appropriate for promulgation as uniform national rules. As a result, many of the changes proposed by the advisory committee in the Federal Rules of Appellate Procedure over the past few years had

been derived from its review of local rules of court.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 5, 1995. (Agenda Item 8)

Uniform Numbering System for Local Court Rules

Professor Resnick stated that four or five years ago the advisory committee had been asked to devise a uniform numbering system for local court bankruptcy rules. The proposal now before the Standing Committee had been prepared by a subcommittee assisted by Ms. Channon of the Bankruptcy Judges Division of the Administrative Office and had been through several drafts, several committee meetings, and public comment. The proposed local rule-numbering system was tied to the numbering of the Federal Rules of Bankruptcy Procedure. Each local rule topic was linked to its equivalent subject in the national rules. When the subject of a local rule had no national equivalent, the committee assigned a new number based on the general framework of the national rules.

Professor Resnick pointed out that the advisory committee had made a decision against designating one single, "catch-all" number for assigning all local court rules that do not have a national counterpart. Instead, the committee designated a specific number to cover every subject presently addressed by the bankruptcy courts in their local rules. To assist the courts further, the advisory committee had prepared a set of cross-references and indexes to the rules. Also, the committee had encouraged the bankruptcy courts to contact Ms. Channon for assistance in revising their local rules.

Professor Squiers pointed out that the proposed numbering system for the bankruptcy rules was different from those proposed for the civil, criminal, and appellate rules. The latter three systems would give the courts more discretion in numbering their rules, and all local topics not covered by a specific national rule would be aggregated in the generic national rule number dealing with local rulemaking, i.e., FED. R. CIV. P. 83 and FED. R. CRIM.. P. 57. Professor Resnick said that the Advisory Committee on Bankruptcy Rules was confident that it had linked every current local rule to either a national rule number or another appropriate number based on the general framework of the national rules. He added that courts should be discouraged from using a single rule number as a "dumping ground" for all local rules not linked closely to a national rule.

Some participants questioned the precise form of citation proposed in the numbering system for local bankruptcy rules. Judge Easterbrook pointed out that judges do not cite the national rules uniformly, and the specific form of citation recommended by the advisory

committee would not achieve the committee's expected results. He suggested, moreover, that there was nothing in the national rules giving the Judicial Conference authority to prescribe a uniform citation system, rather than a numbering system.

Judge Easterbrook moved that the committee recommend to the Judicial Conference that it adopt a uniform numbering system for all local court rules that simply required each court to renumber its local rules according to the numbers of the national rules. A court, thus, could use any system it wanted for numbering its local rules as long as it was sensible and corresponded with the numbers in the equivalent federal procedural rules. The members agreed that the various materials and refinements prepared by the Advisory Committee on Bankruptcy Rules and by Ms. Squiers were very helpful and should be included in the instructional package distributed to the courts.

The committee approved the motion by voice vote without objection.

Judge Easterbrook further moved to give the courts until April 15, 1997, to bring their local rules into compliance with the uniform national numbering systems. The committee approved the motion by voice vote without objection.

Automatic Adjustments to the Bankruptcy Forms

Professor Resnick stated that the Congress had amended section 104(b) of the Bankruptcy Code in 1994 to provide that beginning on April 1, 1998, and every three years thereafter, the various dollar amounts in the Code would be adjusted automatically based on the Consumer Price Index. Some of the dollar amounts appear in the Official Bankruptcy Forms. The statute, as explained in the advisory committee's agenda item, requires the Judicial Conference by March 1 of the pertinent years to publish in the *Federal Register* the amounts of the automatic adjustments, to be calculated using figures supplied by the Executive Branch.

Professor Resnick explained that the advisory committee viewed the dollar adjustment process as a ministerial, administrative matter. Accordingly, it recommended simply that the Official Bankruptcy Forms be amended automatically to conform to whatever adjustments are made every three years in the dollar amounts. Thus, neither the Standing Committee nor the Judicial Conference would have to take further, explicit action to amend the Official Forms to account for the administrative procedure prescribed by section 104(b) of the Code. The Administrative Office could make the adjustments in the forms ministerially and notify the courts and publishers.

To this end, the advisory committee recommended that the Standing Committee approve the following resolution:

That the Judicial Conference resolve that on April 1, 1998, and at each 3-year

interval ending on April 1 thereafter, the Official Bankruptcy Forms be amended, automatically and without further action by the Judicial Conference, to conform to any adjustment of dollar amounts made under § 104(b) of the Bankruptcy Code.

The committee approved the resolution by voice vote without objection.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum of December 13, 1995. (Agenda Item 10)

He pointed out that the advisory committee had published for public comment proposed amendments to the civil rules dealing with: (1) attorney participation in voir dire, (2) the use of 12-person juries in civil cases, (3) protective orders under FED. R. CIV. P. 26(c), and (4) interlocutory appeals in admiralty, FED. R. CIV. P. 9(h). He stated that the civil and criminal advisory committees had received a large number of comments on the voir dire proposals, with attorneys generally favoring the amendments and judges opposing them. He added that the committee had received very useful information on the issue of jury size, but that few comments had yet been submitted regarding protective orders.

