MINUTES OF THE MEETING
OF THE ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 20 & 21, 1993

Judge Kenneth F. Ripple called the meeting to order in the fourth floor conference room of the Federal Judiciary Building in Washington, D.C. In addition to Judge Ripple, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Grady Jolly, Judge James Logan, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of the Acting Solicitor General. Judge Robert Keeton, Chair of the Standing Committee was present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, and Mr. Joseph Spaniol were present along with Mr. Joseph Cecil of the Federal Judicial Center.

Judge Ripple began the meeting by greeting and introducing Mr. Munford, the newest member of the Committee.

Judge Ripple then turned the Committee's attention to the first item on the agenda a review and assessment of the comments submitted concerning the proposed amendments published in January 1993.

I. GAP Report

General Comments

The Reporter noted that in addition to the comments concerning specific rules, two comments were received that were general in nature.

First, one commentator opposed the change from "shall" to "must." He pointed out that unless Congress also makes the same changes, the rules and statutes will use different terminology to refer to the same thing. Professor Mooney stated that the change from shall to must is supported by the Style Subcommittee of the Standing Committee. Indeed the Style Subcommittee has decided to use "must" with both active and passive voice. Because some of the published rules were drafted when the Style Subcommittee continued to use "shall" with the active voice, the Reporter changed every remaining "shall" in the published rules to "must" except in those instances where it is used to indicate the future tense. The Committee agreed that the change is appropriate.

Second, Mr. Munford had written asking whether it would be preferable to omit citations to specific circuit rules in the Committee Note accompanying a rule amendment. He pointed out that local rules change frequently and that in some instances the purpose of an amendment is to supplant a local rule. He suggested that it might be better to simply refer to "local rules of the X & Y Circuits" rather than to cite to specific rules. Mr. Munford further pointed out that citation to specific local rules has not been consistent in the past.

Judge Ripple noted that one reason for citing the local rules is that a significant portion of the amendments originate with local rules, and citation to the local rules becomes a part of the legislative history. He added further that if the Committee thought it would avoid confusion, the Committee Notes could state that citations are to local rules effective as of a certain date. Judge Jolly remarked that the exact citation facilitates historical research. Judge Ripple suggested that we should be conscious of the problem and be careful in writing notes that readers are not mislead, but that we should also try to provide an accurate and complete legislative history. The Committee concurred.

The Committee then turned its attention to the specific comments submitted concerning the proposed amendments.

Item 86-10

The proposed amendment to Rule 38 requires a court to give an appellant notice and opportunity to respond before damages or costs are assessed for filing a frivolous appeal. The published rule states:

> If a court of appeals shall determine that an appeal is frivolous, it may, after notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Two comments were received. The National Association of Criminal Defense Lawyers supports the proposal. The NLRB suggests deleting the requirement that the notice come "from the court."

Mr. Froeb asked whether a statement by a court in its order that the court intends to sanction is sufficient? Judge Logan responded that he believes a show cause order should be entered.

Judge Jolly noted that the rule allows the court to award single or double costs. He asked whether notice must be given before a court may award single costs. The consensus was that Rule 38 applies only to "frivolous appeals" and that single costs may always be awarded under Rule 39 without notice. To omit single costs from Rule 38 might imply that only double costs could be awarded. The Reporter stated that the Committee had long discussed more radical amendments of Rule 38 but had finally decided to leave the rule basically unchanged but to add the notice requirement. Mr. Froeb suggested leaving the wording of the underlying rule unchanged. Rule 11 is currently undergoing changes and he believes that there will be evolutionary changes in Rule 38.

Mr. Munford questioned whether the new language requiring the court to give notice and opportunity to respond should be moved after "court of appeals" in the first line of the rule. The consensus was that the new language was properly placed. A court may decide whether an appeal is frivolous first, but it must give notice and opportunity to respond before

imposing sanctions.

Mr. Munford asked whether the last sentence should be retained in the Committee Note. The last sentence reads: "Requests either in briefs or motions for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures." Mr. Munford was concerned that retention of that language might be read as condoning such conduct. Judge Ripple pointed out that the sentence accurately reflects a fundamental concern that motivated the Committee's decision to require notice from the court. He further stated that after the Advisory Committee compietes its work, the amendment will be carefully scrutinized by both the Standing Committee and the Judicial Conference. Deletion of the sentence would in effect remove supporting documentation from the papers.

Judge Boggs moved approval of Rule 38 as published. Judge Williams seconded the motion; it passed unanimously.

Item 91-2

The proposed amendments to Rules 40 and 41 lengthen the time for filing a petition for rehearing in civil cases involving the United States.

Two public comments were submitted. Judge Newman, the immediate past Chair of the Advisory Committee, states that the additional time for requesting a rehearing under Rule 40 should be extended only to the United States and not to other parties in a civil appeal involving the United States. Judge Newman also states that he sees no need for Rule 41 to delay the issuance of the mandate until 7 days after the time for seeking rehearing has expired. He suggests that the court should be able to issue the mandate "within 7 days." The NLRB opposes the amendment because it may delay the effectiveness of enforcement orders. Although the law is not clear, the NLRB believes that an enforcement order becomes effective only upon issuance of the mandate and that the amendment would delay the effectiveness of enforcement orders.

Judge Boggs expressed disagreement with both Judge Newman and the NLRB concerning the time for issuing the mandate. He noted that when it is appropriate there are procedures authorizing the issuance of the mandate forthwith. Mr. Kopp agreed that when necessary the court can direct that the mandate issue forthwith. Mr. Kopp stated a preference for a day certain for issuance of the mandate and, therefore, he opposed, the "within 7 days" formulation.

With regard to whether the extension of time should be given only to the government, Mr. Munford pointed out that it would doubtlessly be easier for the clerk's office to administer an even handed rule. A rule giving an extension only to the government would leave the clerk's office in the position of trying to guess whether the government might want to petition for rehearing or whether the mandate should issue. Mr. Kopp pointed out that the

published draft was based on D.C. Cir. R. 15 and 10th Cir. R. 40, both of which extend the time for all parties, not just the United States. While the government would probably not oppose an amendment that extended the time only for the government, he stated that it had never occurred to the Solicitor's Office to suggest that the government operate by one time frame while opposing parties use different time limits.

Judge Logan expressed agreement with Mr. Munford that an unbalanced rule would make it difficult for the clerk's office to know whether to issue the mandate before the government's time expired. He stated his preference for an evenhanded rule and one that fixed a day certain for issuance of the mandate.

Mr. Munford also favored a fixed time period but questioned whether 7 days is the right amount of time. He noted that 7 days is the time period currently provided but that amendments of Rule 41(b) under Item 91-13 will change what a party must show in order to obtain a stay of the mandate. Judge Logan responded that a party has the period for filing the petition for rehearing to consider the reasons why a stay should be entered if rehearing is not granted. In fact, he pointed out, that the same reasons are often part of the petition for rehearing.

Judge Williams expressed his opposition to Judge Newman's suggestions that time be extended only for the government and that the court could issue the mandate within 7 days. Judge Williams said, however, that changing the time in Rule 41 for issuing the mandate from 7 to 14 days might be useful.

