MINUTES OF THE DECEMBER 4 & 5, 1991, MEETING OF THE ADVISORY COMMITTEE ON FEDERAL RULES OF APPELLATE PROCEDURE

The meeting was convened by the Committee Chair, the Honorable Kenneth F. Ripple at 10:00 A.M., December 4, 1991, in room 2781 of the Dirksen Building at 219 South Dearborn Street, Chicago, Illinois. The following committee members were present: Honorable Danny Boggs, Honorable Cynthia H. Hall, Honorable E. Grady Jolly, Honorable Arthur A. McGiverin, and Honorable Stephen F. Williams. Robert Kopp, Esquire, of the Department of Justice, attended as the Solicitor General's representative. The Honorable Dolores K. Sloviter, the liaison from the Standing Committee on Rules, was also present. Mr. Thomas F. Strubbe, Clerk of the Seventh Circuit, attended as liaison from the clerks. Professor Mary Squiers, Director of the Local Rules Project was present. Joseph F. Spaniol, Jr., Esquire, and Mr. John Rabiej, both of the Administrative Office were present, as well as Mr. William Eldridge of the Federal Judicial Center.

Judge Ripple introduced those persons joining the Committee for the first time.

Judge Ripple then made several announcements:

1. At the preceding meeting Judge Ripple undertook to write to each of the circuits soliciting their ideas as to how the Advisory Committee should proceed, if at all, to exercise its new authority to define "finality" by rule. Judge Ripple explained that in light of the heavy demands placed upon the circuits by the Advisory Committee to respond to the local rules project, he decided it would be more productive to write to the circuits after they completed their initial responses to the local rules project's suggestions.

2. The staff attorneys of the circuit courts have an advisory committee. Judge Ripple has invited that committee to communicate any suggestions it may have for improving the appellate rules.

3. Two members of the Advisory Committee were unable to attend the meeting, the Honorable James K. Logan, and Donald Froeb, Esquire. Both sent Judge Ripple written comments on the agenda items. Copies of their comments were provided to the committee members.

Status of Rules Forwarded to the Standing Committee in July

Judge Ripple requested the reporter to review the actions taken by the Standing Committee at its July, 1991, meeting with respect to appellate rules. Professor Mooney reported that all of the rules submitted by the Advisory Committee on Appellate Rules were approved, with some amendments, for publication. The period for comment upon the published rules will close in February, 1992.

Judge Ripple explained the need for the Advisory Committee to analyze the comments and to make recommendations based thereon to the Standing Committee. As of the time of the meeting only three written comments had been received; one of them was submitted by Chief Judge Sloviter.

Judge Ripple invited Judge Sloviter to speak about her comment. Judge Sloviter opposes the proposed amendment to Rule 35 which would establish a uniform method for determining a majority for purposes of hearing a case in banc. Judge Sloviter argued that the procedure for voting to hear a case in banc is a matter which is uniquely internal and should be decided by the individual circuits. Two days before the meeting Chief Judge Sloviter faxed her statement to the other chief judges and three chief judges wrote in support of her statement. The supporting judges were Chief Judge Breyer of the First Circuit, Chief Judge McKay of the Tenth Circuit, and Chief Judge Nies of the Federal Circuit. Judge Ripple noted that the Advisory Committee would discuss the proposed amendment to Rule 35 in depth at its spring meeting.

It was further noted that written comments were submitted by Mr. Ganucheau, Clerk of the Fifth Circuit, and by Professor Lushing, of the Cardozo Law School, concerning the proposed amendment of Rule 4(a)(4). Both comments will be considered at the spring meeting.

Judge Ripple further explained that after the Advisory Committee's spring meeting, the reporter would prepare a Gap Report for the Standing Committee. Gap reports may recommend delaying action on some items, sending some items forward to the Judicial Conference, and amending others.

Judge Ripple announced that the Standing Committee recently established a style committee that will be chaired by Professor Charles A. Wright. The style committee will

work to maintain uniformity of style and language in and among the rules.

Judge Ripple also read a letter from Chief Justice Rhenquist to Judge Keeton. The letter requests that when the Standing Committee submits proposed amendments for the Supreme Court's approval, the proposals be accompanied by a statement disclosing any controversies that may have surfaced concerning the proposals, the arguments in support of and against the proposals, and the committee's resolutions of the issues. In short, the Supreme Court wants to be informed about any division of opinion among the public or the committee members concerning proposals sent to the Court for action.

Local Rules Project

Judge Ripple explained that at the January, 1992, meeting of the Standing Committee, he must submit a preliminary report outlining the responses of the circuits and of the Advisory Committee to the report on local rules of appellate procedure. He also noted that Judge Keeton has requested that the Advisory Committee address not only the individual issues raised by particular local rules, but that it also reflect upon the over arching question of what constitutes uniformity.

Judge Ripple suggested that the remainder of the morning be devoted to a discussion of the members initial thoughts concerning the uniformity question and to such items referred to the Advisory Committee by the Local Rules Project as time would permit. He further suggested that after the lunch break the committee discuss regular agenda items and then in the late afternoon and the following day return to the local rules project.

The committee having agreed to that structure, Judge Ripple reviewed his memorandum of November 1 outlining the history of the project and the division among several bodies of the responsibility for maintaining uniformity. He then asked the members of the committee to give their preliminary reactions to the uniformity question.

Judge Boggs stated that his only firm conclusion was that a fair amount of latitude should be given to the circuits to fashion local rules; only provisions that are flatly contradictory to the national rules should be overruled. If a national rule is silent on a topic, a local rule on that topic should be considered acceptable.

Mr. Kopp prefaced his remarks by noting that he began practicing appellate law about the time that the Federal Rules of Appellate Procedure were first developed and that he had been elated because the federal rules had simplified his practice. He noted, however, that the simplification was short lived because the circuits soon began adopting local rules and that the present situation is almost as difficult as it was prior to the adoption of the federal rules. Mr. Kopp expressed his preference for a strong, central, and uniform system but also noted that he recognized that true uniformity may be more of an aspiration than an attainable goal. Mr. Kopp further stated that if variation in practice from circuit to circuit will continue to exist, certain steps should be taken to minimize the difficulties that the variations pose. He noted that a uniform numbering system is important because it makes the local rules more accessible. He further stated that it is important that there be a system of review and comment on local rules before their adoption. For example, rules might be submitted to a reviewer such as Professor Squiers who would be able to identify conflicts with the federal rules and make suggestions for bringing proposed rules into conformity with the federal rules. Mr. Kopp further suggested that it be made clear that only written rules, adopted in the prescribed manner, can be binding. If an emergency change must be made in any rule and the normal procedures are bypassed, courts should be required to provide parties with copies of the emergency rules at the time of docketing so that parties are aware of all rules governing their appeal. Lastly, Mr. Kopp suggested that a chart or summary sheet indicate each local deviation from the federal rules.

