COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

MINUTES of the Meeting of January 8-9, 1998

Santa Barbara, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Barbara, California on Thursday and Friday, January 8-9, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair

Judge Frank W. Bullock, Jr.

Professor Geoffrey C. Hazard, Jr.

Judge Phyllis A. Kravitch

Gene W. Lafitte, Esquire

Judge James A. Parker

Sol Schreiber, Esquire

Judge Morey L. Sear

Alan C. Sundberg, Esquire

Judge A. Wallace Tashima

Chief Justice E. Norman Veasey

Judge William R. Wilson, Jr.

Associate Attorney General Eileen C. Mayer represented the Department of Justice at the meeting. Member Patrick F. McCartan, Esquire was unable to be present.

Participating in the meeting, at the request of the chair, were Judge Frank H. Easterbrook, former member of the committee, and Judge Harry L. Hupp, representing the Judicial Conference Committee on Court Administration and Case Management.

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; and Mark D. Shapiro, senior attorney in that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules -

Judge Will L. Garwood, Chair

Professor Patrick J. Schiltz, Reporter

Advisory Committee on Bankruptcy Rules -

Judge Adrian G. Duplantier, Chair

Professor Alan N. Resnick, Reporter

Advisory Committee on Civil Rules -

Judge Paul V. Niemeyer, Chair

Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -

Judge W. Eugene Davis, Chair

Professor David A. Schlueter, Reporter

Advisory Committee on Evidence Rules -

Judge Fern M. Smith, Chair

Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the Local Rules Project; and Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler introduced the new advisory committee chairs -- Judge Garwood of the Advisory Committee on Appellate Rules and Judge Davis of the Advisory Committee on Criminal Rules-- and the new advisory committee reporter -- Professor Schiltz of the Advisory Committee on Appellate Rules. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

September 1997 Judicial Conference Action

Judge Stotler reported that the committee's September 1997 report to the Judicial Conference had been placed on the Conference's consent calendar and all its recommenda-tions approved without change. The proposed rules amendments in the report had been submitted to the Supreme Court shortly after the Conference meeting and were scheduled to take effect on December 1, 1998.

Judge Stotler added that the members of the committee had been provided with copies both of the committee's report to the Conference and the package of amendments and supporting materials transmitted to the Supreme Court in November 1997. She noted that she had included in the Supreme Court package a memorandum to the justices summarizing the amendments and inviting them to contact her or the advisory committee chairs for any assistance. She said that the Court had not yet acted on the amendments.

Judicial Conference Committee Practices and Procedures

The committee considered suggested changes in Judicial Conference committee practices and procedures and authorized the chair to communicate the committee's views to the Executive Committee of the Conference.

Federal Courts Improvement Act

Judge Stotler reported that the Executive Committee of the Judicial Conference had asked each committee of the Conference to review the Federal Courts Improvement Act of 1997 -- a comprehensive compilation of various legislative recommendations approved by the Judicial Conference -- and to identify any provisions that should be deleted from the bill. The Executive Committee advised that it intended to conduct similar reviews of all pending Conference legislative positions contained in future court improvements acts at the beginning of each Congress with a view towards eliminating any provisions that are no longer needed or have virtually no chance of being enacted.

Several members expressed support for this new procedure. None of the members, however, identified any provision in the current legislation that should be deleted.

Authority of the Federal Judicial Center and the Administrative Office

Judge Stotler reported that an ad hoc committee of the Judicial Conference had been appointed to consider two motions forwarded by the director of the Federal Judicial Center regarding: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training, and (2) the creation of a special mechanism to resolve disputes between the two organizations. She advised that she had asked Chief Judge Sear to appear before the ad hoc committee as the representative of the rules committees to address the potential impact of these proposals on the work of the rules committees. She added that Chief Judge Sear had spent considerable time studying the history of these matters and had served on the Judicial Conference, its Executive Committee, and several other Conference committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 19-20, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 18 bills had been introduced in the Congress that would impact, directly or indirectly, on the federal rules and the rules process. A status report of each bill had been included in Agenda Item 3A.

He pointed out that the Civil Justice Reform Act of 1990 had expired generally on December 1, 1997. The Congress, however, had recently amended the Act's sunset provision to make 28 U.S.C. § 476 a part of

permanent law, thereby requiring continued public reporting of individual judges' pending motions, trials, and cases. The Congress also had continued 28 U.S.C. § 471 into permanent law, requiring each district court to implement a civil justice expense and delay reduction plan. Judge Hupp reported that the Court Administration and Case Management Committee had on its pending agenda a proposal to seek legislation repealing 28 U.S.C. § 471.

Professor Coquillette advised that it had been anticipated that local Civil Justice Reform Act plans would all sunset in 1997. Thereafter, local procedural provisions would have to be promulgated formally as local rules through the process specified in the Rules Enabling Act. He suggested that the continuation of 28 U.S.C. § 471 by the Congress could create mischief because it might be argued that courts could continue to operate under local plans that are inconsistent with the national procedural rules.

Mr. Rabiej stated that comprehensive crime control legislation had been introduced in the Congress that would impact on both the criminal rules and the evidence rules. He added that the Advisory Committee on Criminal Rules and the Advisory Committee on Evidence Rules had considered the proposed legislation at their fall meetings. An analysis of the pertinent provisions in the legislation was contained in correspondence from Judge Stotler to Senator Hatch and set forth in Agenda Item 3A.

Mr. Rabiej reported that several bills had been introduced in the Congress to provide constitutional or statutory rights to victims of crimes. He noted that the bills, among other things, would give victims the right to notice of court proceedings and the right to address the court.

He pointed out that, at the request of the Department of Justice, civil forfeiture legislation had been introduced that would, among other things, alter the time limits set forth in the admiralty rules and conflict with proposed amendments to those rules recently approved by the Advisory Committee on Civil Rules. He noted that the Department of Justice was working with the advisory committee to ensure that the differences between the proposed legislation and the admiralty rules were eliminated.

Mr. Rabiej reported that recently introduced legislation would enact, with style revisions, the committee's proposed new Fed. R. Crim. P. 32.2, governing criminal forfeiture proceedings. He pointed out that the committee had published the rule for public comment in August 1997, and Judge Stotler had written to the chairman of the House Judiciary Subcommittee on Crime requesting that he defer action on the bill until the rulemaking process has been completed and the bench, bar, and public have an opportunity to review and comment on the rule.

Finally, Mr. Rabiej reported that Representative Howard Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, had written to Judge Niemeyer, chair of the Advisory Committee on Civil Rules, requesting that the committee delay consideration of any changes in the copyright rules in order to allow Congress to consider the need for changes in substantive law.

