MINUTES OF THE MEETING

OF THE ADVISORY COMMITTEE ON APPELLATE RULES

APRIL 25 & 26, 1994

Having been preceded by testimony regarding the proposed amendments to Rule 32, the meeting was called to order by Judge Logan at 10:40 a.m. in the Hyatt Regency Hotel in Denver, Colorado. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Judge Cynthia Hall, Judge Grady Jolly, Chief Justice Arthur McGiverin, Mr. Michael Meehan, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp attended on behalf of Solicitor General Days. Judge Kenneth Ripple, the former chair of the Committee, and Judge Alicemarie Stotler, Chair of the Standing Committee, were present. Mr. Robert Hoecker, the Clerk of the Tenth Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Bryan Garner, the consultant to the Style Subcommittee of the Standing Committee, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, and Mr. Joseph Spaniol were present along with Ms. Judith McKenna of the Federal Judicial Center.

Rule 32

The witnesses who had just completed their testimony, Mr. Paul Stack who is General Counsel of Monotype Typography, Inc., Mr. William Davis who also is from Monotype Typography, and Ms. Sarah Leary of Microsoft Corporation, were present. So that the Committee would be able to take advantage of the speakers expertise, Judge Logan began the meeting with discussion of Rule 32. Judge Logan stated that his goal for the morning was to have the Committee make substantive decisions about the direction of Rule 32 rather than to approve precise language. Judge Logan indicated that following the initial discussion, he would appoint a drafting subcommittee to prepare a new draft for the Committee's consideration the following morning.

The Reporter summarized two additional comments on Rule 32 that had been received since the preparation of the materials for the meeting.

The speakers, during their earlier testimony, had presented an alternative draft for the Committee's consideration. Judge Logan called for a vote on whether the Committee preferred to work with the published draft or with the new draft. The Committee preferred the new draft by a vote of six to one. A copy of the draft is attached to these minutes.

Subdivision (a) of the draft contained definitions. Paragraph (a)(1) defined a "monospaced typeface" as one in which "(i) all characters, including spaces, have the same advance width, (ii) there are no more than 11 characters to an inch, and (iii) the weight of the typeface design is regular or its equivalent." One

member of the Committee asked whether justifying the right margin would make the advance width nonuniform since justification adds white space. Another member of the Committee responded that the spacing added to justify the right margin is not technically "advance width."

The definition of a "proportionately spaced typeface" in paragraph (a)(2) stated that it is a typeface in which "(i) individual characters have individual advance widths, (ii) the x-height (the height of the lower case `x') is equal to or greater than 2 millimeters, (iii) the em-width (the width of the upper case "M") is equal to or greater than 3.7 millimeters, (iv) the design is of a serifed, text, roman style, and (v) the weight of the typeface design is regular or its equivalent."

Some members of the Committee initially reacted negatively to including that level of detail in the national rule. Judge Logan reminded the Committee that it decided to address the typeface issue because of the proliferating local rules. The Committee concluded, however, that the draft rule seemed to address not only lawyers who prepare briefs, but also people who design typefaces and software. The Committee hoped to simplify the draft so that it would be readily understandable by both audiences.

A suggestion developed that it might be possible to eliminate the "x" height and "em" width if the rule did three things:

1. required 1-1/4 inch side margins and 1 inch top and bottom margins;

2. limited a brief to a total of 14,000 words; and

3. limited each page to no more than 280 words.

If the text extended to the margins specified, each page contained no more than 280, and the brief as a whole were limited to no more than 14,000 words regardless of the total number of pages, the "x" height and "em" width would likely be met by default. This would permit the use of proportionately spaced typefaces and ensure that the typefaces were of sufficient size to be easily legible.

The Committee concluded that it wanted to permit both monospaced and proportionately spaced typefaces but that the rule should state a preference for proportionately spaced typefaces. Because of concern about the technical nature of the definitions, it was suggested that examples might be added to the definitions.

The Committee conceptually approved paragraphs (a)(3) and (a)(4) of the definitions.

Subdivision (b) of the draft dealt with the form of a brief and an appendix. The Committee conceptually approved paragraphs (b)(1), (b)(2), (b)(4), (b)(9) and (b)(10).

Paragraph (b)(3) established different margins for briefs using proportionately spaced typefaces and for those using monospaced typefaces. The draft suggested wider side margins (resulting in shorter lines of text) for proportionately spaced typeface. A proportionately spaced typeface fits more material in the same amount of space than a monospaced typeface of the same size. If the same line length is used for both typefaces, there is not only more text in the lines produced with a proportionately spaced typeface

but the comprehensibility of the proportionately spaced document also declines. Therefore, the Committee approved different margins dependent upon the typeface used. Paragraph (b)(3) also authorized the use of pamphlet sized briefs. Technology is developing to the point that law firms soon will be able to produce the pamphlet sized briefs in-house. The consensus was that the pamphlet sized briefs are preferred and the rule should continue to permit them.

Paragraph (b)(7) of the draft provided that "[a]ll case citations in a brief must be underlined. A brief typeset in a proportionately spaced typeface accompanied by a true italic typeface may use the italic in lieu of underlining." A member of the Committee noted that the current rule is silent about the treatment of citations and there may be no need to include such a provision. Other members of the Committee expressed preference for the use of italic rather than underlining and stated that if the rule deals with the issue, it should state a preference for italics. The Committee did not reach a consensus about the appropriateness of a provision such as (b)(7).

The Committee agreed that all references to the "appendix" should be removed from paragraphs (b)(1) through (5). An appendix is typically produced by photocopying existing documents. Paragraph (b)(8) provided that if photocopies of documents are included in the appendix "such pages may be informally renumbered if necessary." The Committee agreed that the pages must be renumbered in order of their appearance in the appendix. It was further suggested that it would be helpful if an appendix had a table of contents.

Subdivision (c) of the draft dealt with the length of a brief. It suggested that a principal brief should not exceed 14,000 words and that a reply brief should not exceed 7,000 words. The draft further required that a brief be accompanied by a declaration that it complies with the rule.

The Committee asked the printing experts how those limits compare to the current 50 page limitation. The printing experts responded that in 1970 using an office typewriter, a 50 page brief would have contained approximately 12,500 words; but today, using a proportionately spaced typeface, a 50 page brief can greatly exceed 14,000 words without abusive use of footnotes or compacting the print, etc.