Judge Higginbotham briefed the committee on the activities of his advisory committee regarding potential amendments to FED. R. CIV. P. 23, dealing with class actions. He explained that he was raising the matter with the committee as an informational item to obtain their initial reactions. He added that the advisory committee would present specific proposals at the June 1996 meeting of the Standing Committee.

Judge Higginbotham reported that the advisory committee had held several meetings on class actions, including symposia at the University of Pennsylvania, New York University, and Southern Methodist University. Hundreds of suggestions had been received regarding potential improvements to Rule 23. Following its April 1995 meeting, the committee began drafting specific proposals and asked its reporter, Professor Cooper, to group the suggestions into two categories. The first would consist of four major policy issues. The second would contain a variety of proposals to refine Rule 23. The advisory committee then decided to concentrate its efforts on addressing the four major policy issues and defer consideration of the other proposals.

Judge Higginbotham and Professor Cooper proceeded to discuss the four major policy issues.

1. Appeal of a Class Certification Decision

Judge Higginbotham stated that the single issue raised most often at the meetings and symposia was whether to provide a right of appeal, or some kind of appellate review, of class certification decisions.

The advisory committee concluded that class action certification decisions should be reviewable, but an absolute right of appeal should not be created. Rather, the rules should provide a type of appellate review akin to that provided in 28 U.S.C. § 1292, giving the appellate court discretion as to whether to entertain the review. The committee, though, would not require a certificate from the district court. Rather, a party would be allowed to petition the appellate court directly.

Judge Higginbotham stated that in the view of the advisory committee there was no need for appellate review of most class certification decisions, since most are routine in nature. The courts of appeals should have discretion to entertain those appeals that require consideration. He added that the appellate courts have an important role to play in the law of mass torts, and it would be beneficial for them to start producing a body of law in this area.

Professor Cooper added that there was less controversy over this issue than over any other raised before the advisory committee. There was general agreement that the courts of appeals could sort out the issues and prevent unnecessary appeals. The committee's proposal would be a modest expansion on 28 U.S.C. § 1292(b). Judge Higginbotham added that under the advisory committee's draft, an appeal would not stay a case. Professor Mooney pointed out that if the rule were to be approved, it would require a companion change in the Federal Rules of Appellate Procedure.

2. Requirement that a Class Action be both "Superior and Necessary"

Judge Higginbotham stated that the decision as to whether to allow a case to proceed as a class action should not be made as a matter of efficiency alone. Other, important values must also be considered. The advisory committee was considering whether the Rule 23(b) requirement that a class action be "superior" to other available methods for the fair and efficient adjudication of the controversy should be strengthened into a requirement that it be both "superior and necessary" to the case.

Judge Higginbotham stated that several lawyers had complained to the advisory committee that some courts act too quickly in certifying a class action. Many cases could continue to proceed as individual actions without class certification, particularly when there is enough money involved in each individual claim.

Some of the members questioned what the standard should be for "necessity" and pointed out that there were different kinds of necessity. Professor Hazard, for example, advised

that in some cases where each individual plaintiff's claim could be prosecuted separately, it still may be in the court's own interest and be more efficient to consider the many cases together. He suggested that the idea of looking at the merits makes some sense, but advised caution. It may be artificial to distinguish the notion of necessity or superiority from the issue of the merits of the case.

3. *Considering the Merits of the Case*

Judge Higginbotham stated that the advisory committee was considering whether a trial judge should in some fashion examine the merits of the case in making a class action determination. It had experienced difficulty, however, in attempting to calibrate the nature of the examination without causing other problems. For example, a judge's look at the strength of the case should not be allowed to become the actual determinant of the case. It also should not turn the certification proceeding into a minitrial, with additional discovery and more time for preparation.

The advisory committee had agreed tentatively to use a balancing test. One alternative the committee was studying was to require the court to make a finding that the claim is "not insubstantial" before certifying a class action. Some class actions produce great burdens, and the judge should have discretion to say that the class action simply comes at too high a price.

Professor Cooper added that the balancing approach would weigh the prospect of success on the merits against the burdens imposed by certification. He stated that the committee's goal was to provide a low threshold, but it had not yet chosen an alternative. He added that the committee was also examining a proposal that would give a court discretion to refuse certification if the benefits to individual class members from success on the merits would not be sufficient to justify the costs and burdens of administering the class action and distributing individual recoveries.

