COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of January 11-13, 1995
San Diego, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Diego, California on Wednesday, Thursday, and Friday, January 11-13, 1995. All the members were present:

Judge Alicemarie H. Stotler, Chair
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Judge James A. Parker
Alan W. Perry, Esquire
George C. Pratt, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Representing the Department of Justice on the committee were Deputy Attorney General Jamie S. Gorelick and Geoffrey M. Klineberg, Special Assistant to the Deputy Attorney General.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office, and Mark D. Shapiro, senior attorney in the office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules -
Judge Patrick E. Higginbotham, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair

Professor David A. Schlueter, Reporter
Advisory Committee on the Rules of Evidence -
Judge Ralph K. Winter, Chair
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol Jr. and Bryan R. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, and William B. Eldridge, director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference at its September 1994 meeting had rejected the proposal of the Court Administration and Case Management Committee to promulgate national guidelines governing cameras in courtrooms in civil cases. It then proceeded to disapprove the Standing Committee's proposed amendment to Fed. R. Crim. P. 53, which would have removed the rule's absolute ban on cameras in the courtroom in criminal cases.

The members discussed generally the policy that should be followed in providing information about pending committee business to the public and the media. Judge Stotler pointed out that the rules process is very open and provides numerous opportunities for the public to provide input to the committees. She added that recent correspondence between Administrative Office Director Mecham and Chief Judge Newman had left the door open on the issue of committee members having contacts with the media and the public. She stated that members were free to give their personal views, but should do so with discretion.

Judge Stotler also emphasized the importance of maintaining contacts with other committees of the Judicial Conference, especially the Court Administration and Case Management Committee. Judge Easterbrook added that Judge Ann Williams, chair of the Court Administration and Case Management Committee, had agreed to share with the Standing Committee preliminary results of the RAND Corporation's evaluation of the Civil Justice Reform Act (CJRA) pilot programs as soon as the results become available.

The members expressed concern that the timetables established by the CJRA were unrealistically short and did not allow sufficient time for the Judicial Conference and its committees to analyze the RAND data in a meaningful manner and to prepare meaningful recommendations for national rules changes. It was suggested that the committee communicate these concerns to members and staff of the judiciary committees of the Congress.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of its June 23-24, 1994 meeting.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on recent legislative developments amending or affecting the federal rules.

First, the Congress had made a technical change, as requested by the Judicial Conference, in Fed. R. Crim. P. 46(i), correcting an erroneous statutory reference to the Bail Reform Act.

Second, the Congress had enacted Fed. R. Evid. 412 in the version approved by the Judicial Conference. In so doing, the Congress did not accept the changes made by the Supreme Court that would have limited the rule's application to criminal cases only. The Congressional conference committee explicitly adopted as part of the legislative history the committee note prepared by the Advisory Committee on the Rules of Evidence.

Third, the Congress had amended Fed. R. Crim. P. 32 to require victim allocution in cases involving a crime of violence or sexual abuse. The amendment was made effective on December 1, to coincide with the timing of all other changes in the rules under the Rules Enabling Act.

Fourth, the Congress had amended Fed. R. Bank. P. 7004 to require that service on insured depository institutions under the rule be made by certified mail.

Mr. Rabiej also reported that Senator Heflin had introduced a bill to require that each rules committee be comprised of a majority of practicing attorneys. He noted that the Chief Justice had been advised of the matter and had addressed it in his year-end report. The Chief Justice stated that the rulemaking system was working well, and that Congress should not seek to regulate further the composition of the rules committees.

CONTRACT WITH AMERICA

Mr. Rabiej reported that a bill had been introduced in the Senate, the counterpart of the House's Taking Back Our Streets bill, that included a provision

requiring that the number of Department of Justice representatives of each rules committee be equal to the number of members who represent defendants in criminal cases. It would affect the composition of the Standing Committee, the Advisory Committee on Criminal Rules, and the Advisory Committee on the Rules of Evidence.

Mr. Rabiej stated that the Judicial Conference had already taken a position on the House bill and had requested the Standing Committee to a consider taking a position on this particular bill. The committee agreed with the views of the Chief Justice that the rulemaking system had worked well and Congress should not seek to regulate the composition of the rules committees any more than it had. It was pointed out that many members of the rules committees have had prior prosecutorial experience and that committee votes are neither prosecution-oriented nor defense-oriented. Several members noted, too, that the Department of Justice had provided *ex officio* members to the Standing Committee and the advisory committees for many years. Accordingly, the committee voted to recommend that the Judicial Conference oppose legislation regulating the composition of the rules committees appointed to advise the Judicial Conference and the Supreme Court.

