

MINUTES OF THE MEETING  
OF THE ADVISORY COMMITTEE ON APPELLATE RULES  
OCTOBER 25, 26, & 27, 1994

Judge James K. Logan called the meeting to order at 8:30 a.m. in the Conference Center of the Thurgood Marshall Federal Judiciary Building in Washington, D.C. In addition to Judge Logan, the Committee Chair, the following Committee members were present: Judge Danny Boggs, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the entire meeting on behalf of Solicitor General Days who was himself present for a portion of Thursday afternoon. Judge Grady Jolly, whose term on the Committee had just expired, was present. Mr. Robert Hoecker, the former Clerk of the Tenth Circuit and the newly named Circuit Executive for that circuit, attended on behalf of the clerks. Professor Daniel Coquillette, the Reporter for the Standing Committee was present, along with Professor Mooney, the Reporter for the Advisory Committee. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, and Mr. Robert P. Deyling, all of the Administrative Office, were present along with Ms. Judith McKenna of the Federal Judicial Center and Mr. Joseph Spaniol.

Judge Logan welcomed the new members and announced that items D and E on the agenda would be delayed until the afternoon when the Solicitor General would be able to join the Committee.

Judge Logan made introductory remarks for the benefit of the new members about the Committee's work. He noted that the impetus for much of the Committee's recent work came from the Department of Justice and the national law firms both of which have been urging a return to truly uniform federal practice and the elimination of local rules. The other impetus has been the Local Rules Project that was established by the Standing Committee to study local rules and which has urged, among other measures, uniform numbering of local rules, elimination of any local rule that conflicts with the national rules or that merely repeats provisions in the national rules.

Judge Logan noted that the Advisory Committee has tried to add to the national rules some of the ideas that were developed by the circuits and included in the local circuit rules. The Advisory Committee's aims were twofold: to improve the national rules and to eliminate the need for local rules on those topics. The Advisory Committee has now reached a point where most of the changes proposed as a result of the Local Rules Project have been considered.

Judge Logan stated that the next step will be a systematic simplification of the language used in all of the rules. Significant work has already been done on the civil rules by the Style Subcommittee of the Standing Committee and by the Advisory Committee on Civil Rules. The Style Subcommittee had completed its first draft revision of Rules 1-23 of the appellate rules and those revisions were on the agenda for consideration by the Advisory Committee at the meeting. Judge Logan stated that the Standing Committee hopes that the restyled version of the Appellate Rules will be the first set of restyled rules to be published for public consideration.

## Minutes

Judge Logan turned to the first item on the agenda, approval of the minutes of the April meeting. The minutes were approved as written. There was, however, a brief return to the discussion initiated at the April meeting about the content of the minutes. The minutes of the April meeting do not attribute comments made during the meeting to any particular member. One member stated that he believes speakers should be identified by name. Another member pointed out that the omission of names may be noticeable simply because this Committee's minutes are more detailed than those of the other advisory committees. The minutes of other advisory committee meetings do not include as detailed a record of committee discussion and, therefore, do not attribute remarks to individual members. There was consensus that detailed minutes are helpful to the committee. It was pointed out that the meetings are open to the public and that anyone who desires to know the position of individual members is free to attend the meetings. A compromise position was proposed: comments would not be attributable to individual members but votes would be attributed to individuals by name. It was agreed, however, that the reporter would prepare the minutes of this meeting without any names attached either to comments or votes. Mr. Rabiej promised to provide the committee members with samples of other committees' minutes and the Committee agreed to put the topic on the agenda for a fuller discussion at a future meeting.

## Standing Committee

The Reporter summarized the action taken by the Standing Committee at its June meeting with regard to proposed amendments to the appellate rules.

The Advisory Committee presented 5 new or amended rules to the Standing Committee with a request that those rules be forwarded to the Judicial Conference for consideration; they were Fed. R. App. P. 4(a)(4), 8, 10, and 47, and proposed new Rule 49. Rules 4(a)(4), 8, and 10 were approved without change. The Standing Committee amended Rule 47, dealing with local rules, by adding a sanctions limitation back into subdivision (b). The Advisory Committee had concluded that in light of other post-publication amendments recommended by the Advisory Committee the sanctions limitation was unnecessary. The Standing Committee decided to reinsert it believing that it would do no harm and would make the limitation explicit. Rule 47 as amended was approved for submission to the Judicial Conference. The Standing Committee decided not to go forward with Rule 49, dealing with technical amendments, or its corollaries in the other sets of rules.

The Advisory Committee recommended publication of 6 rules, Fed. R. App. P. 21, 25, 26, 27, 28, and 32. Rules 21, 25, and 32 were actually requests for republication because substantial changes had been made following their publication in November 1993. The Standing Committee approved publication of all six rules having first made changes in Rules 25, 26, and 32.

In Rule 25, the proposed amendment published in November 1993 had provided that in order to file a

brief or appendix using the mailbox rule, the brief or appendix must be mailed by first-class mail. In light of the public comments, the Advisory Committee proposed further amendment of the rule so that the mailbox rule applies when a brief or appendix is delivered to an "equally reliable commercial carrier." The Standing Committee deleted the word "equally" from "equally reliable commercial carrier." In addition, the Standing Committee made amendments in the subparagraph dealing with electronic filing, so that the language would be consistent with amendments proposed by the bankruptcy committee.

The proposed amendment to Rule 26 makes the three day extension for responding to a document served by mail also applicable when the document is served by an "equally reliable commercial carrier." As with Rule 25, the Standing Committee deleted the word "equally."

When considering the amendment to Rule 25, the Standing Committee discussed the adequacy of the three day extension provided when a party must act within a specified time measured from the date of service and service is accomplished by mail. The Standing Committee asked each of the advisory committees to consider expanding the three days to five days. That issue became Item 94-1 on the Advisory Committee's docket and was on the agenda for the October meeting.

The proposed amendments to Rule 32 deal primarily with typeface issues. The Standing Committee made some minor amendments both in the language of the rule and in the Committee Note and then approved Rule 32 for publication.

#### Item 91-24, Amicus Briefs

The proposal to amend Rule 29 grew out of the Local Rules Project. In its response to the Local Rules Project Report, the fifth circuit suggested that the

Advisory Committee consider amending Rule 29 to:

1. specify which of the items required by Rule 28 should be included in an amicus brief;
2. establish a page limit; and
3. permit an amicus brief to be filed later than the brief of the party supported.

The fifth circuit believes that permitting later filing of an amicus brief eliminates needless repetition in the amicus brief of the party's arguments.