Mr. Strubbe expressed a preference for a loose confederation of courts and flexibility in local rulemaking. He noted that the circuits need not follow each other as to substantive law and asked why they must be uniform procedurally.

Chief Justice McGiverin noted that the Iowa Supreme Court tried to make the rules uniform in Iowa's eight judicial districts but after several years of work the effort went up in flames. He too noted the need for some local flexibility. He further noted that one must keep in mind that the primary concern should be whether the courts perform their function and that the federal circuits do get their job done. He agreed that a uniform numbering system is important to practitioners and that the opportunity for

notice and comment are important.

Judge Ripple offered a clarification. Notice and comment are required prior to the adoption of local rules. But in some circuits the distinction between local rules and internal operation procedures is not always clear. Because internal operating procedures are not required to be circulated, it is important that rules not be disguised as internal operating procedures. Several judges noted that their circuits circulate internal operating procedures for comment in the same manner as local rules.

Judge Hall also noted the need for flexibility in local rule making. She observed that questions such as the number of copies of documents that must be filed may be affected by the number of judges on a court and the geographic area covered by a circuit. She further stated that she would not want to see innovation in local rules foreclosed by requiring strict uniformity; she cited as an example experimentation with electronic filing. On the other hand she noted lawyers with the Department of Justice and with the national law firms that try cases all over the country are legitimately concerned about the lack of uniformity. She expressed a desire to balance the need for uniformity against the need for the courts to be able to tailor practices to their unique problems and circumstances.

Judge Ripple suggested that some rules, such as the number of copies to be filed, arise from internal court needs but other rules, such as whether there should be a jurisdictional statement, deal more with how a lawyer practices law and touch more directly upon relations between bench and bar.

Judge Sloviter expressed the opinion that a uniform numbering system is essential. With a uniform numbering system national lawyers would know where to look for local variations upon the national rules. In response to Mr. Kopp's suggestion that local rules be preceded by a chart indicating deviations from the national rules, Judge Sloviter suggested that deleting all parts of the local rules which simply duplicate national rules would serve the same function. If repetition of the national rules were deleted from the local rules, local rules would add to, or diverge in some manner, from the national rules.

Chief Judge Sloviter echoed earlier statements that local rules that add to the requirements of the national rules should not be considered inconsistent with the national

rules. Like Judge Hall, Judge Sloviter noted that local rules may provide a means to test innovative procedures. However, Judge Sloviter referred to Professor Leo Levin's University of Pennsylvania Law Review article which suggests that local experimentation should be controlled -- perhaps by a committee that approves the experimentation and sets a time for reporting back upon the court's experience with the innovative rule.

Judge Williams noted that diversity among the circuits is probably inevitable and that the focus should be upon ways to eliminate the snares the local variations may create. He too suggested that elimination of all repetitious language would flag the local variations. He stated that when developing national rules, the advisory committee should continually ask itself whether it intends the rules to preempt local variations. The committee should consider whether a rule needs to be uniform and one of the criteria should be whether variations would create traps for parties. As an example, he noted that the manner in which the base is calculated under rule 35 for determining whether a majority favors hearing a case in banc need not be uniform because the lack of uniformity would create no trap for litigants.

Judge Jolly stated that the committee should strive for uniform rules to the greatest extent possible. The committee should make it as easy and simple to practice in appellate courts as possible. He noted that there is a tendency to abuse the right of autonomy for idiosyncratic reasons. Yet, Judge Jolly noted the need for the circuits to have flexibility in rule making. The local rules in the district courts must be approved by the judicial council and Judge Jolly recommended that a similar system should control promulgation of local appellate rules.

Judge Ripple observed that a systemic check on local rules could differentiate between purely idiosyncratic deviations from the national norms and those local rules that are valid experiments undertaken to improve the processing of appeals.

After each of the members had offered their initial remarks on the uniformity question, the committee turned its attention to the topics that the local rules project referred to the Advisory Committee for consideration.

1. Numbers of Copies

The Local Rules Project identified several local rules that conflict with the federal

rules because the local rules require parties to file numbers of copies of documents that differ from the numbers required by the federal rules. Professor Mooney reviewed that portion of her memorandum of November 22, 1991, which discussed the varying contexts within which the number of copies problems arise.

Judge Ripple suggested that one possible approach to the problem would be to add to Rules 3 and 15 a requirement that appellants file one copy of a notice of appeal for each of the parties to the case, but otherwise delete from the national rules any required number of copies of documents, leaving that entirely to local rules. Chief Judge Sloviter favored retaining numbers in the federal rules but allowing that number to be varied by local rule, in essence having the FRAP rules set a framework that would operate absent local variation. Judge Boggs agreed with Judge Sloviter's recommendation.

Judge Jolly suggested that the federal rules should withdraw from the practice of setting the number of copies. He noted that it would be simpler if practitioners knew they always must consult local rules to ascertain the required number of copies. No one would ever be confused by the number printed in the national rules.

Mr. Kopp again urged the use of a mechanism, such as a chart, that would flag the instances in which local rules deviate from the national rules.

Mr. Eldridge pointed out that if all numbers are deleted from the national rules a court that thinks uniformity is desirable has no focal point from which to work. Judge Boggs agreed that national numbers serve a default function; courts that do not want a different number need not promulgate a rule.

Judge Ripple reiterated that there are two approaches to the problem: first, the national rules would establish a default number but authorize local variations; second, the national rules would omit all references to numbers of copies, all such requirements would be found only in local rules. Five members of the committee voted to leave presumptive numbers in the rules but to authorize local variations. Two members voted to delete all numbers from the national rules.

The reporter asked the committee whether it thought it better for each of the rules requiring a party to file copies of a document to state that local rules may require a

different number or whether there should be a single reference, probably in Rule 25, authorizing the local deviations from the norm established by the national rules. When put to a vote, five members favored a reference in each of the national rules requiring copies, and two favored a single rule authorizing local options.

Judge Ripple asked the reporter to draft language implementing the committee's wishes and making it clear that a failure to file the number of copies specified in a local rule would not create any jurisdictional defect. As to the latter, the reporter was asked to consult with Mr. Spaniol.

Judge Ripple also asked Mr. Kopp, Mr. Strubbe, and Mr. Spaniol to examine the feasibility of having a chart that would appear in each court's local rules and identify the required number of copies of each document.

The committee then adjourned for lunch. Following the lunch break, the committee began consideration of its regular agenda items.

