COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting on July 17 and 18, 1989

The summer 1989 meeting of the Judicial Conference Committee on Rules of Practice and Procedure was called to order at 9 a.m., July 17, at the Boston College Law School, Newton, Massachusetts, by its Chairman, Judge Joseph F. Weis, Jr. All members of the Committee were present except Gael Mahony, who was unavoidably absent.

Also attending were the Reporter to the Committee, Dean Daniel R. Coquillette of Boston College Law School; Judge Jon O. Newman, Chairman, and Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge John F. Grady, Chairman, and Paul D. Carrington, Reporter, of the Advisory Committee on Civil Rules; Judge Leland C. Nielsen, Chairman of the Advisory Committee on Criminal Rules; and Judge Lloyd D. George, Chairman, and Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules. Judge J. Frederick Motz of the District of Maryland also attended to participate in the discussion of the local rules project. Mary P. Squiers, Director of the Local Rules Project, and Professor Stephen Subrin, Consultant to the Local Rules Project, were present, as were James E. Macklin, Jr., Deputy Director of the Administrative Office and Secretary to the Committee on Rules of Practice and Procedure; Joe S. Cecil, Research Division, Federal Judicial Center; and David N. Adair, Jr., Assistant General Counsel of the Administrative Office.

I. Report on the Status of Committee Work

A. Appellate Rules - Judge Jon O. Newman

Judge Weis opened the meeting by calling on Judge Newman to present the work of the Advisory Committee on Appellate Rules, since Judge Newman had an engagement and would be unavailable on the second day of the meeting. Judge Newman reported proposed amendments to Appellate Rules 4, 28, 30, and 34. The amendment to Rule 4 would allow a district judge to reopen the time for appeal upon a finding that (a) notice of entry of judgment was not timely received and (b) no party would be prejudiced by the reopening. The proposed rule contains limitations on the time within which such a motion may be filed: the motion must be filed within 7 days of receipt of notice of the judgment or, if no notice is received, within 180 days of the entry of the judgment or order. The proposed procedure protects a winning party because the party may simply send a copy of the judgment to the losing party, which begins the running of the 7-day motion period. This amendment was originally submitted to the Standing Committee at its January 1989 meeting and was returned to the Advisory Committee for redrafting. The proposed amendment was approved by the Standing Committee for publication and comment.

Judge Weis pointed out that 28 U.S.C. § 2107 is arguably inconsistent with the proposal. Although the Rules Enabling Act, as amended, permits the amendment to Rule 4, Congress should be notified as to the pending amendment.

Judge Newman also reported that the Advisory Committee proposes to amend Appellate Rule 28 to require the parties to include a jurisdictional statement with their briefs and designate the party who files the first notice of appeal as appellant. The first amendment to Rule 28 was originally submitted to the Standing Committee at its January 1989 meeting and was returned for minor redrafting. The second amendment is intended to change the current rule, which provides that, unless the parties otherwise agree or the court otherwise orders, the plaintiff is deemed the appellant for purposes of briefing, preparing the appendix, and oral argument. The change provides that the party who first files the appeal is the appellant. The Standing Committee approved the amendments to Rule 28 for publication and comment.

Appellate Rule 30(b) would be amended to require a cross-appellant to serve the appellant with a statement of the issues to be explored in the cross-appeal. The amendment was approved for publication and comment.

Appellate Rule 34(d) would be amended to conform that rule to the amendment to Appellate Rule 28 regarding cross-appeals. The amendment was approved for publication and comment.

Judge Newman noted an inconsistency between Federal Rule of Appellate Procedure 4(a)(1) and 28 U.S.C. § 2107. The third paragraph of section 2107 provides that admiralty appeals must be filed within 90 days of a final judgment and within 15 days of an

interlocutory order. Rule 4(a)(1) sets a 30-day limit for filing civil appeals except when the United States is a party, in which case the appeal must be filed within 60 days. Although it seems clear that the Rule supersedes the section 2107 provision, the inconsistency causes confusion. The Standing Committee agreed to recommend that the Judicial Conference suggest that Congress repeal the third paragraph of section 2107.

Judge Newman also reported that the American Bar Association had requested the Advisory Committee to consider amending Appellate Rule 35(a), which deals with en banc review. The Advisory Committee will take up this issue, including whether it is a question of jurisdiction to be left to Congress. Professor Wright suggested that the Judicial Conference may have taken a position that this change should be accomplished by statute. Judge Newman agreed that the Advisory Committee would consider that issue.