Administrative Actions

Mr. Rabiej reported that his office had assembled a docket of all actions of the Advisory Committee on Evidence Rules over the past four years, and it had updated the dockets for the other advisory committees. He stated that a letter was being circulated for approval requesting that courts send their local rules to the Administrative Office in electronic format for posting on the Internet. Finally, Mr. Rabiej stated that the Administrative Office had compiled and published the committee's working papers on attorney conduct and was proceeding to compile the working papers of the Advisory Committee on Civil Rules on its discovery project.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, she noted that substantial progress had been made in installing the judiciary's new satellite television facilities and that the Center was producing many new seminars and television programs, including programs on evidence and voir dire.

Mr. Willging stated that the Research Division of the Center had conducted a national survey of 2,000 lawyers in recently terminated civil cases (of whom 59% responded), examining the frequency and nature of problems in discovery, the impact of the 1993 amendments to the civil rules, and the need, if any, for additional rules changes. He said that the lawyers reported that comparatively little discovery activity occurred in the great majority of cases. Moreover, the cost of discovery was generally about 50% of the total litigation cost and about 3% of the financial stakes in the litigation.

The attorneys reported that they had experienced relatively few problems with discovery in general. Most of the problems they had in fact encountered appeared to have occurred in large, complicated cases, where both contentiousness and financial stakes were high.

Mr. Willging said the survey had disclosed that mandatory disclosure procedures were in wider use than previously thought. Even in districts opting out of Fed. R. Civ. P. 26(a), a sizeable number of the judges imposed mandatory disclosure. The Center, he noted, had found that a majority of the lawyers responding to the survey reported that they had not experienced any measurable effect from mandatory disclosure. But a majority of those reporting an effect stated that mandatory disclosure had been favorable in reducing cost and delay, in promoting settlement, and in increasing procedural fairness.

He reported that the Center had been unable to replicate the finding of the RAND Civil Justice Reform Act study that early discovery cutoffs are related to reducing cost and delay. The Center had not found any statistically significant or otherwise meaningful correlation between the length of the discovery cutoff period and litigation costs or the time to disposition of civil cases. He concluded that in the absence of further research, the empirical data did not support imposing national discovery cutoffs.

Mr. Willging further reported that the Center was in the process of analyzing experiences in districts that have imposed less restrictive disclosure requirements than Fed. R. Civ. P. 26(a), *i. e.*, requiring disclosure only of information supporting a party's claim or defense. The Center is also analyzing local rules and general orders that impose specific limits on interrogatories and depositions.

One member of the committee suggested that there was a need for the civil rules to address the issues of discovery conducted by court-appointed experts. Mr. Willging noted that the Center was examining the use of court-appointed experts in the breast implant cases.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of November 14, 1997. (Agenda Item 5)

He reported that, after four years of work, the advisory committee had completed its restyling of all the appellate rules. The package of proposed amendments had been approved by the Judicial Conference in September 1997 and forwarded to the Supreme Court.

Judge Garwood said that the advisory committee had handled a large agenda at its September 1997 meeting,

consisting of a general review of all matters still pending on its docket. The committee eliminated many items from the docket, identified several items that merited further study, and established priorities for future committee agendas.

He pointed out that the advisory committee had approved a change in Fed. R. App. P. 31, to require that briefs be served on all parties. But the committee decided as a matter of policy not to forward any further rules changes to the Standing Committee until the restyled appellate rules have been in effect for a while.

Judge Garwood reported that the advisory committee was considering the advisability of uniform national rules on the publication of court opinions that would address, among other things, such issues as the precedential effect, if any, of unpublished opinions. He noted that the subject matter is addressed in many local rules of the circuits, but those rules conflict with each other in several respects. He added that the Court Administration and Case Management Committee was also looking into the matter, and that he had conferred with Judge Brock Hornby, chair of that committee. They had agreed that it was appropriate for both committees to examine the subject, but the Advisory Committee on Appellate Rules might have a more immediate concern because it is covered in local circuit court rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of December 2, 1997. (Agenda Item 6)

Judge Duplantier reported that the advisory committee had no action items to present. He noted that a package of bankruptcy rules amendments effect on December 1, 1997. Another set of 16 proposed amendments had been published for comment in August 1997 and would be considered at the advisory committee's March 1998 meeting.

He noted that the advisory committee had a major project underway to revise the litigation provisions of the Federal Rules of Bankruptcy Procedure. He explained that the project had emanated from a survey of bankruptcy judges and lawyers conducted by the Federal Judicial Center in 1996. The results of the survey showed that there was general satisfaction with the substance and organization of the bankruptcy rules, but significant dissatisfaction was expressed with the rules governing motion practice.

Judge Duplantier stated that the project of rethinking and reorganizing the litigation rules was very complex and controversial. It had taken up a great deal of the committee's time over the past two years.

Professor Resnick stated that the revisions that the advisory committee was considering would not affect adversary proceedings, which are akin to civil cases in the district courts and are governed largely by the Federal Rules of Civil Procedure. Rather, the proposed amendments would materially change the procedures for handling (1) routine administrative matters that are usually unopposed, and (2) "contested matters." He explained that the latter category of bankruptcy matters are usually initiated by motion, but are not like motions filed in the district courts. They may involve complex disputes that are unrelated to any other litigation in a bankruptcy case.

Professor Resnick reported that the advisory committee was in the process of considering the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations. He pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code, which -- if enacted -- would eventually require conforming changes to the rules. He noted, for example, that the report recommended giving Article III status to bankruptcy judges. If signed into law, this provision would likely eliminate the need

in both the Code and the rules for maintaining distinctions between "core" and "non-core" proceedings.

Other Commission recommendations were directed expressly to the Advisory Committee on Bankruptcy Rules and called for specific changes in the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms.

Professor Resnick stated that he was in the process of drafting a report on the Commission's recommendations for the advisory committee's consideration at its March 1998 meeting. He added that it was unlikely that there would be a single, comprehensive bill introduced in the Congress to enact all the recommendations of the Commission. Rather, several bills are likely to be introduced by various members of Congress, incorporating some of the Commission recommendations and offering other proposals contrary to the Commission's recommendations.

He reported that the advisory committee has also been considering proposals to improve the effectiveness of notices to governmental units in bankruptcy cases. He pointed out that, under current practice, governmental offices experience difficulties in having bankruptcy notices routed to them in time to take appropriate action in a case. He added that the advisory committee had been dealing with this problem for some time and that, at the committee's invitation, the chairman of the bankruptcy commission had attended committee meetings and presented their views and proposed solutions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of December 8, 1997. (Agenda Item 7)

Amendments to the Admiralty Rules

Judge Niemeyer reported that the advisory committee was seeking the Standing Committee's approval to publish proposed amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims and a conforming amendment to Fed. R. Civ. P. 14. He explained that the changes had been prompted in large part by the increasing use of admiralty in rem procedures in civil forfeiture proceedings.

Judge Niemeyer explained that the proposed amendments had been prepared over a long period of time with the assistance of a special subcommittee, chaired by advisory committee member Mark Kasanin. He said that the subcommittee had worked from proposals drafted by the Maritime Law Association and the Department of Justice, and it had analyzed and monitored proposed civil forfeiture legislation pending in Congress. He added that the chair of the Maritime Law Association's rules committee and a representative of the Department of Justice had participated in the advisory committee's October 1997 meeting.