Item 91-2
Amendment of Fed. R. App. P. 40(a) and 41(a) to lengthen the time for filing a petition for rehearing in cases involving the United States

The Solicitor General had requested that the Advisory Committee consider amending Fed. R. App. P. 40(a) and 41(a) to lengthen the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers.

Mr. Kopp described the lengthy process whereby the Solicitor General decides whether to seek rehearing in banc. The process has multiple steps to insure that the Department of Justice is selective regarding the cases in which it seeks rehearing in banc. The suggestion before the committee is to adopt the rule that has been in effect in the District of Columbia Circuit for many years and was more recently adopted by the Tenth Circuit. In the other circuits the government is repeatedly required to request extensions of time for filing petitions for rehearing, and such motions are routinely granted. Therefore, Mr. Kopp observed that the rule amendment would simply codify what is currently the general practice.

The Department of Justice suggested further language changes in the proposed

rule which would require any shortening of the 45 day period to be done by order, thus precluding local rules that would shorten the time period. The suggested language was as follows:

Rule 40. Petition for rehearing

(a) *Time for filing; content; answer; action by court if granted.* -- A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

The committee voted to adopt the proposal by a vote of six to zero. The committee requested that the committee note accompanying the proposal indicate that the committee deliberately chose to authorize courts to shorten the 45 day time period only by order and not by local rule.

The conforming amendment to Rule 41(a) was also approved by a vote of six to zero. It reads as follows:

Rule 41. Issuance of mandate; stay of mandate

(a) *Date of Issuance.* -- The mandate of the court shall issue ~~21~~ 7 days after the ~~entry of judgment~~ expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The

timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

Item 90-4, Torres

Following the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Advisory Committee received several suggestions that it amend Rule 3. Rule 3(c) requires appellants to "specify the party or parties taking the appeal." The Supreme Court in Torres held that there is no jurisdiction to hear the appeal of parties not properly identified as appellants.

Professor Mooney outlined the various proposals before the committee. The Council of the American Bar Association's Litigation Section submitted language that would allow an appellant to state the name of the "first party on that side of the case with an appropriate indication of the other parties." The ABA proposal apparently would overrule the holding in Torres making the use of "et al." sufficient. Public Citizen Litigation Group also submitted draft language which provides that an appeal filed by an attorney who represents more than one party shall be an appeal on behalf of all parties represented by that attorney. The reporter also prepared several drafts. The reporters drafts follow one of two approaches: three drafts are variations upon a basic rule requiring notices of appeal to name all appellants; a fourth draft provides that it is sufficient to indicate that all parties on one side of a case wish to appeal.

With regard to the Public Citizen proposal, Judge Hall noted if a rule authorized an attorney to appeal for all of the attorney's clients, it would be very difficult for the courts of appeals to ascertain the identity of the appellants because the courts of appeals have difficulty obtaining district court records.

Judge Sloviter inquired whether the committee note could state than in multi-party litigation, notices of appeal may refer to an appendix listing all appellants.

Mr. Kopp remarked that most of the ambiguity arises from the use of the terms "et al.," "plaintiffs," and "defendants." He suggested that a large part of the problem

could be dealt with by language in the rule stating that "use of 'et al.,' 'plaintiffs,' or 'defendants' will be deemed to include all parties on that side of the case."

Judge Boggs stated that as between court convenience and a party's right to bring a case before the court, the right to appeal should prevail. The aim of the rule amendment should be to keep appellants from falling between the cracks.

Mr. Spaniol noted that Supreme Court R. 12.4 presumes that all parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in the Supreme Court unless the petitioner notifies the Supreme Court Clerk of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition.

A consensus developed among the committee members that the rule should not presume that all parties represented by the attorney filing the notice of appeal are appellants. The remaining possibilities were: first, that the rule require the naming of all appellants; second, that the rule allow identification of the appellants by exclusion, for example, the notice could state that the appellants are all defendants below except the following persons; and third, that terms such as "et al.," "defendants," and "plaintiffs" should be deemed to include all parties on that side of the case.

Judge Jolly asked the committee to consider whether it is asking too much to require the notice of appeal to name all the parties. Mr. Kopp suggested that if the committee were to adopt that approach, that the rule should clearly indicate that use of terms such as "et al.," "defendants," and "plaintiffs" is inadequate.

For purposes of moving the discussion along, Judge Ripple suggested that the committee take a straw vote on Draft A found at page 16 of the reporter's memorandum. An alternate suggestion was made that the committee consider only the first phrase of that draft and delete the underscored language in lines three through 8 of the draft. As such the proposal would read as follows:

> The notice of appeal shall specify the party or parties taking the appeal by naming each appellant either in the caption or in the body of the notice of appeal.

Judge Ripple moved adoption of that draft and the motion was seconded by Judge Jolly. The motion passed by a vote of four to three.

Mr. Kopp then moved for an amendment to the proposal so that it would clearly indicate that terms such as "et al.," "plaintiffs" and "defendants" are not sufficient to name the parties. Judge Ripple asked Mr. Kopp and Professor Mooney to redraft the proposal for the committee's later consideration.

Professor Mooney asked the committee to consider the problems the rule would raise as to class actions, particularly when a class has not been certified. The committee consensus was that the language found at page 23 of the reporter's memorandum should be included in the draft amendment.

The committee was of the opinion that the naming requirement would apply with equal force to notices of appeal in cross appeals but thought that a committee note to that effect would be sufficient and that no rule amendment would be necessary.

Professor Mooney pointed out that there have been cases holding that if information that should have been included in a notice of appeal is supplied by other documents filed within the time for filing the notice of appeal, the deficiency in the notice of appeal is cured. The committee decided that such matters should be left to the discretion of the court and that the proposed rule would not preclude the exercise of such discretion and need not authorize it.

To aid pro se appellants, the committee approved in theory amendment of Form 1 in the appendix of forms.

The committee then took a short break after which it returned to the Local Rules Project, and specifically to the topics referred to the Advisory Committee for its consideration.

Local Rules Project (continued)

1. Quick Action Items

Among the topics referred to the Advisory Committee by the Local Rules Project were several suggestions which the reporter characterized as quick action items, not because of their importance but because they were simple suggestions requiring little or no research and needing only committee approval or disapproval.

A. Mailing Addresses in Proof of Service

Fed. R. App. P. 25(d) requires that a certificate of service recite the date of

service, manner of service, and the names of the persons served. The Federal Circuit requires that a proof of service contain the mailing addresses of the persons served. The Local Rules Report suggested that the Advisory Committee consider amending Rule 25 to include the address requirement because it could be helpful in situations where service is disputed. The reporter prepared the following draft:

Rule 25. Filing and service

(d) *Proof of service.* -- Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, ~~and~~ of the names of the persons served, and if service was accomplished by mailing, the addresses to which the papers were mailed, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

Approval of the draft was moved by Judge Jolly and seconded by Judge Ripple. The motion was passed by a vote of 6 to 0.