The consensus of the members was that there was no need to communicate further with the Congress on the legislation.

Judge Stotler reported that the responsibility over most of the Contract With America had been assigned to other committees of the Judicial Conference. Judge Higginbotham pointed out that many of the substantive areas assigned to other committees are laced with procedural issues. The Advisory Committee on Civil Rules was looking at the legislation, but only with regard to their impact on procedural issues.

Judge Winter pointed out that the Advisory Committee on the Rules of Evidence had reviewed Article VII of the Federal Rules of Evidence. It had concluded that since the Supreme Court's decision in the *Daubert* case was relatively new, it was premature to consider either amendments to Article VII or legislation to regulate scientific and technical evidence. He advised that pending legislation to revise Fed. R. Evid. 702 was flawed and that Congress should be persuaded to leave the rule alone. Professor Berger added that there were also difficulties with the proposed legislative redraft of Fed. R. Evid. 702(c), dealing with compensation of expert witnesses.

Judge Logan reported that the Advisory Committee on Appellate Rules had considered a proposed legislative amendment to Fed. R. App. P. 22, dealing with certificates of probable cause. The advisory committee had decided not to take a position on the merits of the proposal.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eldridge described several research projects that the Federal Judicial Center had undertaken to assist the rules committees. He offered the services of the Center to evaluate the impact of rules changes and provide other help that the committees might want.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum of December 8, 1994. (Agenda Item 6) He noted that the committee was not presenting any items that would require action.

Judge Logan reported that the advisory committee had reviewed the Style Subcommittee's draft revisions of Rules 1-23 and planned to review Rules 24-48 as soon as its agenda permitted. He stated that the advisory committee intended eventually to present a restyled revision of all 48 rules to the Standing Committee as part of a single package.

Judge Logan stated that the advisory committee had approved substantive changes in Fed. R. App. P. 26, 29, 35, and 41, but would defer seeking approval of the changes until the July 1995 meeting of the Standing Committee.

Professor Mooney stated that the appellate advisory committee had voted—as had the other advisory committees—not to expand from 3 days to 5 days the additional time a party is given to act where service on the party has been made by mail.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Mannes and Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 14, 1994. (Agenda Item 8)

Judge Mannes stated that the advisory committee had approved several proposed

amendments at its September 1994 meeting, but had decided to defer them for presentation to the Standing Committee at its July 1995 meeting. He also advised that the committee had held a special meeting in December to consider amendments to the Federal Rules of Bankruptcy Procedure made necessary by enactment of the Bankruptcy Reform Act of 1994.

Professor Resnick stated that the Act was very comprehensive and contained 60 operative sections. The advisory committee concluded that most of the rules changes to implement the Act did not require expedited action and could be promulgated under the normal Rules Enabling Act schedule. Accordingly, several proposed amendments would be brought before the Standing Committee for consideration at its July 1995 meeting.

The advisory committee determined, however, that certain matters required urgent attention through immediate: (1) amendment of the Official Forms, and (2) issuance of model interim rules.

The Official Forms, which are widely used by creditors and the general public, did not yet reflect important changes enacted by the 1994 law. Therefore, they were misleading to creditors in such matters as filing proofs of priority claims. Professor Resnick pointed out that the Official Forms are promulgated by the Judicial Conference directly and do not have to be submitted to the Supreme Court and the Congress. Accordingly, the necessary corrective changes could be implemented by the Judicial Conference at its March 1995 meeting.

The committee voted unanimously to approve the proposed amendments in the Official Forms and send them to the Judicial Conference for promulgation.

Under section 104 of the Bankruptcy Code, dollar amounts in the Code are adjusted every three years on the recommendation of the Judicial Conference. The advisory committee recommended that the Judicial Conference automatically change the Official Forms to reflect the periodic adjustments made in the statutory dollar amounts. The Standing Committee asked the advisory committee to return at the next meeting with a specific suggestion for effectuating the automatic adjustments in the Official Forms.

