COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of June 17-19, 1993
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in the Thurgood Marshall Federal Judicial Building in Washington, D.C. on Thursday, Friday, and Saturday, June 17-19, 1993. The following members were present:

Judge Robert E. Keeton (chairman)
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Chief Justice Edwin J. Peterson
Alan W. Perry, Esquire
Judge George C. Pratt
Judge Dolores K. Sloviter
Judge Alicemarie H. Stotler
Alan C. Sundberg, Esquire
William R. Wilson, Esquire
Professor Charles Alan Wright

The Department of Justice was represented by Deputy Attorney General Philip B. Heymann (on Friday), Roger Pauley (Thursday and Friday), and Dennis G. Linder (Friday and Saturday).

Supporting the committee were Dean Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules - Judge Kenneth F. Ripple, chair, and Professor Carol Ann Mooney, reporter;

Advisory Committee on Bankruptcy Rules - Judge Edward Leavy, chair, and Professor Alan N. Resnick, reporter;

Advisory Commmittee on Civil Rules - Judge Sam C. Pointer, Jr., chair, and Dean Edward H. Cooper, reporter;

Advisory Committee on Criminal Rules - Judge William Terrell Hodges, chair, and Professor David A. Schlueter, reporter; and

Advisory Committee on Evidence Rules - Judge Ralph K. Winter, Jr., chair, and 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; William B. Eldridge, director of the Research Division of the Federal Judicial Center, and Judith A. McKenna of the Center; and Paul A. Zingg, Jeffrey A. Hennemuth, and Patricia A. Channon from the Office of Judges Programs of the Administrative Office.

INTRODUCTION

Judge Keeton reported that he had testified on June 16, 1993 in support of the rulemaking process at oversight hearings conducted before the House Judiciary Subcommittee on Intellectual Propery and Judicial Administration. He stated that all witnesses at the hearings, including those opposed to the Judiciary's civil rules package, had urged definitive Congressional action -- one way or the other -- to approve or reject, rather than delay or defer, the proposed amendments to the civil rules.

Judge Keeton also noted that Professor Wright had become president of the ALI and had asked to be relieved of his duties as chair of the Style Subcommittee.

APPROVAL OF MINUTES OF LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held in Asheville, North Carolina in December 1992.

FAX FILING

Dean Coquillette reported that he had coordinated the responses of the advisory committees and their reporters to the fax filing guidelines proposed by the Court Administration and Case Management Committee. He stated that most of the committees had objected to the guidelines because they would have the effect of modifying the federal rules without complying with the rules amendment process and soliciting appropriate input from bench and bar. He added that the Bankruptcy Advisory Committee, in particular, was flatly opposed to the guidelines on both substantive and procedural grounds.

Dean Coquillette further reported that Judge Parker, chairman of the Court Administration and Case Management Committee, had stated that he would be pleased to have the rules committees redraft the fax guidelines to make them consistent with the federal rules. Accordingly, Judge Keeton had prepared a quick redraft of the guidelines the night before the meeting with the expectation that: (1) the members could express their initial views on the guidelines and the redraft, and (2) the six reporters could consider these views and improve the document during a working lunch.

There followed a discussion on the merits of fax filing during which several members expressed the views that: (1) fax transmissions present a number of serious technological and administrative problems, and (2) the need for fax filing in general had not been demonstrated, since other means of prompt communication are available, such as express delivery services. It was pointed out, however, that the civil rules explicitly authorize fax filing in accordance with guidelines promulgated by the Judicial Conference. The Conference adopted limited, interim guidelines in 1991.

Mr. Wilson moved to have the committee reject the fax filing guidelines outright, rather than work to improve them. His motion died for lack of a second.

The reporters, consultants, and staff subsequently produced a redraft of the fax guidelines, pointing out, however, that they were merely accomodating the Court Administration and Case Management Committee and would not have drafted the guidelines the way that committee had. Dean Coquillette reported that some members of the ad hoc drafting group had doubted the wisdom of the whole enterprise because the proposed guidelines leave to local rule matters that should be decided on a national basis.

Judge Keeton recommended adoption of a resolution such as the following:

> The Standing Committee on Rules of Practice and Procedure recommends against adoption of the proposed Guidelines for Filing by Facsimile in their present form. The reporters for the rules committees attempted to draft an acceptable revision of the prepared draft. Having examined the report of the reporters, the standing committee is of the view that there are many issues that require careful consideration before approval of a revised draft could be recommended.
>
> We understand the existing guidelines adopted by the Judicial Conference to be as follows:

> Effective December 1, 1991, the Judicial Conference authorizes any court to adopt local rules to permit the clerk, at the discretion of the court, to accept for filing papers transmitted by facsimile transmission equipment; provided that such filing is permitted only:
>
> (1) in compelling circumstances, or
> (2) under a practice which was established by the court prior to May 1, 1991.
>
> Our consideration of this draft identified significant policy questions that need to be addressed, including the following:
>
> (1) potential abuse by pro se litigants;
> (2) the liklihood that extensive local rulemaking would be necessary to resolve issues left outstanding under the guidelines; and
> (3) the consequences for failing to comply with specific provisions of the guidelines, e.g., using equipment not prescribed by the guidelines.
>
> We recommend that the Judicial Conference not act before one or more of the committees have carefully considered these matters and presented recommendations to the Conference.