B. Attorneys' Telephone Numbers on Document Covers

Fed. R. App. P. 32(a) details the items that must be on the front covers of briefs and appendices. A Fourth Circuit internal operating procedure requires that in addition to the items required by Rule 32, counsel indicate their telephone numbers. The Local Rules Project also suggested that the Advisory Committee consider amending Rule 32(a) to require telephone numbers.

The reporter prepared the following draft:

Rule 32. Form of briefs, the appendix and other papers

(a) *Form of briefs and the appendix.* -

* * *

If briefs are produced by commercial printing or duplicating firms, or, if produced otherwise and the covers to be described are available, the cover of the brief of the appellant should be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix, if separately printed, should be white. The front covers of the briefs and of appendices, if separately

printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (*e.g.*, Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (*e.g.*, Brief for Appellant, Appendix); and (5) the names, ~~and~~ office addresses, and telephone numbers of counsel representing the party on whose behalf the document is filed.

Judge Jolly made a motion to approve the draft, the motion was seconded by Judge Ripple. The motion passed by a vote of 6 to 0.

C. Payment of Docketing Fees by Petitioners Seeking Review of Agency Decisions.

Fed. R. App. P. 15 does not discuss payment of the docketing fee. Yet the Judicial Conference's schedule of fees requires the payment of a docketing fee for "a case on appeal or review." Fed. R. App. P. 3 requires payment of the docketing fee upon filing a notice of appeal; but, Fed. R. App. P. 20 makes Rule 3 inapplicable to review or enforcement of agency orders. Five circuits have local rules requiring the payment of the docketing fee. The Local Rules Report recommended that the Advisory Committee consider amending Rule 15 to require payment of the docketing fee.

The reporter prepared the following draft:

Rule 15. Review or enforcement of agency orders - How obtained; intervention

(e) *Payment of fees.* - Upon the filing in a court of appeals of any separate or joint petition for review, the petitioner shall pay to the clerk of the court of appeals such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States.

Six members of the committee voted to approve the draft amendment, there were no negative votes.

2. Long Range Items

The remainder of the topics referred to the Advisory Committee by the Local Rules Project were either more complex or directly interrelated with the committee's yet to be developed position on conformity of local rules with federal rules. The reporter's

memorandum prepared for the meeting briefly described the topics and indicated that the committee members would be asked to discuss the relative priorities of the items so that the chair and the reporter could plan the committee's work schedule.

A. Uniform Effective Date for Local Rules

The Local Rules Project recommended that the Advisory Committee consider amending Fed. R. App. P. 47 to provide a uniform effective date for local rule amendments and additions.

Mr. Kopp indicated that as a practitioner whose practice is nationwide it is very difficult to keep abreast of changes in the various circuits and a uniform effective date would be an important improvement. He noted that some provision should be made to permit emergency changes, but in such instances the rule changes should be distributed to the parties when the case is docketed.

Mr. Strubbe stated that the January 1 effective date used in the Seventh Circuit has proved beneficial; it is clearly more efficient to announce rule changes only once a year.

Judge Ripple asked Mr. Strubbe to confer with the other clerks about the benefits and burdens of this proposal.

Judge Hall noted that when the Ninth Circuit approved the new death penalty procedure they were immediately effective because the circuit felt that they were so important that their effectiveness should not be delayed. Chief Judge Sloviter also observed that statutory changes or changes in the federal rules could necessitate simultaneous changes in local rules.

Judge Williams suggested that a simpler approach would be to inform each appellant at the time of filing a notice of appeal of the most recent revision of the local rules. That approach would eliminate the necessity of republishing the rules if no changes had been adopted.

The committee favored Judge Williams' suggestion but decided to take no action until such time as the committee had a better developed response to the general uniformity question.

B. Additional Information in Petitions for Leave to Appeal from District Court Decisions Reviewing Magistrate's Judgments

Fed. R. App. P. 5.1 governs petitions for leave to appeal from district court decisions reviewing magistrates' judgments. Rule 5.1(b) outlines the content of such petitions. Two circuits have local rules requiring inclusion of additional materials in such petitions. The Local Rules Project asked the Advisory Committee to consider amending Rule 5.1 so that it either requires additional information, or authorizes courts of appeals to require additional information by rule or order.

Judge Ripple remarked that this topic is illustrative of one aspect of the uniformity question. The additional information required by the local rules is information that the particular courts need to reach a decision. The local variations reflect a collegial consensus among the circuit judges of a particular court that is part of their decision making process.

Judges Sloviter and Williams observed that if all of the language in the local rules that repeats the federal rules were stricken, then the local rules would contain only additional information and the variations would be readily apparent.

It was the consensus of the committee that such cases are sufficiently rare that this topic should be considered low priority.

C. Procedures in Death Penalty Cases

The federal appellate rules do not contain specific procedures in death penalty cases; however, nine circuit courts have local rules establishing procedures for obtaining a stay and review in death penalty cases. The Local Rules Project suggested that this topic should be governed by a uniform, national rule.

Judge Hall stated that the Ninth Circuit has extremely cumbersome procedures that would not appeal to any other circuit but that the Ninth Circuit would not want to abandon.

Judge Ripple noted that the procedures often seem to reflect geography, location of prisons, operating procedures of the state courts, etc., and that allowing the circuits to handle their particular situation may be the only practical solution. Judge Hall agreed. Within the Ninth Circuit some states impose the death penalty frequently while others do

not have the death penalty. The Ninth Circuit procedures include automatic stays and in banc votes.

Judge Ripple stated that he would ask some members of the committee to study this question and determine if there is a need for national death penalty rules.

D. Writs of Mandamus and Prohibition

Fed. R. App. P. 21 provides that the judge actually be named as a party and be treated as a party with respect to service of papers. Nine circuits have local rules according to which a petition for mandamus shall not bear the name of the district judge. Six of these rules also provide that unless otherwise ordered, if relief is requested of a particular judge, the judge shall be represented *pro forma* by counsel for the party opposing the relief who appears in the name of the party and not of the judge. Although Rule 21 anticipates that a judge may not wish to appear in the proceeding, the rule requires the judge to so advise the clerk and all parties by letter. Six of the local rules reverse the presumption and require a judge who wishes to appear to seek an order permitting the judge to appear.

The Local Rules Project suggested that the Advisory Committee consider amending Rule 21 to reflect the presumptions in the local rules. The committee favored so amending Rule 21 and requested the reporter to prepare a draft for the spring meeting.

