MINUTES OF THE APRIL 17, 1991, MEETING OF
THE ADVISORY COMMITTEE ON
FEDERAL RULES OF APPELLATE PROCEDURE

The meeting was convened by the Committee Chair, Honorable Kenneth F. Ripple, at 9:00 A.M., April 17, 1991, in room 638 of the Administrative Offices of the United States Courts. The following committee members were present: Honorable Danny Boggs, Donald F. Froeb, Esquire, Honorable E. Grady Jolly, Honorable James K. Logan, Honorable Arthur A. McGiverin, Honorable Kenneth W. Starr, and Honorable Stephen F. Williams. The Honorable Robert D. Keeton, Chair of the Standing Committee on Rules of Practice and Procedure, attended as did the Honorable Dolores K. Sloviter, the liaison from the Standing Committee on Rules. Mr. Thomas F. Strubbe, Clerk of the Seventh Circuit, attended as a liaison from the clerks. Patricia Brian, Esquire, of the Department of Justice, attended at the Solicitor General's request. Josep F. Spaniol, Jr., Esquire, John Howell, Esquire, Peter McCabe, Esq., and Thomas Hnatowski, Esquire, all of the Administrative Office, were present, as well as Mr. William Eldridge, Mr. Joseph Cecil, and Ms. Donna Stienstra, all of the Federal Judicial Center.

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

Judge Ripple announced two changes in the order of the agenda. First, to accommodate the Solicitor General's schedule, item 91-3, dealing with the new statutory authority to define a final decision by rule, would be placed at the top of the agenda. Second, item 89-3, the local rules project would be taken up when

Professor Mary Squiers, the project director, joined the meeting. Professor Squiers had received late notice of the meeting and the local rules project discussion would be taken out of turn in order to accommodate her schedule.

I. ITEM 91-3, DEFINING FINAL DECISION

One of the recommendations made in the April, 1990, Federal Courts Study Committee Report was that Congress "should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 95 (1990). On December 1, 1990, legislation implementing the first part of that suggestion was signed by President Bush. Section 315 of the Judicial Improvements Act of 1991, Pub.L. No. 101-650, adds a new paragraph to the Rules Enabling Act, 28 U.S.C. § 2072. The addition provides that "[s]uch rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title."

In his introductory remarks, Judge Ripple noted that the Committee's work in this area will be more effective if the Committee first delineates the areas most susceptible to definition by rule. Prior to the meeting Judge Ripple had contacted Judge Joseph Weiss, Chair of the Federal Courts Study Committee; Judge Levin H. Campbell, who chaired the subcommittee

which originated the suggestion; and Judge Richard A. Posner, a member of the committee. Judge Ripple had hoped that those persons could relay the origins of the suggestion and any specific concerns that the committee thought could be addressed through use of such authority. Although the proposal passed the Federal Courts Study Committee unanimously, apparently very little discussion preceded its approval.

Judge Ripple suggested some possible initial steps. First, he suggested contacting all Article III judges to solicit their advice. Second, he suggested soliciting the advice of the academic bar, perhaps through the Federal Courts Section of the American Association of Law Schools.

Solicitor General Starr complimented the work done by Judge Ripple, the Reporter, and the Administrative Office to change the language in the legislation from "shall define" to "may define". Mr. Starr noted that the Justice Department often wrestles with finality problems and that finality issues touch upon areas involving substantive rights such as double jeopardy and qualified immunity. Solicitor General Starr applauded Judge Ripple's March 14, 1991, memorandum in which Judge Ripple suggested that the Committee proceed cautiously and incrementally.

Mr. Starr further stated that the Justice Department sees no need for a broad spectrum codification. Mr. Starr also noted that identification of areas where there is ambiguity, as contrasted with areas of conflict, may be the best way to

proceed.

Judge Logan suggested that as a first step the Reporter look at published opinions to ascertain where the courts have had to struggle with the question of finality. Judge Ripple assured him that would be done.

Judge Sloviter questioned whether the idea was to spell out in the rules those things already covered by Supreme Court jurisprudence, or to use the rules to provide answers to problem areas that are still ambiguous or unsettled.