The committee adopted the resolution with one dissent,

The committee voted unanimously to send the redrafted fax guidelines to the Court Administration and Case Management Committee.

UNIFORM RULE PROVISIONS

Dean Coquillette presented three proposed common provisions for changes in each set of federal rules, dealing with: (1) authority of the Judicial Conference to promulgate technical and conforming amendments in the rules, (2) uniform local rule numbering, and (3) authority of a local court or judge to regulate local practice where there is no controlling law. (Agenda Item III)

Dean Coquillette stated that the reporters had met at lunch and had removed virtually all remaining differences among the advisory committees on the proposed uniform rule.

Professor Resnick stated that the Advisory Committee on Bankruptcy Rules was unanimously opposed to the technical change rule because: (1) it is unnecessary, and (2) there is uncertainty as to exactly what constitutes a technical change.

The committee voted unanimously to approve the reporters' draft in principle.

Uniform Local Rule Numbering System

Dean Coquillette reported that there was no disagreement on the common rule that would require the courts to follow any uniform local rule numbering system promulgated by the Judicial Conference.

The committee voted unanimously to approve in principle the reporters' draft.

Regulation of Local Practice Where There is No Controlling Law

Mr. Perry moved to amend the February 1993 "Asheville Draft" by substituting the words "the alleged violator has been furnished actual notice of the requirement in a particular case" in the last line of the draft. The motion was approved by the committee on a vote of 7-3.

The committee voted unanimously to substitute the word "law" for the word "statutes."

The committee then approved in principle the proposed uniform rule by a vote of 8-4.

On Mr. Perry's motion, the committee voted 6-5 to add to the uniform rule the following additional sentence contained in the civil committee's draft: "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 failure to comply with the request."

Publication of the Uniform Rules

The committee discussed whether the uniform rule amendments should be reviewed again by the respective advisory committees or should be sent out immediately for public comment as part of the next round of proposed amendments to the various sets of rules. Judge Keeton pointed out that there were no proposed amendments to the bankruptcy rules to which the uniform rules might be attached.

Judge Easterbrook moved to publish the uniform rule proposals in all five sets of rules and let the advisory committees review them later, after the public comments have been received. The motion was approved unanimously by the committee.

On Judge Easterbrook's motion, the committee voted unanimously to publish the uniform rules amendments immediately with a 6-month public comment period.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Ripple presented the report of the advisory committee, as set forth in his memorandum of May 28, 1993. (Agenda Item VIII) He stated that the advisory committee was presenting two sets of amendments. The first had been published for public comments and was now being presented by the committee for submission to the Judicial Conference. The second set of proposals was new, and the advisory committee was seeking the standing committee's approval to publish them for comments.

1. Amendments for adoption by the Judicial Conference

Number of copies

Judge Ripple stated that the first group of proposed changes in the appellate rules (Rules 3, 5, 5.1, 21, 25(e), 26.1, 27, 30, 31, and 35) governed the number of copies of various documents that counsel must file with the court of appeals. There was no objection from the members, and the committee agreed to change the word "shall" to "must" in these appellate rules.

The committee further determined to make the change from "shall" to "must," wherever appropriate, throughout all the proposed amendments to the rules, in accordance with the convention established by the Style Subcommittee.

Reorganization of F.R.A.P. 48

Judge Ripple pointed out that the proposed change in Rule 48 was purely one of reorganization and had not been published for public comment. Rule 48, dealing with the scope and title of the rules, would be shifted to become a new Rule 1(c). It would also allow the committee to add future rules at the end of the F.R.A.P.

The committee voted unanimously to approve both the reorganization of the rules and the action of the advisory committee in not seeking public comment on the matter.

F.R.A.P. 9

The committee approved the proposed amendments to Rule 9, dealing with release in a criminal case, with a modification suggested by Judge Pointer that the word "Title" be eliminated on line 62.

Judge Pratt pointed out that the first sentence of Rule 9(a), which imposes requirements on district judges, belongs in the criminal rules, rather than the appellate rules. Judge Keeton stated that he was sympathetic to this view, but its implementation would require several other changes in the appellate rules. The committee thereupon voted to retain the language of Rule 9(a) in the appellate rules.