Mr. Kopp stated that he thinks 7 days is not a problem or that it is a separate problem from the one under consideration. He noted that as a practical matter ordinarily there is no problem because if a mandate issues and a stay is subsequently granted, the court recalls the mandate. He suggested that if there is a problem, a better approach would be to provide that if an application for a stay is filed, the mandate should not issue until the court acts on the application for stay.

Judge Ripple agreed that the question of whether a mandate should issue within 7 days after the expiration of the time for petitioning for rehearing, or after denial of such a petition is a separate question. The issue under consideration is the amendment extending the time for petitioning when the United States is a party. He suggested that the 7 day time period be treated as a separate suggestion and be placed on the table of agenda items as Item 93-3. The committee concurred and Judge Ripple stated that he would form a subcommittee including Mr. Strubbe, practitioners, and judges.

Judge Logan moved adoption of Rules 40 and 41 as published except that the word "shall" should be changed to "must" and the word "application" to "petition" for certiorari. Mr. Kopp seconded the motion and it was approved unanimously.

Item 91-4

Several amendments to Rule 32, governing the form of documents, were published. Four public comments were received. The Reporter summarized the comments.

One commentator, Judge Newman, supports the effort to standardize type styles but disagrees with the approach taken in the draft. He suggests that the committee consult the new Second Circuit rule. He also disagrees with the suggestion that footnotes be double spaced. Judge Newman also opposes the binding requirement.

One commentator favors the binding requirement but suggests that the use of spiral binding should be specifically mandated.

Two other commentators also oppose double spaced footnotes and made miscellaneous minor objections.

After the Reporter summarized the comments, Judge Ripple suggested considering them one at a time. The Committee began with the type style question. The published rule said that unless a brief is commercially printed, it must be prepared with no more than "11 characters per inch." Mr. Strubbe reported that the clerks' committee had discussed the proposal and thought that 65 characters per line would be preferable because such a standard would permit proportional type.

Mr. Kopp suggested that a better way to permit proportional type would be to require a typeface of 12 point or larger. It was pointed out that with 12 point type it would be necessary to prohibit compaction or compressed type. Mr. Strubbe noted that if the rule sets a limit of 65 characters per line, compacted type would simply result in shorter lines.

Judge Logan stated that he likes printed briefs and would like the rule to permit production of similar briefs on computers. He pointed out that a 65 characters per line standard allows proportional fonts and may improve readability. He noted that the Committee's basic aim has been to prevent people from cheating on the page limits.

Mr. Munford expressed concern about a standard that will not make it clear to a practitioner which button should be pressed on a computer to achieve compliance.

Judge Keeton stated that changing the standard from a number of characters per inch to a number of characters per line simply eliminates the notion that looking at any one inch will determine whether a brief is in compliance. Beyond the fact that such a change would force one to look at a larger unit, he thought that there would be no real difference between the two.

Judge Ripple suggested a straw vote. Four members voted to retain the 11 characters per inch standard. Three members voted to change to 65 characters per line; and no one

voted to send the rule back for further study.

After a short break Judge Ripple resumed the discussion by noting that Supreme Court Rule 33.1(b) prohibits any ". . . attempt to reduce or condense typeface." He inquired whether using similar language either in the text of the rule or in the Committee Note would be useful.

Judge Jolly suggested leaving the rule as published. Judge Logan expressed preference for a standard that would allow use of proportional type. The Committee members discussed the possibility of changing to a number of characters per page or per brief.

Judge Ripple appointed a subgroup, chaired by Judge Jolly, to continue the discussion and return to the Committee with a suggestion. Judge Ripple then asked the Committee to discuss the other comments.

The Committee discussed the issue of double spaced footnotes. Judge Logan moved that the rule be amended to permit single spaced footnotes. Judge Williams seconded the motion. After a brief discussion the motion was amended to add the Supreme Court's language concerning compressed type at the end of line 16 and to add a reference therein to footnotes. The motion passed unanimously.

The Committee then discussed the proposal that a brief or appendix be bound to permit it to lie flat when open. Judge Jolly moved that the provision remain unchanged; the motion was seconded by Mr. Munford. The motion was approved unanimously. The requirement that the case number appear at the top center of the cover and that the attorney's phone number be placed on the front cover were also unanimously approved.

The published proposal stated that the title of the document should "includ[e] the name of the party or parties for whom the document is filed (e.g., Brief for Appellant, J.Doe)." Judge Logan asked whether naming the parties is necessary when a brief is filed for all appellants or all appellees. Mr. Munford suggested that the rule could refer to Civil Rule 10(c). Judge Logan moved that the provision be amended by deleting the words "including the name of" and substituting the word "identifying;" he also suggested deleting all examples. Judge Williams seconded the motion and it was approved by a vote of six in favor and one opposed.

Mr. Spaniol had written prior to the meeting and asked whether the rule should continue to refer to carbon paper. The Committee had discussed that issue at the October meeting and decided to make no changes. Mr. Spaniol had also noted that the rule refers to "parties" proceeding in forma pauperis whereas the statute refers to "persons" proceeding in formal pauperis. Judge Logan and Judge Boggs moved that all such references to parties should be changed to persons. The change was approved unanimously.

One of the commentators noted that the proposed amendment requires a petition for rehearing, a suggestion for rehearing in banc, and any response to such petition or suggestion to be produced in the same manner as a brief, but that the rule did not prescribe the cover color. Judge Ripple moved, and Judge Boggs seconded the motion, that line 58 be amended by inserting the words: "with a cover the same color as the party's principal brief." The motion was approved unanimously.

Judge Ripple noted that the Committee Note makes specific reference to local rules but unless someone objected to the references they would be retained. There were no objections.

That concluded the discussion of Item 91-4 except that the Committee would return later to the discussion of type style.

Item 91-5

Proposed Rule 49 authorizes the use of special masters in the court of appeals. One comment was submitted; the NLRB expresses support for the proposal.

Mr. Munford questioned the numbering of the rule. He asked whether it should come at the end of the rules (and thus after Rule 48, the "Title" rule) or whether it should follow Rule 33. He suggested placement after Rule 33 because in both rules someone other than a judge presides. Judge Ripple thought that placement after Rule 33 would be inappropriate because he would like to avoid any suggestion that the rule on special masters is connected to the rule on appeal conferences. Because the use of appeal conferences for settlement purposes is new and the amended Rule 33 is trying to promote a level of informality, he would like to keep the two concepts separate.

Judge Williams suggested moving Rule 48 to Rule 1(c). Judge Keeton questioned whether such a change could be treated as a technical change and decided that it probably could be so characterized. Mr. McCabe noted that Bankruptcy Rule 1 combines the topics currently covered by Fed. R. App. P. 1 and 48.

Judge Ripple moved the approval in substance of the special master rule. Judge Williams seconded the motion; it was approved unanimously.

Judge Boggs moved that Rule 48 be moved to Rule 1 and made subpart (c) and captioned "Title." Mr. Munford seconded the motion. It was approved unanimously.