Professor Cooper explained that there had been increased use of the admiralty in rem procedures for drug-related civil forfeiture proceedings. The advisory committee determined, however, that there was a need to make certain distinctions in the rules between pure admiralty proceedings and forfeiture proceedings. To that end, the proposed amendments would provide a longer time to respond in forfeiture proceedings than in admiralty proceedings. It would also provide an automatic right to participate to a broader range of persons who assert rights against the property in forfeiture proceedings than in admiralty proceedings.

He also pointed out that Fed. R. Civ. P. 4 had been amended in 1993, but conforming changes had not been made in the admiralty rules. He said that it was time to correct that omission.

He noted that the advisory committee had decided that it should, as far as possible, make stylistic improvements in the admiralty rules, using the style conventions incorporated in the recent omnibus revision of the appellate rules. Nevertheless, the committee believed that it was necessary to preserve certain traditional admiralty terminology.

He added that the style subcommittee had suggested changes in the language of the amendments following the October 1997 advisory committee meeting, most of which had been included in the draft set forth in Agenda Item 7. He noted that Mr. Spaniol had also suggested a number of thoughtful stylistic changes, but the advisory committee had not had time to consider them fully and recommended that they be included with the public comment materials.

Admiralty Rule B

Professor Cooper reported that the advisory committee was proposing three changes to Rule B, which deals with maritime attachment and garnishment in in personam actions.

First, new Rule B(1)(d)(ii) would allow service to be made by persons other than the United States marshal when the property to be arrested is not a vessel or tangible property on board a vessel. This change would adopt the service provisions of Rule C(3) providing service alternatives in an in rem proceeding. Where the property is a vessel, however, service under item (d)(i) may only be made by the marshal.

Second, the revised rule would eliminate the current rule's reference to Fed. R. Civ. P. 4 and state quasi in rem jurisdiction remedies. Instead, revised Rule B(1)(e) refers expressly to Fed. R. Civ. P. 64, ensuring that Rule B is not inconsistent with Rule 64 in a way that would prevent an admiralty plaintiff from invoking state-law remedies.

Third, the revised rule conforms the notice provisions of subdivision (2) to revised Fed. R. Civ. P. 4, without designating any of its subdivisions.

Some members stated that there was an ambiguity in Rule B, which limits the use of maritime attachment and garnishment to cases in which the defendant is not found in the district. They explained that a defendant occasionally will appoint an agent for service of process after the action is commenced, hoping by this means to defeat attachment or garnishment. Rule B can be read to provide that the defendant is "found" in the district only at the moment the action is commenced, but this reading is not entirely clear. Dissatisfaction also was expressed by some members with ex parte proceedings, noting that plaintiffs "always appear at 4:45 on Friday afternoon." It was suggested that the advisory committee might explore these matters and consider future rules amendments to deal with them.

Admiralty Rule C

Professor Cooper said that the proposed advisory committee note to revised Rule C provided statutory references and an introduction and background to the rule. He pointed out that a growing number of statutes invoke admiralty in rem proceedings for forfeiture proceedings. But Rule C, governing in rem actions, had not been adjusted to reflect that reality. Accordingly, most of the proposed amendments to Rule C were designed to distinguish between pure admiralty proceedings and forfeiture proceedings.

He noted that a number of forfeiture statutes permit a forfeiture proceeding against property that is not located in the district. The proposed new item C(2)(d)(ii) would reflect those statutory provisions. Paragraph C(3)(b)(i) would be amended to specify that the marshal must serve any supplemental process addressed to a vessel or

tangible property on board a vessel, as well as the original warrant.

He said that Rule C(4) provided for notice and contained two changes. The first would require that public notice state both the time for filing an answer and the time for filing a statement of interest or claim. The second would allow termination of publication if the property is released more than 10 days after execution but before publication is completed.

Professor Cooper stated that the most important changes in Rule C were set forth in subdivision (6). The advisory committee had created separate paragraphs on responsive pleading to distinguish civil forfeiture actions from maritime in rem proceedings. He pointed out that, in admiralty actions, a response must be filed within 10 days of execution of process or completed publication of notice. He said that the need for speed is not as great in forfeiture proceedings, and the advisory committee proposal would allow 20 days to respond. He added that legislation pending in the Congress would amend Rule C to provide for a uniformly longer period of 20 days in both admiralty proceedings and forfeiture proceedings.

A second distinction related to who may participate in the proceeding. In a forfeiture action, the rule would allow anyone who asserts an interest in, or right against, the property to file a response. The admiralty provision reflects the long-standing rule that only those who assert a right of possession or an ownership interest in the property may respond.

He pointed out that paragraph C(6)(c) authorized interrogatories to be served with the complaint in an in rem action without leave of court. This provision departed from the general provision of Fed. R. Civ. P. 26(d) requiring that discovery be deferred until after the parties have met and conferred. He explained that the special needs of expedition that often arise in admiralty justify continuing the practice of allowing interrogatories to be filed with the complaint in an in rem proceeding.

Admiralty Rule E

Professor Cooper stated that Rule E, governing in rem and quasi in rem proceedings, would be amended to reflect statutory provisions that permit service of process outside the district in certain forfeiture proceedings. But service in an admiralty or maritime proceeding still must be made within the district. Professor Cooper added that he had conferred with representatives of the Department of Justice, who informed him that they were unaware of any quasi in rem forfeitures. Accordingly, he recommended that the words "or quasi in rem" be deleted from Rule E(3)(b).

He said that the proposed amendment to subdivision (7)(a) would make it clear that a plaintiff must give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security in the original action.

Subdivision (8) would reflect the proposed change in Rule B(1)(e) that would delete the provision in the current rule authorizing a restricted appearance when state quasi in rem jurisdiction provisions are invoked.

Subdivision (9)(b)(ii) would be amended to reflect the changes in terminology made in amended Rule C(6), substituting "statement of interest or right" for "claim." Judge Niemeyer explained that the advisory committee had retained the word "claim" in the amended admiralty rules only where it was consistent with the meaning of that term as used in Fed. R. Civ. P. 9. In all other cases, it had been eliminated because it had created confusion. Professor Cooper added that the word "claim" had different meanings in the current admiralty rules.

Professor Cooper said that subdivision (10) was new. It would make clear that the court has authority to preserve and prevent removal of attached or arrested property remaining in the possession of the owner or another person.

Professor Cooper explained that the proposed change in terminology in Rule C(6), eliminating the terms "claim" and "claimant" required parallel changes in Fed. R. Civ. P. 14(a) and (c).

Judge Niemeyer explained that in revising the admiralty rules the advisory committee had not attempted to change admiralty law or address all current procedural problems. It just intended to preserve the admiralty process, fill in some of the gaps in the process, and improve the organization and language of the rules.

Judge Niemeyer stated that the representatives from the Maritime Law Association and the Department of Justice who had worked on the proposal had recommended that the period of public comment on the proposed admiralty amendments be reduced from the normal six months to three months. An abbreviated comment period could expedite the effective date of the amendments by one year. He stated, however, that the advisory committee had decided that there was not a sufficient emergency to justify reducing the period for public comment on the proposals.

Professor Cooper stated that the advisory committee had approved a draft revision of Rule E(3)(a) and was presenting it to the Standing Committee together with alternative language rejected by the advisory committee but preferred by Messrs. Garner and Spaniol. He asked whether the amendments published for public comment should include both the advisory committee's approved language and the alternative language. **The committee decided to publish only the version approved by the advisory committee.**

The committee voted without objection to approve the proposed amendments to the admiralty rules for publication.

Informational Items

Judge Niemeyer stated that the advisory committee in August 1996 had published several proposed changes to Fed. R. Civ. P. 23, dealing with class actions. But after considering the public comments and conducting public hearings, the advisory committee voted to forward only two of the proposed changes to the Standing Committee.

At its June 1997 meeting, the Standing Committee approved one proposed amendment to Rule 23 -- to authorize interlocutory appeals of class action certification determinations. That change was later approved by the Judicial Conference and forwarded to the Supreme Court. It is scheduled to take effect on December 1, 1998, if approved by the Court and not altered by Congress.

Judge Niemeyer said that the advisory committee had deferred consideration of the other proposed changes to Rule 23, largely because a consensus could not be reached on them. The committee had decided, for example, that further case law development was necessary on such issues as settlement classes and maturity of litigation.

The committee, moreover, concluded that many of the solutions to the problems of mass torts lay beyond its own jurisdiction and might require legislation. Therefore, it had recommended that a task force be formed across Judicial Conference committee lines to address broadly the problems of mass torts.

Judge Niemeyer reported that the Chief Justice had approved a modified version of the advisory committee's proposal, authorizing an informal working group, under the leadership of the Advisory Committee on Civil Rules, to study the problems of mass torts litigation over a 12-month period and make recommendations for further action. He said that Judge Anthony Scirica would serve as chair of the working group and that Professor

Francis McGovern would serve as special consultant to the group.

Judge Niemeyer reported that the advisory committee had sponsored a symposium on discovery at Boston College Law School in September 1997. The program focused on the costs of discovery and whether the benefits of discovery to the dispute resolution process are worth those costs. He reported that the symposium had been a great success. Members of the Standing Committee had attended, together with corporate counsel, experienced plaintiff lawyers and defendant lawyers, representatives of national bar organizations, leading academics, and other judges. He added that several consensus themes emerged from the symposium, including the following:

1. The discovery process works well in most civil cases.

2. There are, however, serious problems in a small percentage of civil cases.

3. Full disclosure is a policy inherent in federal practice and should be retained.

4. Too much discovery is generated in certain cases.

5. Uniformity of practice among federal districts is a desirable goal.

6. Attorney costs related to discovery account for about 50% of litigation costs in civil cases.

7. In large cases, plaintiffs complain about the number and costs of depositions. In fact, depositions are the largest single cost item for plaintiffs.

8. Defendants, on the other hand, complain most about the amount and cost of document discovery. They point particularly to heavy costs incurred in reviewing documents and compiling logs in order to avoid waiving privileges.

9. Ready access to a judge in order to resolve discovery disputes is number one on the lawyers' wish list.

10. Both plaintiffs and defendants favor fixed trial dates and discovery cutoff periods.

11. Mandatory disclosure draws mixed opinions among the bar. Some attorneys like it, and others do not. The empirical data from the early academic studies, moreover, are also inconclusive.

Judge Niemeyer stated that the advisory committee planned to offer amendments to the discovery rules in light of the "sunsetting" of the Civil Justice Reform Act. He added that the committee was striving for greater national uniformity, particularly in such areas as disclosure. He pointed out that the advisory committee was examining a range of other discovery issues, including the appropriate scope of discovery.

He stated that the advisory committee would consider, at its March 1998 meeting, a package of proposed amendments addressing both the concerns identified at the symposium and the discovery-related recommendations contained in the Judicial Conference's 1997 report to Congress on the Civil Justice Reform Act. The advisory committee then plans to present a package of recommendations for publication at the Standing Committee's June 1998 meeting. He added that it was very important for the committees to achieve broad consensus on a package that is widely acceptable to both bench and bar.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 1997. (Agenda Item 9)

Reduction in the Size of Grand Juries

Judge Davis reported that the advisory committee had been asked to study a pending legislative proposal (H.R. 1536) that would reduce the size of grand juries to not less than nine jurors nor more than 13, with seven jurors required to return an indictment. Currently, under Fed. R. Crim. P. 6(a) -- which tracks 18 U.S.C. § 3321 -- the size of a grand jury is 16 to 23 persons, with a requirement that 16 be present. Under Rule 6(f), 12 jurors must concur in order to return an indictment.

He stated that the advisory committee had voted unanimously to oppose any reduction in the size of the grand jury. He noted that several members of the committee believed that most people serving on grand juries have a positive feeling about the experience and that it was sound policy to have more, rather than fewer, persons involved in the grand jury process. Other members had stated that a reduction in the size of the grand jury would increase the likelihood of runaway indictments. He reported also that the state chief justice who serves on the advisory committee had pointed out that his state had reduced the size of grand juries, and that the experience had not been successful. Finally, he mentioned that the Department of Justice was opposed to legislating a reduction in the size of the grand jury.

Judge Davis reported that the advisory committee was recommending that the Judicial Conference go on record as opposing any attempts to reduce the size of grand juries. Judge Stotler asked whether the proposed Judicial Conference action should state a general policy or merely be directed to commenting on the specific provisions contained in H.R. 1536. In response, Judge Davis amended the advisory committee's recommendation to limit its reach to address only the specific pending legislation.

The committee voted unanimously to approve the recommendation of the advisory committee to have the Judicial Conference oppose H.R. 1536, which would reduce the size of the grand jury.

Informational Items

Judge Davis reported that the advisory committee had received many comments on the proposed amendment to Fed. R. Crim. P. 6, which would authorize any interpreter necessary to assist a jury to be present at a grand jury proceeding.

He pointed out that the advisory committee had proposed amending 18 U.S.C. § 3060 to remove its prohibition on a magistrate judge granting a continuance of a preliminary examination without the consent of the defendant. The Standing Committee, however, decided at its June 1997 meeting not to seek a statutory amendment. It referred the matter back to the advisory committee to consider making the change through an amendment to Fed. R. Crim. P. 5(c), which tracks the language of 18 U.S.C. § 3060. The advisory committee considered the matter afresh at its October 1997 meeting and decided that the problem sought to be addressed through the amendment was just not serious enough to warrant seeking an amendment to Fed. R. Crim. P. 5(c).