F.R.A.P. 25(a)

The proposed rule, which parallels similar revisions in the civil and bankruptcy rules, would prohibit a clerk from refusing to accept for filing any paper solely because it is not presented in proper form. Judge Pratt and Judge Sloviter expressed concern that the revised rule could increase paperwork burdens in clerks' offices. Mr. Perry and Mr. Sundberg, on the other hand, expressed strong support for the rule, stating that laywers should not have their papers rejected by clerks, especially where legal rights may be affected.

Judge Ripple stated that the key issue is whether a decision to reject a pleading may be made by a clerk or must be made by a judicial officer.

After changing the word "shall" to "must" on line 22, the committee approved the proposed amendments to Rule 25(a) by a vote of 9-2.

F.R.A.P. 25(d)

Justice Peterson moved to eliminate lines 33-36 of the proposed amendments to make them consistent with Rule 25(a). He stated that the language was surplus.

The committee voted unanimously to adopt the motion and approve the rule, as modified.

F.R.A.P. 28

Justice Peterson stated that the word "etc." should be deleted from line 35, for it has no place in the federal rules. Others agreed that it was very poor usage but had not caused any problems in practice. Moreover, problems might be created if it were changed at this point.

The amendments to Rule 28(a) and (g) were approved unanimously by the committee without change, other than to substitute "must" for "shall" on line 31.

F.R.A.P. 32

Judge Ripple reported that as a result of the public comments the advisory committee had made substantial changes in rule 32, dealing with the form of briefs, appendices, and other papers,

Judge Stotler and Keeton suggested an amendment to line 45, dealing with pro se parties. Judge Ripple accepted the amendment, which would insert the words "the filings of" before the words "pro se parties."

Judge Ripple stated that the advisory committee had struggled with the issue of typeface and was disappointed with the lack of comments from the bench and bar. He recommended that the rule be sent back for further public comment and that the Administrative Office take special steps to solicit the views of the publishing industry on the matter.

Judge Easterbrook gave an overview of the pertinent technical aspects of typeface as it related to length of briefs. He suggested that the committee might publish three options for consideration of the bench and bar -- the option recommended by a majority of the advisory committee (Draft No. 1), the option recommended by Judge Jolly and Mr. Munford of the advisory committee (Draft No. 2), and an option specifying a limit of 100,000 characters in a brief.

Mr. Perry suggested that the easiest and most reliable alternative would be for the rule to specify a limit of 65 characters per line. He added that the word "be" should be inserted on line 20 before the word "bound" in Draft No. 2.

Judge Easterbrook moved that the committee republish for comment the advisory committee's Draft No. 2, i.e., 300 words per page, but with deletion of the reference to the Administrative Office. He added that the committee note should state that the committee is contemplating a number of options and seek comments as to what is the best method for prescribing brief limits.

The committee approved the motion unanimously and authorized the advisory committee to rewrite the committee note and republish the entire Rule 32 for further public comment.

F.R.A.P. 33

The committee approved the rule, dealing with appeal conferences, after making the previously agreed upon change of "shall" to "must" on line 21.

F.R.A.P. 38

Judge Ripple stated that the revised rule requires the court to give notice before imposing sanctions for frivolous appeals. He noted that there are strong differences of opinion among

circuit judges on sanctions, and the advisory committee was not attempting to address the case law on the subject.

Judge Sloviter recommended deletion of the requirement that the court itself notice the proposed imposition of sanctions. Judge Ripple accepted the recommendation and agreed to delete the words "from the court" on line 3 of the draft. Judge Sloviter also recommended inserting the words "a separately filed motion or" before the word "notice" on line 3. Accordingly, if sanctions are requested in a separately filed motion, the court need not give notice.

Judge Ripple accepted the recommendation and agreed to prepare appropriate amendments to the committee note.

F.R.A.P. 40 and 41(a)

Judge Pratt, seconded by Judge Ellis, moved to change the word "however" in line 5 to "but." There ensued a discussion regarding the acceptability of starting a sentence with the word "however" or the word "but." Following the discussion, the committee voted 6-5 to reject Judge Pratt's motion.

F.R.A.P. 41(b)

The committee approved without change, other than "shall" to "must" on line 32, the proposed amendments to Rule 41(b), dealing with stay of the mandate pending a petition for certiorari to the Supreme Court.

F.R.A.P. 48

The committee approved without change the proposed new Rule 48, dealing with masters in the courts of appeal.

2. Rules submitted for public comment

F.R.A.P. 4

Professor Mooney stated that the advisory committee wished to incorporate two changes in language to conform Rule 4 to the revised language of Bankruptcy Rule 8002. (See later discussion regarding the bankruptcy rules.) On line 17, the committee would change the word "within" to "no later than," and on line 22, it would delete the words "the date of."