The Committee expressed a desire to create safe harbors for briefs using either monospaced or proportionately spaced typefaces so that certification of compliance would be unnecessary. The draft suggested that a 50 page brief set in monospaced typeface should be conclusively presumed to be within the 14,000 word limit. The Committee concurred that such a safe harbor is necessary so that a person producing a brief with a typewriter would not need to manually count the words in the brief. The Committee expressed a hope that it could develop a similar sort of safe harbor for a brief set in a proportionately spaced typeface.

One member mentioned the desirability of including a provision preempting any local rules concerning length.

Paragraph (d) of the draft dealt with the form of other papers such as petitions for rehearing, suggestions for rehearing in banc, etc. The draft contained the same provision as the published rule stating that such documents must have a cover the same color as the party's principal brief. Some of the commentators on

the published rule objected to requiring a cover at all, others wanted the rule to require the colors required by their local rules. One member of the Committee stated that the inclusion of such detail in the published rule was tied to the preemption issue. The details had been included in the rule to eliminate the pitfalls created by varying local rules on such issues.

At the conclusion of the discussion of Rule 32, Judge Logan asked Mr. Munford and the Reporter to join him that evening to work on a new draft. Judge Logan thanked those persons who had testified both for their informative testimony and for their answers to the Committee's technical inquiries.

The minutes of the preceding meeting were unanimously approved with only one correction, on line 11, page 24, the word "advice" should be changed to "advise."

Judge Logan then informed the Committee that he would take up the remaining proposed amendments that had been published for comment.

Rule 4(a)(4)

There were no comments on the proposed amendments to Rule 4(a)(4). The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 8

There were no comments on the proposed amendment to Rule 8. The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 10

The proposed amendment to Rule 10 suspends the 10-day period for ordering a transcript if a timely postjudgment motion is made that suspends a notice of appeal under Rule 4(a)(4). One comment was received. It suggested that counsel be required to notify the court reporter when there is no need to proceed with preparation of the transcript because of a pending postjudgment motion. The Committee agreed that the party paying for preparation of the transcript would have a strong incentive to notify the court reporter that preparation should be halted until disposition of the motion and, therefore, that an additional rule change was unnecessary.

The Committee unanimously approved submission to the Standing Committee of the rule as published.

Rule 21

The proposed amendments to Rule 21 provide that the trial judge is not named in a petition for mandamus and is not treated as a respondent. The published rule, however, permits the judge to appear to oppose issuance of the writ if the judge chooses to do so, or if the court of appeals orders the judge to do so.

Three of the commentators on the rule opposed the provision giving the judge the option to file a response if the judge wishes to do so. The primary reason for the opposition was that the judge's participation puts the judge in an adversarial posture with a litigant.

Several members of the Committee agreed that having the judge in the posture of a litigant is a serious matter. One member of the Committee pointed out that in many instances, however, only the judge can give a thorough response to the petition. Another member responded that if the court of appeals has the authority to ask a judge for a response whenever appropriate, that should be sufficient and there should be no need to give the trial judge discretion to respond. Another member made the point that the court of appeals may not always be aware that the trial court judge possesses information that could make a crucial difference in deciding the petition.

Judge Logan called for a vote on the trial judge's right to respond absent a request from the court of appeals for a response. Four members supported the trial judge's right to respond, and five members felt that the trial judge should respond only when ordered to do so.

Given that vote, it was pointed out that the Committee did not need to address Judge Weinstein's concern about a court of appeal's *sua sponte* conversion of an interlocutory appeal into a petition for mandamus. Judge Weinstein was concerned that in such instances the trial judge would not be served with a copy of the petition by the appellant/petitioner and would not have notice of the commencement of the proceedings and, therefore, might miss the opportunity to respond. If, however, the trial judge may respond only when ordered to do so, the judge obviously will be aware of the need to respond.

The Committee then turned its attention to the Reporter's draft two on page 33 of the GAP materials.

The first question the Committee discussed was whether the Rule should continue to refer specifically to writs of mandamus or prohibition or should simply refer generically to extraordinary writs. The Committee voted unanimously to continue the reference to the writs of mandamus and prohibition.

One member asked the Committee to consider lines 37-40, which provided:

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent -- or if there is no respondent, the trial court judge -- to answer within a fixed time. Even when there is a respondent, the court of appeals may order the trial court judge to respond or may invite an amicus curiae to do so.

The member questioned the wisdom of making it obligatory for the trial court judge to respond when there is no respondent. The provision was rewritten as follows:

(1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed timed.

(2) The court of appeals may order the trial court judge to respond or may invite an amicus curiae to do so.

Another member questioned the role of the amicus curiae; should the amicus assume the traditional "neutral" role or should the amicus be in communication with the trial court judge and essentially represent the judge's position? The consensus was that the rule need not specify the role, that it either would evolve or the amicus could ask the court of appeals for instructions concerning its proper role.

The Committee next discussed the necessity of subdivision (c). It was decided that subdivision (c) governs applications for extraordinary writs when there is no on-going trial court proceeding. For example, it covers an application to an individual circuit judge for an original writ of habeas corpus or a petition for mandamus directed to an administrative agency. The procedures under 21(a) exist when there is an on-going trial court proceeding. The last sentence of subdivision (c) ("Proceedings on such applications shall conform, so far as is practicable, to the procedure prescribed in subdivision (a) and (b) of this rule.") makes allowance for the fact that there will be differences, for example, between the procedures for an original petition for habeas corpus filed with circuit judge and those for a petition for mandamus or prohibition directed to a court because in the former there is no on-going trial court proceeding. For example, subdivision (a) requires service on all other parties to the trial court proceeding; that requirement would be inapplicable in the context of an original writ of habeas corpus.

Given that subdivision (c) governs applications for extraordinary writs when there is no trial court involvement, it was unanimously decided to leave subdivision (c) in its present form. To make the distinction between (a) and (c) clear, however, it was decided that lines 1, 4, and 5 of draft two should be amended to make it clear that subdivision (a) applies only to a petition for mandamus or prohibition directed to a court.

Line 17 was amended by making the "relief sought" the first item that must be contained in a petition.

With the changes noted above, draft two of Rule 21 was approved. It was suggested that the Committee Note should provide some example of instances in which a court of appeals may ask a judge to respond to a petition for mandamus as, for example, when a judge's inaction is challenged.

The Committee decided that republication might be necessary because of the change eliminating the trial court judge's ability to participate when there is no court of appeals order to do so.