Judge Davis stated that the advisory committee had canceled the public hearings scheduled for December 12, 1997. Instead, it had invited the witnesses to appear at a hearing to be held contiguous to the committee's April 1998 meeting.

Judge Davis also reported that he had appointed a subcommittee to continue monitoring victims' rights legislation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of December 3, 1997. (Agenda Item 10)

Action Items

Judge Smith reported that the advisory committee was seeking approval to publish three proposed amendments for public comment. She explained that the amendments were being brought to the Standing Committee at its January 1998 meeting in order to lessen the heavy agenda for the committee's June 1998 meeting. She added that the advisory committee did not intend to accelerate or otherwise change the regular schedule for public comment.

Fed. R. Evid. 103

Judge Smith pointed out that the proposed amendment to Rule 103 -- designed to clarify when an attorney must renew a pretrial objection to, or proffer of, evidence -- had a long history. The advisory committee had published an amendment in September 1995, but withdrew it after publication because public comments demonstrated little consensus.

She noted that the advisory committee had redrafted the amendment at its April 1997 meeting and sought approval from the Standing Committee in June 1997 to publish it. The Standing Committee, however, questioned aspects of the proposal and referred it back to the advisory committee for further study. The advisory committee then took a fresh look at the rule at its October 1997 meeting and prepared a new draft amendment to meet the concerns voiced by the Standing Committee.

Judge Smith stated that the advisory committee had restructured the proposal from the earlier versions, now setting forth the changes as a new paragraph within subdivision (a). She explained that the proposed amendment would codify the principles of *Luce v. United States,* 469 U.S. 38 (1984) -- concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial -- and would make them applicable in both civil and criminal cases. She added that the advisory committee had tried to make clear that the rule applied to all rulings on evidence, whether made at or before trial, including in limine rulings. Finally, she pointed out that the proposed amendment appeared to be stylistically inconsistent with a convention established by the style subcommittee in that it contained an unnumbered paragraph in subdivision (a). She welcomed the input of the style subcommittee on this matter.

One of the members suggested that the advisory committee might consider dropping the word "definitive" from the first line of the amendments and eliminating the second sentence.

The committee voted without objection to approve for publication the proposed amendment to the rule.

Fed. R. Evid. 404

Judge Smith said that the proposed amendment to Rule 404(a) had not been initiated by the Advisory

Committee on Evidence Rules. Rather, the committee was responding to legislation pending in the Congress that would amend Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. She pointed out that the majority of the advisory committee agreed generally with what the sponsors of the legislation were trying to achieve, but believed that the language of the legislation was too broad and would cause technical problems. The Congressional language, she suggested, appeared to allow the prosecution to introduce evidence of any character trait of the accused. Accordingly, the committee decided to draft its own version of Rule 404(a), providing that if a defendant attacks a character trait of the victim of the crime, the prosecution could offer evidence of the same character trait of the accused.

Judge Smith said that the advisory committee also wished to move an amendment to line 11 of its proposal by adding the words "offered by an accused and" before the word "admitted."

She also pointed out that the advisory committee had used the word "accused" rather than the word "defendant" because it was consistent with usage in the Federal Rules of Criminal Procedure.

Some of the members of the Standing Committee expressed disapproval of the proposal on the merits because it would lessen the rights of the accused in certain types of criminal cases. Judge Smith responded that the decision of the advisory committee to proceed with the amendment was not unanimous, and that the committee would not have proposed the change except for the pending legislation. She explained that the majority of the advisory committee were of the view that the proposal represented a fair trade-off, believing that if the defense introduces character trait evidence, the prosecution should be allowed to do so also.

Professor Capra pointed out that there was precedent for the advisory committee's approach, noting that the Judicial Conference had offered alternate language on Fed. R. Evid. 413 to 415 when the Congress was considering enacting these rules by legislation.

The committee approved the proposed amendment for publication by an 8 to 3 vote.

Fed. R. Evid. 803 and 902

Judge Smith reported that the proposed amendments to Rules 803(6) and 902 were designed to provide for uniform treatment of business records and to rectify an inconsistency in the present rules dealing with foreign records. She explained that admissibility of foreign business records can be established -- without a foundation witness -- by certifications in criminal cases, but not in civil cases. She said that the advisory committee believed that foreign records should not be deemed more trustworthy than domestic records in any cases. The amendments were based on the procedures governing the certification of foreign business records in criminal cases under 18 U.S.C. § 3055 and would establish a similar procedure for domestic and foreign records offered in civil cases.

She added that the language of the amendments differed in certain respects and it mixed the terms "certification" and "declaration." The advisory committee had done so to incorporate language from existing statutes. She said that if that approach would cause problems in distinguishing between the two, the language could be made consistent throughout to require certification by a signed declaration. She added that there was a typographical error in the agenda item, as the word "record" on lines 42 and 44 of the proposal should read "declaration."

The committee voted without objection to approve the amendments for publication.

Informational Items

Professor Capra explained that he had reviewed the original advisory committee notes to the Federal Rules of Evidence and produced the document set forth at Agenda Item 10B, identifying inaccuracies and inconsistencies created because several of the rules adopted by Congress in 1975 differ materially from the version approved by the advisory committee. He pointed out that the inconsistencies between the text of the rules, as enacted by legislation, and the accompanying advisory notes created a trap for the unwary. He added that the Federal Judicial Center had agreed to publish his memorandum.

Judge Smith reported that she had appointed a subcommittee to review Article VII of the evidence rules, dealing with opinions and expert testimony. She noted that there was legislation pending in the Congress that attempted -- inadequately -- to amend Fed. R. Evid. 702 and codify *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). She pointed out that the advisory committee had decided in 1995 to delay considering any amendments to the evidence rules regarding expert testimony until the courts had been given enough time to digest and interpret the *Daubert* opinion. She reported, though, that the advisory committee at its October 1997 meeting had decided that there was now enough case law, and conflicts among the circuits, to justify consideration of amendments to Rule 702 to clarify the standards of reliability applicable to expert testimony. The subcommittee will prepare a report for consideration by the advisory committee at its April 1998 meeting.

Judge Smith said that the advisory committee would also consider whether any amendments were necessary to accommodate technological innovations in the presentation of evidence. Among other things, it would review Rule 1001 to determine whether the terms "writings" and "recordings" should be redefined and whether they should apply to the entire body of the evidence rules.

Judge Stotler suggested that the Advisory Committee on Civil Rules should examine Fed. R. Civ. P. 44, regarding proof of official records, to see whether it dovetails properly with provisions in the evidence rules. She also suggested that the advisory committee might wish to consider the advisability of a cross-reference to Fed. R. Evid. 1001, regarding written records. She added that the Standing Committee had discussed in the past the issue of creating standard definitions that would apply throughout all the federal rules.

ATTORNEY CONDUCT

Professor Coquillette reported that a wealth of background materials had been specially prepared to assist the committee in determining whether national rules should be promulgated to govern attorney conduct in the federal courts. He pointed out that the materials included Agenda Item 8, seven background studies conducted by his office and the Federal Judicial Center, and the proceedings of two conferences of attorney conduct experts.

Professor Coquillette noted that the committee at its June 1997 meeting had requested him to draft a proposed set of uniform attorney conduct rules for discussion purposes. Therefore, he had prepared the 10 draft rules set forth in Agenda Item 8. He suggested that the members not debate the substance of the draft rules, but focus on the general approach and outline of the document. He recommended that if the committee were generally comfortable with the draft, it should be forwarded to each of the advisory committees for study and comment.

Professor Coquillette explained that proposed Rule 1 was a "dynamic conformity" rule, specifying that a district court must apply the standards of attorney conduct currently adopted by the highest court of the state in which the court sits. He pointed out that the proposed rule had the advantages of avoiding any conflicts with the states and obviating the need for a federal bureaucracy. He suggested that the first option that the committee might consider would be to adopt only Rule 1, thereby creating no uniform federal attorney conduct standards and leaving all issues of attorney conduct to the states.

A second option, he suggested, would be for the committee to do nothing regarding attorney conduct, thereby

leaving the matter to local court rules. He recommended against that course of action, however, because the participants in the committee's recent attorney conduct conferences had agreed overwhelmingly that the status quo was unacceptable. Although they had differed in their proposed solutions, there was a strong consensus that something had to be done to address attorney conduct in the federal courts in a more uniform manner.

Professor Coquillette stated that a third option would be to adopt proposed Rule 1 plus some, or all, of the other nine rules. He explained that he had selected the 10 rules very narrowly to address only those conduct issues that raise a substantial federal interest and have resulted in actual problems in the federal courts. All other matters would be deferred to the states.

He explained, for example, that proposed Rule 10 dealt with communication with persons who are represented by counsel, which is the subject of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct. He emphasized that the matter was very controversial and had been the subject of lengthy negotiations between the Conference of Chief Justices and the Department of Justice. He recommended that the language eventually agreed upon by the Conference and the Department be incorporated as the national rule applicable in the federal courts.

Professor Coquillette noted that most attorney conduct issues addressed by the proposed rules arise in the district courts. Therefore, he recommended that the rules committees' efforts be directed principally to considering conduct rules for the district courts.

He noted that fewer attorney conduct problems arose in the courts of appeals. He pointed out that Fed. R. App. P. 46 authorized a court of appeals to take any appropriate action against an attorney for "conduct unbecoming a member of the bar." He said that the language of the rule was unworkably vague, prompting most courts of appeals to adopt their own local rules governing attorney conduct.

Professor Coquillette reported that the local rules of the bankruptcy courts generally adopted the rules of the district courts, but that bankruptcy practice presented a number of additional, unique problems because the Bankruptcy Code prescribed certain specific conduct standards of its own. For that reason, he stated that the Advisory Committee on Bankruptcy Rules was generally of the view that separate rules should be tailored to govern attorney conduct in bankruptcy practice. Professor Resnick added that Professor Coquillette's draft rules had specifically exempted bankruptcy proceedings, whether conducted by a bankruptcy judge or a district judge. He stated that it would be necessary -- because of specific provisions in the Bankruptcy Code and pertinent case law -- to consider drafting specific provisions governing such issues as disinterestedness and confidentiality in bankruptcy proceedings.

Mr. Schreiber moved that the package of proposed attorney conduct rules be referred to each of the advisory committees for review and comment by June, if possible.

Ms. Mayer stated that the Department of Justice favored reducing balkanization of attorney conduct rules in the federal courts. She explained that the Department would not support the option of simply adopting only Rule 1 of the proposed draft rules because it would turn over federal interests to the states and effectively turn state laws into national laws. She added that the Department also had problems with the specific language of some of the other nine draft rules.

Ms. Mayer pointed out that the Department was concerned about how the proposed attorney conduct rules would be interpreted and enforced. She emphasized that there was a need to lodge authority in the federal courts to issue binding interpretations of the rules.

Chief Justice Veasey stated that serious federalism interests were at stake. He personally favored adoption of only Rule 1 as the best solution and would not support adoption of all 10 proposed attorney conduct rules. He added, though, that substantial additional information and debate were essential before the committees could make meaningful decisions on the appropriate course of action to pursue.

He explained that a special committee of the Conference of Chief Justices had just arrived at a negotiated solution with the Attorney General on the controversial issue of communication with represented parties for consideration by the Conference at its annual meeting.[*Note: The Conference at its meeting postponed its consideration of the proposal until a later time so that the members could have more time to study it carefully.*] He noted, too, that the American Bar Association had appointed an ethics commission to study needed revisions to the rules of professional responsibility. He added that the commission, which he chaired, would convene following the meeting of the Conference of Chief Justices. In sum, he said, attorney conduct issues were receiving considerable attention at the highest levels of the legal profession. In light of this imminent activity and the evolving nature of the debate, he recommended that Professor Coquillette's draft federal rules be tabled.

Ms. Mayer suggested that the committee consider appointing an ad hoc subcommittee to review the proposed attorney conduct rules. Other members added that the rules could be referred to a special committee comprised of members from each of the advisory committees.

Several members countered that a better course of action would be to refer Professor Coquillette's draft and the supporting documentation to each of the advisory committees for study, with the expectation that there would be extensive coordination among the advisory committees, their reporters, and the Standing Committee.

One member stated that it would be impossible for the advisory committees to make any meaningful contributions in time for consideration at the Standing Committee's June 1998 meeting because the issues addressed in the proposed rules were simply too complex and controversial. He emphasized that it was essential for the committees to give appropriate deference to the rights of the states to oversee the conduct of the attorneys they license. Accordingly, the committees needed to consider whether paramount federal interests were at stake that warranted superseding state rules in certain matters.

Judge Stotler stated that she did not favor directing the advisory committees to accomplish a specific task by a specific date. Rather, she emphasized the need for the advisory committees to make recommendations on the best ways to deal with the attorney conduct issues.

The committee agreed to have each advisory committee consider the proposed draft rules and supporting materials presented by Professor Coquillette and present status reports to the Standing Committee at its June 1998 meeting.

LOCAL RULES OF COURT

Uniform Renumbering of Local Rules

Professor Squiers reported that in March 1996 the Judicial Conference had required the courts to renumber their local rules in accordance with the national rules. As of June 1997, 41% of the district courts had renumbered their rules, and by December 1997, 58% had completed the renumbering. She said that she had contacted the remaining district courts by telephone to determine whether they were making progress in renumbering and had received largely positive responses.

Several members stated that the renumbering requirement had been very helpful in motivating the courts to review their local rules, improve them, and eliminate inconsistencies. They also said that the project had fostered the goal of greater national uniformity and would prove to be of substantial benefit to the bar.

Impact on Local Rules of the Expiration of the Civil Justice Reform Act

Professor Squiers reported that with the recent sunsetting of the Civil Justice Reform Act, she had examined the local CJRA plans of all the district courts. She found that 31% of the district plans referred to the court's local rules and specified the court's interest in eventually integrating the content of the plans into the court's local rules. The other plans were silent on the matter. Accordingly, she telephoned 12 district courts randomly and inquired whether they anticipated incorporating the content of their CJRA plans into their local rules or intended to use their CJRA plans in another fashion. She reported that seven of the 12 courts had already taken action to modify their local rules as of December 1997. Three of the courts said that they anticipated doing so at some point, and the remaining two districts reported that they contemplated taking no action.

Other Proposed Changes in Local Rule Requirements

A number of members added that it would also be beneficial to require courts to send their local rules to the Administrative Office for posting on the Internet. One participant suggested that consideration be given to amending the Rules Enabling Act to require that all local rules take effect on or shortly after December 1 of each year, in coordination with the effective date of amendments to the national rules. Judge Garwood responded that the Advisory Committee on Appellate Rules had placed that suggestion on its agenda. Another participant said that consideration might be given to amending the national rules to provide that local rules may not take effect until they are filed electronically with the Administrative Office

Judge Stotler agreed to refer to each of the advisory committees the various suggestions raised at the meeting regarding the effective date and the effectiveness of local court rules.

Judge Stotler requested that Professor Squiers and the Local Rules Project study the impact on local court rules of the 1995 amendments to Fed. R. Civ. P. 83, Fed. R. Crim. P. 57, Fed. R. Bankr. P. 8018 and 9029, and Fed. R. App. P. 47.

Limitations on the Number of Local Rules

Judge Wilson stated that there were too many local rules of court and too many local procedural variations. Therefore, he recommended that the rules committees take appropriate action to promote greater uniformity in federal practice and place limits on local rulemaking authority. **To that end, he moved to request that the Advisory Committee on Civil Rules study amending Fed. R. Civ. P. 83 by striking the words "imposing a requirement of form" from subdivision (2) and adding a new subdivision (3) that would prohibit a court from adopting more than 20 local rules, including discrete subparts.**

The committee thereupon engaged in an extensive discussion regarding the number, scope, and merit of local rules. Some members stated that a number of courts were strongly attached to their own practices and would resist efforts to limit local rulemaking authority. They noted that the district courts had taken a wide variety of approaches to local rules. Some courts have very few local rules, while others have promulgated lengthy and detailed sets of rules.

Several members stated that there had been a long-standing consensus among the members of both the Standing Committee and the advisory committees that (1) there were too many local rules, and (2) local rules should fill the gaps in the national rules, rather than legitimize local variations in federal practice. Several pointed out that

the rules committees had debated these issues extensively in the past and had concluded that it would not be feasible to eliminate local variations simply by limiting local rules. Local procedural variations would likely continue in effect through the use of standing orders, individual case orders, and other, less formal mechanisms.

A number of members pointed out that the 1995 amendments to Fed. R. Civ. P. 83 -- together with companion amendments to Fed. R. Crim. P. 57, Fed. R. Bankr. P. 8018 and 9029, and Fed. R. App. P. 47 -- had been designed expressly to foster national uniformity by requiring that:

1. all local rules be consistent with the national rules and federal statutes;

2. all local rules conform to a national numbering system;

3. no local rule imposing a requirement of form be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement; and

4. no sanction or other disadvantage be imposed for noncompliance with any requirement not published in federal law, federal rules, or local rules, unless the alleged violator has been furnished with actual notice of the requirement in a particular case.

One member emphasized that the judicial councils of the circuits have -- and should exercise -- the authority to abrogate any local rules that are illegal or inconsistent with the national rules. He added that there was a need to collect and analyze more information on local rules. Professor Coquillette suggested that it would be very desirable for the Local Rules Project to conduct a new study of local rules, particularly in the wake of the sunset of the Civil Justice Reform Act.

Another member suggested that Judge Wilson amend his motion to have the Advisory Committee on Civil Rules study local rules issues broadly, rather than mandate that it consider a specific amendment to Rule 83. He added that the rules committees also needed to address local rule issues in both the district courts and the bankruptcy courts.

Judge Wilson agreed to amend his motion to require that the other advisory committees also study appropriate limitations on local rules. He added, however, that it was essential that the committees address the merits of imposing a national limit on the number of local rules that any court may promulgate.

Other members responded that it was premature to consider additional amendments to the rules governing local rules because the impact of the 1995 amendments had only begun to be felt. They warned, moreover, against changing the language of those amendments because they had been very carefully crafted and subjected to extensive committee discussion and public comment. They pointed out, for example, that the language of the proposed motion could create practical problems because it deleted the specific limitation in the current rules on locally imposed requirements of form.

Some participants suggested that it would be better to have a single, coordinated local rules initiative conducted under the direction of the Standing Committee, rather than have the five advisory committees each undertake their own efforts. One member added that the ultimate goal of the committees might be to prepare a set of proposed model local rules.

The committee voted 6-5 to defeat Judge Wilson's motion.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee would proceed to prepare a restyled draft of the body of criminal rules for initial consideration by the advisory committee. He added that the style subcommittee was not considering an effort to restyle any other set of rules until the Supreme Court has acted on the restyled appellate rules.

In the interim, as amendments and new rules are proposed by any of the advisory committees, the style subcommittee would continue with the procedure that has been in place. That is, once the reporter drafts an amendment or new rule, it will be submitted to the Rules Committee Support Office of the Administrative Office. That office will then provide copies to all members of the style subcommittee. The subcommittee members will have 10 days to submit their comments to Mr. Garner, who will review them and contact the reporter of the appropriate advisory committee with the collective views of the style subcommittee. The reporter will then edit the suggestions provided by the style subcommittee and return a revised draft to the Administrative Office for transmission to the advisory committee members.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte presented the report of the Technology Subcommittee, which was set forth in his report and attachments of December 5, 1997. (Agenda Item 11)

Rules Issues Raised by Technology

He reported that the subcommittee was in the process of gathering information on the interrelationship between technology and the rules. He said that Judge Stotler had asked each of the advisory committees to identify for the subcommittee any future rules amendments that they were considering to take account of advances in automation.

He noted that the advisory committees had responded by pointing to such topics as the filing of briefs on disk, electronic case filing generally, electronic service of notices and other documents, taking of testimony from remote locations, discovery of information contained in electronic format, publication and citation of opinions in electronic form, and including electronic materials in the various definitions contained in the rules.

Mr. Lafitte said that electronic case filing and the serving of notices by electronic means appeared to be the most significant matters to be addressed. He noted that several electronic case file prototypes had been established in the federal courts, and the Administrative Office was monitoring the information gathered in the pilot courts.

Mr. McCabe stated that the Administrative Office had been in regular contact with the pilot courts and had obtained and analyzed copies of their local rules. Judge Stotler added that the chart that the Office of Judges Programs had prepared on these rules was very helpful, and that the committee should also be provided with copies of the local rules governing the pilot programs.