E. Docketing Statements

Eight circuits have local rules requiring that docketing statements be provided at some time after the notice of appeal is filed. The Local Rules Report recommended that the Advisory Committee consider a uniform format and filing time for docketing statements.

The committee consensus was that this was a case management issue better left to the individual circuits.

F. Prehearing Conferences

Fed. R. App. P. 33 authorizes the courts of appeals to direct attorneys "to appear before the court or a judge thereof for a prehearing conference . . ." In five circuits attorneys as well as judges preside at prehearing conferences; in one other circuit

prehearing conferences are held without a presiding person. The Local Rules Project took the position that those local rules are inconsistent with Rule 33 and that the Advisory Committee should consider amending Rule 33 to permit attorneys to preside at prehearing conferences. The Project also suggested amending rule 33 to permit a party to request a conference and to provide that the results of the conferences be held confidentially.

Judges Sloviter and Williams expressed the opinion that this is a simple delegation issue. Courts have the authority to require attorneys to appear before the court or a judge thereof and the local rules simply delegate the courts' authority to other court officers.

Mr. Kopp suggested that Rule 33 could use a thorough updating to authorize not only appearances before non judge personnel but also to encourage the use of telephone conferences which would reduce travel costs, and to address a problem that is unique to the government, sending a person with settlement authority to the conference.

Judge Hall stated that if Rule 33 needs to be amended to allow attorney presiders, it should be amended.

Judge Ripple asked Judge Hall and Mr. Kopp to act as a consultative committee to Professor Mooney to assist in developing draft alternatives. Judge Ripple indicated that he also would ask Judge Logan to join that working group.

G. Uniform Standard for Granting a Stay of Mandate

Fed. R. App. P. 41 provides that a stay of mandate may be granted upon motion pending application to the Supreme Court for a writ of certiorari. The rule is silent concerning the standard to be used in determining the appropriateness of a stay. Nine circuits have local rules enunciating standards to be used in determining whether the issuance of a mandate should be stayed. The Local Rules Project suggested amending Rule 41 to provide a uniform standard for granting a stay of a mandate.

Judge Ripple expressed the opinion that this topic should be given priority and that the case law in the Supreme Court should be used as guidelines.

Chief Judge Sloviter inquired whether the issue is one of substance or procedure.

The Reporter was asked to draft language for the committee's consideration.

H. Authority of Clerks to Return or Refuse to File Documents that Do Not Comply with Federal or Local Rules

Seven circuits have rules that permit the clerk to return or refuse to file documents if the clerk determines that the documents do not comply with the federal or local rules. The Local Rules Project recommended amendment of Fed. R. App. P. 45 to state that the clerk does not have authority to return or refuse documents.

The committee consensus was that this topic should be given high priority. Professor Squiers reported that the topic had been discussed by the Standing Committee with reference to district court clerks.

Judge Jolly observed that granting clerks authority to mark documents received but return them for correction would be acceptable as long as the documents, once corrected, are treated as having been filed on the date they originally were received. Granting clerks authority to refuse documents has jurisdiction implications that are troublesome.

I. Involuntary Dismissals

Discussion of this topic was deferred until further consultation between the reporter and the local rules project director clarifies the nature of the issue.

J. Corporate Disclosure Statements

Fed. R. App. P. 26.1 requires corporate parties to file a disclosure statement identifying affiliated entities. Ten circuits have rules that expand upon the requirements in Rule 26.1. The Local Rules Project recommended that the committee consider expanding the requirements of Rule 26.1 and establish a uniform time for filing the statements or that the committee consider limiting the circuit courts' rulemaking authority in this area.

The reporter reviewed the process by which the current rule was developed and the difficulties that were encountered in attempting to fashion a more inclusive rule that would be widely accepted by the circuits.

The committee designated the topic as low priority.

K. Uniform Appendix

The Local Rules Project recommended that the Advisory Committee reexamine

Fed. R. App. P. 30 either to provide a limited number of options with respect to the form of appendices or to authorize the variations in form now in use in the circuits.

Judge Ripple outlined the five year study conducted from 1980 through 1985 aimed at developing a uniform appendix rule and practice; the report on that study is found at 107 F.R.D. 125-138. The committee agreed that most of the current variations are some form of record excerpt and that the use of record excerpts in place of appendices is authorized by Rule 30(f). Because the topic has been thoroughly studied and current practices are not in direct conflict with the rule, the committee decided that this topic should have low priority.

L. Sanctions under Rule 38

The Local Rules Project recommended amendment of Rule 38 to address the circumstances under which damages may be imposed or dismissal may be ordered. Because amendment of Rule 38 is already on the committee's docket and meeting agenda, discussion of the topic was delayed until later in the meeting.

M. Publication of Opinions

The Local Rules Project recommended that the Advisory Committee consider amending Rule 36 or adding another rule to include a uniform plan for publication of opinions.

The reporter pointed out that the Federal Courts Study Committee recommended formation of an ad hoc committee under the auspices of the Judicial Conference to review the policy on unpublished opinions in light of the increasing ease and decreasing cost of electronic database access to opinions. The Judicial Conference decided not to pursue the recommendation.

Judge Logan's letter indicated that he has some interest in looking at the issue. Mr. Kopp stated that the change in technology has changed circumstances and that a new look at the policy would be timely.

Chief Judge Sloviter observed that the topic would be controversial. She recounted that there was a recent controversy over electronic citations and a uniform policy was not achieved; if that lesser question is left to the circuits, the more important question of what opinions should or should not be published is also likely to be left to the

circuits.

Judge Hall noted that to some extent the publication question is a case management issue. Opinions that will not be published are written differently; such opinions primarily give an answer to the parties, usually without recitation of the facts and sometimes without any discussion of certain issues. The difference in the time spent preparing an opinion that is to be published compared to an opinion that will not be published is enormous. Judge Hall stated that if an issue has been before the court repeatedly, the extra time needed to prepare a decision for publication is not warranted.

Judge Ripple stated that Chief Justice Burger had asked each of the circuits to adopt a publication plan on an experimental basis. Judge Ripple suggested that perhaps the committee could find another body to look at the issue.

The meeting adjourned at 6:00 p.m. on December 4, 1991.

The meeting reconvened at 9:00 a.m. on December 5, 1991.

Judge Ripple announced that Ms. Ann Gardner will be retiring from the Administrative Office in February. Judge Jolly made a motion that was seconded by Chief Justice McGiverin that the committee adopt a resolution thanking Ms. Gardner and wishing her the best in her retirement. The motion passed unanimously.