Judge Boggs pointed out that there are many finality questions that are handled by motion and that would not surface in a review of published opinions. Judge Ripple noted that if the Committee determines that it is appropriate to ask the Article III judges for advice, that the judges could be asked about problems that are unlikely to appear in reported decisions.

Judge Ripple stated that he would draft a letter for transmission to the Article III judges, and have the Committee review it before mailing.

II. ACTION ITEMS

A. Item 91-1, Amendment of the Rules to Change "Magistrate" to "Magistrate Judge"

The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5166 (1990), changed the name of United States Magistrates to United States Magistrate Judges, *id.* § 321. There are four references in the Fed. R. App. P. to magistrates; they are found in the caption and body of rule 3.1 and in the body of

rule 5.1. Judge Logan moved that each of those references be amended to reflect the title change. The motion was seconded by Mr. Froeb. The Committee unanimously approved the following changes:

Rule 3.1. Appeals from Judgments Entered by Magistrates Judges in Civil Cases

When parties consent to a trial before a magistrate judge pursuant to 28 U.S.C. § 636(c)(1), an appeal from a judgment entered upon the direction of a magistrate judge shall be heard by the court of appeals pursuant to 28 U.S.C. § 636(c)(3), unless the parties, in accordance with 28 U.S.C. § 636(c)(4), consent to an appeal on the record to a judge of the district court and thereafter, by petition only, to the court of appeals. Appeals to the court of appeals pursuant to 28 U.S.C. § 636(c)(3) shall be taken in identical fashion as appeals from other judgments of the district court.

Rule 5.1. Appeals by Permission Under 28 U.S.C. § 636(c)(5)

(a) *Petition for Leave to Appeal; Answer or Cross Petition.*- An appeal from a district court judgment, entered after an appeal pursuant to 28 U.S.C. § 636(c)(4) to a judge of the district court from a judgment entered upon direction of a magistrate judge in a civil case, may be sought by filing a petition for leave to appeal. . . .

B. Item 90-5, Technical Amendment of Fed. R. App. 10(b)(3)

Through a printer's error an "of" in the text of Rule 10(b)(3) was changes to "or". Chief Justice McGiverin moved that the error be corrected; the Honorable Kenneth Starr seconded the motion. The following amendment was unanimously approved:

Rule 10. The record on appeal

* * *

(b) *The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.* -

* * *

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript ~~or~~ of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

C. Item 86-25, Statement of the Standard of Review

The advisory committee has been considering for some time adding a provision to Fed. R. App. P. 28 requiring a statement of the standard of review. Currently five circuits have local rules requiring such statements. Judge Newman had surveyed the circuits asking them to comment upon the proposal. A total of 16 responses were received; ten favored the proposal, four opposed it, and two were ambivalent. Of the responses from the circuits having local rules (four of the five circuits with local rules responded), all reported positive experience with their local rules and supported development of a national rule.

The Reporter's memorandum prepared for the meeting suggested amending Fed. R. App. P. 28(a)(5) by adding to it a requirement that the argument contain a discussion of the standard of review. Two drafts were presented for Committee consideration. Draft A would require that discussion of each issue be preceded by a concise statement of the applicable standard of review by the court of appeals. Draft B contained that requirement and additionally would require that with respect to each issue the party indicate the places in the record where the issue was raised and ruled upon.

Judge Logan noted that the 10th Circuit has a local rule that is essentially identical to Draft B. He commented that although not every lawyer and every brief complies, the general experience is that identifying the standard of review helps to focus the discussion of the issues and that identification of the

places in the record where issues were preserved is very helpful. He approved of Draft A, but favored Draft B.

Mr. Starr recognized the utility of the suggestion but thought that it would be preferable to allow brief writers flexibility to include the information either in the body of the argument or in a separate segment preceding the argument. He suggested the following language:

(5) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on. The argument also shall include a concise statement of the applicable standard of review by the court of appeals which may be presented in the discussion of each issue or under a separate heading preceding the discussion of the issues.

Mr. Froeb questioned the need to refer to the places in the record where issues were raised. He wondered if that requirement would clutter appellants' briefs with something that is not necessary.