Item 91-8

The proposed amendment to Rule 25 provides that whenever service is accomplished by mailing, the proof of service must include the addresses to which the papers have been mailed. No public comments were submitted.

Prior to the meeting, Mr. Munford wrote and inquired why an address is required only when service is accomplished by mail. He noted that when a document is hand delivered, the document is usually delivered to office personnel rather than to the party or the party's counsel personally. Therefore, questions about service can arise even when a document has been hand delivered. In light of that comment, the Reporter had amended the draft to require that a certificate of service include not only the addresses to which papers have been mailed, but also the addresses at which papers have been delivered.

The Committee unanimously approved the change and the Committee consensus was that it was not a "substantial" change and that republication would not be necessary.

Mr. Munford noted that in cases involving many parties inclusion of all the addresses could result in a lengthy certificate of service and that the certificate of service should not count against the page limit for a brief. He suggested that Rule 28(g) should be amended to so provide. He made a motion that the words "proof of service" be inserted in Rule 28(g) following "table of citations." Judge Logan seconded the motion and it was approved unanimously. It was decided that the change could be treated as a technical and conforming amendment.

At 12:00 noon the Committee broke for lunch.

The meeting resumed at 1:00 p.m.

Judge Ripple suggested that the Committee pass a resolution thanking Mr. James Macklin, Jr., the Deputy Director of the Administrative Office who served as the Secretary to the Rules Committees for several years. Mr. Macklin will soon retire and it would be appropriate to thank him for his many years of dedicated service and assistance to the Committee. A motion was made and seconded and unanimously approved.

Item 91-11

The proposed amendment to Rule 25 provides that a clerk may not refuse to file a paper solely because the paper is not presented in the proper form. No comments were submitted but the clerks through Mr. Strubbe registered their opposition to the rule.

Mr. Munford questioned whether the proposed amendment to Rule 25 is consistent with amended Rule 32 which provides that carbon copies may not be filed except by persons proceeding in forma pauperis.

Judge Keeton suggested changing the word "submitted" to "used" at line 7 of the amended draft of Rule 32. Judge Boggs suggested using the word "submitted" rather than "filed" at line 64 of the amended draft of Rule 32. Those changes were approved unanimously.

Judge Boggs then moved approval of Rule 25(a) as published. Judge Jolly seconded the motion and it passed unanimously.

Item 91-12

The proposed Rule 33, published in January, differs substantially from the existing Rule 33. The Reporter summarized the two comments received. Judge Newman suggests that the language of the rule be amended to make it clear that the choice of an in-person or telephone conference is the court's and not the parties'. The Solicitor General's office suggests amending the third paragraph of the Committee Note to make it clear that suits against government officials should be treated like suits against government agencies and to state that attendance of an employee with authority "regarding" the matter at issue is sufficient.

In response to Judge Newman's suggestion the Reporter had inserted the words "as the court directs" at line 19 of the amended draft. Judge Ripple expressed his disapproval of that change. He noted that the rule serves dual purposes. It governs the usual prehearing conference that delineates issues, etc. but it also governs settlement conferences. Those circuits that currently use settlement conferences have adopted measures aimed at keeping the judges distanced from the conference. The language "as the court directs" could give the impression that judges are involved in the process. Judge Logan moved approval of line 19 as published (*i.e.*, without the new language). Mr. Froeb seconded the motion. It was approved unanimously.

With regard to the amendment of the third paragraph of the Committee Note, Mr. Kopp stated that many suits against government agencies also name government officials individually. As published, the Committee Note could give rise to an inference that suits against government officials should be treated differently than suits against agencies. The redrafting was intended to make it clear that a government official may also be represented at an appeal conference by an employee. Second, the Committee Note was changed to provide that when a party is required to attend the conference the court may determine that an employee with authority "regarding" the issue is sufficient rather than requiring attendance of an employee with authority "over" the matter.

The changes to the Committee Notes were moved by Judges Boggs and Logan and approved unanimously.

Item 91-13

The proposed amendments to Rule 41 provide that a motion for a stay of mandate must show that a petition for certiorari would present a substantial question and that there is good cause for a stay.

A comment was submitted by the National Association of Criminal Defense Lawyers.

The Association argues that the 30 day period for a stay is anachronistic because the period for filing a petition for certiorari is now 90 days in both civil and criminal suits.

Judge Boggs and Ripple both stated that in their circuits the practice is to grant 90 day stays and that even if the rule were changed to permit a 90 day stay, it would not be necessary to grant a stay for the full period.

Mr. Munford focused the Committee's attention on lines 21 & 22 which require a motion for a stay to show that the petition for certiorari would present a substantial question and that there is good cause for a stay. He stated that those standards are stricter than they need to be. In many circuits the standard is that the petition would not be frivolous. He pointed out that Fed. R. Civ. P. 62(d) & (e) provide for an automatic stay upon posting a supersedeas bond. He said that he would except stays under Rule 62(d) & (e) from the showing required in the proposed amendment. Judge Ripple responded that a stay pending appeal to the court of appeals (the first appeal and an appeal as of right) is different than a stay after judgment by the court of appeals pending petition for certiorari to the Supreme Court.

Judge Logan questioned whether the standard should be substantial question and good cause (as published) or whether it should be substantial question or good cause. Judge Williams stated that "cause shown" has long been interpreted as involving a balancing of the equities. The greater the irreparable injury, the less substantial the question must be in order for a stay to be appropriate.

Mr. Kopp noted that at the Committee's meeting in October 1992, the consensus was that the proposed amendments did not create a substantive standard that the circuits are bound to follow, rather the intent of the proposed amendments was simply to put counsel on notice regarding the issues that a petition should address. Judge Ripple suggested removing the "see, e.g.," citation from the Committee Note in an effort to make it clear that the rule does not establish a substantive standard. The Committee voted to eliminate the Barnes citation in the Note.

With regard to the suggested change from 30 to 90 days, Mr. Kopp suggested that such a change would need to be published for comment. It was agreed to make that suggestion Item Number 93-4 on the table of agenda items.

Judge Logan moved adoption of the text of Rule 41 as drafted. Mr. Froeb seconded the motion; it passed by a vote of six in favor and one opposed. Mr. Munford stated that his opposition was based upon his belief that the "and" should be changed to "or."

91-22

Rule 9 governing review of a release decision in a criminal case was completely rewritten and published for comment. Two public comments were received. A United

States District Judge suggests that subdivision (c) should refer to 18 U.S.C. § 3145(c) in addition to the sections already cited. The National Association of Criminal Defense Lawyers (NACDL) made several suggestions. First, it suggests that the captions of subdivisions (a) and (b) should be coordinated to clarify whether (a) or (b) applies after a finding of guilt but before sentencing. Second, it suggests that the rule should be amended to make it clear whether a motion for release must be filed first in the district court even after filing a notice of appeal. Third, it suggests omitting the statutory references in subdivision (c) and, if necessary, moving them to the Committee Note. Fourth, it suggests amending the rule to allow a party to supplement the district court's bail record with evidentiary material.