Rule 25

The proposed amendment to Rule 25(a) provided that in order to file a brief using the mailbox rule, the brief must be mailed by first-class mail. The current rule requires a party to use "the most expeditious form of delivery by mail excepting special delivery," which, given the advent of express mail and other special services, is no longer a clear directive.

The commentators on the published rule objected to the requirement that the postmark indicate mailing on or before the filing date and to the failure to extend the mailbox rule to private overnight courier services.

The Committee unanimously decided that the rule should make the mailbox rule applicable to a brief sent by first-class mail or by other "equally reliable commercial carrier."

Having decided to extend the mailbox rule to private carriers, the postmark requirement either must be eliminated or extended to include the alternate carrier's record of receipt of the brief. The postmark requirement was eliminated by a vote of 5 to 4. In its place the Committee unanimously decided to require a certification by the filing party that "on or before the last day for filing" the brief "was mailed to the clerk by first-class mail, postage prepaid, or dispatched to the clerk by equally reliable commercial carrier."

Regarding 25(c) the Committee decided to delete the provision permitting service by facsimile. This decision was in accord with the action of the Standing Committee at its January meeting deleting the provision in the model local rule for facsimile service.

Subdivision (c) was amended to permit service by equally reliable commercial carrier and to state that service by commercial carrier is complete upon delivery to the carrier.

The Committee decided, however, to delete lines 49 through 52 providing that when a brief or appendix is filed by delivery to a private carrier, copies must be served on the other parties in the same manner. It was pointed out that there would be instances in which a brief is filed with the court by delivery to a private carrier but the opposing party's counsel resides across the street and service could be accomplished more quickly by personal delivery. It was further noted that the desire for expeditious service is at least as strong in motions practice as it is with regard to briefing.

To eliminate the problem of lawyers filing documents with the court but manipulating service so that the opposing party does not have notice of the filing until much later, an additional sentence was added to subdivision (c). It states, "When feasible, service on a party must be by a manner at least as expeditious as the manner of filing with the court." One member pointed out that although the gamesmanship that is the motivation for the change is real, the change might impose economic hardship because it could be expensive to serve a large number of parties by private carrier. It was felt, however, that the "when feasible" language would be broad enough to encompass such difficulties unless there is evidence of manipulation of the service. The "when feasible" language expresses a policy that service should be

performed in a manner "at least as expeditious" as the manner of filing, but the rule does not require it. The amendment was passed by a vote of 7 in favor and 1 opposed.

Rule 26(c) provides 3 additional days for filing a response to a document served by mail. The Committee unanimously decided to make the extension applicable whenever service is by mail or "commercial carrier." Both the caption and the text of 26(c) must be so amended.

The Committee concluded that because of the changes making the mailbox rule applicable to a brief entrusted to a commercial carrier, and permitting service by commercial carrier, both Rules 25 and 26 should be republished.

Rule 47

The proposed amendments to Rule 47 require that local rules be consistent not only with the national rules but also with Acts of Congress and that local rules be numbered according to a uniform numbering system. The amendments also allow a court to regulate practice in a variety of ways but prohibit a court from causing a party to lose rights because of a negligent failure to comply with a local rule imposing a requirement of form, or from imposing sanctions or any other disadvantage for failure to follow a court directive not contained in a rule unless the violator has actual notice of the requirement.

One of the commentators stated that in some circuits internal operating procedures (I.O.P.'s) are used like local rules and that I.O.P.'s should be required to be consistent with federal law and that sanctions for violation of I.O.P.'s should be subject to the same constraints applicable to sanctions for violation of local rules.

Because directions concerning practice and procedure should be in local rules and not I.O.P.'s, the Committee unanimously approved the addition of a sentence to 47(a)(1) providing: "A generally applicable direction to a party or a lawyer regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order."

At its February meeting, the Advisory Committee on Bankruptcy Rules voted to recommend to the Standing Committee a change in the provision parallelling subdivision (a)(2). The change approved by the Bankruptcy Committee is as follows:

A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a ~~negligent~~ nonwillful failure to comply with the requirement.

One member stated that he preferred "negligent" to "nonwillful" because the higher standard might raise the level of practice. Another member expressed a preference for "nonwillful" because the provision

applies to the party's rights. The change to "nonwillful" was approved by a vote of 5 to 3.

Judge Logan noted that the ABA's comment urged the Committee to prohibit local experimentation. Prior Committee discussion had rejected any such limitation except in those instances when a national rule governs the question. Many of the changes in the national rules have their source in successful local innovations. The Committee did not wish to revisit its prior discussions on the issue.

In light of the ABA comment, however, a motion was made to add the following sentence to the Committee Note: "It is the intent of this rule that a local rule may not bar any practice that these rules explicitly or implicitly permit." For example, if the national rules permit a brief that contains 14,000 words, any local rule that limits a brief to less than 14,000 words is inconsistent with the national rules. The motion passed with no opposition, but one abstention.

Subdivision (b) was amended, by a vote of 7 to 1, to make it applicable only to a "particular case." If subdivision (a) is amended to require that all generally applicable directions regarding practice or procedure be contained in local rules, the only sort of regulation that could be authorized by (b) is the issuance of an order in a particular case.

The Committee was of the opinion that it would not be necessary to republish the rule because the changes approved by the Committee simply memorialize the statutory distinction between local rules and I.O.P.'s and that the local rules project had discussed the problem as well.

Rule 49

Proposed Rule 49 allows the Judicial Conference to make technical amendments to the rules without the need for Supreme Court or Congressional review of the amendments.

The only commentator expressed no opposition to the amendment but suggested that the change might be better made by amending the Rules Enabling Act.

The Committee unanimously approved submission to the Standing Committee of the rule as published.

The Committee adjourned for the day at 5:10 p.m.

The Committee reconvened at 8:30 a.m. on April 26.

Ninth Circuit Rule 22

Five Attorneys General from capital states in the ninth circuit wrote to Chief Justice Rehnquist claiming that the new ninth circuit procedures for death penalty cases conflict with federal law. The Attorneys General requested that the Judicial Conference use its statutory authority to modify or abrogate circuit rules that are inconsistent with federal law.

Before discussing the substance of the allegations, the Committee considered the standard it would use to formulate a recommendation to the Judicial Conference concerning the modification or abrogation of local circuit rules. Title 28 of the United States Code, § 331 states:

The Judicial Conference shall review rules prescribed under section 2071 of this title by the courts, other than the Supreme Court and the district courts, for consistency with Federal Law. The Judicial Conference may modify or abrogate any such rule so reviewed found inconsistent in the course of such review.

Judge Logan asked the Committee to consider the sort of recommendation it would make to the Judicial Conference in the following situations:

1. the local rule under consideration is not inconsistent with existing federal law;

2. the local rule is clearly inconsistent with federal law; and

3. the local rule is arguably inconsistent with federal law.

As to the first situation, the statute appears to make it inappropriate for an Advisory Committee to recommend abrogation of a rule that is not inconsistent with federal law even if the Committee believes the rule is very ill-advised. One member pointed out, however, that the issue is not quite so straight forward. The Judicial Conference can promulgate a rule of federal procedure which itself becomes federal law. Through adoption of a national rule, the Judicial Conference can preclude adoption of a contrary local rule. There is, therefore, a basis -- the normal rulemaking process -- upon which the Judicial Conference can preclude local rules that it finds troublesome but not inconsistent with existing federal law.

One member suggested that there might be an extreme case in which a local rule is not inconsistent with federal law but is so troubling that the Committee might wish to make a recommendation to modify or abrogate the rule without utilizing the normal rulemaking process to bar the rule.

Judge Logan then asked the Committee whether it would recommend abrogation or modification when it finds that a local rule clearly violates federal law. While it may appear self-evident that the Committee should make such a recommendation, one member suggested that judging a rule invalid is an adjudicatory function. Others pointed out, however, that Section 331 clearly seems to contemplate making a decision to invalidate a rule in a non-adjudicatory setting.

One member asked whether the Attorneys General are challenging the ninth circuit rules in court. No one

was aware of any such challenge. Although the local rules became effective on February 14, 1994, the rules were operative on an interim basis for some time before the official effective date. One member commented that the apparent reason for adoption of the ninth circuit rules was to bring order to the eleventh hour litigation that seems to be inevitable in death penalty cases. Raising the legitimacy of the rules during that time would only add to the existing frenzy and chaos; it makes sense, therefore, to examine the rule in a calmer context.

Judge Logan next asked the Committee to consider how it would handle a rule that is arguably inconsistent. One member pointed out that the language of § 331 is not mandatory; it says that the Judicial Conference "may modify or abrogate" inconsistent rules. Another member commented that there should be some discretion not to intervene when the inconsistency is doubtful. Another member noted that § 331 authorizes modification or abrogation of a rule "found inconsistent." He further commented that the language seems to require a degree of firm and settled opinion, arguably requiring a bit more certainty than an individual judge would need to vote on an issue in a case.

Another member commented that the ninth circuit rules have been attacked in 2-1/2 pages. The level of detail and scrutiny that the challengers have brought to bear is minuscule in comparison with what would be presented in litigation.

Another member stated that in his opinion, all the Committee really could address at this time is the question being pursued, the "standard of review" question; that there is insufficient information to make a decision on the merits of the ninth circuit rules.

Another member indicated that two major bodies, the courts and the Judicial Conference, have the duty to determine the consistency of local rules with federal law. Courts have that job when a rule is challenged during litigation. Section 331, however, also gives the Judicial Conference authority to modify or abrogate a rule based on its facial inconsistency with federal law. When a rule may or may not be consistent depending upon its particular application during the course of litigation, the issue should be decided by a court as part of the litigation. But as to an issue such as permitting a second en banc hearing, a committee is as capable of resolving the legitimacy of such a procedure as a court. He further stated that Congress clearly expected that the Judicial Conference committees would do something about inconsistent local rules and that the Committee should be careful not to be too deferential. If the judiciary does not make use of the statutory authority given in § 331, other action may be necessary to take care of inconsistent local rules.

As to whether the Attorneys General should litigate this issue rather than seek relief from the Judicial Conference, another member pointed out that the litigation would take place in the same court that adopted the rule. He stated, therefore, that the Committee must step forward and take action when warranted and the brevity of the challenge put forward should not be treated as a factor disabling the Committee from taking action.

Another member suggested that in order to reach a decision about the validity of these rules it may be necessary to convene special hearings and to take testimony about the rules

Judge Logan summarized the Committee discussion as follows: first, the Committee would not recommend modification or abrogation of a local that is not inconsistent with federal law except in extraordinary circumstances; and second, when determining whether a local rule is inconsistent some members believe that the Committee should be reluctant to make such a finding but others believe that it is the Committee's duty to do so. In other words, there was a division of opinion as to how quick the Committee should be to condemn a local rule.

Judge Logan then directed the discussion to the substance of the ninth circuit rules. Judge Logan stated that Chief Judge Wallace's response indicated that the ninth circuit adopted its rules in response to criticism of their former procedures and in an attempt to speed up the process while still providing a full and fair hearing. Judge Logan outlined the questions he felt the Committee should consider.

1. Are two level in banc hearings appropriate?

2. Should a single judge be able to cause a case to be heard in banc?

3. Is it appropriate for the local rules to authorize single judge stays?

4. Is it appropriate to automatically grant a certificate of probable cause and a stay of execution on appeal from a first habeas petition. 5. Is it appropriate for the rule to apply to related civil proceedings as well as to habeas proceedings?

6. Does the rule countenance inappropriate ex parte communications with a single judge of the circuit?

1. Are two level in banc hearings appropriate?

As to the first issue, Ninth Circuit Rule 22-4(e)(4) permits a limited in banc review followed by a full in banc review if full in banc review is requested by an active judge. The Attorneys General state that when Congress authorized limited in banc review, authority was not given for two levels of in banc review.

Chief Judge Wallace responded that the two level in banc review is not limited to capital cases and is within the broad authority of 28 U.S.C. § 46(c) to establish procedures for in banc hearings. To date, the ninth circuit is the only circuit that has accepted Congress's invitation to "perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." 92 Stat 1633. Chief Judge Wallace asserts that the language of the statute is broad enough to authorize both limited and full court in banc review of a single case.

A member of the Committee argued that dual in banc hearings are not authorized by the language of the statute. The language of the statute is singular; a court "may perform its en banc function by such number of members of its en banc courts as may be prescribed by rules of the court. . ."

Another member asked whether the circuits permit the filing of a petition for rehearing of a case heard in banc or whether it would be lawful to have a rule permitting a petition for rehearing in banc after an in banc hearing. The member thought that permitting such a petition would be analogous to the dual in banc review authorized by the ninth circuit.

Another member asked whether the statutory language permitting a court to perform its in banc function with a limited in banc court should be read to imply a negation of the existing power to convene a full in banc court. That member stated that the burden should be on those persons claiming the negation of the preexisting power. He further stated that to the extent the Committee is looking for clear conflict with federal law, there is no such conflict arising from the dual in banc provisions.

Another member noted that the double in banc review procedure did not originate in the death penalty setting and has existed since the ninth circuit began using limited in banc courts. The full in banc court should be able to delegate its authority to a limited in banc court, but if the full court is displeased with the action taken by the limited court, the full court should be able to convene to rehear the case. Another member noted that the existence of such a back-up procedure may be necessary to get a circuit to agree to use a limited in banc court.

Another member stated that upon reading the statute, his reaction was that a court could either hear a case with a limited in banc court or with a full in banc court but that the court could not do both.

Judge Logan asked the members of the Committee if they felt able to make a recommendation to the Judicial Conference about the lawfulness of the dual in banc review procedure. Some members had said that if they were deciding, they would say that there can be only one in banc hearing; whereas other members had said that they probably would permit the double in banc hearings. In short, reasonable minds differed over whether the procedure is inconsistent with federal law. Judge Logan asked the Committee to consider what it should say to the Judicial Conference in such a situation.

One member made a motion to recommend that the Judicial Conference should find the dual in banc provisions inconsistent with federal law. The movant stated that the Committee had been asked for its advice and it would be inappropriate for the Committee to conclude that it could not find a rule inconsistent with federal law whenever one reasonable person disagrees. On the basis of the statutory language, the movant concluded that the dual in banc procedure is unauthorized. He stated that if there were legislative history indicating that such proceedings had been contemplated, he might be persuaded to change his mind; but, absent any such evidence, he would vote against the validity of the procedure. Concerning the argument that the grant of an additional power does not ordinarily negate the pre-existing power, the movant argued that it is not applicable here. The new authority is not self-executing and becomes operative only at the option of the circuit. That means that the pre-existing power is not automatically displaced by the grant of additional authority but that it is displaced when a circuit exercises the option to use the alternate procedure. In other words when a circuit adopts the limited in banc procedure, it gives up the authority to conduct a full in banc hearing.

In response, another member agreed that the committee should be able to conclude that a local rule is inconsistent with federal law even though reasonable minds can differ about that conclusion. That member indicated, however, that he would vote against the motion not because he had concluded that the procedure is valid, but because it hadn't been shown to be invalid.

The motion was defeated by a vote of 3 to 4 with two abstentions. Judge Hall, from the ninth circuit, and Mr. Kopp, representing the Department of Justice, abstained on this vote and all subsequent votes on the validity of the ninth circuit rules.

2. Should a single judge be able to cause a case to be heard in banc?

Judge Logan asked the Committee to consider the challenge to the provision in the ninth circuit rules permitting a single judge to convene an in banc court. The charge is that such a provision is inconsistent with the requirement that a majority of the active judges must approve an in banc hearing. Chief Judge Wallace responded by saying that "[t]he statute does not specify, however, that the ordering of an en banc hearing always must be by majority vote taken separately in each individual case." Because a majority of the circuit judges have voted to approve the local rule which says a single judge may call for an in banc hearing in a death penalty case, Judge Wallace contends that the rule is not inconsistent with the statute. In addition, he points out that the rule actually may save time because a stay of execution often would be necessary to permit a vote on whether the case should be heard in banc.

One member expressed his agreement with Chief Judge Wallace's argument. The member believes that having a majority of the members of the circuit leave their standing votes that a certain class of cases should be heard in banc is an arguable way to comply with the statute. He noted one important qualification, however, to his approval of the process. The validity of the provision depends, in his opinion, upon the support of a persistent current active majority of the members of the court. The local rule is likely to remain on the books for many years and should be periodically reaffirmed as the composition of the court changes. The 1994 majority should not be used to support an in banc hearing in the year 2000. One member noted that a majority of the court can repeal a local rule at any time and asked whether the failure to repeal a rule should be seen as providing continuing support for the existing rule. The original speaker responded negatively; he believes that the rule requires continuing active support.

One member noted that the D.C. Circuit had taken a similar step when it had ordered that all Watergate cases be initially heard in banc. Another member expressed strong disapproval of the ninth circuit rules. In his opinion, the ninth circuit rules, like the D.C. Circuit's earlier action, give special treatment to politically sensitive cases. In his opinion, sound jurisprudence requires that all cases be governed by the same procedural rules.

Another member noted that pragmatically, the rule saves time and often can eliminate the need to issue a stay of execution. Death penalty challenges often are filed very close to the time of execution. A single circuit judge may call for a vote on a petition for an in banc review. Under local procedures, the other judges of the circuit have 14 days in which to vote. A stay of execution ordinarily would be needed to provide the opportunity to vote. The provision authorizing in banc review upon request of a single judge eliminates the delay caused by the voting process. Further, under the ninth circuit rules, the in banc panel is pre-selected and has been furnished all the materials in the case. The panel may be able, therefore, to vote within a day or two of the request for in banc review without the need to issue a stay of execution. Given the likelihood that some ninth circuit judge would call for a vote on a request for in banc review in every death penalty case, the local rule provides expeditious review.

Another member noted that interpreting the statute in light of the limited nature of federal jurisdiction, he could only conclude that the ninth circuit provision is inconsistent with the statute. The statute says that each judge is supposed to be able to vote on whether an appeal is heard in banc. In addition Fed. R. App.

P. 35 says "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc." To expand upon the "dead hand" notion introduced earlier, the local rule creates not only a situation in which the members of the court may change so that a majority of the existing court has not approved the in banc hearing, but the rule also means that in an individual case a judge is deprived of the ability to vote against hearing the case in banc.

A motion was made and seconded to recommend that the Judicial Conference abrogate the rule as inconsistent with both 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a). The motion was defeated by a vote of 2 to 4, with 2 abstentions (Hall and Kopp).

A motion was then made to recommend that the Judicial Conference permit the rule to stand but that the Judicial Conference should be made aware of and consider the complication that in the future a majority of the active judges of the circuit may not have authorized a single judge to convene an in banc court. The motion passed by a vote of 4 to 2, with 2 abstentions (Hall and Kopp).

3. Is it appropriate for the local rules to authorize a single judge to grant a temporary stay?

One member said that he did not consider this a problem because the rules allow a single circuit judge to grant a temporary stay in almost any kind of case.

4. Is it appropriate to automatically grant a certificate of probable cause and a stay of execution on appeal from a first habeas petition.