Professor Resnick stated that the Advisory Committee on Bankruptcy Rules would like to add the words "a notice or" to line 28 of revised Bankruptcy Rule 8002 in order to conform the bankruptcy rule to line 28 of F.R.A.P. 4(a)(4).

As a result of the above actions, the bankruptcy rule and appellate rule would have the same language.

Judge Sloviter, seconded by Judge Easterbrook, moved to approve for publication these changes in the appellate and bankruptcy rules. The motion was approved unanimously by the committee.

F.R.A.P. 8

The committee approved for publication the proposed technical change in Rule 8(c) and noted that a period was missing from the end of the committee note.

F.R.A.P. 10

The committee approved for publication the proposed amendments to Rule 10(b)(1), which were motivated by the bankruptcy advisory committee and which conform to the changes being made in F.R.A.P. 4(a)(4).

F.R.A.P. 21

Judge Ripple noted that Rule 21, dealing with mandamus, was back before the standing committee for a second look following a lengthy discussion at the December 1992 meeting of the advisory committee focused on around the issue of how to treat the district judge whose actions are being questioned.

Justice Peterson suggested that on line 9 the words "an information copy to the trial judge" be substituted for "an information copy to the clerk of the trial court for the information of the trial judge." Judge Ripple accepted the suggestion. On line 44, the word "shall" was changed to "must."

F.R.A.P. 25

The committee approved for publication without change the proposed amendments to Rule 25, dealing with filing and service.

F.R.A.P. 32, 35, and 41

The proposed amendments in these three rules address the issue of whether a suggestion for rehearing in banc should be treated like a petition for a panel rehearing. They would suspend the final judgment and extend the period for filing a petition for certiorari. It was later determined not to publish the proposed amendments to Rules 35 and 41.

Judge Easterbrook recommended changing the word "should" to "may" on line 5 of Rule 35. Judge Ripple accepted the recommendation.

F.R.A.P. 47 and 49

These rules were considered by the committee during the discussion on uniform rule provisions.

The committee then approved for publication all the rules in Part D of the advisory committee's report, as amended.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Leavy and Professor Resnick presented the report of the advisory committee, as set forth in Judge Leavy's memoranda of May 7, 1993 and May 10, 1993. (Agenda Item V) They recommended that the standing committee approve the proposed amendments to Rule 8002(b), dealing with the time for filing a notice of appeal, and a related amendment to Rule 8006, dealing with the record and issues on appeal.

Justice Peterson recommended that the committee note to Rule 8002 be clarified on page 6, line 36, by adding after the word "party" the words "who has previously filed a notice of appeal." Judge Leavy accepted the recommendation.

Professor Resnick stated that Rule 8002(b) is designed to conform with Federal Rule of Appellate Procedure 4(a)(4) and mirrors its language exactly. He added, however, that a stylistic change had been suggested to Rule 8002(b) to insert the words "the date of" on line 3 before the words "entry of the order." If so amended, the rule would read, "the time for appeal . . . runs from the date of entry of the order."

The members and reporters discussed whether the words "the date of" should be used in Rule 8002 or anywhere else in the rules. They agreed that whatever usage is selected must result in a consistent convention throughout the rules. Professor Resnick pointed out that the Civil Rules do not use "date of." Accordingly, he agreed not to add these words on line 3 of the draft. At Judge Keeton's suggestion, Professor Resnick further agreed, for the sake of consistency, to eliminate the words "the date of" on line 23 of the draft.

Judge Pointer suggested that on lines 13-14 the rule should substitute the words "no later than 10 days" for the words "within 10 days." Professor Resnick pointed out that the language of the bankruptcy rule was taken directly from F.R.A.P. 4(a)(4)(f). Judge Keeton suggested that the bankruptcy rule should be changed to "no later than," since it is preferable usage, even though it would not be consistent with the language of the appellate rule. (See earlier discussion regarding the appellate rules.)

Professor Resnick noted that there was an important difference between Bankruptcy Rule 8002 and F.R.A.P. Rule 4. The bankruptcy rule specifies that the time for filing a notice of appeal is extended when certain motions are timely filed, while the appellate rule extends the time if these motions are timely served. He emphasized that there is a special need for certainty and speed in bankruptcy. The Advisory Committee on Bankruptcy Rules therefore recommends that filing, rather than service, be used as the trigger date for extending the time for a notice to appeal. Filing is preferable because it is dispositive and easy for parties to determine from the court's docket.

Professor Resnick stated that the advisory committee believes that the most appropriate way to achieve consistency in this matter would be to amend Fed.R.Civ.P. 50, 52, and 59 to prescribe filing, rather than service, as the jurisdictional trigger. Since the bankruptcy rules incorporate Rules 52 and 59 by reference, there would be no need to change the bankruptcy rules.