4. *Settlement Classes*

Judge Higginbotham stated that the advisory committee had not arrived at a conclusion as to whether settlement classes should be provided for explicitly in the rule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of December 4, 1995. (Agenda Item 11)

Judge Jensen reported that the advisory committee had no action items to present to the committee. He pointed out that the Advisory Committee on Criminal Rules and the Advisory

Committee on Civil Rules had conducted a joint public hearing in Oakland on proposed amendments to the rules concerning attorney participation in voir dire and 12-person juries in civil cases. He added that a second joint public hearing would be held in New Orleans and that the Advisory Committee on Civil Rules would hold another public hearing in Atlanta.

Judge Jensen stated that the advisory committee would present several proposed rule amendments at the June 1996 meeting of the Standing Committee. He noted that the criminal advisory committee was prepared to review the style consultant's proposed style revisions to the criminal rules, but that the style project would be put on hold until after completion of style revisions to the appellate rules. He also reported that the advisory committee would look further into the work of the local rules project regarding local district court criminal rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Berger reported that the advisory committee had no matters to present to the committee.

LONG RANGE PLANNING

Judge Easterbrook presented the report of the Subcommittee on Long Range Planning, including the subcommittee's December 1995 report, *A Self-Study of Federal Judicial Rulemaking*. He noted that the report was before the committee for the third time.

He pointed out that Recommendation 14, encouraging continuation of efforts to restyle the rules, had been revised to suggest that the experience gained in publishing the style revision of the Federal Rules of Appellate Procedure would permit the Standing Committee to decide how to proceed with style revision of the other sets of rules.

Judge Easterbrook noted that a significant change had been made in the study's treatment of the roles of the Supreme Court and the Judicial Conference. Recommendation 16 of the July 1995 draft of the study had recommended that the Court and the Conference consider whether it would be advisable to establish a public notice and written comment period during the Court's evaluation of proposed rules. The subcommittee deleted this recommendation in the revised draft because it concluded that another round of comments and changes would prolong unduly the rule-making process. The subcommittee then modified the text of the study to declare that much time is consumed for little purpose by having both the Court and the Conference pass on rules that have already been fully ventilated by the rules committees. Judge Easterbrook stated that many believe that involvement of the Supreme Court is indispensable to the process because the Court is the highest body in the judiciary and lends considerable prestige to the process. Therefore, if the Supreme Court were to retain its current role in the rules process, it might be appropriate to consider removing the Judicial

Conference as a separate step in the process.

Judge Easterbrook emphasized that the subcommittee had not made an explicit recommendation to eliminate the role of either the Supreme Court or the Judicial Conference. It had merely deleted Recommendation 16 and questioned the advisability of continuing the current roles of both the Court and the Conference. He added that the reporter to the Standing Committee would be collecting comments for consideration of the matter at the next committee meeting.

Professor Hazard moved that: (1) the subcommittee report be "accepted" by the committee, (2) that it be published as "received," and (3) that the subcommittee be discharged. He added that the committee should state explicitly that the report had been prepared for the edification of the committee, and that it reflected views received as part of the committee's process of seeking input on the operation of the rules process.

Mr. Spaniol suggested that the report not be "published" until the Chief Justice had reviewed and authorized it. Judge Easterbrook replied that it was appropriate for the subcommittee to make recommendations to the parent committee suggesting that the committee ask the Chief Justice to consider taking certain courses of action.

Mr. Lafitte suggested that the report be "received" by the committee for its own, internal consideration. **Justice Veasey recommended that the committees "receive" the report rather than "accept" it. Professor Hazard accepted this formulation as an amendment to his motion**.

Judge Ellis stated that he wanted assurance that the record reflect that the subcommittee report had been received for consideration and discussion, but that the committee had not yet acted on it. Judge Stotler pointed out that the full committee would look at the document again at the June 1996 meeting and that the members should read the latest draft carefully and submit to the reporter any comments they may have.

Judge Stotler called for the vote on Professor Hazard's amended motion to receive the report and discharge the committee. The committee approved the motion by a vote of 7-3.

SPECIAL STUDY CONFERENCE ON ATTORNEY CONDUCT

The committee sponsored a special study conference to discuss attorney conduct issues on Wednesday, January 11, 1996. Approximately 25 guests were invited to participate, including a cross-section of interested and knowledgeable attorneys, professors, representatives of professional organizations, and representatives of other Judicial Conference committees.

Because of the blizzard in the East and major disruption of air travel, several of the invitees were unable to be present.

Professor Coquillette reported that the special study conference had been very frank and useful. He added that he had spoken to the Department of Justice and others about holding another special study conference and made it clear that the committee would make no decisions on attorney conduct until after the second special study conference. He emphasized the sensitive nature of attorney conduct issues and advised that the committee move with caution.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the next meeting of the committee would be held on Wednesday through Friday, June 19-21, 1996, in Washington, D.C. The meeting would be preceded on Tuesday, June 18, by another conference on attorney conduct.

The committee fixed January 8-10, 1997 as the date for the next following meeting. The location for the meeting would be decided in the discretion of the chair.

Respectfully, submitted,

Peter G. McCabe,
Secretary