Local Rules Project (continued)

3. Topics Referred to the Advisory Committee by the Circuits

Having discussed the general uniformity issue, and having discussed the topics referred to the Advisory Committee by the Local Rules Project, Judge Ripple turned the committee's attention to topics that the circuits suggested that the committee consider. As the circuits reviewed the Local Rules Project's report and examined their local rules in light of the report, several of the circuits suggested that some portions of their local rules embodied ideas and practices that the Advisory Committee should consider adding to the federal rules. There were several such suggestions.

A. Supplemental Authorities

Fed. R. App. P. 28(j) states that when pertinent and significant authorities come to the attention of a party after the party has filed a brief, the party may advise the clerk

by letter that sets forth the citations to the authorities. The District of Columbia has a rule allowing a supplemental brief as to authorities issued after the filing of a party's final brief as well as the letter permitted under Rule 28(j).

Judge Jolly suggested that the Committee not amend Rule 28(j) because the rule is a good one. At some point there needs to be an end to briefing and under the current rule a court could request supplemental briefing or parties could move to allow supplemental briefing. Mr. Kopp agreed that the current rule works well and is sensibly administered. It was the committee consensus that no further action was appropriate.

B. Order of Oral Argument

Fed. R. App. P. 34(c) states that an appellant is entitled to open and conclude oral argument. The District of Columbia practitioner's handbook states that the court may alter the usual order of presentation and the Local Rules Report cited that rule as inconsistent with Rule 34.

Judge Hall stated that the courts should have the ability to alter the usual order of argument. Sometimes all the questions are on one side of the case and the court wants to hear from that side first.

Judge Jolly said that judges simply assume they have the authority to alter the order of argument and that very little confusion is caused by either the rule or court practice.

The committee saw no need to change the rule.

C. Single brief for each side in a consolidated or multi-party appeal

The Fourth Circuit Local Rule 28(a) states that a single brief will be filed for each side in a consolidated or multi-party case. Fed. R. App. P. 28(i) presumes that parties will file separate briefs. The Fourth Circuit urged the Advisory Committee to consider adopting the Fourth Circuit approach.

Chief Judge Sloviter noted that a similar question has arisen in the Third Circuit. If multiple parties file a single notice of appeal and pay a single docketing fee, should they be allowed to file more than one brief?

Judge Williams favored establishing the presumption that only a single brief would be allowed but making it clear that exceptions to the rule are permitted.

Judge Hall stated that in the Ninth Circuit, even in non-consolidated cases, parties are strongly urged to file a single brief.

Mr. Kopp observed that it would be inappropriate for the government to be joined with a private party for purposes of brief. He also noted that even when all parties are private parties, the varying levels of competence among lawyers could create difficulties. It would be tough to let a less skilled lawyer brief even one issue in a case.

The conclusion of the discussion was that the topic should be a "discussion " item at a future meeting.

D. Amicus Briefs

Fed. R. App. P. 29 deals with briefs of amici curiae. Rule 29 does not establish a page limit for an amicus brief but five circuits have rules that impose such page limits. The Local Rules Report listed those rules as inconsistent with the federal rules on the assumption that failure to treat an amicus brief differently than other briefs means that an amicus brief is subject only to the ordinary 50 page limitation. The Fifth Circuit recommended that the Advisory Committee examine the local rules that fix the contents of amicus briefs and limit the number of pages in them.

Judge Jolly pointed out another Fifth Circuit rule that prohibits the filing of an amicus brief in an in banc case that has the effect of disqualifying a judge from hearing the case.

Mr. Kopp observed that amicus briefs are long because they are due simultaneously with the parties' briefs. If amicus briefs were filed after the parties' briefs, quite often they would not need to be so long.

The committee consensus was that courts have authority to refuse amicus briefs and the subsidiary authority to limit those amicus briefs that the courts choose to permit. The committee would like to discuss the issue as time goes on, but did not assign it high priority.

E. Release in Criminal Cases

Fed. R. App. P. 9(a), which governs appeals from orders respecting release pending trial, and 9(b), which governs motions for release pending appeal, both state that release determinations shall be made "upon such papers, affidavits and portions of the

record as the parties shall present." Four circuits have rules that specify the type of information the court wants included in the "papers." The Fifth Circuit is one of those circuits and it urged the Advisory Committee to consider including such requirements in Rule 9(a) & (b).

Judge Ripple remarked that the type of information a court wants may vary locally and the subject may not be susceptible to national rule.

Judge Hall observed that the courts have an obligation to act upon such matters with dispatch and if the parties fail to give the court the information it needs, that failure delays the decisional process.

Professor Squiers noted that the rule now states that the decisions shall be based upon such papers as the parties present. Simply changing the rule to state that the decisions shall be made after consideration of such papers as the court may require would authorize the local variations.

The committee asked the reporter to draft language for the committee's consideration.

F. Content of Suggestions for Rehearing in Banc

Several circuits have rules specifying the contents of suggestions for rehearing in banc and the Fifth Circuit requested that the Advisory Committee consider amending Fed. R. App. P. 35 to incorporate a description of the form of such suggestions.

Chief Judge Sloviter observed that suggestions for rehearing in banc place serious demands upon the judicial system and that the number of rehearings in banc is minuscule compared to the amount of time needed to deal with the suggestions. She suggested that rather than circulating all suggestions to all members of the court, perhaps the original panel could be authorized to make the equivalent of a probable cause determination and only upon a finding of probable cause would the documents be fully circulated.

Judge Jolly stated that Fifth Circuit Rule 35.1 cautions lawyers about filing suggestions for rehearing in banc and tells them that Rule 11 is fully applicable to such filings. Judge Williams observed that the language in Rule 35(a) is itself clear that rehearing in banc will be granted only in extraordinary instances.

The consensus of the committee was that a general review of Rule 35 should be

undertaken at some future time but that the committee was not particularly interested in developing a rule specifying the contents of such documents.

4. Recurring Issues Raised by the Circuit Responses

The responses of the circuits evidenced concern with some recurring themes.

A. Typeface

Fed. R. App. P. 32 governs the form of briefs, appendices, and other papers. Rule 32(a) requires printed matter to be in 11 point type. In the age of computer generated documents, that terminology is obsolete. Several circuits have or are developing local rules that are keyed to computer generated type styles.

Judge Ripple stated that in light of the changing technology and the slow process for changing the federal rules, the committee might consider removing the type style requirements from the national rules. Instead, the national rules could require parties to use one of the type styles approved by the Administrative Office. The general counsel for the Administrative Office was of the opinion that such a delegation would be appropriate.

Judge Williams expressed a preference for having the federal rules include at least a safe harbor, that is state that "X" typeface is acceptable, as well as any others on the list approved by the Administrative Office.

Mr. Kopp was of the opinion that leaving that determination to the Administrative Office would not be prudent. At least if the changes go through the Advisory Committee, the users -- the judges and lawyers -- are involved in the decisional process.

The consensus was that the topic should be place on the agenda as a discussion item for a future meeting.

B. Contents of Briefs

Several circuits have local rules requiring the inclusion of additional items in briefs, notably a summary of the argument. Judges Jolly and Ripple both agreed that a summary of the argument is most useful. The committee consensus was that it would consider requiring a summary of the argument.

Another item that the committee thought should be included is a statement that a

party is claiming attorney's fees for the appeal and the statutory basis for the claim. The statement is a necessary precursor to a response to it.

Mr. Kopp observed that it would be helpful if the national rules preempted local rules on minor matters such as stapling and binding of briefs, or at the very least alerted parties to the possibility that local rules may have additional requirements governing such matters. The reporter was asked to consult with Mr. Kopp and Mr. Strubbe about the development of amended Rules 28 and 32.

C. Motions

Fed. R. App. P. 27 governs motions practice in the courts of appeals. Mr. Kopp stated that Rule 27 may be misleading because it suggests that motions may be supported by briefs, which is an anachronism. He observed that if Rule 27 were improved, the improvements might eliminate the necessity of local rules governing motions.

Judge Ripple requested that Mr. Kopp prepare a memorandum outlining the portions of the rule that the committee should examine.

5. Square Conflicts

In a few instances circuit rules are in square conflict with the national rules. The Advisory Committee will point out these instances to the Standing Committee which must generally determine how it will work with the circuits on achieving the desired level of uniformity.

A. The District of Columbia Circuit Rule 11(d) restricts reply briefs to 20 pages whereas Fed. R. App. P. 28(g) permits 25 pages.

B. Under the District of Columbia case management plan, appellants' briefs are often due well after the time specified in Fed. R. App. P. 31.

C. First Circuit Rule 27.1 requires parties to file "four copies of a memorandum or brief" filed in support of a motion. Fed. R. App. P. 27(d) requires parties to file the original and three copies. The First Circuit suggests that its rule is not inconsistent with the federal rule because the First Circuit rule means that a party should file the original and three copies. The wording of the local rule is confusing; it may well be understood to mean that one must file the original and four copies. The Local Rules Project Director believes that a minor word change that would make the rule clearer is needed.

D. First Circuit Rule 45 authorizes the clerk to enter an order dismissing an appeal if an appellant or petitioner fails to file a brief or appendix. This rule conflicts with Fed. R. App. P. 31(c) which requires the appellee to file a motion for dismissal of the appeal.

E. Fed. R. App. P. 10 requires an appellant to order the transcript within 10 days after filing a notice of appeal. First Circuit Rule 10 states that a party should order a transcript "immediately after the filing of the notice of appeal." A proposed amendment to that local rule would allow the court to impose "a monetary penalty" for "not timely ordering a transcript." The rule apparently would authorize a fine for failure to order a transcript "immediately," even though the federal rule allows an appellant 10 days to order the transcript.

F. Fifth Circuit Rule 9.5 requires the government to file a written response to all requests for release in criminal cases and the response must be filed within seven days after service of the request for release. The Fifth Circuit rule creates an automatic seven day delay before the court may act upon a request for release. This is contrary to the intent expressed in Fed. R. App. P. 27(a) and the advisory committee note thereto that because of the nature of requests for release the court may act upon them after reasonable notice and that an automatic delay is undesirable.

Item 90-4 (continued)

Following the discussion of this item on the preceding day, the reporter and Mr. Kopp prepared another draft amendment to Fed. R. App. P. 3(c). The new language is as follows:

Rule 3. Appeal as of right - How taken

(c) *Content of the notice of appeal.* -- The notice of appeal shall ~~specify the party or parties~~ name each party taking the appeal either in the caption or in the body of the notice of appeal. Use of such terms as "et al.," or "plaintiffs," or "defendants" is not effective to name the parties. In class actions, whether or not the class has been certified, it shall be sufficient for the notice to state that it is filed on behalf of the class. The notice of appeal also shall designate the judgment, order or part thereof appealed

from ; , and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal . . .

The committee unanimously approved the new draft and directed the reporter to prepare a similar draft amendment to Fed. R. App. P. 15.

During the prior discussion of this amendment, questions arose concerning the use of an appendix listing the names of all appellants and whether that should be authorized in the rules itself or discussed in the committee note. The committee decided to omit any discussion of such a practice. The committee also approved in substance changes to the forms in the appendix of forms.

Items 89-5 and 90-1

Amendment of Fed. R. App. P. 35(c) to treat suggestions for rehearing in banc like petitions for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus toll the period in which a petition for certiorari may be filed.

A petition for panel rehearing suspends the finality of a court of appeals judgment until the rehearing is denied or a new judgment is entered on the rehearing. Therefore, the time for filing a petition for certiorari runs from the date of the denial of the petition or the entry of a subsequent judgment. In contrast a suggestion for rehearing in banc does not toll the running of time for seeking certiorari.

Although the distinction between a petition for rehearing and a suggestion for rehearing in banc is clear in the rules, the distinction eludes some lawyers and litigants. The confusion may be caused by the fact that a suggestion for rehearing in banc has the same filing deadline as a petition for panel rehearing and it is common practice in many circuits to file a single document that requests both a panel rehearing and a rehearing in banc.

Problems regarding the timeliness of petitions for certiorari arise in two situations: first, when a suggestion for rehearing in banc is filed without a petition for rehearing; and second, when the nature of the document filed is unclear, as when a "petition for rehearing in banc" is filed.

When a suggestion for rehearing in banc is filed without a petition for rehearing, litigants often wrongly assume that the time for filing a petition for certiorari is extended.

A straw vote at the preceding meeting indicated that a majority of the committee members favored 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 a court of appeals' judgment and thus extend the time for filing a petition for certiorari.

The reporter described the draft amendments to rules 35 and 41. The reporter noted that the most problematic aspect of the drafts is that if a suggestion for rehearing in banc is to toll the time for filing a petition for certiorari, there must be a date certain from which the time begins to run anew. Thus the draft at lines 13-16 provided that if no vote is taken on such a suggestion within 30 days of its filing, the court shall enter an order denying the petition unless the court enters an order extending the time for considering the petition. A lengthy discussion followed which revealed the problems such a provision would create. The culture that has developed concerning suggestions for rehearings in banc, is that a court has no obligation to vote or otherwise act upon such suggestions. Requiring any sort of action within a time certain would disturb that culture.

The committee considered alternate approaches such as requiring every suggestion for rehearing in banc to be accompanied by a simultaneous petition for panel rehearing. If both requests were placed before the court, the court would be likely, but not required, to dispose of both simultaneously and thus start the running of the time for petitioning for a writ of certiorari.

Ultimately, the committee decided that rather than change the effect of a suggestion for rehearing in banc, or require the simultaneous filing of a petition for panel rehearing, the most straight forward approach would be to insert language in Rule 35(c) stating that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari. The language found in Supreme Court Rule 13.4 might serve as a useful model. The reporter was asked to prepare drafts for the spring meeting.

Item 91-5, Use of Special Masters by the Courts of Appeals

The courts of appeals have used masters for sometime but neither the federal rules nor the local rules authorize the use of masters. Apparently when masters are used

Fed. R. Civ. P. 53 is used as a guideline.

Chief Judge Sloviter noted that there are a number of occasions when courts of appeal need to make fact findings: when responding to fee petitions, when responding to *in forma pauperis* petitions, and in NLRB enforcement proceedings. The Third Circuit has taken the position that it has inherent authority to appoint masters and it has used magistrates (with the permission of the district court), senior district judges, and staff attorneys as masters.

The committee generally agreed that court officers, not members of the private bar, should be used as masters.

Adoption of such a rule could alert the courts of appeals to their ability to use masters. Mr. Kopp noted that care should be taken in drafting to avoid creating the impression that masters could be used routinely and could perform a judge's Article III functions. It should be made clear that masters would be reserved for "auxiliary matters."

Chief Judge Sloviter remarked that she had envisioned a much less complex rule than the initial redraft of civil rule 53. Judge Ripple suggested that the reporter consult with both Chief Judge Merritt and Chief Judge Sloviter when preparing drafts for the next meeting.

Items 86-19 and 86-24
Sanctions for Frivolous Appeals

At its June 10, 1985, meeting the Standing committee requested that the Advisory Committee on Appellate Rules review the provisions of Fed. R. App. P. 38 to determine whether it is appropriate to afford an appellant an opportunity to respond to a proposed award of damages of costs. Although the Advisory Committee has been discussing sanctions since 1985, the Rule 38 question is a severable one and perhaps more manageable than the broader questions.

Judge Williams stated that he would be reluctant to amend Rule 38 only to add a due process requirement without making any changes in the rule that would make it correspond more closely to current practice. That is, he believes the rule needs "substantive" changes as well as "procedural" ones.

Professor Mooney reviewed the history of the committee action on the topic. The

committee has considered several drafts, many of which would have made extensive changes to rule 38. Although some members of the committee have favored the broader changes others have been reluctant fearing that the changes would encourage more sanctions. The Department of Justice has discouraged any broader changes in the rule until an empirical study is completed documenting the need for a rule. Although the committee has worked with the Federal Judicial Center to develop such a study, the committee has not been convinced that the findings of such a study would warrant the extraordinary costs it would engender. The draft before the committee at this meeting simply requires that the court give notice and opportunity to respond before imposing sanctions. The form of the notice and opportunity are purposely left to the court's discretion.

Chief Justice McGiverin moved the adoption of the draft at page 17 of the memorandum and the motion was seconded by Judge Williams. The committee passed the motion by a vote of five to zero.

Technical Amendment to Rule 28

There was a typographical error in revised Rule 28 as transmitted to Congress. The committee unanimously approved the following correction:

(b) *Brief of the appellee.* -- The brief of the appellee shall conform to the requirements of subdivisions (a)(1)-(5), except that a statement of jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

S. 1569 - Interlocutory Appeals

Section 105(b) of S. 1569 would authorize the Supreme Court to prescribe rules "to provide for an appeal of an interlocutory decision to the courts of appeals . . ." The apparent motivation for the provision is a recommendation from the Federal Courts Study Committee to the same effect. The Standing Committee referred that section of the bill to the Advisory Committee requesting a recommendation on the desirability of its enactment.

Judge Ripple pointed out that the authority that would be granted under the new bill would be much broader than the authority granted to define finality. Rules could not

treat decisions as final if they clearly were not final. However, the power to permit interlocutory appeals could transform the system so that it would be much different than it currently is.

Judge Williams stated that the authority to define finality by rule may allow the rules to untangle a difficult conceptual area. But authority to provide for interlocutory appeals creates the ability to handle special situations that would otherwise be handled by stretching or distorting the normal rules.

Mr. Kopp related that the Department of Justice has already told Congress that it does not oppose this part of the bill but the department is not convinced that it is necessary or that rulemaking would eliminate any litigation.

Judge Jolly stated that the authority may be helpful to deal with particular problems so long as the principle of finality continues to be revered.

The committee consensus was that there is not reason to oppose the grant of authority but the committee was not certain that the authority is needed and if granted it should be used with prudence and caution. The system should not be transformed from one that usually deals with final decisions.

S. 1284 - Rules Enabling Act

Judge Ripple and Professor Mooney reviewed the interchange between Congress and the committee concerning proposed amendments to Section 2107 of title 28 of the United States Code. Congress intended to conform the code to the recent amendment to Fed. R. App. P. 4(a)(6) but could have inadvertently created problems with Rule 4(a)(5) which permits a district court to extend the time for filing a notice of appeal for "good cause shown." A bill, in a form acceptable to all parties, was at the time of the meeting awaiting the President's signature.

Item 91-6, Cost of Producing Copies of Briefs

Fed. R. App. P. 39(c) allows the prevailing party to recover the cost of "producing necessary copies of briefs, appendices and copies of records . . ." The rules distinguish between the nonrecoverable expense of producing the original document and the taxable

cost of producing the copies. The rules do not reflect current office practices in which computers are used to produce the original and sometimes the copies.

Before computers arrived in law offices, a prevailing party could recover the composition and typesetting costs charged by a professional printer to turn a typed document into one that could be filed with a court. "Word processing yields joint costs, which cannot be allocated in any simple fashion," Martin v. United States, 931 F.2d 453, 455 (7th Cir. 1991), between the costs of producing the originals and the costs of producing the copies.

The committee discussed the possibility of amending Rule 39 to make it possible for a prevailing party to recover more than the marginal cost of reproductions. One possibility discussed was to fix a presumptive rate per page, a rate large enough to cover not just the cost of photocopying but also the cost of equipment used to "compose" and produce the documents. Currently Rule 39 fixes a maximum rate. A presumptive rate would differ in that the actual costs need not be established. The possibility of delegating the responsibility for determining that rate to the Administrative Office rather than including it in the rule was also discussed. The reporter was asked to prepare a draft for the next meeting.

The committee having completed discussion of the agenda items adjourned at approximately 1:45 p.m., December 5, 1991.

Respectfully submitted,

Carol Ann Mooney
Reporter