The advisory committee recommended three Suggested Interim Bankruptcy Rules for adoption as local court rules. (These rules would eventually be superseded by amendments to the national bankruptcy rules under the Rules Enabling Act process.) The three interim rules were considered necessary by the advisory committee to implement provisions of the Bankruptcy Reform Act of 1994 immediately. They dealt, respectively, with: (1) election of chapter 11 trustees, (2) special procedures for small business chapter 11 cases, and (3) jury trials.

Professor Resnick stated that the advisory committee had distributed model, interim rules directly to the courts in 1979 and 1987. This time, however, the committee was seeking approval of the Standing Committee to distribute the interim rules to the district and

bankruptcy courts.

The committee voted unanimously to authorize the distribution of the Suggested Interim Bankruptcy Rules.

Professor Resnick pointed out that the advisory committee planned to engage in a dialogue with the new National Bankruptcy Review Commission, which had been given two years in which to report to the Congress with respect to further changes that may be appropriate in the bankruptcy laws. He also noted that the 1994 bankruptcy legislation had changed the effective date of amendments to the Federal Rules of Bankruptcy Procedure to December 1 of each year, making it consistent with the effective date for the other federal rules. It was the consensus of the committee that it would be appropriate for the advisory committee to deal directly with the National Bankruptcy Review Commission.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum of December 13, 1994. (Agenda Item 9)

He stated that the advisory committee requested action by the Standing Committee on five items.

First, the committee recommended that the Judicial Conference ask the Congress to delete the service provisions from the Suits in Admiralty Act, 42 U.S.C. § 742. The Act requires that a libellant "forthwith" serve a libel on the United States attorney and the attorney general. "Forthwith" has been interpreted by some courts to require service within a period shorter than the 120-day period specified in Fed.R.Civ.P. 4(m), creating a trap for practitioners.

The committee approved the recommendation unanimously.

Second, the advisory committee recommended that amendments to Fed. R. Civ. P. 26(c), dealing with protective orders, be approved by the Judicial Conference at its March 1995 meeting. Judge Higginbotham pointed out that legislation introduced by Senator Kohl would cause difficulty because it focused too much on products liability litigation and would require a judge to conduct a hearing and make explicit findings before entering a protective order. He noted that he had met with the senator and his staff, had corresponded with them, and had carried on a dialogue in an attempt to accommodate competing policy considerations. As a result, the advisory committee voted by mail ballot to make some changes in its original proposal to amend Rule 26(c).

Judge Higginbotham stated that the rule had been changed by the advisory committee

after publication to make it clear that nonparties may intervene for the limited purpose of questioning a protective order, thereby reflecting current practice in the courts. The committee expanded the enumerated grounds for dissolving a protective order. It also provided explicitly in the rule for entry of a protective order on stipulation of the parties. In addition, the advisory committee note had been amended to explain more clearly the balancing required by the rule.

Judge Higginbotham stated that these changes would not require a republication of the amendments since they should follow closely the proposal that had been published.

The committee voted unanimously to send the amendments to Fed. R. Civ. P. 26(c) to the Judicial Conference for approval.

The committee further agreed to proceed on an expedited basis by seeking Judicial Conference approval of the amendments to Rule 26(c) at the March 1995 meeting.

Judge Higginbotham expressed his appreciation to Assistant Attorney General Frank Hunger for his assistance on Rule 26(c).

Third, the advisory committee recommended changes to Fed. R. Civ. P. 43(a): (1) to eliminate the requirement that testimony of witnesses at trial be taken "orally," and (2) to allow the court "for good cause shown in compelling circumstances" to permit presentation of testimony in open court by contemporaneous transmission from a different location.

The committee voted unanimously to approve the proposed amendments to Fed. R. Civ. P. 43(a), but to delay transmitting them to the Judicial Conference for approval until the Conference's fall 1995 meeting.

Fourth, the advisory committee recommended for publication amendments to Fed. R. Civ. P. 48 to return to the 12-person jury in civil cases. Judge Higginbotham traced the history of the judiciary's move to 6-person juries, following the Supreme Court decisions in *Duncan v. Louisiana* and *Williams v. Florida.* He argued that the literature demonstrates that 12-person juries are more stable in their decision-making than juries of 6 persons. Moreover, 12-person juries are more representative of the community.

Judge Higginbotham stated that the advisory committee had coordinated with other committees of the Judicial Conference on this issue, including the Space and Facilities Committee and the Court Administration and Case Management Committee.