In light of NACDL's first comment the Committee approved several changes:

1. it amended the caption of subdivision (a) to read: "Appeal from an Order Regarding Release Before Judgment of Conviction";
2. on line 24 of the draft prepared for the meeting, the Committee inserted a period after the word "conviction" and deleted the words "or the terms of the sentence";
3. it amended the first paragraph of the Committee Note; in line three after the word "before" the Committee inserted "the judgment of conviction is entered at the time of";
4. following the first sentence of the second paragraph of the Committee Note, the Committee added citations to Fed. R. Crim. P. 32(b); and
5. in the second paragraph of the Committee Note accompanying subdivision (b), the Committee inserted a period at line 4 after the word conviction and deleted the words "or from the terms of the sentence".

In response to NACDL's second suggestion the Committee decided to omit the second sentence (beginning with the word "implicit") of the Committee Note accompanying subdivision (b). The intent of that deletion was to remove any inference that a motion for release must in all instances be made first in the district court. The rule deals only with review of a release decision made by a district court and not with release decisions that may be sought initially in a court of appeals. Therefore, the Committee decided that it would be inappropriate to include any language stating categorically either that a motion must be made, or need not be made, in the district court after the filing of a notice of appeal.

Because the statutory references in subdivision (c) had been added by Congress, the Committee decided that it should not delete them but should add the reference to § 3145(c).

The Committee decided that it would ordinarily be inappropriate to allow a party to supplement the bail record in the court of appeals.

Judge Boggs moved the approval of the published rule with the amendments to the text and notes described above. The motion was seconded by Judge Williams and passed unanimously.

Following a short break, Ms. Sharon Marsh, a printing expert from the Administrative Office joined the Committee briefly to discuss the Rule 32 typeface issues. She suggested that the rule should specify the size of type, amount of spacing, size of paper, and the size of margins.

Item 91-13

The discussion then returned briefly to Item 91-13. The Committee had discussed deleting the citation to Justice Scalia's chambers opinion in the Barnes case. That change was intended to remove the inference that the rule establishes the substantive standard for granting a stay pending the filing of a petition for certiorari to the Supreme Court. Judge Ripple suggested that rather than simply delete the citation, it be replaced with a reference to § 17.19 of Stern & Gressman's treatise on Supreme Court Practice. Judge Williams asked whether it is clear that the standards for the courts of appeals are the same as those used by the Supreme Court. Judge Ripple replied that Stern & Gressman, at page 690, suggests that they are. Judge Logan moved to substitute the cite to Stern and Gressman for the Barnes citation. Mr. Kopp seconded the motion. It passed unanimously.

Item 91-26

The proposed amendment to Rule 28 requires a brief to contain a summary of argument. Three comments were received. One person suggests that the decision should be left to each court and, in those courts that decide not to require a summary, to the parties. Another person suggests that the choice be left to the judgment of individual lawyers. The third commentator suggests that a summary is needed only when a brief exceeds 25 pages.

Judge Logan stated that he did not feel strongly about the issue either way. Judge Boggs expressed his support of the requirement. He pointed out that Supreme Court Rule 24.1(h) requires a summary and he stated that he thinks it would be useful for judges. Mr. Kopp observed that the Committee has been trying to minimize the need for a pressure to have local rules. Because several circuits have local rules requiring a summary of argument, Mr. Kopp favors including the requirement in the national rule. Judge Jolly agreed with Mr. Kopp and additionally stated that a summary is helpful in deciding whether to grant oral argument. Judge Ripple stated that he uses a summary in a variety of ways and finds it very helpful.

Judges Logan and Williams moved adoption of the rule as published. The motion was approved unanimously.

Item 91-27

This item involves amendment of all appellate rules requiring the filing of copies of documents with a court of appeals. The amendments make it clear that a court may require a different number of copies than the number specified in the national rule either by local

rule or by order in an individual case. No comments were submitted and the Committee approved the drafts as published.

Although no comments were received dealing with the number of copies problem, Mr. Spaniol submitted a comment concerning Rule 26.1, one of the rules amended as part of this process. Rule 26.1 requires a corporate disclosure statement to identify all "parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public." Mr. Spaniol noted that the Supreme Court dropped "affiliates" from its list because no one understood what it meant. The Committee briefly discussed the possible meanings of the term "affiliates." Judge Boggs asked whether that change would mean that a litigant would not need to disclose "full brothers or full sisters" by which he means companies that are wholly owned, or virtually wholly owned, by the same parent? Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree. Judge Ripple stated that a memorandum would be circulated concerning that subject after the meeting.

Discussion of Item 91-27 concluded the reconsideration of the materials published for comment.

Chief Judge Sloviter, the liaison member from the Standing Committee, joined the Committee during the last discussion. The meeting adjourned for the day at 4:50 p.m. to allow time for the subcommittee on Rule 32 to meet.

The meeting reconvened at 8:30 a.m. on April 21.

II. Items Remanded by the Standing Committee

The Standing Committee had requested that the Advisory Committee reconsider a number of items.

Items 89-5 and 90-1

At its June 1992 meeting, the Standing Committee did not approve the draft amendments to Rule 35 proposed by the Advisory Committee on Appellate Rules. That draft made no substantive changes in Rule 35. It simply included within the text of the rule a warning that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari.

The Standing Committee did not approve the draft because it was persuaded that the Advisory Committee should reconsider the original proposal, *i.e.*, to treat a suggestion for rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus extend the period in which to file a petition for certiorari. In short, the proposal had been remanded because it only made the trap obvious rather than eliminating it.

The Reporter reviewed the earlier drafts. A December 1991 draft had taken the approach favored by the Standing Committee. That draft did not win Advisory Committee approval. The major stumbling block was that if a request for a rehearing in banc tolls the time for filing a petition for certiorari, there must be a date certain from which the time begins to run anew. Under prevailing practice, a court has no obligation to vote or otherwise act upon a suggestion for rehearing in banc. Therefore, the draft provided that if no vote is taken on a suggestion within 30 days of its filing, the court must either enter an order denying the petition or extending the time for considering it. The Committee had concluded that requiring any sort of action within a time certain (whether it be 30, 60, or 90 days) was undesirable.

After the Reporter concluded her summary of past discussions, Judge Williams asked whether it really would be necessary to require action on a suggestion within a time certain. There is no time limit in the rules within which a court must act on a petition for panel rehearing. A court knows that a petition for panel rehearing must be acted upon and does so in due course. Judge Williams thought that the same approach would work with suggestions for rehearing in banc. Judges Sloviter, Boggs, and Logan all indicated that suggestions for rehearing in banc are decided by their courts as routine matters. A consensus developed that if a change were made so that the pendency of a suggestion for rehearing in banc stayed the mandate and tolled the time for filing a petition for certiorari, the courts would develop a mechanism for disposing of the suggestions.

At that point the December 1991 draft became the focus of discussion. Judge Logan moved that lines 13 through 16 of the draft be omitted. The effect of that deletion would be to allow the circuits to determine how they would handle the internal voting procedures. The motion was seconded by Judge Williams and approved unanimously.