Receiving Rules Comments on the Internet

Mr. Lafitte reported that his subcommittee was also examining whether to permit public comments on proposed rules amendments to be sent to the Administrative Office electronically. He had asked the Administrative Office

to provide the subcommittee with the pros and cons of permitting the public to use the Internet to submit comments on the rules. The most significant benefit cited by the Administrative Office was that it would make it easier for the public to comment, thereby furthering the rules committees' policy of reaching out to the bar and encouraging more comments on proposed amendments. A disadvantage of electronic comments would be that many of them may be less thoughtful than written comments. Another disadvantage would be that any significant increase in the number of comments might place an intolerable burden on the reporters.

Mr. Lafitte said that the subcommittee expected to receive the views of the advisory committees on this proposal. It would then make recommendations to the Standing Committee at its June 1998 meeting. He added that the informal responses he had received to date had been very favorable toward receiving comments electronically.

ELECTRONIC CASE FILES DEMONSTRATION

Karen Molzen, law clerk to Chief Judge Conway of the United States District Court for the District of New Mexico, presented a demonstration of the electronic case file systems being piloted in the District of New Mexico and nine other federal district and bankruptcy courts. Mr. McCabe pointed out that electronic filing raises a number of important procedural issues that had not yet been addressed by the federal rules. He added that the pilot courts were filling in the gaps in the national rules, where necessary, by provisions in their local rules and by obtaining consent of the parties.

FORUM ON COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler asked the members to reflect on the committee's December 1995 *Self-Study of Federal Judicial Rulemaking*, to comment on the way the committees were currently conducting their business, and to provide a retrospective look at changes occurring in the rules process during their service on the committees.

She pointed out that the volume of materials sent to the Standing Committee had increased substantially, and it was very important for every member to be made aware of all developments in the rules process. She said that it was incumbent upon the members to read the material promptly and identify any matters with which they disagree. She recommended that any member of the Standing Committee who has a concern with the substance or language of any amendment call the chair or reporter of the appropriate advisory committee in advance of the Standing Committee meeting to address or correct the proposal. In that way, the Standing Committee's meeting can be devoted to discussing the merits of proposals.

She also suggested that the committees should propose changes in the rules only when amendments are essential. They should also ensure that they are carefully considered and well drafted because they are scrutinized by the bench and bar, the Judicial Conference, the Supreme Court, and the Congress. She noted that lawyers and judges use the rules on an everyday basis and are generally comfortable with them. Many tend to react negatively to changes, particularly if they are viewed as nonessential. Accordingly, the rules committees should appraise the value of any proposed change against the anticipated opposition. In addition, the committees need to strike the correct balance between the need for national uniformity and legitimate local variations.

Following the custom of having retiring members provide a retrospective view of their service on the committee, Judge Easterbrook noted that when he started on the committee six years earlier, its procedures had been very different. An advisory committee would bring a proposed amendment to the committee's attention

and be asked to provide little description. The committee's ensuing discussion would mix both substance and style, and a good deal of time would be spent in making language improvements.

He said that the Standing Committee's procedures had changed materially for the better, thanks in large part to the *Self-Study* and the leadership of the current chair. He added that the committee had also profited greatly from the work of its style consultant, Bryan Garner, and the style subcommittee. The Standing Committee, he said, had concluded that it was simply too difficult to draft language in large groups. Rather, style and expression problems are best resolved by having the members speaking directly to the advisory committee. The alternative was for the Standing Committee -- as a reviewing body -- to remand an amendment to an advisory committee, rather than attempt to rewrite it. On this point, Judge Stotler pointed out that the committee's *Self-Study* stated specifically that the advisory committees have the responsibility for drafting amendments and that the Standing Committee should normally remand rules, rather than redraft them.

One of the participants concurred that style matters used to take up much of the time of Standing Committee meetings, but now are normally handled in advance of the meetings. He thanked Judge Keeton for appointing a style subcommittee, which, he said, had produced standard style conventions and worked closely with the advisory committees. He emphasized that the advisory committees were uniformly producing substantially improved drafts. Several other members expressed their support for the style process and stressed the need for consistent usage in the rules.

Judge Easterbrook added that the agendas of the Standing Committee had improved, as a wider variety of matters had been included, and members are now given greater opportunities to raise policy issues. He also pointed out that the Standing Committee had coordinated the promulgation of a number of common provisions in the various sets of federal rules and had placed certain policy matters on the agendas of the advisory committees. It had also fostered better communications among the reporters and the advisory committees and should continue to play a coordinating role with the advisory committees.

Judge Stotler stated that the work of the Rules Committee Support Office had increased greatly, and others added that the staff had been instrumental in fostering enhanced relations with the state bars. Chief Justice Veasey said that he would like to see a strengthening of the process of providing state courts with timely information of proposed changes in the rules, particularly rules that the state courts are likely to adopt. He said that state courts commonly only consider the merits of a rule after it has been adopted in the federal courts. He mentioned that he intended to discuss this matter with the Conference of Chief Justices.

One of the participants said that there was a large gap between the time a proposed amendment is published for public comment and the time it is adopted as a rule, often with changes. He suggested that interim notice of actions taken by the Standing Committee and the Judicial Conference would be very helpful. Chief Justice Veasey suggested that notice of rules developments might be sent electronically to the states.

One of the reporters stated that the work of the advisory committee chairs and reporters had increased enormously. He expressed appreciation for the procedural improvements of the last few years, which had resulted in better communications, guidance, and coordination.

Several members stated that the rules process was excellent and needed to be protected. They said that despite recurring legislative attempts in every Congress to amend rules directly by statute, Congress in fact defers in most cases to the rules process.

Judge Stotler pointed out that one of the recommendations in the *Self-Study* was to ask the Chief Justice to consider making the chairs of the advisory committees voting members of the Standing Committee. She said that the Standing Committee had not made a recommendation on the matter and might wish to give the matter further thought.

SUPPORT SERVICES

The committee approved the following motion made by Judge Wilson:

We resolve to acknowledge the excellent support of the Administrative Office for the work of the rules committees-- all six -- and especially the devotion to duty shown by Peter McCabe, our Secretary, Chief John K. Rabiej, Attorney-Advisor Mark Shapiro, and the entire distinguished staff of the Rules Committee Support Office. Further, the Chair of the Committee is instructed to so report to the Director of the Administrative Office.

Judge Stotler thanked Professor Coquillette and the reporters of the advisory committees for the enormous amount of quality work that they produce.

NEXT COMMITTEE MEETINGS

The committee voted to hold its next meeting, scheduled for Thursday and Friday, June 18 and 19, 1998, in Santa Fe, New Mexico.

The committee scheduled the following meeting for Thursday and Friday, January 7 and 8, 1999, with a location to be determined later.

Respectfully submitted,

Peter G. McCabe,

Secretary