Judge Ripple noted that the required references to the record would be extremely helpful in the Seventh Circuit especially in large commercial cases.

Chief Justice McGiverin stated that he would prefer to have the standard presented with each issue rather than preceding all arguments.

A straw vote was taken on which draft the Committee

preferred. Four members voted for Draft A; four voted for Draft B. Judge Logan asked members to state their objections to Draft B. Judge Williams responded that in the overwhelming number of cases an appellee points out any failure of an appellant to properly preserve an issue for appeal and, in light of that, he would prefer not to dictate how parties should write their briefs.

Judge Logan noted that Draft B usually requires only one additional sentence. Mr. Froeb responded that at trial often objections are raised but not neatly packaged and that proving that an issue was adequately preserved may involve bringing in transcripts, etc.

Ultimately, the Committee settled upon a Draft A type solution. Judge Logan moved that the Committee adopt the Solicitor General's language but deleting "by the court of appeals" on line six and substituting therefor "for each issue", and Judge Williams seconded the motion. Eight members of the Committee approved adding the following sentence to Fed. R. App. P. 28(a)(5):

1 The argument also shall include a concise statement of the
2 applicable standard of review for each issue, which may be
3 presented in the discussion of each issue or under a
4 separate heading preceding the discussion of the issues.

Judge Keeton then moved to add at line two after "for each issue" the following: "and how the issue was preserved for appeal." That change would address the earlier issue and would

break the amendment into two sentences. He further suggested beginning the second sentence by providing: "This statement may be presented . . ." Judge Logan seconded the motion. It was defeated four to three.

D. Items 86-10 and 86-26, Rules 4(a)(4) and 4(b)

1. 4(a)(4)

Fed. R. App. P 4(a)(4) creates a procedural trap for litigants who file notices of appeal before the disposition of one of the enumerated post trial tolling motions. The rule requires litigants to file new notices of appeal after disposition of the motions. If a party fails to file a new notice of appeal, the court of appeals lacks jurisdiction to hear the appeal.

At the Committee's October 23, 1990, meeting, the Committee voted to amend rule 4(a)(4) to allow notices of appeal filed before disposition of the post trial tolling motions to ripen into effective notices of appeal upon the disposition of the post trial motions. The Committee also voted to make additional changes in rule 4(a)(4) so that all motions filed within 10 days of judgment in the district court will be tolling motions whether they are Rule 59 motions or Rule 60(b) motions. In addition, the Committee decided that Fed. R. App. P. 3(d) should continue to require transmittal of notices of appeal to the courts of appeals "forthwith." However, so that the courts of appeals are aware of the filing and disposition of any 10 day motions, the Committee recommended amendment of Fed. R. App. P. 3(d) to require district

courts to notify the courts of appeals of any post trial motions filed in cases in which notices of appeal also have been filed and to further notify the courts of appeals of the disposition of the motions.

In a memorandum circulated following the last meeting Judge Ripple suggested an alternate approach in which a party's notice of appeal would ripen only if that party were denied all post trial relief. Judge Keeton made additional suggestions, and two new drafts were circulated in April. Draft 1 provided that all notices of appeal filed before disposition of the post trial tolling motions would ripen upon the disposition of the last of all such motions. Draft 2 provided that a party's notice of appeal would ripen only if that party had been denied all post trial relief.

Judge Logan suggested taking up the less controversial portions of the suggestions first. Professor Mooney pointed out that on page 4 of the memorandum at line 10, the word "filed" should be changed to "made." Fed. R. Civ. P. requires that motions be served no later than 10 days after the entry of judgment; it does not require filing within that time. Referring to page four of the April 11, 1991, memorandum, Judge Logan then moved the following: 1) the word "filed" on line 10 be changed to "made"; 2) the adoption of the underlined material in lines 14-15 (providing that motions for award or determination of costs or attorney's fees shall not be treated as tolling motions); and 3) the deletion of the stricken material and the addition of the

underlined material in lines 17 through 22 (treating all motions requesting alteration or amendment of judgment or a new trial as tolling motions if they are served within 10 days after entry of judgment). The motion was second by Judge Jolly. All three changes were approved unanimously.