B. Civil Rules - Judge John F. Grady

Judge Grady noted that much of the material before the Standing Committee was identical to the material presented at the January meeting, with the suggestions made at that meeting by the Standing Committee incorporated and with some new materials added. Judge Grady called upon Dean Carrington, the Reporter to the Advisory Committee, to explain the proposed amendments.

Dean Carrington briefly described the proposed amendments to Civil Rule 4, which completely rewrite the current rule. Proposed Rule 4(d) would create a new procedure whereby defendant could be requested to waive service of a summons unless the defendant is an infant, is incompetent, or is a Government entity. Judge Pointer suggested that amended Rule 4(d)(2) was ambiguous as rewritten. The intent of the amendment is that the provision, designed to avoid cost of service by waiver, does not apply to infants or incompetent persons but does apply to corporations and other business associations. It was agreed that the rule would be modified to clarify that intent.

Professor Carrington noted that a letter had been received from the Attorney General expressing concern about the proposed amendment to Rule 4 that would eliminate multiple service on the United States. The Advisory Committee had considered the concerns of the Department of Justice, but concluded that they were not sufficiently significant to warrant a continuation of the requirement for multiple service. Judge Grady noted that, since the Government cannot be defaulted, the objection appeared trivial. Judge Pointer suggested that the rule simply require that a plaintiff serve two copies of the summons and complaint on the Government. The Standing Committee voted to accept Judge Pointer's recommendation, but Judge Keeton moved to reconsider, suggesting that the proposed amendment be left as is, but with the understanding that the Attorney General be asked if the

Department's concern would be alleviated by a requirement that two copies be served and a requirement that the Attorney General receive notice prior to any entry of judgment. The Standing Committee agreed to Judge Keeton's proposal.

In response to Judge Weis' question concerning the effect the proposed amendments to Rule 4 would have on bankruptcy procedure, Professor Resnick stated that the Advisory Committee on Bankruptcy Rules would study the amendments to Rule 4 since Rule 4(d) was incorporated into the bankruptcy procedure for contested matters. The new option of avoiding formal service could slow down the adjudication of such a contested matter. Judge Keeton pointed out, however, that this result could be avoided simply by using another service option if speed is required.

Dean Carrington noted that proposed Rule 4.1 was a new rule and was approved by the Committee at its January 1989 meeting.

Proposed Rule 5 is also a new rule which would authorize the use of electronic or other methods of service of papers on opposing parties and counsel. The rule would also prohibit a clerk from refusing filings simply for non-conformance with certain technical standards. Judge Barker expressed concern that the rule could be misunderstood to make such standards, in effect, optional. Professor Wright suggested that the Advisory Committee Notes address this concern and make clear that the district court does have authority to refuse such filings.

Judge Weis suggested further that the Advisory Committee Notes include a statement that a clerk could require a party to file a supplemental pleading in proper form.

Dean Carrington noted that no proof of service was required in proposed new Rule 5. Judge Keeton suggested that it was unnecessary to expand files with unnecessary proof of service forms, when such forms could be provided if service was challenged. Judge Weis noted that the elimination of proof of service requirements was included in an administrative rule that was published for comment and that it received an adverse reaction. The Committee agreed that a provision would be added to the proposed rule to require a certificate setting out the date and manner of service.

Dean Carrington explained that the proposed amendment to Rule 12 was technical and had been previously approved by the Committee at its January meeting. The proposed amendment to Rule 14 would assure that third party defendants are provided with copies of the pleadings filed previous to the third-party complaints. Judge Pointer suggested that the amendment as proposed could present a burdensome requirement to third-party plaintiffs, given the volume of pleadings in certain cases. Mr. Bader indicated that he would not want to leave the decision to a third-party plaintiff whether to include or omit certain documents.

Judge Grady noted, with respect to the proposed amendment to

Rule 15, that some had argued that lines 22 through 25 of the proposed amendment should be stricken as redundant in light of other proposed amendments to that section. Those lines contain a requirement that, in order that amendments to the pleadings relate back to the original pleadings, the party to be brought in by the amendment either must have known or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. Professor Carrington stated that the retention of this provision made clear that the intent of the proposed amendments was not to make changes in statutes of limitations, but to deal with the effectiveness of pleadings. Judge Pointer suggested that the provision was not wholly redundant and that public comment might shed some light on whether this provision should be retained.