During the discussion that followed, the members agreed that there should be consistency throughout the rules and that "filed" was preferable both to "served" and to "served and filed." Professor Resnick agreed to add a sentence to the committee note to Rule 8002 regarding the requirement of filing. He later presented the following additional sentence which was approved by the committee:

> The reason for providing that the motion extends the time to appeal only if it is filed within the 10-day period is to enable the court and the parties in interest to determine solely from the court records whether the time to appeal has been extended by a motion for relieve under Rule 9024.

The committee voted unanimously to approve and send to the Judicial Conference the proposed amendments to Bankruptcy Rules 8002(b) and 8006, and the accompanying committee notes, as modified above.

Professor Resnick also pointed out that the advisory committee had voted unanimously against the proposed uniform rule that would allow the Judicial Conference to make technical amendments to the Federal Rules of Bankruptcy Procedure without sending them to the Supreme Court and the Congress. (New Rule 9037)

The proposed amendments to Rules 9029 and 8010 were considered by the committee during the discussion on uniform rule provisions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Pointer presented the report of the advisory committee, as set forth in his memorandum of May 17, 1993. (Agenda Item XI) He recommended that the standing committee approve for public comment amendments to Rules 26(c), 43(a), 50(c)(2), 52(b), 59(b)-(e), 83 and 84.

Judge Pointer reported that the advisory committee was not seeking approval of the proposed amendments to Rule 23 at this time.

Fed.R.Civ.P. 26(c)

Judge Pointer corrected a typo on line 31 and deleted the words "by the court."

The committee voted 8-2 to approve for publication amendments to Rule 26(c), dealing with protective orders. It also agreed to defer to its advisory committee the date of publication.

Fed.R.Civ.P. 43

The amendments to the rule, authorizing testimony in open court by contemporaneous transmission from a different location, were approved unanimously for publication without change.

Fed.R.Civ.P. 50, 51, and 59

The amendments to the three rules would make uniform the time for making a post-trial motion. Judge Pointer pointed out that the advisory committee draft specified that a timely motion must be both "served and filed. " But in light of the committee's discussion earlier in the meeting regarding the appellate and bankruptcy rules, the advisory committee would substitute

"filed" for "served and filed." He aded that the committee notes would be modified and would highlight the fact that the rules elsewhere require that papers that are filed must also be served.

Judge Pointer stated that it would also be necessary to make a change in Rule 50(b) from "service and filing" to "filing." Moreover, the advisory committee would proceed to examine the body of civil rules generally to see whether further conforming amendments would be necessary. Any further changes could be included in the same package for publication.

Judge Pointer agreed to delete the dash on line 14 and the word "even" on line 15, regarding Rule 59(d).

The committee voted unanimously to approve publication of the amendments to Rules 50(b), 50(c), 52, and 59.

Fed.R.Civ.P. 83 and 84

The rules were considered by the committee during the discussions of uniform rule provisions.

Judge Pointer pointed out some differences in language between the provisions of Rule 83 and 84 and provisions of the other uniform rules discussed above.

The committee voted unanimously to authorize publication of the proposed amendments to Rules 83 and 84.

Timing of Publication

Judge Pointer expressed concern over the timing of publishing the proposed amendments to the civil rules. He stated that the advisory committee preferred not to publish any additional amendments as long as extensive and controversial amendments were still pending before the Congress. In addition, the amendments before the Congress include changes to Rule 50 and 52, which are now the subject of further amendments.

Judge Keeton moved to authorize all the advisory committees to publish their respective proposed amendments as they see fit. They might determine to publish them early, or include them in a package with other rules for publication after January 1, 1994. His motion was approved without objection.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Hodges presented the report of the advisory committee, as set forth in his memorandum of May 14, 1993. (Agenda Item VI) He stated that the advisory committee was presenting two sets of amendments. The first had been published for public comments and was now being presented by the committee for submission to the Judicial Conference. The second set of proposals was new, and the advisory committee was seeking the standing committee's approval to publish them for comments.

1. Amendments for adoption by the Judicial Conference

Fed.R.Crim.P. 16

Judge Hodges stated that the comments received from the public had been favorable to the proposed amendments to Rule 16(a)(1)(A), but some commentators had complained that the revisions to Rule 16 simply did not go far enough in permitting discovery in criminal cases.

The committee approved the amendments to Rule 16 without change.

Fed.R.Crim.P. 29

The committee approved the amendments to the rule, which would allow a district judge to reserve judgment on a motion for judgment of acquittal.

Fed.R.Crim.P. 32

Judge Hodges reported that the advisory committee had received a substantial number of comments on the proposed amendments to Rule 32 and had given careful consideration to a letter submitted by the chairman of the Criminal Law Committee opposing a number of provisions in the proposed amendments. He stated that the advisory committee had made several changes in the rules as a result of the letter, but had rejected some of its suggestions.

