MINUTES OF THE OCTOBER 23, 1990 MEETING OF
THE ADVISORY COMMITTEE ON
FEDERAL RULES OF APPELLATE PROCEDURE

The meeting was convened by the Committee Chair, Honorable Kenneth F. Ripple, at 9:00 A.M., October 23, 1990, in room 638 of the Administrative Offices of the United States Courts. The following committee members were present: Honorable Myron H. Bright, Mr. Donald F. Froeb, Esquire, Honorable E. Grady Jolly, Honorable James K. Logan, Honorable Arthur A. McGiverin, and Honorable Stephen F. Williams. Mr. Robert Kopp, the Director of the Civil Staff Appellate Division, Department of Justice, attended on behalf of the Solicitor General. The Honorable Jon O. Newman, the outgoing chairman also attended. Mr. Robert St. Vrain, Clerk of the Eighth Circuit, attended as a liaison from the clerks. Mr. James E. Macklin, Jr., and Mr. Thomas Hnatowski both of the Administrative Office, were present, as well as Mr. William Eldridge of the Federal Judicial Center.

Judge Ripple welcomed and introduced the new members of the committee.

Judge Ripple expressed his thanks both personally and as the incoming chair of the committee to Judge Newman for his excellent service to the committee. The committee unanimously adopted the following resolution:

> As the **HONORABLE JON O. NEWMAN** completes his term as Chairman of the Advisory Committee on Appellate Rules, the Advisory Committee expresses its gratitude and appreciation to him for his leadership of the

Committee. While continuing with his duties as a Judge of the United States Court of Appeals for the Second Circuit, Judge Newman has provided the Advisory Committee with guidance, insight, and dedicated service; he has earned the Committee's deep respect and admiration. Judge Newman presided over the Committee's meetings with efficiency, good humor, and fairness; he managed the work of the Committee and the reporting of its recommendations to the Committee on Rules of Practice and Procedure with distinction. For his dedicated service to the Committee, through which he has served the federal judiciary and the entire legal community, we express our esteem and gratefulness.

Judge Newman expressed his gratitude to the committee members and his confidence in the incoming chair, Judge Ripple.

General Direction of the Committee's Work

Judge Ripple reported that he had spoken with Judge Keeton, the new Chair of the Standing Committee. Judge Keeton said that the Standing Committee is in transition changing both the Chair and a number of members and he expressed the opinion that the Standing Committee may need some breathing space before it takes up any additional rule changes. Judge Keeton further noted the Judicial Conference needs to decide the direction that it wishes to take in the wake of the Federal Courts Study Committee Report and that the Judicial Conference's position would influence the work of the Advisory Committees. Although Judge Keeton plans to

hold a short Standing Committee meeting in January, proposals from the Advisory Committees probably will not receive plenary consideration until the July 1991 meeting.

I. DISCUSSION ITEMS

A. Fed. R. App. P. 4(a)(4)

Professor Mooney explained the various drafts attached to her memorandum. The drafts were arranged in reverse order of their chronological development as the committee struggled to amend the rule over the past several years. The two earliest drafts (drafts C and D) allow a notice of appeal filed before disposition of a post-trial tolling motion to ripen into an effective notice of appeal when the post-trial motion is disposed of (the ripening approach). Draft B takes a different approach and requires district courts to forward to the courts of appeals copies of all post-trial tolling motions in cases in which a notice of appeal has been filed; the draft rule further requires the courts of appeals to dismiss the notices of appeal giving the would be appellants notice of the need to file new notices of appeal (the notice approach). Draft A, the most recent version, is basically a notice rule with the ripening approach as a fall back in those instances in which the courts fail to complete the paper work and the party does not receive the notice intended.

Judge Ripple relayed that Judge Keeton had reviewed the memoranda prepared for the meeting and had expressed concern about the complexity of Draft A, the current proposal. Judge Keeton suggested that a simpler approach might involve placing

the burden on the appellee to file a motion to strike the notice of appeal. Judge Ripple suggested, however, that the committee proceed with its discussion and that Judge Keeton would be consulted as the committee proceeded to develop a proposal.