Dean Carrington noted that the proposed amendment to Rule 16(b) was to establish a more rational period of time for scheduling the pretrial conference. The amended rule would provide for scheduling within 60 days after service of an opposing party, instead of 120 days after filing. The proposed revision to subdivision (d) is derivative of the proposal to be made with respect to Rules 50, 52, and 56.

The proposed amendments to Rules 16 and 56 would permit the court, under certain circumstances, to consider summary judgment at the pretrial conference on its own motion. Dean Carrington noted that the current Rule 56 requires a motion by one of the

parties. Judge Pointer expressed concern that the amendment would permit the court to enter summary judgment without the parties having specific notice of the issues subject to summary judgment and suggested that the proposed amended rule contain a provision to require such notice. Mr. Bader echoed that concern, and indicated that the bar would probably prefer some type of notice. Judge Grady proposed that any change require "appropriate notice" because there are some circumstances that would justify entry of summary judgment without notice. Judge Weis suggested that the phrase, "adequate notice," was better. Dean Carrington agreed that this change would be made. Judge Keeton suggested that the phrase, "extrajudicial procedures," which appears in paragraph 7 of proposed Rule 16(c), was ambiguous and too narrow. Judge Grady agreed that this provision should be clarified.

The proposed amendment to Rule 24 adds reference to 28 U.S.C. § 2403, which requires notice to the State Attorney General of an action involving the constitutionality of any state statute. The amendment would require the court to provide such notice. Judge Keeton suggested that counsel be required to bring this requirement to the attention of the court. Dean Carrington agreed that language would be added that counsel should advise the court of its obligation under the statute.

Dean Carrington noted that the proposed amendments to Rule 26(a) had been before the Committee before. The amendment

incorporates the concerns expressed by the Standing Committee in January regarding inequitable discovery methods. The proposed amendment to Rule 26(b) would impose on parties asserting privileges a duty to disclose as much information as can be disclosed without compromise of the privileges.

The amendments to Rule 28 were approved at the January meeting.

Dean Carrington explained that the purpose of the proposed amendments to Rule 30 was to facilitate the use of videotape and other modern methods of recording testimony at depositions. Although the party taking the deposition would designate the method of recording, any other party could designate another method at that party's expense.

The proposed amendments to Rules 34 and 35 had previously been approved by the Standing Committee. The proposed amendment to Rule 38 was suggested by the local rules project. The proposed amendment to Rule 41 relates to the amendment to Rule 52(c). The proposed amendment to Rule 44 was approved by the Committee in January.

The proposed amendment to Rule 45 was before the Standing Committee in January. Dean Carrington described the discussion at that meeting about the requirement that a witness be required to travel anywhere in the state in response to a subpoena served in that state. He explained that the proposed amendment now provides that the court may impose the full cost of the

inconvenience on the party requiring travel more than 100 miles. The provisions would also apply to parties and non-parties alike. Judge Pointer asked whether the proposed amendment should include a provision that permitted the service of a subpoena by the same means permitted for the service of the summons and complaint. Judge Weis suggested that any such change should relate to other types of subpoenas as well. Dean Carrington added that any such change should involve a study of all of the rules. It was agreed that the amendment would go forward as proposed.

The proposed amendments to Rules 47 and 48 were approved by the Committee in January. The amendments would, inter alia, give the court discretion to fix the size of the jury; but no fewer than six could be seated. Professor Wright suggested that the Advisory Committee Notes should explicitly indicate that the parties may stipulate to a jury of less than six. Judge Pointer suggested that the comment should also make clear, when jurors are dismissed, that, without a stipulation by the parties, there must be at least six jurors left to decide the case.

The proposed amendment to Rule 50 completely rewrites section (a) to enable the court to render a judgment at any time during a jury trial when it is clear that a party is entitled to such a judgment. The proposed amendment also, by eliminating standard terminology, avoids the technical anachronisms inherent in directed verdicts and judgments n.o.v. The amendment would

articulate the standard for entry of judgment that is currently set out in case law in the rule. Judge Keeton asked about the use of special interrogatories under the proposed amendment. Dean Carrington explained that the notes could stipulate that this option was still available. Judge Pointer expressed concern that it is not clear that the revised rule would permit the court to take away from the jury an issue that is not determinative of the case. Judge Lively opined that if the judgment does not deal with the whole case, it should not be entered under the provisions of Rule 50. Dean Carrington agreed that this could be done under the provisions of revised Rule 56. But Judge Pointer noted that Rule 56 as it is proposed to be amended only permits judgments on motions or at the pretrial conference. After additional debate, Judge Pointer withdrew his objection, noting that his concern did not relate to Rule 50(a), which deals with motions for judgments during trial, but to paragraph (b), which deals with motions for judgment after trial. Proposed Rule 50(b), Judge Pointer agreed, is stated in sufficiently broad language to cover nondeterminative motions. Dean Carrington agreed to add a note making this clear. Judge Keeton suggested and the Committee agreed to add a sentence to proposed Rule 50(b) to make clear that a judge could disregard any determination made by the jury without an evidentiary basis.