Judge Hodges summarized each of the advisory committee's changes made as a result of the public comments, as set forth at pages 2-4 of his memorandum of May 14, 1993. Most significantly, the advisory committee had agreed to eliminate the 70-day time limit between a finding of guilt and the imposition of sentence. This action was taken largely to accomodate the concerns probation officers, who had complained that the proposed period is too restrictive for their offices. Accordingly, the advisory committee revised the rule after the public comment period to specify simply that sentence should be imposed "without unncessary delay."

Judge Hodges pointed out that the Criminal Law Committee and other commentators had objected to the new presumption that a probation office's recommendations on sentencing must be

disclosed, unless the court orders otherwise. They urged reversal of the presumption, so that sentencing recommendations must be withheld, unless the court orders otherwise. The advisory committee rejected the recommendation.

Mr. Pauley reported that the Government had no objection to the committee's proposed presumption in favor of disclosure since the recommendations of the probation office are limited by the reality of the sentencing guidelines.

Judge Pointer pointed out that the word "withhold" on line 99 was unclear. Thus, Judge Sloviter and Judge Keeton recommended that the sentence beginning on line 95 be amended to read: "The court may, by local rule or in individual cases, direct the probation officer not to disclose the probation officer's recommendation, if any, on the sentence." Judge Pratt moved the change, and it was approved by the committee without objection.

Judge Bertelsman stated that the meeting of the probation officer with counsel is essential, since it can avert sentencing problems and lengthy sentencing hearings. He suggested that the rule have more teeth and moved that it should specify on line 110 that "the court may order" the defendant and counsel to meet with the probation officer. The motion died for lack of a second.

Judge Hodges accepted Judge Keeton's suggested improvements for pages 35-36 of the committee note. As modified during committee discussion, the revised language reads as follows:

> Under that new provision (changing former subdivision (c)(3)(A), the court has the discretion (in an individual case or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure.

Mr. Garner and Professor Cooper recommended that the words "advanced or continued" on line 7 be changed to "shortened or lengthened," since technically one does not "continue" a time limit. Judge Hodges accepted the change.

Victim Allocution

Mr. Pauley reported that the Department of Justice supported the careful efforts of the advisory committee in redrafting Rule 32. He pointed out, however, that approval of the rule might be jeopardized because the Congress was likely to enact a limited right of victim allocution in the pending Violence Against Women Act. The legislation would give victims of violent crimes and sex offenses the right to address the court. It had been drafted by the Department of Justice and approved unanimously by the Senate Judiciary Committee.

Mr. Pauley asserted that the committee's rewrite of Rule 32 would, in effect, repeal a future act of the Congress that would be enacted before the effective date for the final rules amendments. This might not be an appropriate action for the rules committee to take. Therefore, the Judicial Conference and the Supreme Court should be alerted to this serious political problem.

Mr. Pauley also enunciated the merits of victim allocution and stated that victims feel slighted in the criminal justice system. Moreover, the personal appearance of a victim may influence the judge in sentencing. Accordingly, he proposed that the committee add a right of victim allocution to Rule 32. He suggested that the best fit would be between lines 194 and 195.

Judge Hodges reported that the advisory committee had considered the matter fully at its last meeting and had decided to adhere to its consistent position against mandating any victim allocution in the rule. The committee's views were articulated in the last paragraph of the committee note to Rule 32.

Several of the members stated that it would be a mistake to anticipate what the Congress would do with the pending legislation and recommended that committee action await final action by the Congress. The committee also discussed: (1) whether a victim allocution provision would necessarily invoke matters of substance, rather than procedure, and (2) whether it should be enacted by statute, rather than by rule. Mr. Wilson and Mr. Perry added that they believed in the right of victim allocution, but agreed that the committee should not mandate it in the rule at this time.

Judge Keeton and Judge Hodges stated that victim allocution was an important and sensitive issue and the committee's position should be communicated explicitly to both the Judicial Conference and the Supreme Court.

Mr. Pauley moved to include a right of victim allocution in Rule 32, based on the merits of the issue, with politics as a lesser consideration. The motion failed by a vote of 2-9.

Judge Sloviter, seconded by Professor Baker, moved to delete all but the first sentence of the last paragraph of the committee note. The motion carried by a vote of 7-4. Mr. Wilson moved to delete the entire paragraph, but the motion failed for lack of a second.

Fed.R.Crim.P. 40

The committee approved without change the proposed amendment to Rule 40, clarifying the authority of a magistrate judge to set conditions of release in cases where a probationer or supervised releasee is arrested in a district other than the one having jurisdiction.

Judge Keeton called for the vote on approving the entire package of criminal rules amendments and sending them to the Judicial Conference. The vote was unanimous to approve the package.