Ninth Circuit Rule 22-3(c) provides:

On a first petition, if a certificate of probable cause and a stay of execution have not been entered by the district court or if the district court has issued a stay of execution that will not continue in effect pending the issuance of this court's mandate, upon application of the petitioner a certificate of probable cause will be issued and a stay of execution will be granted by the death penalty panel pending the issuance of its mandate. (emphasis added)

One member said that he did not consider this a problem because the Supreme Court has said that in a first petition case a court of appeals should almost always grant a stay but should be reluctant to do so on subsequent petitions.

Another member stated that the automatic issuance of a certificate of probable cause seems inconsistent with federal law as enunciated by the Supreme Court in Barefoot v. Estelle.

Another member questioned why the automatic issuance was thought necessary since it was his impression that there are members of the ninth circuit who are always willing to issue the certificate of probable cause and the rule removes the discretion that is supposed to exist.

One judge responded that if a certificate will inevitably be granted on a first petition, why shouldn't the rules make it automatic.

Another member stated that although a single judge can grant a certificate of probable cause, if all the issues raised by the petition are frivolous, the certificate should be denied at every level.

A motion was made to recommend to the Judicial Conference that automatic issuance of a certificate of probable cause on a first petition is inconsistent with federal law as enunciated by the Supreme Court in Barefoot and with Fed. R. App. P. 22(b).

A member stated that in view of the fact that a single judge may issue a certificate of probable cause, a rule providing for automatic issuance of such a certificate is not cutting off any judge's right to vote against issuance since a majority is not needed. So, although the rule is inconsistent, in view of the discretion he sees implicit in § 331 and for pragmatic reasons, the member would not recommend voiding the provision.

The motion lost by a vote of 1 to 3, with four members abstaining (Boggs, Hall, Kopp, and Munford).

A motion was then made to recognize the inconsistency of the rule with federal law but to recommend that the Judicial Conference refrain from invalidating the rule because of the lack of actual impact on cases. A friendly amendment was accepted to recognize that in effect the local rule is a standing order by a single judge to grant a certificate of probable cause in every first petition in a death penalty case and, as such, the rule is subject to the same "dead hand" problem noted in conjunction with the provision permitting the convening of an in banc court on request of a single judge. The motion passed by a vote of 5 to 0 with three abstentions (Hall, Kopp, and Williams).

5. Is it appropriate to apply the local rules to related civil proceedings as well as to habeas proceedings?

A related civil proceeding might be a § 1983 challenge to the method of execution as being cruel and unusual. One member stated that he did not consider the application of the local rules to related civil proceedings a problem except with regard to the granting of a stay of execution. There are very limited circumstances in which a federal court may stay a state court proceeding in a civil case.

One member pointed out that although stays do frequently occur in habeas cases even though they are civil cases, such stays are specifically authorized by statute. 28 U.S.C.§ 2251. The Attorneys General are challenging the lawfulness of a local rule that permits stays in non-habeas civil cases. The member pointed out that the Supreme Court is currently considering the McFarland case in which the State of Texas is challenging a stay granted by a federal district court judge before whom no habeas petition was pending. It is possible that the Supreme Court may resolve the issue in its decision on the McFarland case.

A motion was made to make no recommendation to the Standing Committee because the question of the

authority of a federal judge to grant a stay of execution when there is not a pending habeas petition is currently before the Supreme Court. The Committee agreed unanimously.

6. Does the rule countenance inappropriate ex parte communication with a single judge of the circuit?

One member stated that in the Harris case the ACLU went to a judge who was not a member of the panel and ostensibly presented new evidence to the judge causing the judge to issue a stay. The new rules are aimed at reducing such "ex parte" communication.

The new rules require the parties to file a motion for a stay with the clerk of the court who is directed to refer the motion to the panel. If a motion is presented directly to a judge not on the panel, the rules require the judge to refer the motion to the clerk for determination by the panel. Ninth Cir. R. 22-4(d)(5). A single judge may grant a temporary stay only if execution is imminent and the panel has not determined whether to grant a stay pending final disposition of the appeal, and that judge must immediately notify the clerk and the panel of the action. By majority vote the panel may vacate the stay. Id.

No motions having been offered as to items 3 and 6, Judge Logan undertook to summarize the Committee's discussion for purposes of reporting to the Standing Committee.

The Committee had decided the following:

1. Local rules that do not violate federal law should not be voided by the Judicial Conference. However, the Judicial Conference should remain mindful of the fact that it can recommend adoption of a national rule that would have the effect of voiding or preempting a local rule that it finds troublesome.

2. The Advisory Committee was asked to present the Standing Committee with the Advisory Committee's best judgment about the consistency of the local rules with federal law. The Advisory Committee decided that in those instances in which it has questions about the consistency of the rules, it is the Advisory Committee's responsibility to report its views to the Standing Committee.

3. The Advisory Committee took a vote on each of the issues raised by the Attorneys General which in the opinion of the Advisory Committee raised serious consistency questions.

a. A motion to recommend abrogation of the dual in banc procedure was defeated by a vote of 3 to 4 with 2 abstentions.

b. A motion to recommend abrogation of the rule permitting a single judge to convene an in banc court was defeated by a vote of 2 to 4 with 2 abstentions.

A motion to recommend that the rule be permitted to stand but that the Judicial Conference should be informed about the "dead hand" implications passed by a vote of 4 to 2 with 2 abstentions.

c. A motion to recommend abrogation of the rule providing for automatic issuance of a certificate of probable cause and stay of execution in first petition cases was defeated by a vote of 1 to 3 with four abstentions.

A motion to recommend no action with respect to that rule but to recognize the inconsistency and the existence of "dead hand" implications passed by a vote of 5 to 0 with 3 abstentions.

Two members wished to make it clear that in their opinion the materials presented to the Advisory Committee by both the Attorneys General and the ninth circuit were not adequate to reach the merits of the issues. Therefore, their votes not to invalidate a local rule were based upon the fact that they did not have enough information to declare them invalid. The recommendations to the Standing Committee were based upon the information available. It was suggested that the Judicial Conference might want to ask the complainants to file complete briefs on the issues raised and perhaps even to ask for responses either from the ninth circuit or the public. The consensus was that the Committee was being asked to perform a function that was much more adjudicatory than its usual "legislative" function.