The discussion then turned to the ripening question. Judge Logan noted that most post trial motions are disposed of by either denying all such motions, granting ministerial changes such as correction of typographical errors in judgments, or by granting substantive partial relief as to one claim. None of those dispositions would require further proceedings in a district court and there should be no objection to the ripening of a previously filed notice of appeal. He commented that the logical way to draw the line between those notices that ripen and those that do not is not whether relief is granted or denied, but whether the order entered requires any further proceedings in the district court. If further proceedings are needed, then the notice should not ripen and the appellant should start the appeal process again after the conclusion of proceedings in the district court.

Judge Jolly commented that the point of amending Rule 4(a)(4) is to eliminate the trap. He pointed out that at previous meetings the Committee had discussed the administrative problems that would arise from a provision that would result in the ripening of all notices of appeal, but the Committee had concluded that some price must be paid to achieve the objective

of saving appeals. Judge Jolly stated that trying to fashion a rule that would deal with all these different contingencies would complicate the rule unduly.

Mr. Froeb commented that if a ripening approach is taken, the message that the bar will hear is that the time trap has been eliminated from Rule 4(a)(4) and that the first notice of appeal will be effective. A rule that is more subtle than that message could create, not solve, problems.

Judge Williams moved to discard Draft 2 in favor of Draft 1. Judge Logan seconded the motion. Seven members voted in favor of the motion.

In order to clarify the status of a notice of appeal that has been filed before the disposition of the post trial motions, Judge Williams suggested inserting "be in abeyance and shall" at line 29 following the word "shall." The motion was seconded and passed unanimously. Judge Keeton noted that appeals in the "in abeyance" category should not be on the docket as pending appeals. The creation of a new category should be addressed in the Committee Comments.

Judge Sloviter asked whether it would be clear to the court of appeals that the district court had disposed of the last of the post trial motions. She suggested that it might be helpful to require district court clerks to notify courts of appeals when all post trial motions in a case have been decided. Judge Ripple moved that the following language be inserted in Rule 3 at line 12 on page three: "and shall inform the clerk of the court of

appeals after the last of any pending post judgment motions has been decided." The motion was seconded but failed to pass.

Judges Jolly and Logan suggested removing the last two sentences on page 5 of the memorandum thus eliminating everything from line 30 onward. The suggestion would omit language providing that an appeal from the disposition of a post trial motion requires a separate notice of appeal and that the time for filing that notice would run concurrently with the time for filing a notice from the underlying decision which would be measured from the disposition of the last tolling motion. Judge Logan noted that the language on lines 16-18 states that the time for appeal runs from the entry of the order disposing of the last of the post trial motions.

Judge Keeton asked whether the intent of the motion was to eliminate the requirement of a new notice of appeal. Judge Williams stated that the rule should not add any more requirements as to notices of appeal than those already in Fed. R. App. P. 3. He suggested that the Committee Note make reference to Fed. R. App. P. 3(c) and state that in order to appeal from disposition of a post trial motion a party may need to file a new notice of appeal or amend the original notice.

Judge Keeton suggested a revision of the sentences in question to read as follows:

> An appeal from an order disposing of any of the above motions requires an amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any

such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

Judge Ripple moved approval of the language suggested by Judge Keeton; the motion was seconded by Judge Boggs. Seven members voted in favor of the motion.

Finally Judge Ripple called for a vote on Draft 1 dealing with Rules 3 and 4(a)(4) as amended through the course of the discussion. It was approved by a vote of seven to one. The approved draft reads as follows:

Rule 3. Appeal as of right - How taken

* * *

(d) *Service of the notice of appeal.* - The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last known address of that party~~; and~~. The clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice and the clerk of the district court shall transmit copies of any later docket entries in that case to the clerk of the court of appeals. When an appeal is taken by a defendant in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice

of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

Rule 4. Appeal as of right - When taken

(a) *Appeals in civil cases.*-

(2) ~~Except as provided in (a)(4) of this Rule 4, a~~ A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