2. Rules submitted for public comment

Fed.R.Crim.P. 5

The committee approved for publication the advisory committee's proposed amendments that would carve out an exception to Rule 5's procedural requirements for Unlawful Flight to Avoid Prosecution cases. Judge Hodges accepted Mr. Garner's suggestion that on lines 5-6 the words "in the event that" be changed to the word "if."

Fed.R.Crim.P. 10

The committee approved for publication the proposed amendments to Rule 10. They would authorize video teleconferencing if the defendant waives the right to be arraigned in open court.

Mr. Wilson moved to eliminate the word "technology" from line 11 of the rule. The motion was approved with one dissent.

Fed.R.Crim.P. 43

Judge Pointer suggested that there was no parallelism in the structure of the five subdivisions of Rule 43(c) and that there were several inconsistencies in the rule. In light of Judge Pointer's suggestion, Judge Hodges subsequently prepared and circulated a revised draft of Rule 43(c).

The committee thereupon approved the following language proposed by Judge Hodges:

(c) PRESENCE NOT REQUIRED. A defendant need not be present:

> (1) when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;
> (2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence;
> (3) when the proceeding involves only a conference or hearing upon a question of law;

(4) when the proceeding is a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court; or
(5) when the proceeding involves a correction of sentence under Rule 35.

Fed.R.Crim.P. 53

The amended rule, which would allow photographs and broadcasting in the courtroom under guidelines of the Judicial Conference, was approved unanimously by the committee without change.

The committee voted unanimously to approve for publication the proposed amendments to Rules 5, 10, 43, and 53, as modified.

REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Judge Winter reported that the new advisory committee had recast the proposed Rule 412 that it had inherited as its first order of business. The committee's redraft was set forth in a draft dated May 24, 1993. (Agenda Item VII) He summarized the provisions of the draft and offered some stylistic improvements as oral amendments to the advisory committee's report.

Judge Leavy pointed out that the amended Rule 412, as drafted, would cause problems for a prosecutor who tries to introduce evidence of prior sexual acts by the defendant with the victim, such as in a case of multiple child molestation. The evidence of prior acts would be offered to prove that the defendant had engaged in prior sexual misconduct with the victim.

The committee discussed this problem, and the members suggested a number of refinements in the rule. It was agreed that Judge Winter and Dean Berger would take these suggestions into account and prepare a revised draft of the rule for consideration by the committee later in the meeting.

Judge Winter subsequently circulated a new draft of Rule 412, which formed the basis of the committee's further deliberations.

Judge Pratt moved to eliminate from (b)(2) of the redraft the words "evidence" through "victim," but the motion died for lack of a second.

Judge Pratt suggested that the words "an alleged's victim's" be inserted before the word "reputation" on line 37. Judge Winter accepted the change.

Professor Schlueter recommended that in line 1 the rule should be revised to begin with the following words: "The following evidence is not admissible." He suggested that the same formulation should also appear on lines 14-15, i.e., "the following evidence is admissible." Judge Winter accepted the changes.

Judge Winter also agreed: (1) to take out the reference to Rule 404(b) on line 27, (2) to relocate the word "alleged" in the heading of the rule from before the word "Sexual" to before the word "Victim's," (3) to change the word "authorize" to "require" on line 49, and (4) to change punctuation on lines 26 and 52.

Judge Stotler moved approval of the rule, as revised. The committee thereupon voted unanimously to approve Judge Winter's revised draft and submit it to the Judicial Conference.

REPORT OF THE SUBCOMMITTEE ON LONG RANGE PLANNING

Professor Baker presented the report of the subcommittee. (Agenda Item IX)

The committee approved the recommendations in the subcommittee's report:

1. That the new Advisory Committee on the Rules of Evidence review the Report of the Carnegie Commission on Science, Technology, and Government, Science and Technology in Judicial Decision Making -- Creating Opportunities and Meeting Challenges (March 1993) and report back with recommendations for rules or procedures, if appropriate. Additionally, that the Advisory Committee suggest how the Standing Committee, in turn, might respond to the Carnegie Commission Report more generally within the context of the committee structure of the Judicial Conference.

2. That the Advisory Committee on the rules of Evidence coordinate a joint effort among the various Advisory Committees to study Judge Keeton's concept of "Rules of Trial Management."

3. That the subcommittee be authorized to undertake a thorough evaluation of the federal court rulemaking procedures that will include: (1) a descriptive narrative of existing procedures; (2) a summary of the extant criticisms of the existing procedures; and (3) an assessment of the existing procedures and the criticisms, with recommendations on how federal court rulemaking might be improved.

Judge Keeton mentioned that some criticism had been voiced during the June 16, 1993 oversight hearings regarding the role of the Supreme Court and the degree of judge control of the rulemaking process.

Judge Keeton pointed out that the standing committee needed to respond to the Conference's Long Range Planning Committee on the issues of: (1) capping the size of the article III bench, and (2) the appropriate mission of the federal courts. There was a consensus among the members that the institutional expertise of the rules committees was generally limited to the rulemaking. Accordingly, while the members as individuals could surely voice their own views on these two important issues, the rules committees were simply not in a position to take an institutional position on the issues submitted by the Long Range Planning Committee.

Judge Sloviter moved that the committee take no position as a committee on the issue of capping the size of the article III judiciary. The committee approved the motion with one dissent.

Judge Keeton stated that he had prepared the following draft response, which he proposed to send to the Long Range Planning Committee:

> The Standing Committee on Rules of Practice and Procedure has considered whether a cap or limitation on the number of Article III judges would have material effects on the rules enabling Act process or the content of the federal rules that ought to be taken into account in formulating a Judicial Conference position regarding the size of the judiciary. It is the sense of this Committee that the answer is no.
>
> Many of the specific proposals for amendment of federal rules recommended in recent years and now under consideration respond to the growing numbers and complexity of cases and the growing burden on individual judges at both the trial and appellate levels. Thus, the scope of the jurisdiction and the extent of the workload of courts do bear upon the work of this Committee. It is the view of the Committee, however, that rules of procedure can be adapted to

needs and that decisions on more fundamental questions about the future of the federal judiciary should not be driven by concerns about procedural rules and rulemaking.

With respect to the more fundamental question, the views of individual members of this Committee vary widely and, we believe, are not in any way materially different from the differences among federal judges generally. Many of us have expressed our views to your Committee individually. In these circumstances, we conclude that we should not take a position on this matter as a committee.

MISSION AND PROCEDURES OF THE RULES COMMITTEES

The standing committee members and the chairs of the advisory committees engaged in an extended discussion of the role and procedures of the rules committees.

Judge Ripple expressed concern that: (1) the Department of Justice representatives had injected partisanship into the rules deliberations and tended to represent their client, rather than the rulemaking process, (2) the terms of rules committee members was too short, resulting in a loss of institutional memory to the committees, and (3) the membership of the committees may not be sufficiently representative of the legal community.

Judge Sloviter suggested reconsideration of the role of the liaison members of the standing committee to the advisory committees.

Several members voiced the view that the standing committee generally spent too much time at its meetings on redrafting the language of proposed rules amendments submitted by the advisory committees. One member asserted that the committee should spend less time on "minutiae" and more on policy issues.

Some members suggested that the standing committee should become more involved in improving the substance and language of proposed amendments before the committee meeting. They could communicate their concerns to the reporter and chair of the appropriate advisory committee. In this way they could mutually resolve any problems by letter or telephone and avoid taking time on these matters at the standing committee meeting.

Judge Keeton made four general observations:

1. The standing committee, which now operates largely in a reactive mode, should be more pro-active.
2. The committees should engage in more short-term and long-range planning.
3. It is difficult to separate substance from style. Thus, drafting in a large group can be beneficial, since it provides a wider range of viewpoints and ultimately produces a better product.
4. The committees need to establish new time schedules for considering proposed amendments to the rules.

Several members suggested rethinking the length of time required for public comment on proposed amendments in an efffort to expedite the rules process.

Judge Winter asserted that the rapid rotation of members of Judicial Conference committees was a serious problem. Several other members agreed with him.

Several members stated that there are simply too many changes and too frequent changes in the rules.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Pratt reported that the Advisory Committee on Civil Rules had completed its review of the work of the Style Subcommittee. The civil rules amendments, thus, are back before the Style Subcommittee for further action. He further reported that Mr. Garner might soon have ready the redraft of the appellate rules. After completion of the appellate rules, the subcommittee will turn its attention to the criminal rules, then the bankruptcy rules, and maybe the evidence rules.

Professor Wright stated that intense efforts have been devoted to style revision and that many thanks are due to Judge Pratt and to everyone else who had worked so hard on the project.

Judge Pointer suggested that the public comment period for the style revisions to the civil rules should be nine months or a year.

Judge Keeton asked the Administrative Office to send copies of the style revisions to all members of the civil advisory committee in time for consideration at their next meeting in October.

THANKS TO RETIRING COMMITTEE CHAIRMEN

The committee extended its profound gratitude to Judges Keeton, Ripple, Hodges, Pointer, and Leavy for their enormous contributions to the rules process as committee chairmen during the last three years, as committee members for additional years, and in other capacities in support of the rules program.

THANKS TO THE STAFF

Judge Keeton thanked the staff for their "hard work and exceptional competence."

NEXT MEETING

The committee voted to hold its next meeting in Arizona on June 13-15, 1994. The staff was asked to make appropriate arrangements.

Respectfully submitted,

Peter G. McCabe,
Secretary