Style

Mr. Bryan Garner, consultant to the Style Subcommittee of the Standing Committee had prepared initial revisions of several appellate rules for the Advisory Committee's consideration. He asked the Committee for reactions to the drafts in order to give him guidance as he proceeded to work on the entire set of appellate rules. The discussion examined some of the drafting conventions developed by the style subcommittee when working on the civil rules and some specific phraseology questions likely to arise when working with the appellate rules.

Mr. Garner said that he would try to have a draft of the FRAP rules completed by himself and the other members of the style subcommittee by July 31. The Advisory Committee could then review the rules in preparation for its fall meeting. Mr. Garner said that the chief function of the review by the Advisory Committee is to make certain that the changes recommended by the style subcommittee do not substantively change the rule. Judge Logan said that he probably would divide the redrafted rules and assign them to subcommittees of the Advisory Committee hoping that the subcommittees could work with Mr. Garner prior to the meeting to iron out any obvious difficulties. In that way it might be possible with a three day meeting to review the entire set of restylized rules in the fall.

Rule 32

On the basis of the discussion the preceding day, a new draft of the first part of the Rule 32 had been prepared for the Committee's discussion. The new draft read as follows:

(a) Form of a Brief, an Appendix, and Other Papers

(1) A brief may be produced by typing, printing, or by any duplicating or copying process that produces a clear black image on white paper with a resolution of 300 dots per inch or more. The paper must be opaque, unglazed paper, both sides of the paper may be used if the resulting document is clear and

legible. Carbon copies of a brief or appendix must not be used without the court's permission, except by pro se persons proceeding in forma pauperis.

(2) Either proportionately spaced typeface or monospaced typeface may be used in a brief but proportionately spaced typeface is preferred.

(A) "A proportionately spaced typeface" is one in which the individual characters have individual advance widths. The design must be of a serifed, text, in roman style. For example, Dutch Roman, Times Roman, and Times New Roman are all proportionately spaced typefaces.

(B) "A monospaced typeface" is a typeface in which all characters have the same advance width and there are no more than 11 characters to an inch. For example, both a typewriter with Pica type, and Courier font in 12 point are both monospaced typefaces.

(3) A brief must be on either 8-1/2 by 11 inch paper or 6-1/8 by 9-1/4 inch paper.

(A) A brief on 8-1/2 by 11 inch paper

(i) using a proportionately spaced typeface must have margins of 1-1/4 inch on the sides and 1 inch on the top and bottom;

(ii) using a monospaced typeface must have margins of 1 inch on the sides and 1-1/4 inch on the top and bottom; and

(iii) must be double spaced, but quotations more than two lines long may be indented and single-spaced; headings and footnotes may be single-spaced.

(B) A brief on 6-1/8 by 9-1/4 inch paper

(i) must use proportionately spaced typeface;

(ii) must have typeface not exceeding 4-1/6 by 7-1/6 inches; and

(iii) must be single spaced or its equivalent in leading.

(4) A brief may use bold typeface only for covers, headings and captions. Case citations must be underlined unless a distinct italic typeface is used.

(5) Except by permission of the court, a principal brief must not exceed 14,000 words and a reply brief must not exceed 7,000 words, and in either case there must be on average no more than 280 words per page including footnotes and quotations. The word count shall not include the corporate disclosure statement, table of contents, table of citations, certificate of service and any addendum containing statutes, rules, regulations, etc. The brief must be accompanied by a certification of compliance with the word limits of this paragraph. In preparing this certificate, a party may rely upon the word count of the word processing system used to prepare the brief. No certificate is required if the brief is

(A) in at least 12 point proportionately spaced typeface and does not exceed

(i) 40 pages for a principal brief, or

(ii) 20 pages for a reply brief; or

(B) in monospaced typeface and does not exceed

(i) 50 pages for a principal brief, or

(ii) 25 pages for a reply brief.

(6) An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record may be included. The pages of the appendix must be separated by tabs, one for each document, or consecutively numbered.

In paragraph (a)(1), the draft provided that brief may be produced using both sides of the paper as long as the brief is clear and legible. This was responsive to one of the comments on the published rule. Two members of the Committee noted their circuits had affirmatively rejected a suggestion that briefs be double sided. A motion was made that the rule be left silent on the issue of single or double-sided briefs, leaving determination of the issue to local rule. The motion was defeated by a vote of 3 to 5 so the double-sided provision remains in the draft.

Paragraph (a)(2) defined proportionately spaced and monospaced typefaces. The second and third sentences of (a)(2)(A) were amended to read as follows: "The design must be of a serifed, roman, text style. Examples are the Roman family of typefaces, Garamond, and Palatino." The second sentence of (a)(2)(B) was amended to read as follows: "Examples are Pica type and Courier font in 12 point."

In paragraph (a)(4) the words "bold typeface" were replaced by "boldface," and "[c]ase citations" was changed to "[c]ase names."

In paragraph (a)(5) the word limitation for a principal brief was reduced from 14,000 to 12,500, and for a reply brief, from 7,000 to 6,250. The 12,500 word limit corresponds to the new D.C. circuit rule. Also the charts presented during the testimony the preceding day indicated that courier font in 12 point produces approximately 250 words per page, so that a 50 page brief in courier font in 12 point would have approximately 12,500 words.

The page limits in the safe-harbor provisions in (a)(5) were lowered to 30 pages for a principal brief and 15 pages for a reply brief using a proportionately spaced typeface and to 40 pages for a principal brief and 20 pages for a reply brief using a monospaced type face. With regard to a brief prepared with a typewriter rather than a computer, it was recognized that such a person should be able to file a 50 page brief. But it was further recognized that unless such a brief was larded with footnotes, the certification could honestly be made without counting every word. If a typed brief is heavily footnoted, several members of the Committee felt that it would be appropriate to require the preparer to count all the words in order to make the certification.

The first sentence of paragraph (a)(6), regarding preparation of the appendix was amended to state: "An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record or of a published court or agency decision may be included." The sentence requiring the pages of an appendix to be tabulated or consecutively numbered was omitted.

The remainder of the Rule was taken from the draft prepared prior to the meeting beginning at page 71 of the GAP materials.

On page 73, paragraph (b)(1) was omitted and paragraph (b)(3) was amended by making it applicable to a petition for rehearing, a suggestion for rehearing in banc, and any response to either. The effect of those changes was to omit any cover requirements for those documents.

The Reporter was asked to consider all of subdivision (b) in light of the redrafting of subdivision (a) and to make the word limitation and certification requirements inapplicable to papers other than briefs.