At the Advisory Committee's September 1993 meeting, the Committee accepted the fifth circuit's first two recommendations, but rejected the third. In addition the Committee decided to include language similar to that in Sup. Ct. R. 37.1, indicating that an amicus brief will be permitted only when the amicus will bring information to the court that has not already been presented by the parties. The Committee also decided to insert language similar to that in Sup. Ct. R. 37.4 in order to provide the court with some standards for granting leave to file an amicus brief and a party with a guide for framing a motion for leave to file. In light of those decisions, the Reporter had prepared a new draft for the Committee's consideration.

One member recommended eliminating the rule altogether or limiting its application to technical matters such as length. He noted that the Supreme Court receives many amicus briefs but they are not as common in the courts of appeals. He further stated that he would not require a motion for leave to file an amicus brief. The brief must accompany the motion and as a practical matter the courts rarely refuse to file an amicus brief.

Two members favored retention of the motion. The privilege of filing an amicus brief can be abused. It can become a way to file a longer brief; a party convinces a friend to file an amicus brief in order to present arguments that the party wants to advance but is unwilling to give space to in the party's own brief. Another member noted that preparation of the motion may help the drafter to crystallize the reasons for the amicus brief.

A member noted that this motion, like any other, requires a response. Until the court responds, the parties do not know whether the amicus brief has been accepted and do not know whether they must respond to the arguments advanced by the amicus.

Another member noted that the language in proposed subdivision 29(a), language modeled on Sup. Ct. R. 37.1, could be read as creating a standard that a clerk's office has responsibility for enforcing. He suggested that if the language is retained it should be more cautionary or advisory in tone. Another member noted that it is difficult for an amicus of a court of appeals to honestly state that the amicus will not discuss matters discussed by the party. Such a representation is more easily made at the Supreme Court because the party has already briefed and argued the case at the court of appeals and the amicus knows the arguments that will be advanced by the party.

Judge Logan noted that some revision of Rule 29 is desirable in order to eliminate some of the matters covered by local rules and to specify the contents of an amicus brief. Two issues had emerged from the discussion so far:

1. should the rule include precatory language, similar to that in Sup. Ct. R. 37.1, stating that the role of an amicus is to bring matters to the attention of the court that are not presented by the parties; and
2. should the rule require a motion for leave to file an amicus brief.

Judge Logan asked the Committee to focus on the first question, whether proposed subdivision 29(a) should be retained, and if so, whether it should be modified. The draft read as follows:

(a) *In general.*--An amicus curiae brief should bring relevant matter to the attention of the court which has not already been brought to its attention by the parties.

One member expressed general approval but suggested that the provision should be amended to permit an amicus brief to discuss matters not brought to the court's attention by the parties, or not adequately elaborated upon by the parties. Another member pointed out that in order for an amicus to make that determination, the amicus brief would have to be filed later than the party's brief and such later filing had been rejected by the Committee at its previous meeting. Another member indicated that ordinarily there is a level of coordination between the party and the amicus that would permit an amicus to make the "not

adequately elaborated" determination.

Another member stated that if 29(a) were truly precatory it would be acceptable, but if it could be interpreted as imposing a requirement, it would be problematic. When the government files an amicus brief, it cannot coordinate with a party and could not make the representation "required" by 29(a). Another member pointed out, however, that the government has a right to file an amicus brief and could not be precluded from doing so as a result of 29(a).

Judge Logan asked the Committee to vote on retention of a provision similar in nature to 29(a). A motion to eliminate subdivision (a) and to move the language into the note was made and seconded. Five members voted to eliminate any such provision; three voted to retain it.

Judge Logan then asked the Committee to turn its attention to the motion question.

A member moved that the Committee eliminate the motion requirement and substitute an attorney's certificate that the brief is not filed for purposes of delay but to assist the court. He stated that it typically takes one week to get a response to the motion and the opposing party remains uncertain during that time whether there is a need to respond to the arguments raised by the amicus. The motion was seconded.

During discussion other members questioned whether elimination of the motion requirement entitles everyone to file an amicus brief. Several members felt that the motion requirement is important because it provides the court with a measure of control.

The motion failed by a vote of 4 to 3.

Having decided to retain a motion for leave to file, a member suggested eliminating the requirement in draft Rule 29(c)(2), that the motion state "the facts or arguments that have not been, or reasons for believing that they will not be, adequately presented by the parties, and the relevancy of those facts or arguments to the disposition of the case." The member suggested substituting language from an earlier draft that would require the motion to state "the reasons why an amicus brief is desirable."

It was pointed out that it would be helpful to include as specific a statement as possible about what makes an amicus brief desirable. Although it was agreed that a variety of reasons in addition to those mentioned in (c)(2) may make an amicus brief desirable, specificity helps practitioners know what should be in the motion.

A motion was made and seconded to substitute the following language for that in paragraph (c)(2) of the draft:

(c)(2) the reasons why an amicus brief is desirable and the relevance of the matters asserted to the disposition of the case.

The motion passed unanimously.

With regard to subdivision (d), dealing with the contents and form of an amicus brief, a motion was made to add a requirement that the brief include "a concise statement of the identity of the amicus and its interest in the case." The requirement would become (d)(2). It was pointed out that although a statement of its interest is required in an amicus's motion for leave to file, the members of panel in the case will not necessarily have the motion. The motion was seconded and passed unanimously.

A motion was made to delete the word "only" on line 30 of the draft. The sentence in question stated that "[w]ith respect to Rule 28, an amicus brief must include only the following. . ." The word "only" is ambiguous. It is unclear whether the list establishes the minimum required items, or whether it establishes both the minimum and the maximum items. The motion was seconded and passed by a vote of 7 to 1. The member who opposed the deletion believes that the word established both minimum and maximum contents and that deletion of the word "only" would eliminate uniformity.

Subdivision (d) of the draft, at lines 26-29, included a provision requiring the cover of an amicus brief to "identify the party or parties supported or indicate whether the brief supports affirmance or reversal." A motion was made to change the second "or" to "and." The stated reason for the motion was to promote uniformity. The motion was seconded but defeated with 2 votes in favor and 6 in opposition.

To coordinate the length limitation with Rule 32, and to make frequent amendment of Rule 29 unnecessary, a motion was made to change the length limitation from 20 pages to one-half the length of a principal brief as specified in Rule 32. The motion was seconded and unanimously approved. If Rules 32 and 28, which are currently published for comment, are not approved, subdivision (e) should be reexamined.