Dean Carrington noted that the proposed revision to Rule 52 parallels the proposed amendment to Rule 54, for non-jury

trials. The proposed amendment to Rule 53, which requires a special master to transmit his report to the parties, was suggested by the local rules project.

Dean Carrington noted that one of the purposes of the proposed amendment to Rule 56 was to enable the court to confine discovery by deciding certain issues of fact and law at an early stage in the proceedings.

Judge Keeton expressed concern that proposed Rule 56(a)(2)(B), which requires that a motion to establish an issue of law be accompanied by a statement of the issues of fact that would be made immaterial by such a ruling, was unduly burdensome and unnecessary. The Committee agreed that that subsection would be stricken. Judge Keeton suggested that in line 126 of the proposed rule, dealing with what may be relied upon to support or oppose summary establishment of fact, the words "or disprove" should be added to the phrase, "prove the fact to be established . . . ." The Committee agreed to add the phrase.

Dean Carrington noted that the remaining proposed amendments had all been previously approved by the Committee. Judge Pratt suggested that the language in the note to proposed Rule 63 was too strong in that it stated that a substitute judge could never make a determination on the credibility of a witness not seen or heard. The Standing Committee agreed to an appropriate modification of the note.

The Standing Committee approved for publication and public comment the amendments proposed by the Advisory Committee to Civil Rules 4, 5, 12, 14, 15, 16, 24, 26, 28, 30, 34, 35, 38, 41, 44, 45, 47, 48, 50, 52, 53, 56, 63, 72, 77, Admiralty Rules C and E, and new Rule 4.1.

C. Study of Local Court Rules and Proposed Civil Rule 84 - Dean Daniel R. Coquillette and Mary P. Squiers

Dean Coquillette reported that some misunderstanding about the scope of the Local Rules Project had arisen as a result of the distribution of local rules materials to the courts. The project proposes a uniform numbering system based on the numbering system of the Federal rules. The Judicial Conference has specifically endorsed only this aspect of the Local Rules Project. Dean Coquillette explained that the purpose of using the Federal rules model was its familiarity. He also noted that in order for judicial councils to comply with their duty to review local rules, a uniform numbering system is necessary. The local rules treatise identifies those local rules that, in the opinion of the Local Rules Project, should be reconsidered. Apparently some judges believed that the Judicial Conference intended to rescind local rules called into question by the project. Of course, judicial councils can rescind local rules, but the treatise is designed only to provide assistance in reviewing local rules.

Dean Coquillette emphasized that the administrative manual and the revisions to Rule 84 designed to create the authority for such a manual are separate and distinct from the Local Rules Project. Judge Weis noted that, at the Fourth Circuit Judicial Conference, the District Judges Association passed a resolution disapproving the recommendation for the numbering system, the administrative manual, the rescission of local rules, and the promulgating of rules limiting the number of interrogatories. Judge Weis had, therefore, invited Judge Motz of the District of Maryland to speak on behalf of the Fourth Circuit Judicial Council.

Judge Motz expressed concern that his district had just completed a review of their local rules, had considered the Federal rules numbering system and declined to use it. They had determined that a numbering system based on the "phases of litigation" was superior. He explained that local rules deal with many issues not covered in the Federal rules and suggested that a cross-index to the Federal rules is a better approach. Judge Motz noted that the implication that the Judicial Conference would rescind local rules had been insulting because the process by which districts promulgate their local rules is a responsible one. He also expressed some disagreement with the model local rules themselves.

Dean Coquillette noted that there are problems with cross-referencing unless the use of the cross-reference citation is in

the rule itself. Otherwise, rules would not be retrievable in computer-aided legal research systems. Judge Weis pointed out that the project will also include Appellate and Criminal Rules, and it is useful to have consistent uniform numbering systems throughout the rules.