The Committee then discussed lines 24 through 26 and whether a petition for rehearing in banc should be included with a petition for panel rehearing. The existing rule states that a suggestion for rehearing in banc may be combined with a petition for panel rehearing. The draft would have required the two to be combined if both are filed. Judge Logan made a motion to excise that requirement. Judge Jolly seconded the motion and expressed his preference for separate documents. Mr. Munford noted that in the Fifth Circuit, a suggestion for rehearing in banc may be treated as a petition for panel rehearing. Judge Sloviter responded that the suggested change would not preclude that; the change simply means that the rule does not require that the two petitions be combined. The motion carried by a vote of five to three. Judge Williams made a motion that was seconded by Judge Logan to amend the Committee Note to state that a circuit has the option of requiring a separate document. The motion passed unanimously.

Judge Logan then moved approval of the drafts of Rule 35(b) & (c) and Rule 41 as amended by the preceding motions. Judge Williams seconded the motion. Judge Jolly stated that he believes the term "suggestion for rehearing in banc" should be retained to distinguish it from a petition for panel rehearing. Judge Logan responded that calling it a "petition for

rehearing in banc" makes it clear that a response is required from the court. Judge Keeton noted that with the omission of lines 13 through 16, there is no certainty as to what may happen, the petition may languish and the mandate is stayed until disposition of the petition. Judge Jolly pointed out that the problem is more theoretical than actual because whenever a judge is seriously considering voting in favor of rehearing in banc, the judge stays the mandate. Mr. Kopp suggested that the Committee Note point out that Rule 41 provides that the filing of a petition for rehearing in banc stays the mandate and that the court of appeals will need to take final action on the petition but the procedure for doing so is left to local practice. The motion passed by a vote of six to two.

Mr. Munford pointed out that Rule 32(b) uses the term "suggestion for rehearing in banc." Because the amendments just approved changes that term to "petition for rehearing in banc" that reference plus all other cross-references in the rules to "suggestions" for rehearing in banc must be amended.

Item 91-14

This item arose from a Local Rules Project suggestion to amend Rule 21 so that a petition for mandamus does not bear the name of the judge and the judge is represented *pro forma* by counsel for the party opposing the relief. At its December 1992 meeting, the Standing Committee did not approve for publication, the draft amendment of Rule 21 proposed by the Advisory Committee. The Standing Committee asked the Advisory Committee to consider further amendment of Rule 21. The Standing Committee was concerned about two issues. First, some members of the Committee felt strongly that a trial judge should have the option to appear to oppose the relief sought in a petition for mandamus. Second, in many instances a mandamus action is actually adversarial in nature and further changes in the rule might be desirable to emphasize the similarity of mandamus to an interlocutory appeal.

The Reporter summarized the three drafts that were prepared for the meeting. The first draft differed from the one submitted to the Standing Committee in that it would permit the trial judge to respond whenever the court of appeals requires a response. The second draft amends the rule so that the trial judge is not treated as a party but it allows the trial judge to respond and authorizes the court of appeals to order the judge to respond. The third draft was prepared by Judge Easterbrook. The third draft also amends the rule so that the trial judge is not treated as a party but unlike the second draft it permits the trial court judge to participate only if ordered to do so by the court of appeals. The third draft also authorizes a court of appeals to invite an amicus curiae to defend the order in question.

Judge Ripple invited Judge Keeton to add any comments about the Standing Committee discussion. Judge Keeton reported that there are deep divisions of thought on the issue of a trial court judge's appearing before a court of appeals and arguing. But there are also instances in which neither party may want the order to stand and that the position of the court may go unrepresented.

Judge Logan stated that in most instances one party supports the judges action but there are instances in which that is not true. For example, if a district judge refuses to act on a remand from a court of appeals, it is not likely that either party would support the judge's position. In some cases the judge is the proper person to respond to a petition for mandamus and the judge wants to respond.

Judge Williams expressed support for Judge Easterbrook's position in which a judge participates only upon court order. If a judge does not have the option to participate, the judge has a greater incentive to give a written explanation for the judge's conduct at the time he or she acts.

Judge Boggs noted that mandamus cases are of two different types. In some instances the issue is fundamentally substantive and in such instances there is no greater need for the judge's participation than in an appeal. In other instances, the issue involves a question of delay, of the judge's conduct, or of control of the court. In such instances the judge often wants to provide an explanation. The trouble with the judge's participation is that it calls into question the judge's impartial position.

Mr. Froeb favored allowing a judge to appear whenever the judge wishes to do so. He states that sometimes the outcome of a mandamus petition can have a serious effects on the administration of justice. When he served as the chief judge of a trial court, he had occasion to present the trial court's position in writing to a court of appeals. He did not agree that an amicus curiae would be able to adequately represent the court in all instances, and may not be willing to do so for little or no compensation.

Chief Judge Sloviter agreed that are cases where the parties do not have any interest in the outcome of the mandamus. For example, there was a case in her circuit in which the district judge assessed the cost of empaneling jury against the lawyer who failed to give notice that the case had been settled. Because the case had been settled, there was no appeal. But the question of the judge's authority to so assess the cost of the jury was called into question on mandamus. In that case, she asked a law professor to represent the judge's position as an amicus. She observed that the fundamental question is whether the district judge has a right to be a party to the action.

Mr. Munford stated that in his opinion it is unseemly for a judge to be a party in a case. Typically a court will not grant mandamus unless the party has asked for relief in the trial court. At the time that the trial court judge responds to that request, the judge has the opportunity to give reasons for the response. Mr. Munford stated that he thinks that participation by the trial court judge is proper only upon invitation of the appellate court.

Judge Ripple pointed out that if the parties have mutual self-interest, it is possible for them to frame the petition for mandamus so that the court of appeals is not aware of the real issue. It may be important to leave open the possibility of the district judge appearing to clarify the situation.

Judge Williams agreed that a case may be framed before a court of appeals so that a certain angle is obscured but that can happen on appeal as well as on mandamus. Therefore, he said that he does not see anything distinctive about the problem in mandamus cases.

Judge Ripple agreed that in mandamus cases involving substantive matters there is little or no distinction. But when a mandamus case involves case management or procedural issues, only the district court has a global viewpoint and the ability to explain certain actions to the court of appeals.

Chief Judge Sloviter suggested that after the filing of a mandamus petition, it might be appropriate to allow a district court to enter a supplementary opinion explaining its conduct. Allowing the court to file such an opinion would not constitute participation as a litigant.

Judges Jolly and Ripple both expressed the opinion that mandamus is an unusual writ and is not to be considered a substitute for an appeal. It is an action against the judge or against the judge's ruling. It is important that the judge have the opportunity to defend himself or herself.

Mr. Kopp observed that the problem is that mandamus occurs in many different contexts and the context determines the appropriateness of a judge's participation. As a general practice one does not want to encourage a judge to act as a litigant. The difficulty in drafting a rule, is that it cannot cover all the various situations.