Subdivision (f) of the draft, deals with the time for filing an amicus brief; it provides that the brief must be filed within the time allowed the party supported, or if the amicus does not support either party, within the time allowed the appellant. When the previous drafts were discussed by the Committee, it accepted that approach. The Committee had rejected the fifth circuit's practice of allowing later filing because it results in extending the time for filing responsive briefs. For example, if an amicus supporting the appellant files a brief 15 days after the appellant, the time for filing the appellee's brief does not begin to run until the filing of the amicus brief.

A motion to accept subdivision (f) as drafted was made and seconded. The motion passed by a vote of 6 to 2.

Subdivision (h) of the draft provides that "[a] motion of an amicus curiae to participate in the oral argument will be granted only for extraordinary reasons." A member suggested that the Committee Note should indicate that if a party is willing to share its argument time with an amicus, the court may permit the amicus to argue without "extraordinary reasons." An amicus would still need to file a motion seeking court approval, but the motion would not need to show extraordinary circumstances. Another member observed that such a rule makes it possible for an amicus to exert inappropriate pressure on a party to share its time. The Committee consensus was to make no change in either the language of the rule or the

note.

Approval of the rule as amended was moved, seconded, and unanimously approved.

In light of the large number of appellate rules currently in the pipeline at various stages of development, the Committee decided that it would not submit the rule to the Standing Committee at the January 1995 meeting. Rather, the Committee decided to submit the amended draft to the Style Subcommittee for its review and take up the Style Subcommittee's suggestions at the spring meeting. A request for publication will be made some time after the spring meeting.

The meeting recessed from noon until 1:15 p.m.

### Ninth Circuit Local Rule on Death Cases

At the beginning of the afternoon session Professor Coquillette summarized the status of the ninth circuit local rule on death penalty procedures. On March 11, 1994, five attorneys general from capital states in the ninth circuit wrote to Chief Justice Rehnquist claiming that the new ninth circuit procedures for death penalty cases conflict with federal law. The attorneys general requested that the Judicial Conference use its statutory authority to modify or abrogate circuit rules that are inconsistent with federal law.

The Chief Justice referred the matter to the Standing Committee, which in turn referred the matter to the Advisory Committee on Appellate Rules. The Advisory Committee report of its April deliberations on the issues was submitted to the Standing Committee and considered at its June meeting. At that meeting, the Standing Committee made no decision on the merits of the issues. Instead, the Standing Committee decided to invite both the states attorneys general and the ninth circuit to submit briefs elaborating on their positions. The Standing Committee will consider the issues at the January meeting.

Professor Coquillette stated that the Standing Committee would appreciate guidance about the appropriate response to a possible determination that one or more provisions of the ninth circuit rule are inconsistent with federal law. Professor Coquillette stated that there are three possible responses; the Standing Committee may recommend to the Judicial Conference that it: 1) modify the rule to make it consistent with federal law; 2) abrogate the entire rule or the inconsistent provisions; or 3) take no action. Professor Coquillette believes that the third option is available because the statute says that the Judicial Conference "may" modify or abrogate. 28 U.S.C. § 331.

A member of the Advisory Committee indicated that he reads the statutory language as requiring the Judicial Conference to either "modify or abrogate" a circuit rule, once the Conference determines that the rule is inconsistent with federal law. Another member disagreed; that member believes that the statutory language permits the Judicial Conference to abstain from acting. He noted that the Judicial Conference is not a court and that if it abrogates a circuit rule there is no review by the Supreme Court. Because the Judicial Conference is not a court before which parties appear, it is not presented with the sort of in depth

research and argument that is typical of the adversary process. He believes that the questions can and should be litigated and in that context the issues can be presented to the Supreme Court.

Professor Coquillette invited the members of the Advisory Committee to write to him with their recommendations for the Standing Committee.

#### Item 93-5, Rule 26.1

Fed. R. App. P. 26.1 requires a corporate party to file a statement "identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." At the Committee's April meeting, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates." As a result of Mr. Spaniol's observation, the Committee determined that it would reconsider the propriety of requiring disclosure of "affiliates."

As a preliminary matter, one of the Committee members asked whether the scope of the rule should be broader; it does not require disclosure of all matters that are cause for recusal under the statute. Some of the circuit rules require disclosure of anyone who has a financial interest in the case. The Reporter indicated that during the process of developing Rule 26.1, the Advisory Committee approved a rather broad draft and circulated it to the circuits. Several circuits had strongly negative reactions to the broad rule. As a result, the Advisory Committee promulgated a rule that requires bare-bones disclosure. The Committee Note indicates that the Advisory Committee realizes that some circuits may wish to require more complete disclosure.

Another member spoke in support of the limited disclosure required by Rule 26.1. It would impose a serious burden to require a party to certify that it has identified all persons who may have a financial interest in the outcome of the case. A corporate party, however, is in a position to know who it controls and by whom it is controlled and it is reasonable to require the party to disclose that information.

Another member spoke in support of an even narrower rule than current Rule 26.1; in his opinion the seventh circuit provision dealing with corporate affiliates is narrower but sufficient. The rule need only require disclosure of corporations that may be adversely affected by a decision in the case. The seventh circuit rule requires a corporate party or amicus to disclose its parent corporation and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus. That disclosure is appropriate; if a judge owns stock in a parent corporation of the litigant, the judge has an interest in the litigant. The other disclosures required by the current federal rule and many of the circuit rules, however, seem unnecessary. For example, disclosure of subsidiaries may be unnecessary. If the litigant is a part parent of a corporation in which the judge may own stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation. Similarly, that a judge owns stock in a brother or sister corporation of the litigant is unlikely to create any bias. In short, it may be appropriate to eliminate not only the term affiliate but also the term subsidiaries.



Another member posed a hypothetical that illustrated the possibility of an ethical problem arising from participation of a judge in a case if the judge owns stock in a corporation which is under common control with a party to the case. A judge owns 20% of Joe's Barber Shop; the other 80% is owned by Barber Shops Inc.. Barber Shops Inc. also owns 80% of Mary's Barber Shop. If Mary's Barber Shop is the litigant and is awarded judgment, 80% of that will accrue to the benefit of Barber Shops Inc. Although Barber Shops Inc. does not owe Joe's Barber Shop any of that money, does the fact the Barber Shops Inc. is wealthier effect Joe's Barber Shop and its shareholders (one of whom is the judge in the case)? Does the fact that the judge's co-owner could be richer as the result of the litigation mean that the judge should recuse himself or herself? It might because if Joe's Barber Shop needs cash at some point in the future, Barber Shops Inc. may be in a better position to provide the cash if Mary's Barber Shop is awarded a substantial judgment.