Judge Jolly suggested that the committee return to a pure ripening approach in spite of the administrative problem. Judge Williams noted that the administrative difficulties did not appear overwhelming. Judge Logan also expressed a preference for the ripening approach.

Judge Newman described the procedures in the Second Circuit. In that circuit as soon as a notice of appeal is received scheduling begins; parties are called for conferences etc. Having a notice of appeal on file but held in abeyance would generate confusion for the Second Circuit.

Judge Jolly noted that the motivation for the amendment is to save appeals from technical traps that cause jurisdictional failures. He expressed the opinior that the rule should be simple and understandable and have as few words as possible. He further stated that administrative problems should not cloud those objectives. Judge Jolly suggested that the problems inherent in the ripening approach might be solved by allowing each circuit to adopt procedures designed to keep the court of appeals aware of the status of a notice of appeal.

Judge Newman noted that if the committee consensus was to work with the ripening approach then it should be adapted to make it workable. Although delaying transmittal of a notice of appeal

to a court of appeals until ten days after judgment would have the salutary effect of putting the court of appeals on notice of any post-trial motions, as they would be reflected on the docket sheet accompanying the notice of appeal, Judge Newman expressed reluctance to follow that approach. Once a notice of appeal is filed, the court of appeals has jurisdiction for many purposes and the court of appeals should know it has jurisdiction. Therefore Judge Newman suggested that Fed. R. App. P. 3(d) should continue to require transmittal of the notice of appeal "forthwith." Instead he suggested that Fed. R. App. P. 3(d) be amended to require the district courts to send the courts of appeals docket entries showing the filing and disposition of any 10 day motions. Then the courts of appeals could set up procedures for handling the suspended notices of appeal.

Judge Jolly asked whether it would be necessary to amend Fed. R. App. P. 3(d) or whether the circuits could simply instruct the district courts to send them the needed information. It was noted that there have been conflicts between the district and circuit courts and that if the burden were placed on the district courts by rule, conflict could be minimized.

Chief Justice McGiverin expressed a preference for leaving rule 4(a)(4) in its current form. The rule is clear and understandable, and if a litigant makes a mistake and jurisdiction is not established, only civil appeals are effected. Judge Ripple noted that the committee resolve to amend 4(a)(4) is backed by significant judicial opinion that the current rule

creates a needless trap especially for *pro se* litigants.

Judge Ripple called for a tentative vote on Drafts A (notice approach with ripening fall back) and C (ripening). He stated that after Judge Keeton had been consulted and expressed an opinion, the committee members would be given an opportunity to reconsider either by mail or by meeting. One member voted in favor of Draft A, six voted in favor of Draft C, and there was one abstention.

Because the committee favored the approach taken in Draft C, Judge Ripple asked if the committee also favored amendment of Fed. R. App. P. 3(d) to require district courts to notify the courts of appeals of any post-trial motions filed in cases in which a notice of appeal also had been filed and to further notify the courts of appeals of the disposition of the motions. Six members of the committee favored such an amendment.

Judge Newman asked if the intent of the committee would be to further refine Draft C to carry through with the changes suggested in Drafts A and B so that any motion filed within 10 days of judgment would be a tolling motion without regard to whether it was a Rule 59 motion or a Rule 60(b) motion. The consensus was that those changes are desirable.

Draft C differs from Draft D in that under Draft C only notices of appeal filed after judgment ripen into effective notices following disposition of the post-trial motions. Under Draft D notices before judgment, such as a notice filed after an order that appeared final (e.g., an order eligible for Fed. R.

Civ. P. 54(b) certification but that was not certified), might ripen into effective notices. Judge Newman stressed that the committee should be aware that adoption of Draft C would overrule case law allowing the ripening of such notices of appeal.

Judge Newman further pointed out that under the ripening approach an appeal may go forward when a post-trial motion is granted or granted in part. Technically then the notice of appeal filed before disposition of the motion is from a judgment that no longer exists. The committee should also be conscious of that problem and decide whether to address that issue either in the rule or in the committee note.