Judge Logan expressed a preference for draft two because it neither names nor blames the trial court judge but gives the court the option of responding to the petition for mandamus.

Judge Ripple outlined the various options before the committee and asked for a straw vote. First, the Committee could take no action; Judge Jolly favored that approach. Second, the Committee could work with draft one; no member voted in favor of that approach but Judge Jolly indicated that it would be his second preference. Third, the Committee could work with draft two; five members voted to do so. Fourth, the Committee could work with draft three, the Easterbrook draft; two members voted to do so.

Following the straw vote, the Committee focused upon draft two found at pages 6 and 7 of the memorandum.

With regard to lines 18 through 20 of the draft, it was suggested that the two sentences could be made one by deleting the words "[o]therwise, it must" and substituting the word "or." Upon reflection, however, the Committee concluded that the change would alter the rule substantively. As written, unless the court denies a petition, it must order respondents to answer. If rewritten as suggested, the rule would say, "[t]he court may deny the petition without an answer or order that the respondents answer . . .." That formulation

omits the idea that the court must order a response unless it denies the petition. It was decided to leave the sentences as written.

Judge Jolly noted that lines 15 and 16 require the clerk of the court of appeals to send a copy of a petition for mandamus to the clerk of the trial court. He suggested moving that idea to line 6 and requiring the petitioner to serve the clerk of the district court. Judge Ripple noted that such a change might reintroduce the idea that the judge is a party. But he further, noted that the document would come to the trial court's attention earlier if it were sent to the trial court by the party at the time of filing rather than being sent by the court of appeals after filing. Judge Logan responded that mandamus cannot be granted without ordering a response, so delay is inevitable and the delay involved under the latter approach should not be problematic.

As an alternative, Judge Ripple suggested that a new sentence be inserted in line 7 following the word "court." He suggested that it state: "The party shall also transmit a copy to the clerk of the trial court for the information of the trial judge and certify to the court of appeals that such transmission has been made." A motion was made to delete the underlined language at line 16 and 17 and to add Judge Ripple's sentence at line 7. The motion was seconded and passed unanimously.

Two minor amendments were also approved unanimously. At line 5 the word "therefor" was deleted. At line 19 the word "respondents" was changed to singular.

Finally, the Committee unanimously approved the entire rule as amended with a request that the Standing Committee publish it for comment. Two members of the committee, however, wanted it recorded that they preferred the Easterbrook draft.

Item 91-4

The Committee returned once more to the discussion of the typeface problem in Rule 32. The Committee began by considering a draft prepared by Judge Jolly and his subcommittee. That draft read as follows:

> A brief or appendix produced by the standard typographic process must be printed in 11 point or larger type; ~~those~~ briefs produced by any other process must ~~be printed with~~ not exceed ~~more than~~ an average of 2000 ~~11~~ characters per ~~inch~~ page with double spacing between each line of text. Quotations and footnotes must appear in the same size type as the text. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. At the end of the non standard typographic brief, there must be an attorney's certification of the number of characters produced in the total brief (excluding the table of contents and the lists of cases and authorities).

Judge Jolly also provided a suggested Committee Note.

> Further, it is important that all briefs contain approximately the same average content per page so that no brief achieves an advantage in content based on the method or style of production. At the same time the rule seeks to allow a broad range of easily readable type, including proportional and non proportional fonts. To achieve this end the Committee concluded that a per page character average, including quotes and footnotes, was the most appropriate measurement to apply. Thus, following the close of the brief an attorney will certify the total number of characters produced (excluding the table of contents and the lists of cases and authorities). The Committee wishes to make plain that any typeface used must be easily readable and that no attempt should be made to reduce or condense the typeface in a manner that would increase the content of the document.

The Committee discussion focused upon whether computer programs can provide character counts and how a person using a typewriter rather than a computer would be able to certify the number of characters per page. The Committee also realized that further study would be needed to determine whether 2000 characters per page is the correct number. To easily accommodate the person using a typewriter, the Committee considered using the 11 character per inch standard as an alternative to the number of characters per page.

Judge Keeton indicated that he had been working on an alternative draft. He read his draft, which provided that a brief produced by any means other than standard typographic printing must not exceed on average the same content per page and must include a certification of compliance with this requirement. He suggested that the Committee Note could explain the standard and give examples from different software programs. His intent to avoid the need to change the text of the rule as technology changes.

Judge Keeton agreed to have his proposal typed for consideration by the Committee after the lunch break.

At 12:10 p.m. the Committee broke for lunch.

The meeting resumed at 12:55 p.m.

Item 92-10

At the December 1992 meeting of the Standing Committee, the Advisory Committee on Bankruptcy Rules submitted amendments to Bankruptcy Rule 8002. Those amendments parallel the proposed amendments to Fed. R. App. P. 4(a)(4). When reviewing the language in Bankruptcy Rule 8002, the Standing Committee questioned language appearing in both that rule and Rule 4(a)(4). As a consequence the Standing Committee asked the Advisory Committee on Appellate Rules to review the corresponding sentence of Rule 4(a)(4).

The Advisory Committee was asked whether, at line 87 of Rule 4(a)(4), the rule should require a party to file "a notice, or amended notice, of appeal" rather than simply an "amended notice of appeal." Judge Logan moved approval of the change; the motion was seconded by Judge Ripple. It was approved unanimously.

Item 91-4

The discussion returned to Judge Keeton's draft of Rule 32. The draft read as follows:

(a) Form of a Briefs and ~~the~~ an Appendix.

(1) A brief or appendix may be produced by standard typographic printing or by any duplicating or copying process ~~which~~ that produces a clear black image on white paper. Carbon copies of ~~briefs and appendices~~ a brief or appendix may not be submitted without the court's permission ~~of the court~~, except in behalf of ~~parties allowed to proceed~~ pro se persons proceeding in forma pauperis.

(2) A brief produced by the standard typographic process must be in 11-point or larger type. Quotations and footnotes must be in the same size type as the text.

(3) A brief produced by any other process must not exceed on the average the same content per page and must include a certification of compliance with this requirement. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. Quotations and footnotes must be in the same size type as the text.

(4) All printed matter must ~~appear in at least 11 point type~~ ....

The Committee decided that it would be clearer if the word "process" on line 10 of the draft were changed to the word "printing."

Mr. Munford suggested moving all the requirements for a brief produced by standard typographic printing into paragraph 2, which would mean including page and margin sizes for a printed brief in that paragraph. The Committee agreed and suggested that after the meeting the reporter reorganize the material in subdivision (a).

Judge Sloviter asked whether line 14 is clear enough; specifically, she wondered whether it is clear that one must count footnotes and block quotes in the content per page. Judge Williams suggested that the rule be amended to state that a brief must not exceed on average the same content per page "(including footnotes and quotations)" and the Committee agreed.

Judge Ripple commented that substantively, subpart (a)(3) is still ambiguous. The person preparing a non-printed brief is given a broad standard but does not have detailed instructions. Judge Jolly stated that a practitioner would need to obtain a printed brief and use it for comparison. Judge Keeton stated that he had hoped that the notes would be able to provide concrete illustrations. Judge Ripple continued to believe that the standard in the draft is so broad that the circuits would inevitably adopt local rules to provide guidance to practitioners and, therefore, there is a great risk that there would not be uniform application of the rule.