Judge Pointer expressed concern about whether a uniform numbering system based on the Federal rules is the best numbering system. Professor Wright suggested that a Federal rule-based uniform numbering system is workable for the Appellate Rules but very different for the Civil Rules. He also noted that many local rules apply both to criminal and civil matters. Judge Newman pointed out that a local rule may touch on a number of national rules. If the local rule is listed under only one of the uniform numbers, the purpose of the system is defeated because the other subject could not be found by use of the numbering system. Judge Pointer suggested further study to determine whether there are superior numbering systems.

Judge Weis pointed out that the advantage of using the Federal numbering system is that it is logical, familiar, and that it has already been approved by the Conference and sent to the courts. Mary Squiers noted that most other numbering systems were simply sequential and not based on any system. Judge Lively suggested that to reverse field at this point would be a mistake. A uniform system is needed for oversight by the circuit councils, and the Federal-based system has already been sent out

for consideration. Fine-tuning of that system could be done as more information is gathered. The Chairman surveyed the members of the Committee, and the majority agreed that the Federal-based system should be retained.

With respect to proposed new Rule 84, Judge Weis indicated that, although the administrative rules contemplated to be promulgated under Rule 84 were innocuous and were not appropriate for consideration by Congress, there have been objections that proposed Rule 84 goes beyond the Rules Enabling Act. Professor Stephen Burbank of the University of Pennsylvania, for example, has suggested that since an administrative rule promulgated under the authority of proposed Rule 84 could supersede a local rule, it is a national rule and should therefore be promulgated under the normal rulemaking process. Judge Pointer disagreed with that view, particularly since the circuit councils now have the authority to abrogate local rules. Judge Wiggins suggested that the Committee should go ahead with Rule 84 and Congress could take action if it disagreed.

Judge Barker suggested that the administrative rules be set out as part of the Model Local Rules. Judge Lively agreed with this suggestion and noted that Rule 84 had caused a firestorm of concern that could jeopardize the entire Local Rules Project. Professor Wright agreed with Judge Lively, noting that the project is one of the most important activities recently undertaken by the Standing Committee, and urged that every effort

should be taken to avoid jeopardizing the project. The Committee agreed to refer the proposed Rule 84 to the Civil Advisory Committee. It was suggested that the Advisory Committee circulate the administrative manual to the circuit executives for study and comment.

D. Criminal Rules - Judge Leland C. Nielsen

Judge Nielsen asked on behalf of the Advisory Committee that the Standing Committee approve two amendments to the Criminal Rules for publication and public comment. The proposed amendment to Rule 16(a)(1)(A) would expand the prosecution's duty to notify the defense of oral statements made by the accused pursuant to an interrogation. The current rule requires only that the prosecution give notice of those oral statements which it intends to offer. The amendment would extend that requirement to any oral statements of which a written record has been made. Judge Pointer suggested that the proposed language is ambiguous with respect to what is required to be disclosed in the situation where there is no written record of an oral statement, and how the oral statement is to be disclosed. After several suggested changes were rejected by the Standing Committee, Judge Nielsen indicated that the rule would be withdrawn for redrafting in light of that concern.

Judge Nielsen advised that the Advisory Committee also requested approval of an amendment to Federal Rule of Evidence

404(b), which would require the prosecution, upon request by the defense, to give pretrial notice to the defense of its intent to use evidence of other crimes, wrongs, or acts committed by the accused. Judge Pointer asked why this notice requirement was placed in Evidence Rule 404(b), when it is actually a notice requirement of the kind generally included in Criminal Rule 16. Judge Nielsen explained that Rule 404 is more specific to the issue. Judge Wiggins expressed concern that, since the provision is a notice requirement, the sanction generally available for violation of rules of evidence, namely the exclusion of the evidence, would not always be appropriate. Judges Weis, Keeton, and Barker suggested that the provision was better placed in Criminal Rule 16. Judge Nielsen agreed to return the rule to the Advisory Committee for further consideration.

The proposed amendment to Federal Rule of Evidence 609(a) was approved by the Standing Committee in January but was held up pending the Supreme Court's decision in Green v. Bock Laundry Machine Company. Judge Nielsen asked that, since the Supreme Court had decided the case, the Standing Committee recommend to the Conference approval of the amendments for transmittal to the Supreme Court. Professor LaFave pointed out that the thrust of the rule change was actually to create three categories of evidence: evidence that a witness other than an accused has been convicted of a crime if the crime was a felony, evidence that an accused has been convicted of a felony, and evidence that a

witness has been convicted of a crime involving dishonesty or false statement. He suggested that the rule be so organized, instead of grouping these three types of evidence into only two categories. After discussion, the Standing Committee agreed to leave the language of the amendment as proposed by the Advisory Committee.