Rule 27

Fed. R. App. P. 27 governs the filing of motions in the courts of appeals. At the September 1993 meeting the Committee had considered a redraft of the rule prepared by the Department of Justice. After that initial discussion, a subcommittee had been charged with preparing a new draft. The new draft was before the committee.

The new draft was approved unanimously with the following changes:

1. Paragraph (a)(3) was amended by striking subparagraph (C) and by rewriting the second sentence of the paragraph to state: "The response must be filed within 7 days after service of the motion, unless the court shorten or extends the time, but . . ."

2. Subdivision (c) was rewritten to read as follows:

A single judge of a court of appeals may act on any request for relief that under these rules may properly be sought by motion, but a single judge must not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular case that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

3. Paragraph (d)(2) dealing with the format of a motion must be rewritten to be consistent with the changes made in Rule 32. The general consensus was that there was no need for the same level of detail as in Rule 32. Several members favored retaining the 20 page limit in (d)(3) but eliminating any word limit per page, etc.

Sanctions

Chief Judge Breyer placed the proposed amendments to Rule 38 on the discussion calendar for the Judicial Conference last fall. He was concerned that requiring notice and opportunity to respond before a court can assess costs and sanctions for filing a frivolous appeal would stifle the ability of the courts to

sanction minor delicts of counsel. Chief Judge Breyer asked the Advisory Committee to consider a procedure that would permit a court to appropriately note such an infraction.

The subcommittee chaired by Judge Boggs reported that it had considered Chief Judge Breyer's concerns. The subcommittee stated that there have been historically and remain, without hindrance from the revised Rule 38, a number of methods to deal with matters not warranting invocation of Rule 38. These include:

1. admonition from the bench;

2. letters to counsel subsequent to decision, transmitted either by the clerk, the presiding judge, or the entire panel;

3. criticism in an opinion; and

4. referral to the bar association.

The subcommittee believes that such methods can adequately address minor delicts that do not warrant the significant sanctions envisioned by Rule 38 or that are not cost effective to address through that rule.

The subcommittee could not think of any matters that would fall outside of Rule 38 that could not be adequately addressed by the alternative methods enumerated above.

A member of the Committee noted that some of the alternatives mentioned can be more serious than any sanction under Rule 38. Criticism of a lawyer in a judicial opinion, for example, can ruin a lawyer's career; and yet the lawyer is not entitled to due process.

Judge Logan said that he would relay the response to Judge Breyer.

Item 86-23, Service on an Inmate

The Committee was originally asked to address the problem a prisoner may have in filing a timely objection to a magistrate judge's report. Because a prisoner's receipt of mail is often delayed, a prisoner may not receive a magistrate judge's report until late in the ten-day period provided for responding, or even until after the close of the period.

The Committee decided that it could not cure the time problem with regard to a magistrate judge's report because trial court rules are involved. There was some thought, however, that the Committee should address the general problem of service on institutionalized persons. Draft amendments were circulated to the Chief Judges of the circuits, to the Committee of Staff Attorneys, and to the Advisory Committee of Defenders. The draft amendments generally provided that service on an inmate would not be complete until the inmate receives the document.

After consideration of the comments, many of which pointed out the complications that would arise from

the proposed amendments, a motion was made to drop the proposed amendments. The motion passed unanimously.

Item 93-7, Houston v. Lack and Administrative Agencies

The Reporter's memorandum illustrated that changes to Rule 4(c) and Rule 25(a), which became effective on December 1, 1993, have cured the Houston v. Lack problem for persons confined by an administrative agency such as the INS. The Committee decided that it need not take any further action on this item.

Item 91-24, Amicus Brief

The Fifth Circuit's response to the Local Rules Project suggested that the Advisory Committee consider amending Rule 29, governing amicus briefs. At its September 1993 meeting, the Committee considered two draft rules prepared by the Reporter. In light of the September discussion, a new draft was prepared for the Committee's consideration.

One member voiced doubts about a decision made by the Committee at the preceding meeting. The Committee had decided that a motion for leave to file an amicus brief must state that the amicus will present material that will not be adequately presented by the parties. Although that requirement was drawn from the Supreme Court Rule, the member noted that it will be a difficult burden for an amicus to shoulder at the time of the first appeal especially because the Committee also decided that an amicus must file its brief at the same time as the party it supports. At the time of Supreme Court review, the parties have already prepared briefs for consideration by the court of appeals and, therefore, an amicus knows the line of argument the party will use. An amicus does not have the same sort of information at the time of review by a court of appeals.

In view of the hour, it was decided that discussion of the new draft should be postponed until the next meeting.

Items 91-25 and 92-4, In Banc Proceedings

Item 92-4 involves a suggestion from the Solicitor General that intercircuit conflict should be made an explicit ground for granting an in banc hearing. At its September 1993 meeting, the Committee preliminarily approved such a change but did not decide whether intercircuit conflict should constitute a separate category of cases as to which in banc review is appropriate, or whether to treat intercircuit conflict as grounds for determining that a proceeding involves a question of "exceptional importance."

The representative from the Federal Judicial Center indicated that four circuits have local rules or I.O.P's

stating that intercircuit conflict is grounds for granting an in banc hearing. The Federal Judicial Center volunteered to study the kind and number of petitions in those circuits and report to the Committee at its next meeting.

Judge Logan postponed discussion of the two in banc items until the next meeting.

Item 93-1

Judge Becker wrote to Judge Ripple, in his capacity as Chair of the Committee, about the apparent conflict between Fed. R. Civ. P. 9(h) and 28 U.S.C. § 1292(a)(3) with respect to interlocutory appeal of admiralty cases that include non-admiralty claims. Section 1292(a)(3) authorizes interlocutory appeal from a decree in an admiralty case, as distinguished from an admiralty claim. As such, § 1292 apparently permits interlocutory appeal of a non-admiralty claim that is part of a larger admiralty case. Fed. R. Civ. P. 9(h), however, can be read to limit the broad grant in § 1292(a)(3) of interlocutory appeal in admiralty cases to one that allows only interlocutory appeal of admiralty claims.

The Committee decided to refer the matter to the Advisory Committee on Civil Rules for whatever action that Committee thinks appropriate.

Because the hour set for adjourning had arrived, the remainder of the discussion items were postponed until the fall meeting, by which time Judge Logan asked the Reporter to prepare discussion drafts.

The meeting adjourned at 3:00 p.m.

Respectfully submitted,

Carol Ann Mooney

Reporter