The committee voted without objection to publish the amendments to Fed. R. Civ. P. 48 for public comment.

Fifth, the advisory committee recommended for publication amendments to Fed. R. Civ. P. 47(a) to provide counsel with a right to participate in the examination of prospective

jurors. Judge Higginbotham pointed out that the proposal would keep the judge in control of the voir dire process, but would give counsel an opportunity to supplement the court's questioning under limits set by the judge.

He stated that many judges are deeply concerned about the proposal, but that it is strongly supported by legal associations and had been approved by the advisory committee on a unanimous vote. He noted that trial lawyers offer two arguments in support of the change: (1) voir dire in civil cases conducted exclusively by judges is often inadequate, and (2) laywers know more about the details and nuances of their case than the judge. He also pointed out that recent research shows that more than 60 percent of district judges currently allow some form of voir dire by the lawyers. Finally, he mentioned that as a result of the *J.E.B.* and *Batson* cases, lawyers have a greater need for effective voir dire in order to articulate nondiscriminatory reasons for striking potential jurors.

Judge Jensen stated that the Advisory Committee on Criminal Rules had reached the same conclusions, but had not decided on the final language of a proposed amendment. He stated that his advisory committee would attempt to return to the Standing Committee in July 1995 with a common proposal to cover attorney participation in voir dire in both civil and criminal cases.

The committee voted without objection to table action on publishing Fed. R. Civ. P. 47 until the July 1995 meeting.

Judge Higginbotham reported, as an information matter, that the advisory committee was continuing to conduct research and to consult with the bar and academia on class actions. It had scheduled a special meeting in February at the University of Pennsylvania to hear the views of practitioners and academics expert in class actions. It also had planned to hold its regular meeting in New York in connection with a symposium on class actions conducted by the New York University Law School.

He also reported that he had appointed a subcommittee, chaired by Judge Scirica, to monitor legislative developments in the area of securities litigation and class actions.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of November 29, 1994. (Agenda Item 10)

He stated that the advisory committee had no matters requiring action, but would present some proposed amendments to the Standing Committee at the July 1995 meeting, including an amendment to Rule 24 (attorney participation in voir dire) and Rule 16 (pretrial discovery). He noted that in enacting Fed. R. Evid. 413-415, the Department of Justice and the Congress had both taken the position that it is necessary for purposes of a fair trial, when the prosecution intends to introduce propensity evidence, to have pretrial disclosure of witness statements, notwithstanding the Jencks Act.

REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Judge Winter presented the report of the advisory committee, as set forth in his memorandum of November 22, 1994. (Agenda Item 7)

He reported that the advisory committee had published for public comment its tentative decision not to amend 25 rules of evidence, but it had received only one comment. On the other hand, the committee had spent a great deal of its time in connection with evidentiary matters in which the Congress had taken an interest.

He stated that the advisory committee had made a tentative decision not to amend another three rules: Fed. R. Evid. 406, 605, and 606. He agreed to defer seeking authority to publish these rules until the July 1995 meeting of the Standing Committee, at which time the advisory committee would have other rules to present as part of a more comprehensive package.

Judge Winter requested authority to publish for public comment proposed amendments to Fed. R. Evid. 103(e) and 407.

Fed. R. Evid. 103(e)

The proposed new Rule 103(e) would make it clear that any pretrial objection to a proffer of evidence be renewed by counsel in a timely fashion at trial—unless the court expressly states on the record, or the context clearly demonstrates, that the court's ruling on the objection is final. Judge Winter pointed out that the case law among the circuits on the effect of a pretrial ruling is unclear, and the advisory committee had decided unanimously that a default rule would be very helpful to practitioners.

He added that some members of the advisory committee had thought that the default rule should be the converse, i.e., that a pretrial ruling by the court should normally be considered final and should not have to be renewed. A majority of the committee believed, however, that attorneys normally will raise issues again at trial in any event. Moreover, many rulings on admissibility are subject to change because of changed circumstances at the time of trial.

Mr. Perry moved: (1) to publish the advisory committee's proposed amendments to Fed. R. Evid. 103(e), incorporating several style improvements accepted by Judge Winter, and (2) to state explicitly in the accompanying note that the committee was also considering an alternative version of the default rule. By so doing, there would clearly be no need to republish the rule if the committee later accepted the alternate provision.