Judge Wiggins expressed concern that the definition of the term "dishonesty" in the notes should specify that larceny and other such crimes are not crimes of dishonesty. It was agreed that the note so stipulate. It was also agreed that the notes would make a stronger statement regarding decisions that take an unduly broad view of the definition of "dishonesty." The Committee voted to send the amendments to Rule 609 to the Conference with the suggestion that they be approved and sent to the Supreme Court for its consideration with a recommendation they they be approved by the Court and transmitted to Congress pursuant to law.

Judge Nielsen noted that a proposed amendment to Rule 41(a) and new Rule 58, dealing with magistrate procedures, had been circulated for comment. The comment period is over in November, and the Committee will consider any comments on these proposed changes at its meeting in November.

E. Bankruptcy Rules - Judge Lloyd D. George

Judge George advised the Standing Committee that the

Advisory Committee on Bankruptcy Rules has met eight times in the last eighteen months and has considered hundreds of proposals to amend the Bankruptcy Rules. The primary goal of this amendment process was to deal with the changes imposed as a result of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554. Judge George expressed appreciation for the work of the Reporter to the Advisory Committee and for that of Reese Bader, the liaison with the Standing Committee. He also reported that a representative of the United States trustees was present at most of the meetings, and that representatives of the court clerks had been invited and had attended some meetings.

Professor Resnick explained that the United States trustee system is designed to take away from bankruptcy judges the administrative and supervisory tasks of bankruptcy and place them in the Executive Branch. In 1986 the original pilot program for United States trustees created in 1978 was expanded and made permanent. It now applies nationally with the exception of North Carolina and Alabama, which may be included at a later date. Part X of the Bankruptcy Rules was added in 1983 to deal with the 1978 pilot program. Now that the system is national, Part X must be integrated into the rest of the rules. In addition, the rules had to be adjusted to take into account the right of the trustee to be heard. The rules also had to be amended to take into consideration new chapter 12, dealing with bankruptcies and

family farms. Finally, amendments were required to take into account the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-361.

Judge Weis asked whether the proposed amendment to Rule 7004 should be reconsidered in light of the amendments to Federal Civil Rule 4(d). Professor Resnick explained that Rule 4 is incorporated by reference and that, therefore, the amendment to Rule 4 could cause some bankruptcy ramifications. Nonetheless, Rule 7004 could go forward for comment with a note that it might be modified in conformity with the amendments to Civil Rule 4 insofar as is necessary. Judge George also pointed out that Rule 9014, which deals with contested matters, incorporates Rule 7004 and, accordingly, Civil Rule 4. The primary concern is that any additional delay created by the amendment to Rule 4 could impact significantly on contested matters in bankruptcy.

Judge Pointer asked whether the citation to the Federal Rules of Civil Procedure in the Bankruptcy Rules is consistent with other rules. Judge George agreed to study the question. The Committee agreed that the proposed amendments would be circulated for public comment.

Judge George asked whether the Committee wished to suggest an amendment to 28 U.S.C. § 2075 to make it consistent with section 2074. The difference in the sections creates, inter alia, a different effective date for bankruptcy rules. Professor

Wright pointed out that the Supreme Court has the authority to stipulate an effective date later than the earliest effective date set out in the statute. Judge Weis added that any amendment would raise a supersession question and that perhaps it would be better to leave the rule as it is. The Standing Committee agreed that no change is required at this time.

II. Proposed Expedited Procedure for Promulgating Rules - David N. Adair, Jr.

Mr. Adair reported that the Department of Justice had requested the Committee to consider an amendment to the Rules Enabling Act to provide for an expedited rulemaking procedure for rules that are deemed to require faster processing than the current procedure allows. Judge Wiggins noted that the cumbersomeness of the rulemaking process is sometimes a problem and that this problem results in Congress avoiding the rulemaking process in some situations. Accordingly, the Committee should consider an expedited procedure. Judge Weis suggested, and the Standing Committee agreed, that the matter should be considered further.

III. New Business

There was no new business.

IV. Time and Place of Next Meeting

The Committee agreed that there was no necessity for a meeting in January 1990 due to lack of business.

Respectfully submitted,

Joseph F. Weis, Jr., Chairman
Pierce Lively
George C. Pratt
Charles E. Wiggins
Sarah Evans Barker
Robert E. Keeton
Sam C. Pointer, Jr.
Edwin J. Peterson
W. Reece Bader
Wayne R. LaFave
Gael Mahony
Charles Alan Wright

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