In light of the difficulty the Committee had during the meeting with the technical aspects of the rule, Judge Ripple asked the Committee to reconsider the approach considered some time ago under which the Administrative Office would publish a list of acceptable typefaces. There was discussion about whether that approach would violate the Rules Enabling Act as well as the question of accessibility to such a list.

Judge Logan made a motion to approve the draft as amended with the understanding that the Reporter would reorganize some of the material. The motion was seconded by Judge Ripple. Judge Jolly asked if the vote could be taken subject to the understanding that if it is possible to count characters per page, that a standard based upon characters per page would be used. With those understandings, the Committee voted unanimously to approve the draft. The Committee believed that the rule should be republished for a period of comment.

Item 92-2

At the Advisory Committee's October 1992 meeting it approved a draft rule that would permit technical amendment of the rules without the need for Supreme Court and Congressional review. At the Standing Committee's December meeting, the chairs and reporters of all of the advisory committees met, compared their various drafts, and agreed upon uniform language. The Reporter for the Standing Committee prepared uniform committee notes.

The Reporter reminded the Committee that the uniform draft is very similar to the October draft and that when the new draft was circulated to the Committee for a mail vote, it was approved unanimously. For informational purposes, the Reporter related that the Advisory Committee on Bankruptcy Rules met recently and failed to approve the technical amendments rule.

In light of the fact that the mail vote unanimously approved the new draft, Judge Ripple stated that unless some member of the Committee called for reconsideration in light of the Bankruptcy Committee's action, there was nothing further for the Committee to do. No member called for reconsideration so the rule was approved.

Because the Committee was awaiting photocopies of the materials for Item 92-1,

Judge Ripple proceeded to consider the next portion of the agenda with a promise to return to Item 92-1 when possible.

III. ACTION ITEMS

Item 92-4

In spring 1992, then Solicitor General Starr requested that the Committee consider amending Rule 35 to make the existence of an intercircuit conflict a ground for seeking a rehearing in banc. Acting Solicitor Bryson wrote to Judge Ripple shortly before this meeting and requested that the Committee take no final action on the suggestion until the new Solicitor General has an opportunity to consider the proposal.

Judge Ripple, however, had invited Mr. Cecil of the Federal Judicial Center to report on the Center's findings from its recent survey. Mr. Cecil reported that the survey of appellate judges revealed that intercircuit conflicts are not at the forefront of the judges' concerns. He further reported that four circuits have local rules that permit the courts to consider inter-circuit conflict as a basis for granting a rehearing in banc. The Ninth is one of those circuits but Professor Hellman's empirical research on the Ninth Circuit indicates that intercircuit conflict is not a prominent factor in granting a rehearing in banc in that circuit. Concerning alternatives to a full in banc that provide some check on the proliferation of intercircuit conflicts, nine circuits circulate opinions to all the judges of the circuit for their comment prior to publication. Some of those circuits require the circulating judge to note intercircuit conflicts so that the existence of the conflict is brought to the attention of the other judges.

Judge Ripple thanked Mr. Cecil and the other researchers at the FJC for their assistance. Judge Ripple also indicated that this item would be considered at the Committee's next meeting.

Item 92-1

This draft, like Item 92-2 dealing with technical amendments, is a uniform draft resulting from the December meeting of chairs and reporters. This draft deals with local rules.

When the draft was circulated by mail for a vote prior to the meeting, one member of the Committee did not approve the draft. Mr. Munford objected to that portion of the new draft that would allow a court to impose sanctions for non-compliance with a directive not found in either a national or local rule, but concerning which the person sanctioned had actual notice. Mr. Munford stated that if a matter is important enough to be sanctionable, it should be placed in a local rule.

Mr. Munford stated that he would prefer to end the rule on line 25 with the words

"local circuit rules." His suggestion would mean that sanctions could only be imposed for noncompliance with a federal statute or rule, or a local circuit rule. In contrast, the draft would permit sanctions for violation of other requirements so long as the violator had actual notice of the requirements.

Judge Ripple noted that the uniform draft does not deal with internal operating procedures. The Advisory Committee's earlier draft stated that any provision regulating practice before a circuit should be placed in a local rule rather than in an internal operating procedure. Internal operating procedures are abused in that way in some circuits. Judge Ripple suggested that the real issue is whether uniformity is sufficiently important to forego tailoring a rule to the particular differences between a court of first instance and an appellate court.

Judge Ripple invited Judge Keeton to speak about the uniformity issue. Judge Keeton stated that from the perspective of both the courts and the bar when the rules committees address the same problem, it is desirable that they use the same language. If the committees intend different things, they should use different language only when they mean to be different. He stated, however, that the Committee should feel free to make whatever recommendation it sees fit.

Judge Logan expressed support for the draft with the possible exception of making the two word changes made by the Bankruptcy Committee so that the two rules would be identical. He noted, however, that internal operating procedures are problematic in many circuits. Several circuits use i.o.p.'s like local rules but are not required to publish or circulate them like local rules.

Mr. Munford expressed disapproval of the final sentence of the Committee Note, lines 38-42. That sentence states: "Furnishing litigants with a copy outlining the court's practices -- or attaching instructions to a notice setting a case for conference or oral argument -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a court's standing order and indicating how copies can be obtained." He pointed out that the last phrase would force a lawyer to somehow obtain a copy of the cross referenced standing orders. The last phrase, in fact, treats what is normally considered constructive notice as actual notice. Judge Jolly and Mr. Kopp moved that the entire sentence be deleted. The motion was approved unanimously.

Because the mail vote approved the draft and no member called for reconsideration of that vote, the draft was approved.

Item 86-23

The Committee was asked to address the problem a prisoner may have in filing timely objections to a magistrate judge's report. The problem is the converse of the one addressed

by the Committee in response to Houston v. Lack. Houston addressed the problem that a *pro se* prisoner has in timely filing documents because a prisoner has no control over when prison officials place the prisoner's mail in the United States mail -- a problem with outgoing mail. The focus of this item is that an incarcerated person also does not have control over when mail is delivered to him or her -- a problem with incoming mail.

The drafts prepared for this meeting provide that service upon institutionalized persons is complete only upon receipt of the document by the inmate.

Following a brief discussion about whether there is any need for such a change, Judge Ripple suggested that the drafts be circulated to the Chief Judges of the circuits and to the Committee of Staff Attorneys, who deal with motions for leave to file out of time, to get their reactions. It was further suggested that the Advisory Committee of Defenders be consulted. The Committee concurred.

Items 86-24 and 92-8

A suggestion was submitted to the Committee that it reexamine the operation of Rule 38 just as the Civil Rules Committee had reexamined Rule 11. Judge Ripple had appointed a subcommittee consisting of Judge Boggs, Mr. Froeb, Judge Hall, and Mr. Munford to consider the suggestion and to lead the discussion.