Fed. R. App. P. 4(b)

Unlike Fed. R. App. P. 4(a)(4), Fed. R. App. P. 4(b) does not state that a notice of appeal is a nullity if it is filed before disposition of the tolling post-trial motions. However, the Seventh Circuit has read Rule 4(b) as if it states that a notice of appeal must be filed after disposition of the tolling post-trial motions. See United States v. Gargano, 826 F.2d 610 (7th Cir. 1987); United States v. Naud, 830 F. 2d 768 (7th Cir. 1987).

The Seventh Circuit sees a jurisdictional problem with treating a notice of appeal as effective during the pendency of one of the tolling motions. In the Seventh Circuit's view, if a notice of appeal commences a valid appeal, the district court is barred from acting on the motion. On the other hand, if the notice is treated as null, the district court may act on the

motion and the time for appeal is postponed until the judge does so.

Judge Logan moved adoption of Draft 2 - a ripening approach. Chief Justice McGiverin also favored the ripening approach for 4(b), even though he did not favor that approach in 4(a)(4), because jurisdictional traps are more serious for criminal defendants than for civil litigants. The committee was unanimous in its approval of Draft 2. The ripening approach does not create the jurisdictional problems that concern the Seventh Circuit because the notice does not become effective until the disposition of the post-trial motions.

B. Fed. R. App. P. 34(c)

At the last meeting the committee had resolved to delete the requirement that at oral argument the first argument contain a statement of the case. The committee further resolved to accompany that change with an advisory note indicating that deletion of the requirement does not indicate disapproval of the practice and that the circuits are free to adopt a local rule that reflects local practice. The reporter drafted the rule and committee note for consideration at this meeting.

Mr. Froeb suggested that rather than having the circuits adopt local rules, it might be better if the note simply stated that although a statement of the case is not required the panel might request such a statement at the time of argument.

Judge Ripple made an alternate suggestion to amend the last sentence of the note to read as follows: "Those circuits that

desire a statement of the case may continue the practice."

The draft rule and committee note with the Ripple amendment were unanimously approved.

C. Fed. R. App. P. 35(a)

At the committee's last meeting it approved amendment of Fed. R. App. P. 35(a) to provide that the majority of active judges for purposes of hearing or rehearing a case in banc should mean a majority of the presently appointed active judges who are not recused provided that the participating judges constitute a majority of the presently appointed judges in regular active service.

Judge Williams expressed uneasiness with the quorum rule noting that in a circuit with 13 judges (such as the D.C. Circuit) as few as 4 judges (4 out of a panel of 7, with 6 recusals) could make circuit law.

Judge Newman pointed out that if there is not an in banc, then the panel of 3 sets the law of the circuit and in that light an in banc of seven may be better than a panel of three.

Judge Ripple stated that an in banc opinion carries a greater sense of permanence and it is desirable that an in banc panel represent a broad spectrum of the court. At the preceding meeting the committee thought that it was taking care of that problem with the quorum rule, but the current question is whether that is sufficient.

Judge William suggested an intermediate approach in which the quorum must be a two-thirds majority. A vote was taken on

the amendment and there were 3 votes in favor of the amendment (with one additional member expressing mild approval) and 4 votes against the amendment.

The amendment having failed, a vote was taken on the draft on page two of the memorandum. Six members voted in favor of the draft and two in opposition.

Judge Newman pointed out that the "presently appointed" language was included in the draft because there had been at least one decision that counted vacancies.

Judge Jolly pointed out that questions arise when a judge takes senior status between the time of the original panel decision and the time of the in banc vote. It was decided that the rule should not address that issue.

D. Fed. R. App. P. 35(c)

The suggestion before the committee was to amend Fed. R. App. P. 35(c) so that a suggestion for rehearing in banc effects the finality of a judgment of a court of appeals in the same way as a petition for panel rehearing does; a suggestion (petition) for rehearing in banc would then have the same effect upon the time for filing a petition for certiorari as a petition for panel rehearing.

Mr. St. Vrain stated that he had contacted Mr. Spaniol at the Supreme Court and learned that 105 petitions for certiorari were denied as untimely last year because the petitioner had assumed that a suggestion for rehearing in banc extended the time for filing the petition for certiorari.

Judge Ripple suggested that because the committee had not previously discussed this question and because the committee was unaware of the reason for the amendment to Sup. Ct. R. 13.4 (which states that a suggestion for rehearing in banc does not extend the filing time like a petition for rehearing) that he would undertake to speak with Mr. Spaniol about the issue. But before speaking with Mr. Spaniol, Judge Ripple requested a sounding of the committee's sentiment. A vote was taken on the three proposals presented in the memorandum: one member voted in favor of taking no further action; one member voted in favor of clarifying the rule (or committee note) to make the time tra, obvious; and five voted in favor of treating 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 of appeals' judgment and thus extend the period in which a petition for certiorari may be filed.

It was suggested that the draft accompanying proposal three should be amended by adding to the end of line 12 "unless extended by order of court." There is also a typographical error on line 17 of the draft; there should be two e's at the end of "appellee's".

E. Discussion of the Federal Courts Committee recommendations was postponed until later in the meeting.

F. Item 90-3

Edgar F. Barnett, Esquire, of Houston, Texas, wrote suggesting that an appellant should have a thirty day automatic

stay of execution of a district court judgment (requiring amendment of Fed. R. Civ. P. 62). The committee unanimously voted in favor of referring the issue to the Advisory Committee on Civil Rules as within its primary jurisdiction but requesting that the FRAP committee be informed about the proposal as it develops.

II. REPORT ITEMS

A. Sanctions for Frivolous Appeals

Judge Newman reported that he had sent letters to the Chief Judges of each of the circuits outlining the three sanctions proposals before the committee: amendment of Fed. R. App. P. 38 to state that an attorney may be ordered to bear costs; amendment of Fed. R. App. P. 38 to require notice before imposing costs; and adoption of an appellate equivalent of Rule 11.

The types of responses varied. Some judges transmitted their own opinions, some solicited the views of other judges in the circuit, and some sent the letter to the local rules committee.

Not all of the circuits responded. Several said that notice and opportunity to respond in writing should precede sanctions. A formal show cause order seemed to be what was intended at least in those instances in which the court acted sua sponte; otherwise notice comes from the party requesting sanctions. None of the responding judges expressed opposition to notice although some made no mention of it.

With regard to the proposal that there be an appellate Rule

11, two responded no and one yes.

Judge Ripple noted that there is a broad spectrum of sanctionable activities even in a court of appeals, some of which involve factual questions. In proceeding with any of these proposals the committee should be conscious of the effect they might have on long term bench/bar relations and of issues of fundamental fairness.

Mr. Macklin pointed out that the Civil Rules Committee has solicited comments on Rule 11 with a November 1 deadline for responses. The Reporter was asked to keep abreast of the Civil Rules activity.

With regard to the notice issue Judge Newman stated that he thinks notice must be given as a matter of due process. He further stated that it is awkward to ask a lawyer to defend a charge of frivolousness at the same time as he is arguing his client's case. So it may not be sufficient to say that an appellant's attorney may reply to a request for sanctions in the reply brief or at oral argument.

Judge Ripple drew the committee's attention to Fed. R. App. P. 46(c) dealing with attorney discipline. That rule requires notice and opportunity to respond before disciplinary action may be taken against an attorney for "conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court." The scope of Rule 46(c) is an unresolved question. Judge Ripple asked whether bringing a frivolous appeal could be considered "conduct unbecoming a member of the bar", and whether

"fining" a lawyer for a frivolous appeal is a "disciplinary action." Judge Logan stated that he would not favor treating monetary sanctions as a bar disciplinary matter because that would make the courts reluctant to act.

Judge Jolly asked if requiring notice and opportunity to respond would create satellite trials. He stated that a frivolous appeal is usually evident from the briefs and that a sanctioned party would always be able to petition for rehearing. Judge Newman responded that the opportunity to respond would probably rarely effect the outcome, but the response can be on paper and need not create protracted litigation. Judge Ripple stated that the Seventh Circuit has issued orders to show cause that run concurrently with the time for petitioning for rehearing. Judge Jolly noted that due process is satisfied in different ways in different cases; in some instances a rehearing may be all that is due.

Mr. Froeb stated that he favors notice and opportunity to respond because it advertises the court's concern with frivolous appeals even in those cases in which no sanction is ultimately imposed. He agreed with the earlier statement to the effect that an appellant should not have to shadowbox against sanctions in the reply brief. He further stated that notice should come from the court indicating that the court is contemplating imposing sanctions.

Mr. Kopp expressed the opinion that some form of notice from the court is crucial. Suggestions in briefs for sanctions are so

common that an appellant may often think that it is not worth mentioning much less giving the suggestion the dignity of a reply. He too thinks that the opportunity to respond should be separate from the brief.

Judge Logan noted that if a show cause order is issued at the time of the decision, that gives the party the advantage of knowing how the court views the case when responding to the charge of frivolity.

Judge Ripple stated that because of the complexity of the issue the sanctions matter would be a matter of continuing conversation among the committee members. He noted that the committee needs to sort the areas that need rulemaking from those that do not and then come up with concrete proposals.

Mr. St. Vrain stated that his court receives numerous calls from appointed counsel who feel caught between a client who may sue the lawyer for not pursuing the case and a court that may sanction the lawyer for advancing frivolous litigation. Although the judges on the committee expressed the opinion that a court would not sanction an appointed attorney for bringing a frivolous appeal, the judges understand that the bar may not be aware of that and the committee needs to remain sensitive to that issue.

B. Standard of Review

Judge Newman reported that he also had sent letters to the Chief Judges of each of the circuits soliciting reaction to the proposal that all briefs should contain a statement of the standard of review on appeal. All circuits but the First Circuit

responded and most thought it was a good idea; a couple thought that it would not do much good and is not always needed.

Judge Newman expressed his opinion that the standard of review is either very obvious or so difficult that it takes up much of the brief. But he noted that he is impressed that so many judges think that their local rules requiring such statements are helpful.

Judge Logan stated that the Tenth Circuit had copied the Ninth Circuit's rule and he believes that the rule is useful. He stated that it changes the way briefs are written because it forces the writer to focus upon what must be proven. He also noted that the rule requires parties to state where in the record the issue was raised and that provision is helpful. He further noted that there is a good 30-40 page article in F.R.D. on the standard of review.

Chief Justice McGiverin stated that Iowa rule 14(a)(5) requires such a statement and may contain helpful language.

Mr. Kopp stated that the Department of Justice favors any amendment that would encourage easy to understand briefs. He thought that non-mandatory language suggesting inclusion of a statement of standard of review might be better than a requirement.

The Committee concluded that it would like this item to go forward.

C. Houston v. Lack, Item 89-2

After the discussion at the committee's last meeting Judge

Newman contacted Mr. Michael Quinlan of the Bureau of Prisons and several state prison officials to inquire whether there is anything that the committee needs to know about mail collection in the prisons. The federal prison prison policy requires a collection box for legal mail and further requires that the mail be collected and date stamped each day. The state prisons have a variety of practices.

Judge Newman expressed the personal viewpoint that a rule may be unnecessary but if the committee decides to go forward with a rule that it probably should address only the filing of notices of appeal and not all time deadlines that litigants must meet.

Judge Ripple asked the committee members if they knew of any problems that had arisen in their courts in light of the Supreme Court's ruling that a prisoner's notice of appeal shall be deemed filed at the time it is delivered to prison officials for forwarding to the court. Judges Jolly and Logan both said that they were unaware of any problems in their circuits. However, Judge Logan stated that he believes a rule is necessary because the current rule conflicts with the rule enunciated by the Supreme Court in Houston.

The committee's discussion at the preceding meeting included the possibility of extending the coverage of a proposed amendment to include filings by persons confined to mental institutions. Judge Ripple asked the reporter to see if any of the circuits had extended the principle announced in Houston beyond persons

confined in penal institutions. It was decided to keep the item on the docket and to work from the draft prepared for the meeting by Judge Newman. Mr. St. Vrain was asked to consult with his fellow clerks about their experience with prisoner filings and the Justice Department was asked to consult with prisons about their experience.

D. Local Rules Project

Mr. Hnatowski gave a brief history of the local rules project. In 1984 the Judicial Conference asked the Standing Committee to undertake a review of the local rules. In 1985 Dean Coquillette, the Reporter for the Standing Committee, was charged with organizing that study. In January 1986 a budget and a plan for the project was approved. In fall 1986 the project began work at Boston College Law School, focusing first on district court rules. In April 1990 a report went to the district courts suggesting a uniform numbering system for the local rules and pointing out local rules that the project concluded were in conflict with national rules or repetitious of the national rules. A final report on the local admiralty rules will soon be filed and the final report on the appellate rules will soon be completed.

The report on the appellate rules will include: identification of local rules in conflict with or repetitious of the federal rules; identification of local rules that should be left local; and, identification of rules that should be considered for inclusion in the national rules.

There is a statutory obligation imposed upon the Judicial Conference to review local appellate rules and to determine those that are in conflict with the national rules. In 1989 the Standing Committee delegated that responsibility to the FRAP Advisory Committee but instructed the committee to await completion of the local rules project report on appellate rules. When the report is prepared the committee must review the report and all of the local rules.

I. Discussion Item F. Federal Courts Study Committee Report Recommendations.

The Federal Courts Study Committee Report made a number of recommendations that touch upon the appellate process and in some instances upon appellate rules.

1. Authority to define a final judgment via the rulemaking process.

The Committee discussed the two bills currently before the Congress. Section 104 of H.R. 5381 would amend the rules enabling act, section 2072 of title 28 of the United States Code, by adding a new paragraph (c) which would provide, "Such rules shall define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." See lines 15-17 of H.R. 5381. Section 318 of S. 2648 would also amend the rules enabling act by adding a new paragraph (c), but rather than mandating that the rules will define a final judgment the Senate bill includes a simple declarative sentence stating: "Such rules define when a ruling of a district court is final for the

purposes of appeal under section 1291 of this title."

Mr. Macklin's office has communicated with the legislators in an effort to change the language in the bills so that they state the rules "may define" when a ruling is final, which is in keeping with the apparent intent of the Federal Courts Study Committee. If neither of the bills becomes law, the committee would like to have the opportunity to comment on the issue before Congress acts again.

2, 3 & 4. Using a certiorari procedure in the courts of appeals, restructuring the federal appellate system, and intercircuit conflicts.

These recommendations raise a threshold issue concerning the role of the advisory committee. Judge Keeton in his conversation with Judge Ripple indicated that he thought the rules committees should be more active rather than reactive, meaning perhaps that they should be involved in major structural reform.

Judge Newman expressed the opinion that there is a legitimate role for committees that deal solely with the minutia of the rules and that asking the same committee to deal with structural concerns would dilute its efforts in both directions.

It was suggested that a compromise position might be possible. The advisory committee has an established working pattern and responsibilities and having primary responsibility for addressing structural issues could impede the progress of the committee's normal workload. Another committee could be given primary responsibility for addressing structural issues but the advisory committee could accept assignments from that committee.

5. Unpublished Opinions.

Several members expressed the opinion that the issue of unpublished opinions might be quite susceptible to rulemaking both with regard to whether citations may be made to unpublished opinions and with regard to the standards for non-publication.

III. COMMITTEE UPDATE

A. Equal Access to Justice Act

In April 1988 the committee approved a rule governing applications to courts of appeals for fees under the Equal Access to Justice Act. Because some members of the committee thought that a rule covering only EAJA fees might be inappropriate in the national rules, that it might be more appropriate to develop a rule governing fees in general, it was decided to circulate the rule to the circuits as a suggested model rule. In July 1988, the rule was circulated to the chief judges of each of the circuits. To date only the First Circuit has a rule that closely resembles the model rule.

There was a brief discussion of whether the committee should continue to examine this issue, but no conclusion was reached.

B. Committee operation between meetings.

Judge Ripple stated that when suggestions come before the committee that might be subject to summary disposition or that might be referred to another committee as more properly within the jurisdiction of that committee, the suggestion will be circulated to committee members for their reaction.

Judge Ripple expressed his intention to hold a spring

meeting and he would contact members later about a date for that meeting.

Judge Ripple also reiterated the need for committee correspondence to be sent to Mr. Macklin so that he may maintain complete records of committee business. Mr. Macklin will also arrange for circulation of materials to committee members.

The meeting adjourned at approximately 2:00 P.M.

Respectfully submitted,

Carol Ann Mooney
Reporter