Other members suggested, however, that it would not be necessary to republish since a committee is always free to reach a different conclusion on a proposal, based on the comments it receives during the publication period. Judge Winter expressed concern that the alternative default rule might overrule the Supreme Court's decision in the *Lucas* case. Professor Schlueter suggested that a better approach would be to explain clearly in the advisory committee note that the committee had considered and rejected the converse approach, thereby directing public attention to the issue.

Mr. Perry's motion to include a description of the alternate default provision in the publication failed by a vote of 3-7.

Mr. Sundberg then moved to add a sentence to the note declaring that the committee had considered a default rule—providing that counsel would not have to renew an objection at trial—but had rejected it.

The motion was approved by a vote of 9-1.

The committee then voted unanimously to approve publication of Rule 103(e).

Fed. R. Evid. 407

Judge Winter stated that the advisory committee was proposing two amendments to Fed. R. Evid. 407 (subsequent remedial measures). The first would apply the rule expressly to product liability actions, thereby reflecting the position of a majority of the federal circuit courts (although state law is generally to the contrary). Second, the rule would be clarified to provide that it applies only to changes made after the occurrence that produced the damages giving rise to the action.

Judge Winter agreed to accept stylistic changes suggested by the members.

The committee voted 9-4 to publish Fed. R. Evid. 407 for public comment.

Fed. R. Evid. 413-415

Judge Winter stated that new Fed. R. Evid. 413-415 had been enacted as part of the 1994 omnibus crime legislation. The rules provide that in a civil or criminal action involving sexual assault or child molestation evidence of the defendant's commission of a prior sexual assault or child molestation "is admissible."

Judge Winter pointed out that the new rules have a very sparse legislative history, consisting principally of floor statements made by members after the bill had been passed. He reported that the rules would go into effect in 150 days after enactment—February 10, 1995—unless the Judicial Conference recommended otherwise. In that event, the rules would take effect in an additional 150 days.

He reported that the Administrative Office had distributed the new rules to thousands of people for comment and that the comments had been overwhelmingly negative. Opponents argued that: (1) the criminal justice system had a long tradition against allowing the introduction of propensity evidence, and (2) there was no empirical support for the change.

Judge Winter stated that there was virtually unanimous belief among the critics—which the advisory committee shared—that the rules as written were unclear as to whether the proffered evidence was subject to the balancing test of Rule 403 and to the other rules of evidence designed to protect against unreliable evidence (such as the hearsay provisions). Rule 403, for example, excludes evidence if its probative value is substantially outweighed by the danger of unfair prejudice or other specified factors. Accordingly, the new rules presented a constitutional problem, because the defendant's evidence would be subject to the balancing test, while that of the prosecution would not. Moreover, Rules 413-415 were inconsistent philosophically with Rule 412. The latter rule shields against earlier events, while the former makes them admissible.

Judge Winter reported that the Advisory Committee on the Rules of Evidence had passed a resolution with only a single dissenting vote by the representative of the Department of Justice that disagreed with Fed. R. Evid. 413-415 on policy grounds: (1) because the rules breached the traditional propensity bar, and (2) because of the high possibility that the prior acts evidence would be unduly prejudicial. The committee agreed, further, that the rules as drafted did not accomplish what their proponents wanted them to accomplish. Accordingly, the advisory committee had decided to assist the Congress by redrafting the rules to capture what appeared to be the intent of the proponents.

Judge Winter pointed out that in redrafting the rules, the advisory committee decided that the provisions belonged logically in Fed. R. Evid. 404 and 405, rather than as new Rules 413-415. He emphasized that the committee's draft would permit evidence of an earlier act of sexual assault or child molestation to be introduced only "if otherwise admissible under these rules." It also included an explicit balancing test in the rule.

Judge Jensen stated that the Advisory Committee on Criminal Rules had examined Rules 413-415 and had agreed with the evidence committee that the rules were unsound as a matter of evidentiary policy and should not be enacted. He added that, as a matter of drafting, the Advisory Committee on the Rules of Evidence had made all the appropriate corrections in the rules. Professor Schlueter noted that the criminal advisory committee had considered the rules in 1991, when they were before the Congress, and had opposed them by a vote of 8-1. He added that the committee was also deeply concerned about the sidestepping of the Rules Enabling Act process.

Judge Higginbotham stated that the Advisory Committee on Civil Rules had also concluded that the rules were unwise, but had deferred to the evidence committee on matters of style. Professor Coquillette stated that he had read the public comments and that nearly all were negative, including those from child abuse organizations, which had stated that the rules would do more harm than good.

The consensus of the members following lengthy discussion, was stated by Professor Hazard and accepted by Judge Winter:

(1) The committee should express its opposition to the new rules because they are ill-founded and wrong as a matter of policy.
(2) If the Congress wishes to proceed with the rules, it should be encouraged to substitute the corrected and improved language drafted by the Advisory Committee on the Rules of Evidence.
(3) The committee should enumerate the deficiencies in the rules in its report to the Congress.
(4) No attempt should be made to supersede the rules through the Rules Enabling Act process.
(5) Members should communicate the committee's views personally to the House and Senate committees and staff.

Ms. Gorelick stated that the Department of Justice could not oppose adoption of the rules, nor could it support a delay in their effective date. The Department believed that the new rules must be read together with Fed. R. Evid. P. 403 and the hearsay rules. On the other hand, the Department would be pleased to participate in making improvements in the rules through the normal Rules Enabling Act process. Thus, the Department would vote against a motion to delay implementation of the rules for another 150 days, but would abstain on a motion for substitute language.

In light of the committee's deliberations, Judge Winter and Professor Berger drafted a revised report overnight and accepted style improvements in the rules, presenting them to the committee on Friday morning.

After reviewing the revised draft of the report to the Congress, Ms. Gorelick suggested

that it was too forceful in interpreting Rules 413-415 as requiring that evidence of past acts of sexual abuse or child molestation be admitted regardless of the limitations imposed by the other rules of evidence. She recommended that alternate language be used stating that the legislative history suggested that the rule might be interpreted as incorporating the hearsay rule and the Rule 403 balancing test. Judge Winter agreed to consider Ms. Gorelick's edits in preparing the final report.

Judge Stotler stated that there appeared to be a consensus on the committee that the report to the Congress should not include an absolute statement that evidence of prior acts of sexual abuse or child molestation is admissible regardless of the hearsay rules or Rule 403. She recommended that this view be incorporated in the final report. She suggested, though, that it would be impractical for the committee to draft the report as a committee of the whole.

Judge Stotler recommended that the committee endorse in principle the draft report to the Congress on Fed.R.Evid. 413-415, with the final language to be prepared by Judge Winter and distributed to the members as soon as possible.

The recommendation was approved unanimously.

NINTH CIRCUIT LOCAL RULE ON CAPITAL CASES

The Chief Justice had referred to the committee a request by the attorneys general of five states that the Judicial Conference exercise its power under 28 U.S.C. § 331 to invalidate Local Rule 22 of the United States Court of Appeals for the Ninth Circuit on the grounds that it was "inconsistent" with "federal law." The local rule prescribes procedures for processing capital cases in the Ninth Circuit.

The committee's discussion centered on a memorandum prepared by the reporter, Professor Coquillette. (Agenda Item 5) The members also had before them the brief of the state attorneys general and the response of the Ninth Circuit, submitted by Chief Judge Wallace.

Professor Coquillette posed two questions for the committee to consider:

(1) whether the Ninth Circuit rule is inconsistent with federal law under 28 U.S.C. § 331, and
(2) what action the Judicial Conference should take if the rule is in fact in conflict with federal law.

Professor Coquillette stated that the attorneys general had set forth nine legal arguments for holding the rule inconsistent with federal law. He found two areas where Local Rule 22 was most arguably inconsistent with federal law.

> The first is that the Ninth Circuit rule authorizes a single judge to invoke an in banc hearing. Under 28 U.S.C. § 46 and Fed.R. App. P. 35, however, a majority vote of the judges of the court in regular active service is required for in banc consideration. He pointed out that the Ninth Circuit had defended the legality of the rule on the grounds that Rule 22 itself had been adopted by a majority of the circuit judges in regular active service.
>
> The second is that Rule 22 provides for automatic issuance of a certificate of probable cause on the appellant's first petition. But the federal habeas corpus statute and case law require a determination on the merits for the issuance of a certificate of probable cause. The Ninth Circuit had defended the rule on the grounds that it had by majority vote delegated its power to act.

Professor Coquillette concluded that there is nothing in the pertinent statutes and rules that permits a court to delegate its judicial responsibility: (1) to act by majority vote on each suggestion for an in banc hearing, or (2) to consider each certificate of probable cause on the merits. He pointed out, however, that his memorandum contained a suggestion by Judge Easterbrook on how the Ninth Circuit might redraft the rule to deal with both problems.

Judge Easterbrook recommended that the committee express its considered view that Rule 22 was inconsistent in two respects with federal law and invite the Ninth Circuit to modify it. This procedure would give the court a formal opportunity to take action to correct the problems and avoid potential abrogation of the rule by the Judicial Conference.

Judge Ellis moved Judge Easterbrook's suggestion that the committee: (1) express its sense that there is an inconsistency in two respects between Ninth Circuit Rule 22 and the pertinent federal statutes and rules, and (2) invite the court to reconsider the rule and take whatever steps it deems appropriate.

The motion was approved unanimously.

Judge Stotler thanked Professor Coquillette for an excellent memorandum and expressed the committee's appreciation to Judge Easterbrook, Judge Logan, and the Advisory Committee on Appellate Rules for their work on the matter.

ATTORNEY DISCIPLINE RULES

The committee engaged in a general discussion of state Supreme Court rules and local United States district court rules that regulate attorney conduct. Professor Coquillette had prepared and distributed to the members a comprehensive chart surveying the content of each district court's local rule. Much of the committee's deliberations centered on a July 1994 regulation promulgated by the Department of Justice to govern the conduct of United States attorneys in making contacts with represented parties.

Deputy Attorney General Gorelick explained that federal criminal investigations and prosecutions had become more complex in recent years and that government lawyers had become more involved in investigations, particularly in undercover operations involving criminal conspiracies. Government attorneys, moreover, were faced with enormous variations in the rules of the 50 states and the federal district courts. She stated that in some cases government attorneys had experienced practical difficulties in complying with state ethical rules that prohibit attorney contacts with represented parties (as under Rule 4.2 of the A.B.A. model rules). The Department of Justice took the position that their attorneys do not have to comply with this specific ethical prohibition. Accordingly, it promulgated a national regulation to supersede state ethical obstacles in discrete circumstances. In some states, however, assistant United States attorneys have been threatened with the loss of their license if they follow the Department's rule.

Ms. Gorelick emphasized that the Department's rule was legally supportable and would be applied thoughtfully and narrowly. She stated that government attorneys should comply with state ethical rules generally, and she expressed the desire of the Department to reach agreement with the states on this sensitive and controversial issue.

Chief Justice Veasey framed the issue as one of authority and federalism. He asserted that the state chief justices have agreed unanimously that the regulation of the Department of Justice was without authority and posed a threat to federalism. He added that the state chief justices were willing to meet further with Department of Justice officials in an effort to resolve their differences.

REPORT OF THE LONG RANGE PLANNING SUBCOMMITTEE

Professor Baker presented an information report on behalf of the subcommittee. He noted that the subcommittee had distributed its draft report and welcomed any comments, especially from the advisory committees following their next meetings. He stated that the subcommittee would present a final report for action by the Standing Committee at the July 1995 meeting.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Pratt reported that the Style Subcommittee had sent its completed revision of the civil rules to the Advisory Committee on Civil Rules. The advisory committee had made considerable progress on the revisions, but was facing competing demands on its time.

He reported that the restyled appellate rules had been sent to the Advisory Committee on Appellate Rules. The advisory committee had completed its revisions of half the rules, and the Style Subcommittee was in the process of reviewing the revisions.

Judge Pratt stated that the subcommittee was about to begin work on the criminal rules.

He stated that the subcommittee had always operated on the assumption that once the rules had been restyled, the Standing Committee would authorize their publication for a considerable period of public comment. After the comment period, the rules would be reviewed again by the advisory committees and the Standing Committee under the normal rulemaking process.

Finally, Judge Pratt reported that Bryan Garner had completed work on a new style guide to rule drafting that had been approved by the subcommittee. He stated that it had been distributed to the advisory committees and would be published by the Administrative Office.

NEXT MEETINGS OF THE COMMITTEE

The next meeting of the committee had been scheduled for July 5-7 in Washington, D.C. The committee decided to hold the following meeting on January 10-12, 1996. The chair would determine the location.

Respectfully submitted,

Peter G. McCabe,
Secretary