Judge Boggs reported that subcommittee concluded that further consideration of the topic would not be fruitful at this time. He did state, however, that the subcommittee believed that the area does bear watching and may need to be revisited in the future.

Judge Ripple stated that he would keep the subcommittee in place and ask it to monitor, with the help of the Reporter, the developments in the area of sanctions. That subcommittee would be charged with informing the Committee when, and if, it should address the topic in a more formal way. Judge Boggs agreed to continue to serve as subcommittee chair.

Item 91-28

At the December 1991 meeting Mr. Kopp suggested that Rule 27, which governs motions, needed updating. Mr. Kopp prepared a proposal and supporting memorandum. Because of the complexity of the topic and the lateness of the hour, Judge Ripple suggested that the Committee was not in a position to take up the topic during the meeting. But Judge Ripple appointed a subcommittee to examine the proposal. He asked Judge Williams to chair the subcommittee and Mr. Froeb and Mr. Munford to serve on it; they all agreed. He further requested that the subcommittee circulate the draft to the Chief Judges of the circuits, if the subcommittee thought that was appropriate.

Item 92-3

This item concerns the possible conflict between Rule 4(b) and 18 U.S.C. § 3731. The matter was brought to the attention of the Committee by Judge Logan. The former Solicitor General wrote to the Committee suggesting that the Committee take no further action and allow case law to resolve any remaining problems.

Judge Ripple noted that Rule 4(b) was amended by Congress. The conflicting provision was not a product of the committee process but a direct expression of Congressional intent. Therefore, Judge Ripple stated one could argue that because 4(b) was enacted after § 3731, 4(b) is the most recent expression of Congressional intent and the conflict is more apparent than real.

Mr. Munford observed that the only party that could be injured by the conflict is the government and the government does not want the Committee to act.

Judges Jolly and Boggs moved that the Committee take no further action. The motion was approved unanimously.

Item 92-5

At the Advisory Committee's April 1992 meeting, the Committee reviewed proposed amendments to Rule 25 drafted in response to the Houston v. Lack case. At that time one member of the Committee noted that in order to file a brief using the mailbox rule, Rule 25 requires a party to use "the most expeditious form of delivery by mail, excepting special delivery." Now that the postal service offers overnight mail service, the Committee questioned whether the rule requires the use of that service.

The Reporter prepared a draft amendment to Rule 25 requiring the use of first class mail, which is what the current Supreme Court Rule requires. Mr. Froeb and Mr. Kopp moved that the Committee approve the draft; it was approved unanimously.

Item 92-6

Mr. Greacen, the Clerk of the Fourth Circuit, asked that the Advisory Committee consider eliminating the mailbox rule in Rule 25 for filing a brief or appendix. Following the Reporter's review of the issue, no motion was made; therefore, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-7

Judge Newman of the Second Circuit wrote and suggested that Rule 30 be amended to require that a joint appendix include a copy of the notice of appeal. Judge Newman's letter stated that the notice often needs to be examined to determine the timeliness and scope of the appeal.

Mr. Munford observed that those circuits that want a copy of the notice require it by local rule. The issue, therefore, is whether the requirement should be national.

No member making a motion to adopt the suggestion, Judge Ripple stated that the item would be treated as one for which no further action is deemed appropriate.

Item 92-9

When changing the Bankruptcy Rules to conform to the recently approved changes in Appellate Rule 4(a)(4), a member of the Bankruptcy Advisory Committee noted the need to make a conforming amendment to the rule requiring the preparation of the record on appeal. The Bankruptcy Committee has published such an amendment. The Reporter prepared draft amendments to Fed. R. App. P. 10(b)(1) using the Bankruptcy Rule as a model. The draft provides that if a notice of appeal is suspended because of the filing of a post trial motion, the appellant is not required to order a transcript until after disposition of the last post trial motion.

Mr. Froeb made a motion to approve the draft. The motion was seconded by Judge Williams and approved unanimously.

Item 93-2

The Acting Solicitor General wrote to Judge Ripple noting a technical problem with Rule 8(c). Rule 8(c) provides that a stay in a criminal case shall be had in accordance with the provisions of Rule 38(a) of the Federal Rules of Criminal Procedure. When Rule 8(c) was adopted, Fed. R. Crim. P. 38(a) addressed the rules for obtaining a stay when the sentence in question is death, imprisonment, fine, or probation. Criminal Rule 38 was later amended to address those subjects in separate subsections. Subsection (a) now only covers the death penalty; subsection (b) imprisonment; subsection (c) fines; and subsection (d) probation. Mr. Bryson suggested that the specific cross reference to subdivision (a) be dropped and that Rule 8(c) refer simply to Criminal Rule 38.

Judge Williams made a motion to approve the suggestion; the motion was seconded by Mr. Kopp. The motion was approved unanimously.

Miscellaneous

Judge Ripple reminded the Committee that in late January he had circulated a list of agenda items to determine whether there was any continuing interest in the topics. In response to that memorandum, none of the Committee members wanted to take any further action with regard to Items 91-18 (content of a petition to review a magistrate judge's judgment); 91-19 (uniform docketing statement); 91-20 (amendment of FRAP 26.1); and 91-21 (uniform appendix). However, two members requested further action with regard to Items 91-23 (consolidated brief for each side); 91-24 (page limits or other changes re: amicus

briefs); and 91-25 (contents of a suggestion for rehearing in banc). Judge Ripple stated that the last three items will be placed on the agenda for the Advisory Committee's fall meeting. The first four items will be listed as "no further action deemed appropriate."

IV. DISCUSSION ITEMS

Item 91-3 deals with implementing the authority to define a final decision by rule and to expand by rule the instances in which an interlocutory decision may be appealed. Judge Ripple informed the Committee that he had written to the Chief Judges of the Courts of Appeals asking their advice and that responses from them have begun to arrive. He also had written to the chairs of the AALS Sections on Federal Courts and Civil Procedure asking their advice and requesting that through their newsletters they make their members aware of the Committee's interest in hearing from the academic bar. Judge Ripple also reminded the Committee that the former Solicitor General had conveyed his hope that the Committee would not take an activist role simply because the authority had been granted.

With regard to Items 91-6, concerning the allocation of word processing equipment costs between producing originals and producing copies, and 91-15, concerning a uniform effective date for local rules, Judge Ripple informed the Committee that he would write to the Committee to ascertain if the members wish to keep those items on the docket.

Item 91-17, involving unpublished opinions, will be discussed at the fall meeting to determine whether the Committee wishes to pursue the topic.

Item 92-11 originated with a request from the Solicitor General to examine those local rules that do not exempt government attorneys from joining a court bar or from paying admission fees. Judge Ripple informed the Committee that the Acting Solicitor General has asked that the Committee defer acting on the item until the new Solicitor General has an opportunity to address the issue.

Judge Ripple suggested that the Committee try to meet next September before the Chair of the Committee changes. Such a meeting would give the Committee the opportunity to try to clear a number of remaining items off the docket before the new Chair assumes his or her duties.

The meeting adjourned at 3:00 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter