

Meeting of the Advisory Committee on the
Federal Appellate Rules

December 15, 1983

Present: Chief Judge Pierce Lively, Chairman; Judge J. Smith Henley; Chief Judge Edward D. Re; Solicitor General Rex E. Lee; Ira C. Rothgerber, Esquire; E. Milton Farley, Esquire; Professor Kenneth F. Ripple, Reporter; Joseph F. Spaniol, Jr., Esquire, Secretary.

Absent: Judges Edward A. Tamm and Eugene A. Wright.

Guests: Judge Edward Gignoux, Chairman, Standing Committee on Practice and Procedure; Leland Beck, Esquire, Administrative Office of the United States Courts.

1. Procedures: The Chairman announced that the Standing Committee on Practice and Procedure had established procedures for the operation of the Standing Committee as well as the various advisory committees. These procedures are designed to provide for orderly consideration of proposed changes and to ensure that all interested parties have adequate opportunity to comment on such proposals. The Chairman invited the members' special attention to paragraph 4 which details the procedure for publication of proposed rules and for public hearings.

The Reporter noted that copies of these procedures had been provided to the clerks and deputy clerks of the courts

of appeals and that he had met with each group to go over the procedures and to encourage them to assist the Committee in informing the bar of these procedures.

2. Summary Calendar

The members of the Committee had studied various items on the basis of memoranda circulated by the Reporter. It was determined that no further action was appropriate with respect to the following agenda items:

Item 4
Item 9
Item 10
Item 12
Item 13
Item 15
Item 18
Item 20
Item 22
Item 24
Item 25
Item 29
Item 31

3. FRAP Item 6 - Separate Appendix

The Committee discussed the draft report submitted by the Reporter. Part VII, entitled "Conclusions and Recommendations," was the Committee's principal focus. Particularly detailed attention was given to the proposed amendment to Rule 30(b) which would require that each circuit have a local rule specifically noting that, in addition to sanctions

against the litigant, the court may, in an appropriate case, impose sanctions against counsel. This recommendation met with general approval. One member noted that the promulgation of such a local rule would have an educational benefit and was in keeping with the modern trend of the courts in policing the adversary system.

The Solicitor General moved that the draft report be accepted as submitted. His motion was seconded by Mr. Rothgerber. The motion carried unanimously.

The Reporter was instructed to proceed with planned footnote additions and editorial changes. The final text will then be circulated to the members.

4. FRAP Item 7 - Rule 45(b) - Word change to reflect modern docket systems.

The Committee examined the alternate drafts submitted by the Reporter. "Option B" was preferred by all. Amendments were proposed by several members and accepted by the Committee. Several members of the Committee stressed the need to give the Administrative Office maximum flexibility in supervising the delicate transition from a "hard copy" to a "soft copy" docket.

Chief Judge Re moved the adoption of Option B as amended by the Committee.

Judge Henley seconded the motion.

The motion carried unanimously.

5. FRAP Item 14 - Amendment of FRAP 28 to require a table of contents and a table of authorities in reply briefs.

The Committee examined the draft submitted by the Reporter.

Mr. Rothgerber moved the adoption of the draft as submitted.

Chief Judge Re seconded the motion.

The motion carried unanimously.

6. FRAP Item 32 - The Majority Vote Requirement for an En Banc Court

The Committee noted that this issue was currently pending before the Supreme Court of the United States in the petition for certiorari in 83-553, Arnold v. Eastern Airlines. In light of the pendency of the matter before the Court, the Committee declined to take further action.

7. FRAP Item 34 - Rule 4(a)(4)

- whether Court of Appeals ought to have discretionary authority to treat a premature notice of appeal as valid, despite an intervening motion to alter or amend the judgment.

The Committee considered the memorandum of the Reporter. It also noted that some courts of appeals and district courts had not set up adequate administrative arrangements within

the clerk's office to ensure that errors were detected early in the process. There is a need for adequate communication between offices of the district court clerk and the court of appeals clerk in handling this matter.

Mr. Rothgerber moved to table the matter indefinitely.

Mr. Farley seconded the motion.

The motion carried unanimously. The Committee further asked that the Chairman suggest, through communication with the chief judges, that administrative mechanisms for handling this matter be reevaluated.

8. FRAP Item 35 - Requirement of a Formal Motion in Order to Extend the Time for Filing a Notice of Appeal.

The Committee considered the memorandum of the Reporter.

Mr. Rothgerber moved to table the matter indefinitely.

Mr. Farley seconded the motion.

The motion carried unanimously.

9. FRAP Item 36 - Death Pending Criminal Appeal

The Committee reviewed the memorandum of the Solicitor General and the memorandum of the Reporter. The Solicitor General then suggested to the Committee that the matter be stricken.

Chief Judge Re seconded the motion.

The motion carried unanimously.

10. Suggestions by the Clerks

The Committee then considered the suggestions submitted by the clerks of the courts of appeals. The entire list of these suggestions and the comments of the clerks had been presented by the Reporter at the June 1983 meeting of the Committee. At that time, the Committee had agreed to consider in plenary session any matter which any member deemed worthy of consideration.

The Reporter invited the Committee's attention to Judge Wright's letter of June 22, 1983 in which he suggested that several items be given plenary discussion. Since Judge Wright was necessarily absent, the Chairman deferred consideration of those items. No member suggested that any other item warranted plenary consideration.

11. FRAP Item 23 - Brief Requirements: Standard of Review and Statement of Jurisdiction

The Committee considered the memorandum of the Reporter. Mr. Farley moved that no further action was deemed appropriate.

The Solicitor General seconded the motion.

The motion carried unanimously.

12. FRAP Item 26 - Disclosure of Corporate Affiliates

After considering the Reporter's memorandum, the Committee directed him to submit a proposed national rule for its consideration.

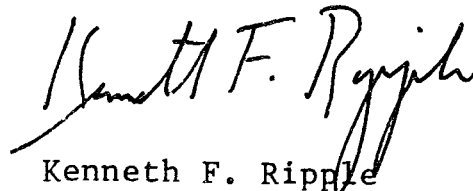
13. Uniformity

The Reporter noted that his study of the Rules indicated a significant proliferation of local rules which raised the possibility that uniformity of federal appellate practice was being needlessly diluted. He noted that the clerks of the courts of appeals had also suggested that this matter needed careful monitoring. The Reporter suggested that he undertake an indepth study of this problem.

The Solicitor General moved that such a project be undertaken.

Mr. Rothgerber seconded the motion.

The motion carried unanimously.



Kenneth F. Ripple

Reporter