* * *

(4) If a timely motion under the Federal Rules of Civil Procedure is ~~filed~~ made in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, other than for award or determination of costs or attorney's fees; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order ~~denying a new trial or granting or denying any other such motion~~ disposing of the last of all such motions. If a motion under Rule 60 of the Federal Rules of Civil Procedure is served within 10 days after the entry of the judgment, the motion shall be treated as a motion under Rule 59 for purposes of this paragraph (a)(4). ~~A notice of~~

~~appeal-filed-before-the-disposition-of-any-of-the-above-motions shall-have-no-effect.--A-new-notice-of-appeal-must-be-filed within-the-prescribed-time-measured-from-the-entry-of-the-order disposing-of-the-motion-as-provided-above.--No-additional-fees shall-be-required-for-such-filing.~~ A notice of appeal filed after entry of the judgment but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order that disposes of the last of all such motions. An appeal from an order disposing of any of the above motions requires an amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

2. 4(b)

Unlike Fed. R. App. P. 4(a)(4), Fed. R. App. P. 4(b) does not state that a notice of appeal is a nullity if it is filed before disposition of the tolling post trial motions. However, the Seventh Circuit has read Rule 4(b) as if it states that a notice of appeal must be filed after disposition of the tolling post trial motions. See United States v. Gargano, 826 F.2d 610 (7th Cir. 1987); United States v. Naud, 830 F.2d 768 (7th Cir. 1987). At the October, 1990, meeting the Committee voted to amend 4(b) by adding language stating that a notice of appeal filed before disposition of a post trial motion becomes effective

upon the date of entry of an order denying the motion. A single draft implementing that decision was prepared for the meeting.

Judge Logan suggested eliminating the language at lines 33 through 41 of the draft requiring a new notice or amended notice of appeal in order to bring an appeal from denial of a post trial motion. Judge Logan moved, and the motion was seconded by Judge Ripple, substitution of the following language for lines 33 through 41 of the draft:

> Notwithstanding the provision of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions.

The motion was carried unanimously. The placement of that language within Rule 4(b) was left to the discretion of the Chair and the Reporter.

In keeping with the change made in Rule 4(a)(4) it was suggested that the following language be inserted at line 25 following the word "shall": "be in abeyance and shall".

A motion was made to adopt all of Draft 1 as amended during the course of the discussion. The motion carried unanimously. The approved draft reads as follows:

Rule 4 Appeal as of right - When taken

* * *

(b) *Appeals in criminal cases.*- In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by the Government. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion under the Federal Rules of Criminal Procedure is made: (i) for judgment of acquittal, (ii) for ~~in~~ arrest of judgment, ~~or~~ (iii) for a new trial on any ground other than newly discovered evidence, or (iv) for a new trial based on the ground of newly discovered evidence if the motion is made before or within 10 days after entry of the judgment, ~~has been made~~ an appeal from a judgment of conviction may be taken within 10 days after the entry of an order ~~denying the motion~~ disposing of the last of all such motions, or within 10 days after the entry of the judgment of conviction, whichever is later. ~~A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment.~~ A notice of appeal filed after announcement of a decision, sentence, or order but before disposition of any of the above motions shall be in abeyance and shall become effective upon the date of the entry of an order

that disposes of the last of all such motions, or upon the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant.

A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed. R. Crim. P. 35(c), nor does the filing of a motion under Fed. R. Crim. P. 35(c) affect the validity of a notice of appeal filed before disposition of such motion.

At 12:35 the Committee broke for lunch.

The meeting resumed at 1:30.

III. The Local Rules Project

The project director, Professor Mary Squiers joined the meeting and provided a brief history of the Local Rules Project.

The Committee on Rules of Practice and Procedure formed the Local Rules Project several years ago to examine the local rules of the ninety-four federal district courts and of the thirteen appellate courts. The Project was intended to provide a complete review of local rules for errors or internal inconsistencies, to study how rulemaking and the actual rules work in practice; and to provide a systematic review of the underlying policies of local rules. In April, 1989, the Report on Local Rules of Civil Practice in the district courts was distributed to the chief judges of the district courts. The project then turned its attention to the admiralty rules and to the appellate rules. At its February 4, 1991, meeting the Standing Committee approved distribution of the Report on the Local Rules of Appellate Procedure to the circuits.