Another member pointed out that what is striking about the hypothetical is that the ownership interests are large and in such cases the judge is likely to be aware of the ownership interests and the disclosure statement would not be necessary to make the judge aware of his or her potential interest. In the typical case the ownership interests of shareholders are minuscule and the impact of a judgment for or against a brother or sister corporation would be negligible upon a judge shareholder.

Another member indicated that the purpose of the rule is to address clear- cut interests. The party's certificate cannot address all possible problems such as persons who are contemplating purchases of interests, etc.

A motion was made and seconded to weave the seventh circuit solution into the rule and to eliminate disclosure of subsidiaries and affiliates. It was pointed out that there may be political reaction to what may be perceived as a narrowing of the disclosure. In response, it was suggested that the Committee Note should explain the change, indicating that a person who owns stock in a subsidiary or an affiliate is not affected by judgment for or against the parent. The publication period provides an opportunity to gauge the public reaction to the proposal.

Specifically the motion was to amend Rule 26.1 to read as follows:

Any non-governmental corporate party in a civil or bankruptcy case, or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying its parent corporation, if any, and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party.

The motion passed by a vote of 6 to 2.

Although the seventh circuit rule requires an amicus that is a corporation to file a similar statement, the Committee decided to treat the amicus question in Rule 29. Specifically, a motion was made to amend draft Rule 29(d) to indicate that "an amicus brief must comply with Rule 32 and, if a non-governmental corporation, file a disclosure statement like that required of a party in Rule 26.1." The motion was seconded and passed unanimously.

### Item 93-10, Rule 26.1

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The language of Fed. R. App. P. 26.1 does not address the trade association question. The current rule requires only that a "corporate" party disclose its parent, subsidiaries and affiliates. Under the current rule, a trade association would be required to make disclosure only if it is incorporated and even then it typically would not have anything to disclose; a trade association does not have a parent and the association's members are not subsidiaries or affiliates in the ordinary sense of those words.

Given the decisions just approved under item 93-5, that the only disclosures required are those involving financial interest and, more specifically, only disclosure of parent corporations, the consensus was that no change is needed.

### Item 94-1, Rule 26(c)

Fed. R. App. P. 26(c) provides that when the time for action is measured from the date of service and service is accomplished by mailing, three days are added to the time period. At its June 1994 meeting the Standing Committee asked each of the advisory committees to consider whether the three day extension should be changed to a five day extension because of frequent delays in mail delivery.

The Reporter indicated that the bankruptcy, civil, and criminal advisory committees have all recommended retaining the three day rule. A motion was made to recommend no change. The motion was seconded and passed unanimously.

### Item 92-8, Sanctions

Mr. Alan Morrison had written to the Committee asking it to reexamine Rule 38 and consider additional amendments. A subcommittee had been appointed to consider Mr. Morrison's suggestion and to monitor the sanctions question generally.

Judge Boggs, the chair of the subcommittee, reported that about a year and a half ago the subcommittee agreed that in light of the uncertain future of Rule 11 and the proposed changes in Rule 38 regarding notice and opportunity to respond before imposition of sanctions, no further amendment of Rule 38 was advisable at the time. In addition there had been an inquiry by then Chief Judge Breyer asking whether the amendment requiring notice and comment would make court chastisement of counsel too difficult. The Committee responded to that inquiry indicating that there are several means of chastisement that would not require notice and comment.

Since that time the subcommittee has continued to monitor the sanctions area and nothing has transpired that has caused the subcommittee members to change their minds about the need for further amendment of Rule 38.

Mr. Morrison wrote to the Committee again in October 1994. Essentially, he argued that because litigation is uncertain and the Supreme Court sometimes rules contrary to virtually all courts that have previously considered an issue, litigation should seldom be classified as frivolous. Judge Boggs indicated that the subcommittee has not been persuaded that Rule 38 should be reinstated as an action item at this time.

Mr. Morrison offered to come to the Committee to speak about the issue. Judge Logan proposed that the subcommittee be continued, that Rule 38 be placed on the agenda for the next meeting, and that Mr. Morrison be invited to attend the meeting and make a presentation. The Committee consensus was that in light of the amendment of Rule 38 scheduled to become effective on December 1, 1994, (an amendment that provides significant new protection for those who might be sanctioned) the subcommittee should continue to monitor Rule 38 but that it would be premature to provide Mr. Morrison a hearing at the next meeting.

Judge Logan asked the subcommittee to run a computer search of the cases under Rule 38 and determine whether there are any current problems. The Reporter indicated that she would provide the subcommittee with her background research on the question of frivolous appeals. Judge Logan asked the subcommittee to submit its report at the fall 1995 meeting.

#### Item 93-11, Draft Opinions

Justice Peterson of the Oregon Supreme Court wrote to the Committee suggesting that the appellate rules be amended to permit a party to include, as an appendix to the party's brief, a draft opinion. After a brief discussion of the proposal, there was a motion to take no further action on the proposal. The motion was seconded and unanimously approved.

#### Item 94-2, Prohibiting Citation to Appellate Decisions that Lack a Clear Recitation of Jurisdiction

William Leighton, Esq. wrote to Mr. McCabe suggesting that the appellate rules be amended to prohibit citation in a brief to an appellate decision that does not clearly recite the applicable basis for federal court jurisdiction. After brief discussion of the proposal, there was a motion to take no further action on the proposal. The motion was seconded and unanimously approved.

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

Solicitor General Drew Days joined the Committee for discussion of these items and Judge Logan invited him to address the Committee.

Solicitor General Days stated that both he and his predecessor had proposed amending Rule 35 so that intercircuit conflict would be made an explicit ground for granting an in banc hearing. Between July 1, 1993 and June 30, 1994, there were 160 cases in which a federal government agency or division recommended that the government file a suggestion for rehearing in banc. (There were in excess of 500 matters in which the preliminary recommendation was not to request a rehearing in banc.) Of the 160 cases in which an agency recommended requesting a rehearing in banc, the Solicitor General approved the filing of a suggestion for rehearing in banc in only 51% of the cases. A rehearing in banc was granted in approximately 25% of the cases in which suggestions were filed. There were five circuits that did not grant any of the petitions. The Department of Justice realizes that it should not routinely petition for a rehearing in banc but the department is in a better position than perhaps any other litigant in the country to have an overview of the problem of intercircuit conflicts. Solicitor General Days believes that some conflicts can be avoided by granting an in banc rehearing; if a conflict is avoided, later Supreme Court intervention is unnecessary.

Intercircuit conflicts create problems not only for the Department of Justice but also for the judicial system as a whole. Intercircuit conflicts create the impression that a party's rights depend upon the circuit in which he or she litigates. Intercircuit conflicts also create upward pressure to hear cases in the Supreme Court and additional litigation around the country.

Solicitor General Days stated that the proposed amendment simply makes explicit a matter that is typically part of a circuit's current deliberative process. In many instances, the existence of an intercircuit conflict, or the fact that a panel's decision would create an intercircuit conflict, leads a circuit to treat the case as one of "exceptional importance" and to grant a rehearing in banc. Several circuits make it clear in their local rules that intercircuit conflicts are a special concern and may lead to the granting of a rehearing in banc. But, it would be helpful to litigants to make that clear in the national rule. The proposal would not make it mandatory to convene an in banc court.

The Reporter's memorandum prepared for the meeting included two drafts. Draft one treated intercircuit conflict as grounds for finding that a proceeding involves a question of "exceptional importance." Draft two treated intercircuit conflict as a separate category of cases as to which in banc review may be appropriate. A member of the Committee noted that draft two might be read as more mandatory than draft one. When asked which draft he preferred, Solicitor General Days expressed a slight preference for draft two. He further stated he had not thought that draft two created an impression that an in banc hearing might be mandatory, and either draft would be satisfactory.

One member noted that some judges in his circuit only vote for an in banc hearing when there is a conflict within the circuit. In such an instance, those judges feel compelled by the language of Rule 35 to vote for a rehearing in banc. If Rule 35 is amended, as suggested in draft two, to make intercircuit conflict a distinct ground for granting an in banc hearing, it is likely to have a similar impact and to

increase the number of cases in which an in banc hearing is granted. The member then asked whether the likelihood of a rehearing in banc would create pressure for a panel to simply follow the lead of the other circuits that have already addressed the issue. In other words, might this change raise the stakes when a circuit is confronted by an issue on which another circuit has already ruled, and perhaps impede the development of the law?

Two members expressed a preference for draft one because making intercircuit conflict one subset of cases of "exceptional importance" does not create an impression that the granting of a rehearing in banc is "mandatory" whenever there is such a conflict; whereas, draft two, which makes intercircuit conflict a separate grounds for granting a rehearing in banc, might create such an impression.

Another member stated his opposition to draft one because he thought that it might result in the narrowing of the range of cases that will be considered of exceptional importance.

A motion to work with draft one was made and seconded. The motion passed by a vote of six to one.

The discussion then turned to the fact that the draft states that a case may present a question of exceptional importance if the panel decision conflicts with the decision of another federal court of appeals. But a rehearing in banc is truly useful only when the panel decision creates an intercircuit conflict. In such a case, the in banc court may prevent the creation of a conflict. When a panel decision does not create a conflict but simply joins one side of an already existing conflict, a rehearing in banc cannot avoid the conflict. It was pointed out, however, that when a conflict was created by a pre-existing decision of the same circuit, the second decision in that circuit which persists in the conflict may also be a strong candidate for a rehearing in banc.

A motion was made to amend lines 31-39 of draft one to read as follows:

A proceeding may present a question of exceptional importance if it involves an issue as to which the panel decision conflicts with the authoritative decisions of every other federal court of appeals that has addressed the issue (citation to the conflicting case or cases is required).

The word "authoritative" was used rather than "published" because in some circuits unpublished opinions may be treated as authoritative. It was noted that the language of the rule encompasses both a case in which the panel decision creates the conflict and also a case in which the panel decision maintains a conflict created by an earlier decision of the same circuit. The language does not include those instances in which a circuit joins one side or other in an already existing conflict. The motion was seconded and approved unanimously.

Although there were additional items on the agenda dealing with Rule 35, consideration of them was postponed to allow the Solicitor General to address the Committee on his proposal to amend Rule 41.

Solicitor General Days had previously proposed that Rule 41 be amended to state that a mandate is effective upon issuance. Judge Logan invited him to discuss his proposal.

The Solicitor General noted that the time at which a mandate becomes effective is not specified in Rule 41. A mandate could be considered effective when it issues, when it is received by the district court or agency to which it is sent, when it is docketed, or when the court or agency acts upon it. The effective date of the mandate is especially important when a court of appeals reverses a district court order granting an injunction. The parties need to know when they can rely on the decision of the court of appeal. The fourth circuit has a local rule stating that the mandate is effective when issued. The Department of Justice believes that incorporating such a provision in the national rule would be helpful.

Judge Logan asked the Solicitor General whether the language at lines 22 and 23 of the draft on page 14 of the Reporter's memorandum would be sufficient. That language stated: "The court's mandate is effective on the day the court issues it." The Solicitor General responded affirmatively. Committee discussion resulted in amendment of the sentence to read as follows: "The mandate is effective when issued."

The Solicitor General stated that there is often a delay in issuing the mandate. The Department would prefer that the rule provide that the mandate is effective on the date that the clerk should issue it, in accordance with the rules, even if it is not issued on that date because of clerical delay.

A member expressed opposition to that position. The mandate should be effective when issued, not when it should issue. A judge may delay issuance of the mandate. If a mandate is not issued on the date established by the rules and the approach advocated by the Department of Justice were accepted, one would have to determine whether the delay was the result of clerical delay or judicial intervention. The effective time should be the time of actual issuance. Such an approach provides an easily applied bright line rule.

A motion was made and seconded to amend the rule to state that "the mandate is effective when issued." The motion was approved unanimously.

Following adoption of that language, discussion turned to the practical implications of the amendment. As previously noted, the time at which a mandate is effective is most crucial in cases involving an injunction. If a court of appeals reverses a district court order granting an injunction, the party can cease compliance with the injunction as soon as the mandate issues. If, however, a court of appeals reverses a district court order denying an injunction, the entry of the mandate does not result in the imposition of an injunction by the district court. If the court of appeals itself issues a stay or injunction, that injunction would be effective upon issuance of the mandate. If the court of appeals does not issue the injunction but simply says that the district court should have, there is no effective injunction until the district court issues it.

Discussion then turned to Item 93-3, a proposal to amend Rule 41 to expand the 7 day period for issuing the mandate. Rule 41 generally requires a court of appeals to issue the mandate 7 days after expiration of the time for filing a petition for rehearing, or if such a petition is filed, 7 days after entry of an order denying the petition.

A recent amendment to Rule 41 requires a petition for a stay of mandate to show that a petition for certiorari "would present a substantial question and that there is good cause for a stay." Because of these new requirements, it may be more difficult than it was previously for a party seeking a stay of mandate to obtain one within the 7 day period. Therefore, the Committee was asked to consider expanding the 7 day period.

One member suggested that the 7 day period after expiration of the time for filing a petition for rehearing is adequate but that the 7 day period after denial of a petition for rehearing is inadequate. A party may not know that the court has denied the petition for rehearing until it arrives in the mail several days after its entry. Therefore, he suggested that the rule should be amended to state that the mandate should be entered 14 days after entry of an order denying a petition for rehearing. Another member suggested that having two different time periods would be confusing.

Rather than expand either of the time periods, a motion was made to adopt draft three. Draft three ensures that the mandate does not issue while a motion for a stay of mandate is pending by providing that the mandate cannot issue while the motion is pending. The motion was seconded and passed unanimously.

It was noted that further amendment of the draft will be needed in light of changes to Rule 35 already approved. Those changes provide that a petition for rehearing in banc will stay the issuance of the mandate just as a petition for panel rehearing does.

#### Item 93-4. Stay of Mandate

Rule 41 provides that a stay of mandate pending the filing of a petition for writ of certiorari cannot exceed 30 days unless the period is extended for cause shown. The National Association of Criminal Defense Lawyers pointed out that the 30-day presumptive period for a stay was adopted when the period for filing a petition for a writ of certiorari in a criminal case was only 30 days. Because the period for filing a petition for certiorari is now 90 days in both criminal and civil cases, the association suggested that the presumptive period also should be expanded to 90 days.

The draft prepared for the Committee's consideration provides that the normal period for a stay will be 90 days but that the period cannot, in any event, exceed the time available to the party to file a petition for a writ of certiorari to the Supreme Court. It was pointed out that a court would remain free to specify a shorter period.

Adoption of the draft without amendment was moved and seconded. Some members expressed

preference for the current rule because the 30 day period provides an incentive for the party to move with dispatch and it ensures that the mandate is not stayed for an extended period in a case in which the party may never petition for certiorari.

Another member responded that all the rule does is grant the court broader discretion over the period of the stay. The amendment eliminates the need to find good cause for extending the period to 90 days. Given the fact that the motion for stay must show that a petition for certiorari would present a substantial question and that there is good cause for a stay, the 90 day period is appropriate.

The motion passed by a vote of 6 in favor and 3 opposed.

The Committee then returned to Rule 35 and discussion of the items that had been postponed.

### Item 91-25, In Banc Proceedings

As a result of suggestions made by the Local Rules Project and the fifth circuit, the Advisory Committee had previously decided to amend Rule 35 to provide:

1. a petition for in banc consideration must demonstrate that in banc consideration is appropriate;
2. a limit on the length of a petition for in banc consideration;
3. a change in the caption for subdivision (a); and
4. a senior judge or a judge sitting by designation may not call for a vote on a request for rehearing in banc unless the judge was a member of the panel whose decision is sought to be reviewed.

With regard to the page limitation the draft under consideration stated that a petition "may not exceed 15 pages unless the court provides otherwise by local rule or by order in a particular case." A member suggested that the local rule option should be eliminated. Another member inquired whether the published version of Rule 32 continued to permit the circuits to shorten the maximum length of briefs and the member suggested that Rule 35 should be consistent with Rule 32. Rule 32 does not permit the circuits to shorten the maximum length other than on a case by case basis. Therefore, the language at lines 40-43 was altered to read as follows: "Except by permission of the court, a petition for in banc hearing or rehearing may not exceed 15 pages."

With regard to using page limits rather than a word count similar to that in proposed Rule 32, the Committee had previously decided to retain page limits in documents such as motions and petitions. The Committee judgment was that there was not a serious enough problem to justify importing the word count and typeface requirements applicable to briefs into other contexts.

The next sentence of the draft, beginning at line 43 of the draft, established a page limit for a combined petition for panel rehearing and petition for rehearing in banc. Because it dealt with a petition for panel



rehearing, something generally not addressed in Rule 35, it was suggested that the distinction might be clearer if that sentence constituted a separate numbered paragraph. In that event, however, the next sentence (providing that "[m]aterial excluded by Rule 32(a)(6) does not count" toward the page limits) would have to be dealt with in a manner making it clear that it applies to both of the preceding sentences. The Committee delegated the task of reorganizing the structure of the rule to the Reporter. The Committee approved the substance of those changes.

The meeting recessed at 5:30 p.m.

The meeting resumed at 8:30 a.m. on October 28.

#### Item 91-25, In Banc Proceedings (continued)

Line 64 of the draft was amended to change the word "filed" to "due." That change having been approved, a motion was made to adopt draft one as amended. The motion passed unanimously.

#### Style Revisions

The Style Subcommittee's suggested revisions of Rules 1 through 23 were circulated prior to the meeting to the members of the Committee for their consideration. Judge Logan also had appointed two subcommittees and assigned Rules 1 through 12 to the first of the subcommittees and Rules 13 through 23 to the second and asked the subcommittees to be prepared to lead discussion of those rules at the meeting. Mr. Garner, the consultant to the Style Subcommittee was unable to attend the meeting but he had responded in writing to suggestions submitted to him by Judge Logan and by the Advisory Committee Subcommittee consisting of Judges Garwood and Jolly and Mr. Munford.

Judge Logan asked the first subcommittee to begin the discussion of the first twelve rules.

Attached to this memorandum are copies of the Style Subcommittee's suggested revisions marked to indicate the further changes suggested by the Advisory Committee. The box on the left side of the page contains the current language of the rule; the box in the center contains the Style Subcommittee's suggested language; the editorial marks to the far right indicate the Advisory Committee's changes to the Style Subcommittee's version. These minutes will not discuss each of the Advisory Committee suggested changes. Rather, the minutes will discuss only matters as to which further discussion may be necessary.

#### **Rule 1**

In paragraph (a)(2) the Committee voted to replace the word "application" with the words "other document." Mr. Munford's subcommittee agreed with Mr. Garner's observation that an application and a motion are the same but noted that the appellate rules require the filing of other documents in the district

court, such as a notice of appeal or a transcript order form.

In subdivision (c) the Committee voted to change the sentence from: "These rules are cited as the Federal Rules of Appellate Procedure" to "These rules shall be known as the Federal Rules of Appellate Procedure." The Subcommittee noted that one does not "cite" the full set of rules. The Committee was cognizant of the Style Subcommittee's desire to eliminate all use of the word "shall" but decided that its use is appropriate in this subdivision. Subdivision (c) does not create a rule to be enforced and, therefore, "shall" does not create the troublesome ambiguity in this context that it does when a rule mandates some conduct. Therefore the Committee decided to use the traditional "shall be known as" language.

### **Rule 3**

In paragraphs (a)(1) and (3), the Style Subcommittee changed the words "must be taken by" to "is taken by." The Advisory Committee changed the words to "may be taken only by." The Advisory Committee preferred the word "may" to avoid the implication that there is an obligation to take an appeal. The word "only" was added to indicate that there is only one method for taking an appeal, an implication that formerly arose from the word "must." The Committee believed that these changes did not create any substantive change.

With regard to paragraph (b)(1), the Committee noted that it does not understand what it means to "join" an appeal after filing separate timely notices of appeal. Is this different from "consolidating" appeals as under (b)(2)? The Committee asked the Reporter to note this problem for later substantive discussion.

With regard to paragraph (b)(2), it is unclear under the existing rule whether appeals can be consolidated without court order if the parties stipulate to the consolidation. The Style Subcommittee's version requires a court order even when the parties stipulate to consolidation. The Committee Note should identify the existing ambiguity and indicate that the new version clarifies the procedure consistent with the Committee's view of the proper interpretation of the existing rule.

With regard to paragraph (d)(2) the Committee voted to omit the words "a pro se." The Committee noted that Rule 4(c) does not limit its applicability to an inmate proceeding pro se, but only to an inmate who "files" the notice of appeal. The question is whether Houston v. Lack applies when an attorney prepares a notice of appeal but sends it to the inmate for review and the inmate "files" it by depositing it in the institutional mailing system. The Committee noted that whether Rules 3(d)(2) and 4(c) should be applicable only to an inmate who is proceeding "pro se" is a substantive question that the Committee should discuss at a later time in order to ensure that the restyled rules do not make substantive changes. The Committee also noted that it should explore the meaning of "an inmate confined in an institution" -- language taken from the Supreme Court's rule.

### **Rule 4**

The Committee Note accompanying subparagraph (a)(1)(A) should indicate that a cross-reference to

subdivision 4(c) has been added to conform the rule to the Houston v. Lack amendments.

Subparagraph (a)(6)(B) permits a district court to reopen the time to file an appeal if a party entitled to notice of the entry of a judgment or order sought to be appealed did not receive notice of its entry "from the clerk or any party" within 21 days after the entry. As a substantive matter, the Committee should consider whether actual notice during the 21 day period from some other source should bar reopening of the time for appeal.

Paragraph (a)(7) states that a judgment or order is entered for purposes of Rule 4(a) "when it is entered in compliance with Rule 58 and 79(a) of the Federal Rules of Civil Procedure." A substantive question was raised: Does Rule 58 require entry of a separate order when a court denies a new trial? It is possible to read (a)(7) as abolishing the collateral order doctrine. Rule 4(a)(7) should be substantively reviewed.

Item (b)(1)(B)(ii) states that the time for the government to file an appeal runs from the later of the entry of the judgment or order or any defendant's filing of a notice of appeal. A substantive question is left unanswered. Does the time begin to run from the filing of the first notice of appeal or from the last if more than one notice of appeal is filed? The statute may be dispositive.

Subparagraph (b)(1)(D) of the Style Subcommittee's draft, subparagraph (b)(3)(A) of the Advisory Committee's redraft, begins with the words "[i]f a defendant timely makes one of the following motions." The criminal rules should be consulted to determine whether the criminal rules require the "filing" of such motions in a manner that would make the use of the verb "files" appropriate in (b)(1)(D).

Paragraph (b)(3) of the Style Subcommittee's draft, paragraph (b)(5) of the Advisory Committee's redraft, permits a district court to extend the time for filing a notice of appeal, either before or after the time has expired, upon a showing of excusable neglect. It was pointed out that if a motion for extension of time is filed before the period has expired, there should be no need to show neglect. It was suggested, therefore, that the rule should permit a district court to extend the time for "good cause" as well as excusable neglect. The Committee approved adding the words "good cause" but decided that the Committee Note should identify that addition as a possible substantive change. The Committee postponed consideration of whether there possibly should be a difference between the grounds available for extension when the application is made before time expires and the grounds available when the application is made after the time has expired.

Paragraph (c)(2) states when an inmate uses the Houston v. Lack filing provisions, the time for filing a notice of cross-appeal runs from the date the district court "receives" the first notice of appeal. Because "receives" is not clear enough, the Committee voted to change the work to "dockets." A court may "receive" a paper when its mail is delivered to it even if the mail is not opened for a day or two. "Docketing" is an easily identified event. The Committee Note must disclose the change.

## **Rule 5**

The term "leave to appeal" was changed back to the term used in the existing rule -- "permission to appeal." Use of the term "permission" is consistent with the caption and with the statute which says that a court of appeals may "permit" an interlocutory appeal.

### **Rule 5.1**

The caption of Rule 5.1 was changed from appeal by "permission" to appeal by "leave." The term "leave to appeal" is used in subdivision (a) of Rule 5.1 and in the statute, 28 U.S.C. § 636(c)(5).

### **Rule 6**

Item (b)(2)(A)(2) of the Style Subcommittee's draft, item (b)(2)(A)(ii) of the Advisory Committee redraft, was amended to conform to Rule 4(a)(4). The amendment provides that a party intending to challenge an altered or amended judgment order or decree must file "a notice or amended notice of appeal." The Committee Note must identify the conforming change.

### **Rule 8**

Paragraph (a)(3) of the Style Subcommittee's draft, subparagraph (a)(2)(D) of the Advisory Committee's redraft, says that a motion for a stay pending appeal that is made to a court of appeals is "filed with the clerk" and normally is considered by a panel of the court, but in exceptional circumstances such a motion may be made to and considered by a single judge of the court. Several substantive questions were raised in connection with this provision. First, does a single judge have power either under statute or Rule 25 to "file" a motion presented directly to him or her? Can a party apply to a single judge in other exigent circumstances? Does this rule limit a judge's power? The Committee indicated that it would like to discuss these questions at its next meeting.

Subdivision (b) provides that the grant of a stay may be conditioned upon a party's "filing" a bond. Whether there is a substantive difference between "giving" and "filing" a bond is a question that was noted for future discussion.

### **Rule 9**

Paragraph (a)(1) requires a district court to state in writing the reasons for its order regarding release or detention of a defendant in a criminal case. The question was raised whether such an order to a district court would be better placed in the criminal rules. It was noted that Rule 22(b) dealing with habeas corpus imposes a similar requirement upon a district judge.

### **Rule 10**

Paragraph (d) permits the use of an agreed statement as the record on appeal. Given its infrequent use, it

was suggested that the Committee consider abrogating the provision.

The Committee recessed for the evening at 6:00 p.m..

The meeting resumed at 8:30 a.m. on October 27.

## **Rule 15**

The Committee discussed the use of the terms "petition" for review in subdivision (a) and "application" for enforcement in subdivision (b). The Committee decided that use of the different terms helps to distinguish the two proceedings. As a result the Committee decided to retain the use of the term "application" in subdivision (b) even though the Committee had earlier discussed the general desirability of abandoning the term "application."

Rule 15(c) requires the circuit clerk to serve a copy of a petition for review, or an application to enforce an agency order, on each respondent. Similarly, Rule 3(d) requires the district clerk to serve a copy of a notice of appeal on the other parties. The Committee decided that at a later time it would discuss the possibility of amending subdivision (c), as well as Rule 3, to require that the appellant or petitioner serve the copies rather than imposing that burden on the clerk.

## **Rule 18**

Rule 18 permits a party to move for a stay of an agency order pending review of the agency's decision or order. It was pointed out that there is no corollary provision authorizing the agency to move during the pendency of an appeal for enforcement of its order. Rule 8 permits a party to litigation in a district court to move for an order "restoring or granting an injunction during the pendency of an appeal" but that provision is not applicable (see Rule 20) in the agency context. Because this is a matter not addressed by the existing rules, the Committee concluded that it would place the question on the list of substantive questions for later consideration.

## **Rule 21**

The Advisory Committee did not consider the Style Subcommittee's draft of Rule 21 because a significantly altered version of Rule 21 has been published for comment. The Committee decided that it would be better to work with Rule 21 after the close of the comment period.

Judge Logan offered a comment on the published version of the rule. On page 9 of the pamphlet at line 37 the proposed rule uses the word "application." In light of the discussions at this meeting, Judge Logan suggested that the word probably should be changed to "petition." The Committee agreed, however, the use of the word "application" on page 12 at line 94 was appropriate. On page 13 at lines 99-100, the published draft says that a petition must be served on "the parties named as respondents." A member suggested that the words "the parties named as" should be deleted.

## **Rule 22**

The use of the word "original" in the caption of subdivision (a) was discussed. One member suggested that it indicates that subdivision (a) deals with a party's first application for the writ. Another member pointed out that subdivision (a) does not apply only when a party applies for a first writ, but also when a party first applies for even for a subsequent writ. Another possible interpretation is that subdivision (a) deals with application for the "original" common law writ, as contrasted with application under the statutory provisions, sections 2054 and 2055. Given the Committee's confusion about its meaning, the Committee decided to change the caption to: "Application for Writ."

The word "application" was retained because that is the word used in the statute.

The Committee changed the word "must" to "shall" in the first sentence of subdivision (a). Because this Rule governs the procedure for the constitutionally preserved writ, it is not appropriate to require -- by use of the word "must" -- application to a district court. The second sentence of subdivision (a) makes it clear that one may apply first to a circuit judge. A circuit judge ordinarily transfers the application to a district court, but a circuit judge may grant the writ in an appropriate circumstance. The Committee considered but decided not to use the word "should" in place of the word "must" (an application for a writ of habeas corpus "should" be made to the appropriate district court) because "should" might imply greater openness to an application to a circuit judge than exists. The Committee voted to return to the word "shall;" the word used in the existing rule. Although "shall" is ambiguous, the Committee was more comfortable with that ambiguity than any of the alternatives. "Shall" might mean either "must" or "should" but the ambiguity preserves the proper tension. In fact, the Committee Note accompanying the rule upon its original promulgation, can be read to say that the ambiguity was deliberate.

The Committee realized that the Style Subcommittee placed a hyphen between the words habeas corpus in the caption and elsewhere in the rule when habeas corpus is used as a compound adjective. The Committee decided, however, to delete the hyphens.

## **Rule 23**

Rule 23 was modeled on Supreme Court Rule 36, and the Committee believed that the rule should retain its similarity to the Supreme Court Rule. As a result, the Advisory Committee rejected several of the proposed revisions and returned to the original rule, making slight modifications therein in order to improve comprehension.

Subdivision (a) prohibits a person having custody of a prisoner from transferring custody, pending review of a decision in a habeas corpus proceeding brought by the prisoner. A question was raised concerning how a warden of a state prison is made aware of this provision in the federal rules.

Subdivision (b) deals with review of a decision denying a prisoner's petition for habeas corpus. It

provides that, pending review of that decision, the prisoner may be detained in the custody from which release is sought, in other appropriate custody, or released. Subdivision (c) deals with review of a decision to grant the writ. In contrast to subdivision (b), it provides that the prisoner must be released "unless the court or justice or judge rendering the decision or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order." Subdivision (b) permits release of the prisoner to a half-way house ("other appropriate custody"), but no similar authorization is included in subdivision (c). It appears anomalous to permit release to an institution such a half-way house pending review of a decision not to grant the writ, but not to authorize release to "other appropriate custody" pending review of a decision to grant the writ. The anomaly may be more apparent than real. In subdivision (c) the presumption is that the prisoner will be released on personal recognizance, but numerous persons and entities have the ability to "otherwise order." It may well be that the order not to release on personal recognizance can order release to a half-way house. The Committee placed this question on its list of substantive questions to be considered at a later time.

In Subdivision (d) the existing rule says that the initial order respecting custody "shall govern review" in the court of appeals unless it is modified for special reasons. The Style Subcommittee's revision says that the initial order "continues in effect" unless it is modified for special reasons. A member asked whether the change is substantive. The provision that an order "shall govern review" is an unusual one and could be read as establishing the law of the case and that the order is not alterable. The words "continue in effect" implies only that the order is in effect until something else is done. The use of the phrase "shall govern review" is especially odd when applied to an order regarding release. The order regarding release will not govern review of the case. The restyling may be clarifying an existing ambiguity. The Committee decided that the issue should be flagged in the Committee Note.

Judge Logan thanked the Committee for its hard work.

The next meeting of the Committee was tentatively scheduled for April 27 and 28 in Pasadena.

The meeting adjourned at noon.

Respectfully submitted,

Carol Ann Mooney

Reporter