The Standing Committee asked the Advisory Committee to examine the report and to look at those areas that may merit attention in the national rules. The Standing Committee also asked the Advisory Committee to coordinate the circuits' evaluation of their rules in light of the report.

As to the second charge, Judge Ripple stated that he hoped to have initial responses from the circuits before the Advisory Committee's next meeting in December, 1991, so that he may present an initial report to the Standing Committee at its January, 1992, meeting. Judge Ripple gave the Committee copies of the distribution memorandum that will be circulated to the chief judges of the circuits on April 19. He described the memorandum as consultative in nature. The circuits are requested

to do three things: first, determine which of their local rules are clearly in conflict with the Fed. R. App. P. and take steps to eliminate the conflict; second, where a conflict noted in the report is not clear to a circuit, contact the project director; and, third, communicate with the project director concerning those portions of the report that a circuit believes are incorrect. With the permission of Judge Keeton, Professor Squiers will continue to work with the Advisory Committee as a consultant.

With regard to the Committee's charge to identify topics covered by local rules that might profitably be covered by the national rules, Judge Ripple asked the committee members to review Professor Mooney's April 3 memorandum and to identify those areas that may be particularly important or ripe for national rulemaking.

IV. SANCTIONS

At the Advisory Committee's October, 1990, meeting the Committee decided that it should continue to discuss the development of a rule concerning sanctions for frivolous appeals or for other misconduct in the course of an appeal. Given the sensitive nature of the issue, the Committee decided that it would be unwise to act precipitously. The topic was placed on the agenda for this meeting as a discussion item.

At the October meeting the Committee was still receiving responses to Judge Newman's letter to the chief judges asking whether they believed there should be more explicit authority to

impose sanctions and whether they thought notice and opportunity to respond should be required before sanctions are imposed. Judge Ripple reported that the responses to Judge Newman's inquiry were not very helpful. Many of the responses reflected only a chief judge's personal views and did not reflect any polling of the judges in the circuit.

In preparation for this meeting, the Reporter prepared a model rule providing authority to sanction and requiring notice and opportunity to respond before sanctioning. The model rule draws heavily on existing local rules. Judge Ripple stated that it should be considered a discussion draft. Also in preparation for this meeting, the Federal Judicial Center was asked to prepare a proposal for a study that would provide the Committee with more information about current sanctioning practices in the circuit courts. Both steps were taken to help move the inquiry forward.

Mr. Joseph Cecil of the Federal Judicial Center outlined the center's research proposal. He first noted that it is a preliminary protocol and is open to changes suggested by the Committee. He stated that the proposal is in two parts. One part would involve a search of the case records in selected circuits for the purpose of learning the kinds of sanctions currently being used, and the procedures followed prior to imposing sanctions. The other part would involve a survey of judges regarding their perceptions of the abuses that occur in the appellate process, their current sanctioning practices, and

the extent to which they believe additional sanctioning authority is needed.

Judge Sloviter noted that neither part of the proposed study would identify cases in which sanctions were requested but not imposed. Mr. Cecil responded that identification of all such cases would be too labor intensive.

Judge Williams asked whether the issues involved lend themselves well to empirical data. He suggested that perhaps the first step should be a standard law type study.

Ms. Brian, of the Department of Justice, stated that the department is wary of increased sanctions. Before the Committee moves forward with a model rule, the department would like a study that shows there is, or may be, a problem. The department does not think that experimentation with a sanctions rule would be wise.

Judge Jolly suggested that the Reporter proceed to develop language and then the Committee may be able to focus its discussion and determine whether a study is needed. He further suggested that a special meeting solely to discuss sanctions might be considered.

Judge Keeton asked whether there should be a coordinated sanctions rule for both trial and appellate proceedings.

The Committee resolved only to continue the discussion.

V. MORE ACTION ITEMS

A. Item 88-10, Statement of the Case

At the October, 1990, meeting the Committee approved a proposed amendment to Fed. R. App. P. 34(c) that deletes the requirement that at oral argument the first argument contain a statement of the case. The language of the rule was approved at that time. For this meeting a new Committee Note was drafted adding language authorizing those circuits that desire a statement of the case to continue the practice. The language of the amendment and the committee note contained in the reporter's December 20, 1990, memorandum were unanimously approved.

B. Item 89-2, Houston v. Lack and filings of institutionalized persons

At the Committee's last meeting, the Committee briefly discussed a draft amendment to Fed. R. App. P. 25(a) providing that "a notice of appeal by a party confined in a prison, jail, mental hospital, or other institution" would be considered filed on the "day of delivery to the personnel or location . . . designated by the institution for mailing to the court . . ." No action was taken on that draft.

At the last meeting the reporter was asked to examine the case law and determine if any of the circuits had extended the principle announced in Houston beyond persons confined in penal institutions; none have. The Department of Justice was asked to consult with prison officials about their experience following the Supreme Court's decision. The Solicitor General's letter of January 30, 1990, reports that the proposed rule would not pose

any significant problems for the federal prison system and the department favors adoption of the proposed amendment.

A new draft was prepared for this meeting. The new draft closely tracks the language in the Supreme Court's Rule 29.2. The reporter outlined the differences between the new draft and the previous one. First, the new draft applies to all persons "confined in an institution." The prior draft spoke of persons confined in a "jail, mental hospital, or other institution." Second, the prior draft limited its application to persons "not represented by an attorney." The new draft does not contain that limitation because the Supreme Court's rule does not. Third, the new draft requires that the notice of appeal be accompanied either by a notarized statement or a declaration in compliance with 28 U.S.C. § 1746 setting forth the date of deposit and stating that first class postage had been prepaid.

The reporter's memorandum suggested amendment not only of Rule 4 which governs filing of notices of appeal, but also of Rule 25, which governs all filings with the courts of appeals. The memorandum also suggested conforming amendment to Rules 4(a)(3), 4(b) and 3.

Ms. Brian stated that if the Committee decides to go forward with the rule, the Department of Justice would like to ask INS and HHS if the proposal meets with their approval.

Judge Logan suggested omitting the requirement that a notice of appeal be accompanied by a statement concerning the date of deposit of the notice in the institutional mailing system. He

noted that if the notice is not received by the court within the time for filing, the court may require the appellant to supply such a statement. Judge Logan moved that at page two of the memorandum line 18 be amended by placing a period after "filing", by striking the words "and it is accompanied", and by adding in the same place "Timely filing may be shown", and by adding at the end of the line, "by a". Judge Boggs seconded the motion and it carried five to two.

Judge Keeton suggested, and the Committee approved, deleting "shall be deemed" from line 16 and inserting in its place "is". Judge Keeton further suggested creating a new paragraph 4(c) dealing with filings by institutionally confined persons, rather than amending both 4(a) and 4(b). The suggestion received unanimous approval. All other changes, including the conforming amendments were approved unanimously. The language approved is as follows:

> If any inmate confined in an institution files a notice of appeal, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration in compliance with 28 U.S.C. § 1746 setting forth the date of deposit and stating that first-class postage has been prepaid.

Due to travel plans of some members of the Committee, discussion of the following items was postponed until the next meeting: Item 90-4, the Torres problem; Item 91-2, a proposal to amend Fed. R. App. P. 40(a) and 41(a) to lengthen the time for filing a petition for rehearing in civil cases involving the United States; Item 91-4, a proposal to amend Fed. R. App. P. 32 concerning typeface; and Item 89-5 and 90-1, proposals to amend Fed. R. App. P. 35 so that a "suggestion" for rehearing in banc becomes a "petition" and extends the time for filing a petition for certiorari in the same manner as a petition for a panel rehearing. With regard to Item 86-14, Judge Ripple noted that his survey of the chief judges indicated insufficient interest in an Equal Access to Justice Act rule, so that item will be dropped from the Committee's docket.

Judge Ripple thanked the members of the Committee for their help and noted that a meeting would be scheduled for fall.

The meeting adjourned at 3:45 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter