MINUTES OF THE MEETING

OF THE ADVISORY COMMITTEE ON APPELLATE RULES

SEPTEMBER 22 & 23, 1993

Judge Ripple called the meeting to order at 8:40 a.m. in Rooms B and C of the Education Center in the Federal Judiciary Building, in Washington, D.C.. In addition to Judge Ripple the Committee Chair, the following Committee members were present: Judge Danny Boggs, Mr. Donald Froeb, Judge Cynthia Hall, Judge James Logan, Chief Justice Arthur A. McGiverin, Mr. Luther Munford, and Judge Stephen Williams. Mr. Robert Kopp and Mr. Mark Levy attended on behalf of Solicitor General Days. Judge Robert Keeton, Chair of the Standing Committee, and Chief Judge Dolores Sloviter, Liaison from the Standing Committee to the Advisory Committee, were present. Mr. Strubbe, the Clerk of the Seventh Circuit, attended on behalf of the clerks. Professor Mooney, the Reporter, was present. Mr. Peter McCabe - the Secretary, Mr. John Rabiej - Chief of the Rules Support Office, Mr. Paul Zingg - Mr. McCabe's assistant, Mr. Jeff Hennemuth of the Administrative Office, and Mr. Joseph Spaniol were present along with Ms. Judy McKenna of the Federal Judicial Center.

Judge Ripple began by introducing Judge Logan as the chair designate of the Committee. Judge Ripple welcomed Mr. Levy, the Deputy Attorney General representing the Solicitor General. Judge Ripple also welcomed Judge Keeton and Chief Judge Sloviter from the Standing Committee, and Mr. Spaniol, the former Clerk of the Supreme Court of the United States and long time secretary to the rules committees.

Judge Ripple stated that his objective at this meeting was to complete work on as many items on the docket as possible.

Judge Ripple asked Judge Keeton to report on the Judicial Conference meeting held earlier in the week. Judge Keeton reported that Chief Judge Breyer of the First Circuit had placed appellate rules 28, 38, 40, and 41 on the discussion calendar for the Judicial Conference meeting. Both Judge Keeton and Judge Ripple spoke with Chief Judge Breyer prior to the Judicial Conference meeting and convinced him that the Advisory Committee had considered suggestions that he had made early in the development of some of those rules. As a result of those discussions, Chief Judge Breyer was persuaded that it was not necessary to retain the appellate rules on the discussion calendar. The Chief Justice, however, said that the rules could not be removed from the discussion calendar without unanimous consent. Unanimous consent was forthcoming at the meeting as a result of which all appellate rules would be forwarded to the Supreme Court.

Judge Keeton also reported that the Court Administration Committee had urged the Judicial Conference to approve fax filing guidelines so that those courts desirous of permitting fax filings on a routine basis my adopt local rules authorizing such filings. At last summer's Standing Committee meeting, the Committee had discussed fax filing guidelines prepared by the Court Administration Committee and the Committee on Automation. The Standing Committee was troubled by the initial draft because it contained provisions that ordinarily would be contained in the rules. For example, the guidelines defined

"filing" in the context of fax filing. As a result, a rump committee put together by Judge Keeton studied the guidelines and made suggestions for change. It was those revised guidelines that were presented to the Judicial Conference by the Court Administration Committee for approval.

In spite of the revisions made during the Standing Committee meeting, Judge Keeton had urged the Judicial Conference not to approve even the revised guidelines. He noted that the guidelines would impose procedural requirements (such as maintaining an original signed document until the conclusion of the litigation) that are not found in the rules, and that adoption of the guidelines would result in the imposition of those requirements without compliance with the Rules Enabling Act procedures. Judge Keeton had pointed out that in light of the ongoing struggle to convince Congress not to bypass the Rules Enabling Act process by passing direct amendments to the rules, it could prove embarrassing to the Judicial Conference to approve what are in effect rules amendments without following the Rules Enabling Act procedures. As a result of Judge Keeton's arguments, the Judicial Conference passed a motion to delay action on the fax filing guidelines until September 1994.

Judge Keeton pointed out to the Advisory Committee that in order to have a recommendation ready for the Judicial Conference by fall 1994 and to comply with the Rules Enabling Act procedures, any necessary rule amendments would need to be published before the Standing Committee's January 1994 meeting. He further noted that drafts of the further revised guidelines and rule amendments would need to be prepared in the next month or two and approved on an expedited basis for publication.

Judge Keeton stated that the key task of the Advisory Committees would be to modify the guidelines so that they do not conflict with the rules of procedure. Judge Keeton indicated that he had a rough redraft of the guidelines that he would offer for the Committee's consideration later in the meeting.

Judge Keeton further stated that in private conversation with Judge Boyle during the Judicial Conference meeting, Judge Boyle indicated that if fax transmissions to court clerks are going to be regulated, he hoped the rules also would address fax service.

Chief Judge Sloviter, who also had attended the Judicial Conference, stated that she was reasonably convinced that the fax guidelines would have been approved but for Judge Keeton's forceful arguments. In her opinion, the argument that approval of the guidelines would undercut the Rules Enabling Act was the persuasive factor. Both Judge Keeton and Chief Judge Sloviter stated that the Judicial Conference is impatient with the long length of time between generation of an idea and its presentation to the Conference.

Judge Ripple indicated that in light of those developments the Committee would devote whatever time was necessary the following morning to consideration of the guidelines and rule amendments.

Judge Ripple returned to Judge Keeton's opening remarks about the rules placed on the discussion calendar for the Judicial Conference. During discussions preceding the meeting of the Judicial Conference, Judge Ripple learned that there had been some confusion arising from the fact that the Advisory Committee's GAP report did not summarize comments submitted to the Committee when early drafts were circulated to the Chief Judges for comment. When it was explained that a GAP report only summarizes the comments received during the formal comment period and not those generated by initial

consultation with the circuits during the process of developing a proposal, Chief Judge Breyer stated that he hoped this experience would not cause the committee to discontinue the process of consultation that it often uses. Judge Ripple stated his belief that the process of consultation with the circuits has been extremely useful to the Committee and should be continued in those instances where the Committee believes it would be appropriate.

Judge Ripple stated that Chief Judge Breyer did express concern, however, about the notice requirements in the proposed amendments to Rule 38. Chief Judge Breyer sees a need for an expeditious way that a court of appeals can bring a misstep to the attention of an attorney without the punitive aspects currently associated with "sanctions." Because imposition of sanctions can have implications for an attorney's career, due process and fairness concerns enter the picture; Chief Judge Breyer, however, believes that there should be some means by which a court can bring matters to the attention of counsel that do not result in a mark against the attorney's professional reputation. Judge Ripple stated that he had promised Chief Judge Breyer that his concerns would be added to the Committee's docket and referred to Judge Boggs' subcommittee on sanctions and would, in due course, be considered by the full committee.

Before turning to the items on the agenda for the meeting, Judge Ripple indicated that items 91-6 and 91-15 had been circulated as possible "dead list" items and that all votes had indicated that no further action was needed. He stated that unless a member voiced objection, both items would be stricken from the docket. No objections were heard.

Item 91-28

Item 91-28 is a proposal to redraft and update Rule 27, the rule governing motions. Judge Ripple indicated that Item 91-28 was being taken out of turn because Judge Williams, who chaired the sub-committee on this item, would need to leave before the close of the meeting that afternoon in order to attend a reception for his colleague Judge Ginsburg.

Judge Ripple indicated that the Department of Justice had prepared a draft for the Committee's consideration and he had assigned the draft to a subcommittee for study and solicitation of the views of the circuits'. Judge Ripple stated that at this meeting the Committee should be ready to make substantive decisions. He and Judge Logan agreed that once the substantive decisions are made the subcommittee should work with the Reporter to come up with a refined text for the Committee's next meeting. Because Judge Williams chaired the subcommittee, Judge Ripple asked him to lead the discussion.

Judge Williams indicated that his memorandum of September 8 was a composite of all the written comments he had received on the draft. The comments were arranged topically and in the order that the topics appear in the draft. Judge Williams proposed that each topic be addressed in turn.

1. Nature of Motions

The first suggestion, appearing at the top of page 3 of the memorandum, was that the rule should state that "an application for . . . relief shall be made by filing a motion." The current appellate rule and the civil rules include such statements. Because the suggestion was Mr. Munford's, Judge Ripple asked him whether something like the first sentence of the existing rule would be sufficient. Mr. Munford replied that it would except that it may not be necessary to include the direction that a motion be accompanied by proof of service because Rule 25 generally requires proof of service to accompany papers presented for filing. After a brief discussion, Mr. Munford moved that the draft be amended to include such a statement; Mr. Kopp seconded the motion. It passed by a vote of 7 in favor, two opposed.

2. The Question of Oral Motions

Judge Williams then asked the Committee to turn to pages 4 and 5 of his memorandum and that portion of the draft rule stating that motions must be in writing except for motions made in open court with opposing counsel present. Judge Williams indicated that there was general approval of the requirement that motions be in writing but that the exception for motions made in open court in the presence of opposing counsel had generated some opposition.

The First Circuit opposed the exception because the tapes of its proceedings are destroyed and the court would have no record of the motion. Judge Williams stated that in his seven years on the court of appeals the only motions made before him in open court have been for an attorney to appeal *pro hac vice*. He further indicated, however, that if a more substantive motion were made in open court, the court would be free to order that the tapes be preserved.

Judge Logan indicated that the Tenth Circuit's experience is that some motions do not need to be reduced to writing. For example, if at oral argument the court wishes to discuss points not developed in the parties' briefs, counsel often ask permission to file supplemental materials. In such instances the court enters an order setting the date for the filing of such materials; no other writing seems necessary.

Chief Judge Sloviter stated that in the Third Circuit when something such a Judge Logan described occurs, the crier enters minutes and the docket reflects what has occurred.

Mr. Strubbe stated that the Seventh Circuit has a form that is given to the judges' law clerks and the clerks note any order made by the court. The clerk of the court enters the order on the docket so that the clerks' office knows to expect additional documents.

Mr. Munford indicated that in the Fifth Circuit counsel do not have access to the records of the proceedings in court and if a provision as broad as the draft were used, all sorts of motions would be made in open court.

Judge Ripple indicated that there are four possible approaches to the question:

1. no oral motions;

2. oral motions are permitted in open court but discouraged;

3. oral motions are permitted in open court but must be memorialized by submission in writing; or

4. motions must always be in writing.

Judge Sloviter suggested a fifth possibility: that oral motions be permitted only by leave of the panel.

Mr. Levy suggested yet another possibility: that oral motions be limited to housekeeping matters.

Mr. Froeb stated that he has never encountered a problem with oral motions and that the rules should not be cluttered with provisions governing insignificant or non-existent problems.

Judge Ripple indicated that he would like to take a straw vote in order to advance the discussion.

1. The proposal that oral motions would never be permitted was opposed unanimously.

2. The proposal that oral motions be permitted only as to procedural matters was favored by two members and opposed by five.

3. The suggestion that the consent of the court be required for any oral motion was favored by six members and opposed by two.

Mr. Kopp reminded the members that the draft was an attempt to create a national rule. The DOJ draft was prepared in light of the fact that oral motions are permitted in some circuits and reflects a belief that an umbrella rule should accommodate existing practices.

Judge Logan summarized the discussion by noting that there was consensus that there should be some leeway so that trivial oral motions need not be reduced to writing. As an example, he stated that a lawyer's request at oral argument to share argument time with co-counsel typically would be considered and acted upon at that time and there would be no need to create a paper record on that issue. He suggested that the details of the drafting could be left to the sub-committee and that perhaps the problem could be most satisfactorily addressed in the committee notes.

The discussion pointed out that some circuits permit motions for extension of time to be made over the telephone to the clerk. Mr. Munford stated that the 5th Circuit permits such motions to be made over the telephone but must be followed up in writing. Mr. Kopp stated that his draft did not intend to disturb such practices. The committee unanimously agreed that a court should be able to delegate authority to the clerk to handle procedural or housekeeping matters telephonically.

Mr. Munford questioned the need for the opening phrase of the draft rule which says "[e]xcept where otherwise specifically provided by these Rules" motions shall be in writing. Because there are no contrary provisions in the FRAP, he suggested that the phrase may be unnecessary.

3. Documents that Must Accompany a Motion

Judge Williams asked the Committee to turn to pages 6 and 7 of the memorandum dealing that portion of the draft rule governing the documents that must accompany a motion. He noted that Rule 27 currently says that a motion must "set forth the order or relief sought" and that language can be read to imply that a moving party must provide a proposed order along with the motion. The Justice Department's draft deletes the language without stating that a proposed order is not desired. Judge Keeton pointed out that the Civil Rules strongly discourage submission of proposed orders unless the court directs otherwise. The Committee agreed that it should be made clear that no proposed order is desired.

With regard to "supporting papers" the DOJ draft includes the following three subparagraphs

(a) Affidavits should contain factual information only. Affidavits containing legal argument will be treated as memoranda of law.

(b) A copy of the lower court opinion or agency decision shall be included as a separately identified exhibit by a moving party seeking substantive relief.

(c) Exhibits attached should be only those necessary for determination of the motion.

Judge Williams asked whether it is appropriate to include such provisions in the national rules or whether they really are simply helpful suggestions to counsel.

Judge Ripple stated that a motion should be a self-contained packet of materials and that if it is necessary to call the clerk's office to get a copy of the lower court opinion etc., the time for deciding a motion may be significantly lengthened.

Mr. Froeb stated that he thought a lawyer would automatically include the necessary supporting papers but that if that is not so, perhaps the sort of directions included in the draft are necessary.

Mr. Kopp stated once again that he attempted to develop a draft that would be complete enough that the circuits would not feel a need to supplement it.

Judge Ripple summarized the options and asked the Committee to express its preliminary preferences.

1. The first option would be to stop after the statement that "[i]f a motion is supported by affidavits or other papers, they shall be served and filed with the motion" and not provide any further instructions. Three members favored that approach.

2. A second option would be to simply direct that all necessary supporting documents should be appended. One member favored that approach.

3. A third option would be to put all such directions in the committee notes. No member favored that

approach.

4. A fourth option would be to take the approach taken in the DOJ draft. Five members favored that approach.

Given the preference for the fourth option, Judge Ripple called for a vote on that approach. Retention of the draft language was approved by a vote of six in favor and three opposed.

Judge Williams noted that Mr. Munford had suggested a slight adjustment in the language of the DOJ draft (a)(2)(c) but Mr. Munford requested that his suggestion be referred to the drafting subcommittee.

4. Briefs

Judge Williams directed the Committee's attention to the comments on page 8 concerning briefs. The DOJ draft deletes the language in the current rule stating that a motion may be supported by a brief.

The Federal Circuit commented that it explicitly prohibits the filing of briefs and Mr. Munford had suggested that if the intent is to ban separate briefs, then the rule should so state. Judge Logan said that the Tenth Circuit had discussed this issue and concluded that a motion and supporting arguments should be contained in a single document.

The single document approach was unanimously approved but several members indicated that the committee note should explain that a motion itself may contain supporting arguments. Mr. Spaniol noted that Supreme Court Rule 21 uses the single document approach and that its language might prove helpful in the drafting process.

5. Page Limitation

Judge Williams moved onto the page limitation provisions and comments discussed on pages 9 and 10 of his memorandum. Professor Mooney summarized the status of Rule 32, noting that a new proposal would be published on November 1. The new proposal would include a words per page limitation, although Judge Easterbrook had written to the Committee suggesting that characters per brief or words per brief would be preferable to words per page.

During discussion of the status of Rule 32, Chief Judge Sloviter noted that if the members of the Advisory Committee are confused about where certain rules proposals are in the pipeline, that those circuits that are not represented on the Committee are even more confused. She suggested that the table of agenda items should be circulated to the circuits or at least to the rules committees in the circuits. Both Judge Ripple and Judge Logan agreed that circulation of the table would be helpful. Judge Ripple further suggested that the Chair's letter to the Chief Judge should suggest that it be circulated to the rules

committee.

Judge Williams suggested that given the uncertain development of Rule 32, it may be difficult to proceed with such provisions in Rule 27.

Judge Keeton suggested that the problem might be finessed by providing that a motion or response to a motion cannot exceed 1/2 the length permitted for a principal brief under Rule 32 and that a reply to a response cannot exceed 1/4 of that length.

Judge Ripple suggested separating the discussion concerning the length of a reply from that concerning the length of a motion or response. He thought that some members might take the position that the rule should not authorize a reply to a response and that discussion of replies might muddy the discussion of Judge Keeton's proposal. The Committee concurred.

Judge Hall noted that the Ninth Circuit has reduced the length of a brief from 50 pages to 35 pages. Judge Ripple stated that under Judge Keeton's proposal, to the extent that a circuit has authority to limit the length of its briefs, it would correspondingly limit the length of its motions.

Judge Logan said that when the Tenth Circuit reviewed the DOJ draft, the Tenth thought that the suggested twenty page limit was too long.

Mr. Kopp replied that motions vary from minor to very major (such as a motion for summary affirmance or a motion to dismiss for lack of jurisdiction) so that in some contexts a motion is more important than the brief. The twenty page limit was proposed as a fair compromise. Mr. Kopp stated that Judge Keeton's draft is a good way to finesse the fact that Rule 32 is in flux but Mr. Kopp further noted that if the committee consensus was that the limit on a motion should be 20 pages, one would end up with a awkward fraction.

Chief Judge Sloviter said that the disadvantage of Judge Keeton's proposal is that the motion rule would not be self-contained; one would need to refer to another rule to know the limit. She also said that the number of pages for a motion has never posed the sort of problem that has been encountered with the length limitations on briefs.

Mr. Froeb agreed that the motion rule should be as free-standing as possible. With regard to the specific number of pages, he suggested that the real question is how many motions to exceed the page limits do the courts want to receive. Because there are motions of the type that may decide the appeal, if the page limit is set too low, there will be many requests to exceed the limit. Mr. Froeb suggested that a mid-line number should be settled upon so that there will not be an excessive number of motions to exceed the limit.

Mr. Munford stated that he liked separating the page limit question from the typeface issue. He believes that it is preferable to have the motions rule as self-contained as possible and that it would be good to

have the page limit in Rule 27 but that the typeface question could await the Rule 32 resolution.

Judge Hall stated that in her experience there has not been a problem with the length of motions. In her experience, the length of a motion has generally been commensurate with the difficulty of the issues presented. She has been more troubled by the attachments being either excessive or insufficient. She expressed willingness to do without a page limit.

Judge Logan said that the Tenth Circuit was concerned that once a page limit is established, lawyers would tend to use the maximum number of pages permitted. The Tenth Circuit, therefore, favored a shorter limit which would force parties who wish to file a longer motion to seek court permission to file a longer document.

Judge Williams said that lawyers do tend to use the entire 50 pages allowed for briefs whether the issues warrant it or not, but that his experience has been different with motions and that the D.C. Circuit has had a page limit on motions ever since he has been on the court. He further stated that he rarely receives a motion to exceed the page limits.

Mr. Kopp stated that the draft includes a page limitation to eliminate the need for local rules establishing limitations. He also believes that the existence of a limit usually provides an incentive to carefully structure one's writing. He stated, however, that he would rather have no limit than a 15 page limit. In his opinion, too many motions cannot be adequately supported in 15 pages but that 20 or 25 pages is usually sufficient.

Judge Ripple called for a straw vote on the three options posed:

1. Three members favored imposing no limit.

2. Two members favored using Judge Keeton's proportional approach.

3. Four members favored using a twenty page limit.

Given that outcome, Judge Ripple called for a final vote on options one and three. Four members voted for no page limit. Five members voted for a twenty page limit.

Judge Williams noted that the DOJ proposed 27(a)(4), on page 11 of his memorandum, deals with typeface questions. Judge Ripple suggested that the Committee not attempt to deal with that issue until Rule 32 is resolved because Rules 27(a)(4) and 32 should use the same approach. Mr. Spaniol noted that Rule 32(b) purports to establish format requirements for motions. He suggested that the Committee should determine whether the format requirements should be in both rules or only one, and which one and, if they are to be both places, they clearly should use similar or identical language.

Judge Logan suggested that Rule 27(a)(4) should simply cross-reference Rule 32(b). Mr. Munford countered by suggesting that it would be preferable to include the formatting information for motions in Rule 27 and to eliminate Rule 32(b). Judge Ripple responded, however, that Rule 32(b), deals with petitions for rehearing and other documents as well as with motions. There was discussion about whether

a cross-reference to 32(b) would make the binding and cover requirements of Rule 32(a) applicable to motions. Judge Williams suggested that removing motions from 32(b) might be preferable. Mr. Spaniol suggested using the language of Supreme Court Rule 34 so that a motion would be "stapled or bound at the upper left hand corner." The working out of this problem was left to the drafting subcommittee.

6. Responses that Request Affirmative Relief

Judge Williams asked the Committee to turn to page 13 of the memorandum dealing with responses to motions. He noted that there are two issues that the Committee must address: the first is whether the rule should allow a party to combine a response to a motion with a request for affirmative relief and second, if the answer to the first question is yes, then page limits for such a document must be established.

The DOJ proposal allowing combined documents was based upon a D.C. Circuit Rule. Judge Williams stated, however, that such combined documents are rare and that he could not cite any example where the D.C. rule either caused or solved any problem. Judge Williams said, however, that the rule is useful because there often is substantial overlap of arguments in the response and in the request for affirmative relief.

Mr. Kopp said that when a lawyer is not simply opposing a motion but also is asking for summary affirmance, it is not clear how the documents should be structured. Because the arguments overlap, it is not clear whether the response should be followed by a one page motion or whether the response should conclude with a paragraph asking for summary affirmance. If it is decided to include the request for relief in a response, Mr. Kopp noted that it is important that the caption alert the court to the request for relief.

Mr. Munford stated that in his opinion, the problem is too obscure to address in a national rule.

Judge Ripple called for a straw vote as to whether the rule should provide that a response may include a request for affirmative relief. Four members voted in favor of doing so, and five opposed. Given the opposition, Mr. Kopp suggested that the topic be addressed in the comment saying either that there must be a separate motion for affirmative relief or that the motion may be combined with the response. Mr. Levy pointed out that with a separate motion, the original movant would have the opportunity to respond.

Because the previous vote had been that the rule need not specifically address the combined document question, Judge Ripple asked for a clarifying vote on whether the Committee substantively supports the idea of a combined response and request for cross-relief even though the rule does not speak about it. Seven members indicated that they do support that approach. Therefore, the drafting subcommittee should try to address the matter in the notes to the extent appropriate. Mr. Froeb indicated that in drafting the rule it is important to keep in mind that many lawyers want to be the last party to speak.

7. Replies

Judge Williams asked the Committee to turn to page 15 of his memorandum and to proposed Rule 27(a)(6) dealing with a reply to a response. The DOJ draft allows a reply to be filed within three days after service of a response.

Judge Williams indicated that he finds replies very useful to clarify a point that appears for the first time in the response. He was surprised, therefore, to find opposition to the practice.

Judge Logan said that the Tenth Circuit's opposition was based upon its belief that most motions are relatively simple and that a reply is not needed and simply delays the ruling on the motion.

Mr. Kopp stated that if the rule does not authorize a reply and the party believes that it is needed, the party will file a motion for permission to reply.

Mr. Strubbe said that his circuit has always refused to file a reply to a response to a motion unless the panel wants a reply and orders one.

Mr. Levy said that a movant wants assurance that the court will not act before the movant has a chance to reply or at least to move for permission to reply. He expressed the opinion that it is only fair to provide the moving party with the last word.

Judge Keeton pointed out that although the draft says that a reply must be filed within three days after service, the time for reply is really much longer -- probably a minimum of eight days. Rule 26(c) provides three additional days after service by mail and that in some instances there would be an additional two days because of the week-end. So, the delay is more significant than the draft indicates.

Judge Williams pointed out, however, that the party with the right to reply is the moving party. If there is urgency to decide the motion, the moving party could waive the right to reply or act very quickly or the motion panel could shorten the time.

Judge Ripple asked the Committee to vote on whether the national rule should provide an opportunity to reply. Five members favored having a provision for a reply; four opposed it. Given that vote, he asked the Committee to vote on the three day period for filing a reply; all members voted in favor of that time limit.

Judge Williams pointed out that the DOJ draft, page 9 of his memorandum, proposed a seven page limit on a reply. Judge Williams suggested that if the motion and response are to be limited to 20 pages, that the reply should be one-half of that or 10 pages. Judge Ripple treated the suggestion as a motion and he seconded it; the Committee approved it unanimously.

8. Procedural Relief

The Committee then turned its attention to page 17 of the memorandum dealing with procedural orders. The DOJ draft, like current Rule 27, permits the court to dispose of a motion for procedural relief before a response to the motion is filed. The primary issue addressed in the comments on the draft is how "timely opposition to the motion that is filed after the motion is granted in whole or in part" should be treated. The DOJ draft said that it would be "treated as a motion to vacate the order." The Federal Circuit and the Seventh Circuit treat such responses as moot and the opposing party must file a motion to reconsider if he or she wants to the court to reexamine the appropriateness of the relief granted.

Judge Ripple outlined the possible approaches to the question. First, the response to the motion may be treated as a motion to vacate the order and ruled upon (the DOJ proposal). Second, the response may be treated as moot and not ruled upon. Third, if the party wants to press his or her opposition to the motion, the party must file a motion for reconsideration which addresses the court's order granting the motion. A straw vote was taken and the approach taken in the draft received no support. There was consensus, however, that the rule should address the need to file a motion for reconsideration.

The Committee broke for lunch at noon.

The meeting resumed at 1:20 p.m.

Judge Williams indicated that with regard to the DOJ proposed Rule 27 subdivision (b), governing procedural orders, there were some miscellaneous points to be discussed. Judge Posner had asked whether the language on lines 8 and 9 of the draft requiring "[a]ny party adversely affected by such action" to file a motion for reconsideration, referred only to decisions made by the clerk or to any order on a motion. The Committee generally agreed that it should be clarified that the requirement applies to all orders.

Judge Posner had also suggested that the rule clarify whether a party can suggest an in banc hearing on a motions matter. Rule 35 states that there may be an in banc hearing on an "appeal or other proceeding" and the general consensus of the Committee was that Rule 35 authorizes in banc consideration of a motion. The Committee, however, was hesitant to be more specific about the ability of a party to request in banc consideration either in the text of Rules 35 or 27 or in Committee Notes. The Committee feared that such a change might be taken as an invitation to request in banc consideration of motions. Judge Logan made a motion that the Committee make no changes either in the text or the Committee Notes; Mr. Munford seconded the motion. Six members voted in favor of the motion; no one opposed it.

Mr. Munford withdrew his suggestion (p. 17) that clerks be limited to deciding unopposed motions.

9. Power of a Single Judge to Entertain Motions

Judge Williams directed the Committee's attention to DOJ proposed subdivision 27(c) (p. 19) dealing with the power of a single judge to entertain motions and noted that it had elicited no unfavorable comments. The Committee also had no comments.

10. Number of Copies

Judge Williams asked the Committee to turn to page 20 and DOJ proposed subdivision 27(d) dealing with the number of copies of motion papers that must be filed. The Reporter pointed out that the DOJ prepared its proposal prior to the time that the Committee had generally addressed the number of copies problems. The Committee had made consistent changes in all of the rules dealing with numbers of copies and those amendments, including an amendment to Rule 27(d), were approved by the Judicial Conference earlier in the week and would be forwarded to the Supreme Court for its consideration. The Committee decided that no further changes should be made Rule 27(d).

11. Oral Argument

Judge Williams turned to page 22 of his memorandum and DOJ proposed subdivision 27(e) stating that motions will be decided without oral argument unless the court orders otherwise. Once again, there was no opposition to this proposal and the Committee had no suggestions to offer.

12. Preemption of Circuit Rules

Judge Williams then directed the Committee's attention to page 23 of the memorandum and DOJ proposed subdivision 27(f) concerning preemption. The DOJ draft suggests that the provisions of Rule 27 should preempt local rulemaking on motions. Judge Williams and Mr. Munford noted that the Committee had rejected a similar preemption provision when it was proposed for Rule 32. They said that whether the national rules should preempt local rulemaking is a generic issue and saw no justification for treating it differently in the context of motions than with regard to briefs. Judge Williams moved to delete subdivision (f); Chief Justice McGiverin seconded the motion. Mr. Kopp stated that the issue had been given a thorough airing during the discussions of Rule 32 and that he would defer to the Committee's earlier judgment. The Committee passed the motion unanimously.

Mr. Munford pointed out that the Second Circuit requires that a party file a notice of motion form. He suggested that the Rule be amended to state that a notice of motion is not required. The members of the Committee generally agreed that it would be a good idea to eliminate that practice. Mr. Munford moved that the Committee proposal include a provision that no notice of motion should be required; he suggested that it might be placed with the provision stating that briefs are not required. Judge Williams seconded the motion and it was approved unanimously.

Judge Ripple thanked Judge Williams for all his work on this item and asked the subcommittee composed of Judge Williams, Mr. Froeb, and Mr. Munford, to remain in place to continue working on Rule 27.

Item 91-23 is a suggestion that each side file a single brief in consolidated or multi-party appeals. The Reporter had prepared three basic drafts for the Committee's consideration and she briefly explained them as follows:

1. Draft one simply encourages a single brief.

2. Draft two requires a single brief to the greatest extent practicable and requires a party who files a separate brief to include a certificate stating the reasons it was necessary.

3. Draft three requires a single brief unless the court orders otherwise.

In the event that the Committee considers it appropriate to distinguish between civil and criminal cases, she had drafted variations on drafts two and three that gave the parties greater discretion to file separate briefs in criminal cases.

Chief Judge Sloviter stated that the Third Circuit has a variation requiring a party filing a separate brief to pay a separate filing fee.

Mr. Munford opened the discussion by expressing his hesitation to support any of the drafts. He stated that coordinating the preparation of briefs with other parties would be fraught with problems. As an example he stated that in a medical malpractice case where a patient visits four different hospitals and is misdiagnosed in all four, even though all the hospitals are on the same side of the case they will have different interests and their attorneys may have conflict of interest problems. In his experience when parties can file a single brief, they often do so. He suggested that the Committee make no change or adopt the Eleventh Circuit's one lawyer, one brief rule or the Third Circuit's rule that when a joint appeal is filed there be only one brief (a one fee, one brief rule).

Mr. Froeb strongly concurred. He said that he would rather have the number of pages be divided by the number of parties on one side than be forced to join in a brief that he considered substandard.

Chief Justice McGiverin said that the Iowa Rule of Appellate Procedure 14(j) is the same as FRAP 28(i) and it works very well; therefore, he also favored making no changes.

Mr. Levy agreed. In many cases there are differences in the legal arguments made by parties on the same side, as well as differences of strategies. Furthermore, he indicated that he would be loathe to disclose publicly the reasons why the parties are unable to file a consolidated brief because often they are matters of strategy that the parties should not be required to disclose and upon which the judges should not be asked to rule.

Judge Williams stated his desire to join the practitioners based upon his experience in attempting to do

collaborative academic work. He did state that he finds Rule 28(i) a little chilly in that it simply permits joinder in a single brief. For that reason he stated a preference for draft one which encourages the filing of a single brief.

Judge Hall spoke in favor of draft three. The Ninth Circuit currently has a local rule requiring parties in a civil case to file a joint brief to the greatest extent practicable and encouraging the filing of a joint brief in criminal cases. She does not find those provisions helpful and believes that something stronger is needed. She further stated that she believes the problem is even greater in criminal cases than in civil cases.

Judge Ripple noted that in some cases the legal arguments may be virtually identical but the real problem with cooperation is that the abilities of the lawyers are unequal and the reason they do not collaborate is unspoken -- the better lawyer will not give in and allow the weaker one to write any portion of the brief.

Mr. Kopp said that he understands why the court would not want to be drowned in repetitive paper but that good advocates know that it is better to get together because their single brief will have stronger impact. He suggested that there might be ways to address the problem other than by rule. For example, he suggested that if parties file duplicative briefs that both of them would not be awarded full costs. He further suggested that the Committee Note state that the court expects that in the interest of good advocacy parties will cooperate in the preparation of a single brief.

Mr. Munford said that Mississippi tried giving parties a choice between cooperating in the preparation of a single brief or dividing the pages between the parties on the same side. The problem with that approach is that there is nothing to bargain with; if a party wants his or her own pages there is nothing you can do about it. In criminal cases, he believes that the 6th Amendment and the increasingly stringent rules on conflicts of interest are the driving force that require the defendants to have separate lawyers in the first place. He indicated that it would be ironic for one set of rules to say that each criminal defendant must have his or her own lawyer but when they get to the appellate court the defendants must file only one brief.

Judge Logan moved the adoption of draft one. Judge Boggs seconded the motion. Mr. Kopp asked whether that was the proper juncture to discuss the treatment of the government. He stated that he is not sure that it is appropriate even to encourage the government to file a single brief with a private party because the government is supposed to represent an independent interest. Encouraging the government to file a consolidated brief with a private party would send the message that a private party has a role in shaping the position of the government.

Judge Boggs stated that there are cases in which the government is involved in litigation as a property holder and in those cases the government is not unlike any other private party. In his opinion, draft one would not say anything affirmatively improper.

Mr. Kopp suggested that a Committee Note might cure his hesitation. The note might indicate that because of its duty to represent the public interest, a governmental party might find it inappropriate in most instances to join in a brief with a private party and that must be taken into consideration in applying the language of the rule.

Mr. Levy indicated that even when the government is a private property, it may be inappropriate to treat the government like any other party. There are special limitations upon the government. The government often does not assert certain arguments or defenses that a private party would assert and the process of consultation concerning the arguments that will be made in a government brief is quite different. In his opinion, it would send the wrong signal to encourage the government to join in a brief with other parties.

Judge Hall stated that government briefs are not the problem but noted that there are judges on her circuit who object to any special treatment for the government. For that reason, she believes that it is better to leave it to the court to decide whether the government would be required to join in a brief with a private party rather than flag the special treatment. She stated that draft one is milder than the Ninth Circuit's rule which is ineffective and she questioned whether it is worth making a change.

Judge Logan concurred that it may not be worth going through the whole rulemaking process to change from a rule stating that the parties may file a single brief, to one that encourages filing a single brief. Even after the change the rule would only include precatory language. Judge Logan, therefore, withdrew his motion.

Mr. Munford made a motion to leave the rule as it stands; Mr. Froeb seconded the motion. The motion passed by a vote of five in favor and four in opposition.

Item 91-24

In its response to the Local Rules Project, the Fifth Circuit suggested that the Advisory Committee on Appellate Rules consider amendment of Rule 29 governing a brief of an amicus curiae. The Fifth Circuit suggested that Rule 29 should specify which of the items required by Rule 28 for briefs of parties should be included in an amicus brief; that Rule 29 should establish a page limit for an amicus brief, and that Rule 29 should permit an amicus brief to be filed later than the brief of the party supported by the amicus.

The Reporter prepared two drafts for the Committee's consideration. Draft one was an entire rewriting of Rule 29. In addition to specifying the items that must be included in an amicus brief, draft one provided that an amicus brief may be filed 15 days after the brief of the party supported by the amicus and may not exceed 20 pages. Allowing the amicus to file after the party would avoid needless repetition of the party's arguments in the amicus brief and make the shorter page limits realistic. The rest of the briefing schedule, however, would be extended. Draft two was similar to draft one except that it required the amicus to file its brief at the same time as the party supported.

As a preliminary matter Chief Judge Sloviter asked the Committee to consider whether it wants to continue to permit an amicus brief to be filed with the consent of all parties. Sometimes whether a court

will permit participation by an *amicus curiae* is hotly contested and there have been members of her court who have written dissents from decisions to permit participation of an *amicus curiae*. The provision in Rule 35 that permits the filing of an amicus brief upon consent of the parties imposes reading on a court even if there is no receptivity to it.

Mr. Munford also posed a number of questions:

1. He asked whether the rule should include standards for granting leave to participate as an *amicus curiae.* He noted that the Supreme Court Rule suggests that leave will be granted only if the amicus truly has something to add.

2. He noted that the Fifth Circuit rule states that an amicus brief should avoid repetition of facts and legal arguments contained in the principal brief. Since that is the purpose for the delay, he asked whether such language should be included at least in draft one.

3. With regard to draft one, he asked whether the time for the responsive brief should run from the time the court grants the motion for leave to file the amicus brief rather than from the filing date of the brief and motion for leave to file.

Judge Logan noted that the drafts pose four new questions: 1) whether an amicus should be able to file a reply brief;

2) whether there should be a page limitation for an amicus brief; 3) when the brief should be filed; and,

4) whether the brief should accompany the motion seeking leave to file.

Judge Hall stated that it also would be helpful to establish a standard for accepting an amicus brief. Mr. Munford pointed out that Supreme Court Rules 37.1 and 37.4 attempt to do that. Sup. Ct. R. 37.1 states:

An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Sup. Ct. R. 37.4 requires that the motion for leave to file must:

concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case.

Judge Ripple moved the adoption of language similar to Sup. Ct. R. 37.1 as prefatory to FRAP Rule 29. Mr. Munford seconded the motion. The motion passed unanimously.

1. Time for Filing an Amicus Brief

Judge Ripple then suggested that the Committee address the question of the time for filing an amicus brief. Draft one permits an amicus to file its brief 15 days after the principal brief of the party supported. Draft two requires the amicus brief to be filed within the time for filing the party's brief.

Judge Logan expressed a preference for requiring the amicus to file within the same time as the party because that requirement leaves the briefing schedule undisturbed.

Judge Williams said that he had no preference as to the time for filing the brief but he strongly urged that the rule establish a time for filing the motion for leave to file.

Mr. Kopp noted that the 15 day delay in draft one is modeled on the D.C. Circuit Rule which was adopted in an attempt to shorten amicus briefs. If the amicus files after the party, the amicus will know what the party has said and the amicus can focus its brief more closely. The staggered filing schedule permits the court to have a tighter page limit than otherwise would be reasonable.

Judge Logan stated that most amicus briefs do not attempt to cover ground not covered by the party. Rather, they usually say in effect that there is a major interest group which concurs with the position of the party. Usually they simply state their interest and argue their one major point.

Judge Boggs said that an amicus frequently propounds a legal theory that the litigant does not believe is the most promising theory and as to which the litigant is unwilling to devote space. Judge Ripple agreed and said that in such cases the efforts of the party and the amicus are coordinated. In such cases the 15 day period is not necessary because the party and the amicus are aware of each other's arguments.

Mr. Froeb indicated that in any event, fifteen days is not sufficient time for an amicus to get the party's brief, read it, and write the amicus brief. The focusing that the staggered schedule hopes to achieve may be unrealistic given the short interim period.

Mr. Levy countered by observing that the staggered period gives the party some opportunity to have influence upon the amicus brief -- an opportunity that is effectively foreclosed when both are busy preparing briefs on the same schedule.

Judge Ripple called for a preliminary vote on whether there should be a staggered briefing schedule under which an amicus files later than the party he or she supports. Six members favored a staggered schedule and one member opposed that approach.

Given that vote, Judge Ripple asked the Committee to address the length of the delay. He noted that if the period is 15 days, when an amicus brief is filed in support of an appellee the reply brief would be due before the amicus brief. An appellant would file his or her reply without knowing whether an amicus brief will be filed in support of the appellee and without an opportunity to address the arguments made

by the amicus.

Discussion followed about using a 7, 10, or 14 day delay and the effect of Rule 26(a) on time computation and about whether the responding party's time should begin to run from the filing of the motion for leave to file, assuming that the brief must accompany the motion, or from the time the court grants the motion.

Given that the Committee had not yet voted on whether the proposed brief must accompany a motion for leave to file, Judge Keeton suggested that resolution of that issue might ease the discussion about the running of the time for a responsive brief and thence about the length of the stagger. Seven members indicated that if a staggered briefing schedule were used, they would require that the proposed brief be filed with the motion.

Mr. Munford indicated that even with that requirement he believes the time should not begin to run until the court grants the motion. In some circuits leave to file is not routinely granted, the responding party, therefore, needs to know whether the amicus brief is accepted before the party can finish its brief.

Chief Judge Sloviter expressed strong opposition to any proposal that would delay the briefing schedule. Letting an amicus brief delay the briefing schedule would be, she observed, letting the tail wag the dog.

Mr. Froeb noted that in his state system, the amicus must indicate that all the briefs are in and that the amicus has read them before it moves for leave to file. If the party wants to respond to something said by the amicus, the party must file a motion for leave to respond. He indicated that the system seems to work fine and that there is no delay in the regular briefing schedule.

Mr. Kopp indicated that the staggered system can work but that there should be no more than minimal delay in the briefing schedule. He concluded, therefore, that the responding party's time should begin to run when the motion and proposed brief are lodged.

Mr. Levy pointed out that under that scenario, an appellee may need to respond before the court grants an amicus leave to file. The party may use part of its brief to respond to an amicus brief that may never be accepted.

Judge Logan moved that there should not be any delay in the briefing schedule even though an amicus brief is filed on a staggered schedule. Most of the time the amicus brief will be received early enough for the party to include a response in its brief. If, however, significant new arguments are raised in the amicus brief, the party could file a motion requesting adequate time to respond. Judge Hall seconded the motion. Mr. Munford opposed the motion because the appellee will respond to the principal brief and use the filing of an amicus brief as an excuse to get the last brief in the case. Judge Logan pointed out that the court need not permit the response unless it thinks there is sufficient need for it. Judge Hall stated that in her experience the Ninth Circuit does not permit anyone respond to an amicus brief other than at oral argument.

Judge Ripple pointed out that the purpose of the 15 day stagger period is to let everyone know what everyone else is arguing in the case. If there is a 15 day stagger period but the briefing schedule is not delayed, achievement of that goal is undercut substantially. He suggested that the stagger period may be more accommodating to amicus briefs than is necessary and that the Committee might reconsider the wisdom of the 15 day delay.

Mr. Munford moved that the time for filing a responsive brief should run from the filing of the motion by the amicus for leave to file its brief. Specifically, he suggested that lines 60 through 62 of draft one, page 6, be amended to read: "Unless otherwise ordered, for purposes of Rule 31(a), the time for filing the next brief runs from the filing of the motion for leave to file. Mr. Munford stated that he would like to separate the stagger issue from the question of whether the briefing schedule is otherwise extended. He would like to retain the stagger even if the briefing schedule is not extended at all. His motion dealt only with the briefing schedule. Mr. Kopp seconded the motion.

Judge Logan, however, moved for reconsideration of the 15 day stagger. He further proposed adding a new sentence at the end of subdivision (e) of draft two on page 10 of the memorandum. Subdivision (e) of the draft states that "[a]n amicus brief must be filed within the time allowed for filing the principal brief of the party supported. If the amicus does not support either party, the brief must be filed within the time allowed for filing the appellant's brief." Judge Logan suggested adding: "A court may permit later filing, in which event it must specify the period within which an opposing party may answer." That would make it clear that if a court permits an amicus to file a brief after the party supported, it can allow additional time for any responsive briefs. Mr. Froeb seconded the motion.

Judge Ripple called for a vote on Mr. Munford's motion. It was defeated; only two members favored the motion and five opposed it.

Judge Ripple then asked the Committee to consider Judge Logan's motion. Mr. Levy asked what would happen if an amicus brief is filed at the same time as the appellant's brief but the motion for leave to file is not granted within the time for filing the appellee's brief. Mr. Levy asked whether the appellee should respond to the arguments made by the amicus. Judge Logan said that if the amicus brief raises an issue that is important enough that a response to the argument is warranted, the appellee should treat the issue in his or her brief even though the court has not yet ruled on the motion for leave to file. He recognized that the court may never admit the amicus brief but stated that if the argument raised by the amicus is important, it needs to be met in any event.

Mr. Munford asked for clarification as to whether Judge Logan intended only to require that the motion for leave be filed within the time for filing the brief of the party supported, or whether he also intended to require the brief to accompany the motion. Judge Logan, responded that he intended the latter.

Mr. Munford also asked about the time for filing an amicus brief in support of a petition for rehearing. He pointed out that the current rule does not tie the time for filing to the principal brief, rather it requires an amicus brief to be filed within the time allowed the party whose position the amicus supports. Judge Logan responded that he intended to require filing within the time allowed for filing the principal brief of the party supported. He said that he has never seen an amicus brief in support of a petition for rehearing and if one were submitted it should be accompanied by a motion for leave to file it.

The discussion having concluded, Judge Ripple called for a vote on the motion. It passed by a vote of seven in favor and one opposed.

2. Standards

Judge Ripple asked the Committee to consider lines 15 and 16 on page 9 which provide that a motion for leave to file must state "the reasons why an amicus brief is desirable." He suggested that the language from Sup. Ct. R. 37.4 should be substituted for lines 15 and 16. That language is: "The motion shall concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case." He suggested that the Supreme Court language would provide the judge with some standards and also would guide the lawyer in fulfilling the requirement on lines 15 and 16. Judge Hall seconded the motion.

The Committee discussed the extent to which an amicus can raise new issues. The consensus was that an amicus cannot raise an issue not preserved by a party but that an amicus can provide additional arguments supporting a party's position on an issue. The question before a court of appeals, however, is usually much broader than that before the Supreme Court. Mr. Munford suggested that the language should be altered so that the amicus need only show that the facts or "arguments" have not been "adequately presented" by the party. Judge Keeton pointed out, however, that the Supreme Court will hear only the issues on which it has granted certiorari; whereas, the question before a court of appeals is whether the judgment of the district court is correct. Judge Ripple pointed out that Mr. Munford's language retains the idea that an amicus is subject to the laws of waiver and preservation of issues.

Judge Ripple's motion, as amended, passed unanimously.

3. Page Limitation

The next issue considered was the imposition of a page limit on amicus briefs. Both drafts impose a twenty page limit. Judges Boggs and Hall moved adoption of that limit.

Judge Ripple asked the Justice Department representatives whether 20 pages is long enough. Mr. Kopp said that in most instances it would be but that 25 might be more helpful.

Judge Logan spoke in favor of the motion noting that an amicus brief typically focuses on one issue and 20 pages is sufficient.

The Reporter pointed out that the draft permits the court to order otherwise either by local rule or by order in a particular case. Therefore, local rules such as the D.C. rule that permits 25 pages would not be in conflict with the national rule.

The motion passed by a vote of seven in favor, none in opposition, and one abstention.

4. Contents

Judge Logan requested that the Committee consider the language in the draft at the top of page 10 concerning the items that must be included in an amicus brief. He noted that the draft specifies the items that may be omitted but that he would prefer that the rule state positively those items that should be included.

The Reporter stated that a positive statement could be modeled on Sup. Ct. R. 37.6 which states that an amicus brief generally must comply with the requirements for parties' brief "except that it shall be sufficient to set forth . . ." The Reporter indicated, however, that she probably would advise adding a requirement that an amicus brief should include a table of contents and a table of authorities.

Judge Logan moved that the rule should list the items that should be included in an amicus brief in a fashion similar to that of Sup. Ct. R. 37.6. The items that he wanted included were: the interest of the amicus, the argument, and the conclusion as well as a table of contents and a table of authorities. Mr. Froeb seconded the motion. Judge Ripple suggested that requiring a summary of argument would be helpful in screening the briefs. Judge Logan amended his motion to include a summary of argument.

Mr. Munford remarked that the Sup. Ct. R. is confusing and does not clearly tell an amicus what should be included or excluded. While he had no objection to using a positive approach, he suggested that the rule should make it clear whether an amicus needs to do such things as file a certificate of interest. He thought that the list given was incomplete because it does not cover such topics as covers, typeface, form, etc. The Reporter responded that she understood the motion to include the cross-references in the draft at lines 19 and 20, so that the brief must comply with Rule 26.1, 28 and 32. Mr. Munford suggested that it would be clearer to state that an amicus must comply with 26.1 and 32, but with respect to Rule 28 a brief need only include . . .. Judge Logan and Mr. Froeb agreed to that amendment.

Mr. Levy asked whether an amicus actually needs to comply with Rule 26.1. He asked whether it would be grounds for recusal if a judge had some interest in an amicus or its related businesses? Chief Judge Sloviter stated that if participation of an amicus could cause disqualification of a judge, that may serve as grounds for refusing to allow the amicus to file a brief.

The discussion strayed into the question of whether the membership of a trade association could disqualify a judge if the association participates as an amicus. Mr. Munford suggested that 26.1 was aimed at parties and that a national trade association with hundreds of members could not be expected to list all of its members every time it files an amicus brief.

Judge Boggs asked whether the recusal rules are applied with respect to an amicus given that the rules are aimed at disqualifying a judge with a financial interest in the outcome of the case. Judge Ripple and Chief Judge Sloviter said that a number of judges in their circuits treat the rules as applicable even though a judge may have no direct financial stake because of the appearance of impropriety that may

arise if a judge sits on a case and the judge has an interest in an amicus or one of its affiliates. Of course, there is a difference between the participation of a large association such as the National Association of Manufacturers and the participation of a single corporation or small group of corporations. It is difficult to say that it would be improper for a judge to sit if N.A.M. is the amicus and if the judge owns stock in any U.S. manufacturing corporation. If however, the amicus group is composed of ten corporations and the judge owns stock in one or two of them, the appearance of impropriety may well arise.

Mr. Munford suggested that the issue be delayed until the Committee discusses the "affiliates" issue under 26.1. Chief Judge Sloviter suggested that the Advisory Committee should check with the Ethics Committee. She believes that a ruling has been issued on the question of whether the participation of an amicus may disqualify a judge.

Judge Hall stated that the Ninth Circuit believes that an amicus may disqualify a judge and for that reason she believes it is important to require the amicus to provide a certificate of interest with the brief.

Mr. Spaniol said that Sup. Ct. R. 29.1 exempts amicus briefs from the disclosure requirement. The comment, however, prompted discussion about whether the Supreme Court is required by law to obtain disclosure statements.

Mr. Munford moved that Judge Logan's motion be amended to delete the corporate disclosure requirement for amicus briefs. The motion died for want of a second. Judge Logan stated that he failed to second the motion because Rule 26.1 requires the naming only of parent corporations, subsidiaries, and affiliates. In his opinion the language of the rule does not require the naming of the members of a large trade association.

Judge Ripple called for a vote on Judge Logan's motion that the draft be amended to positively state the items that must be included in an amicus brief. The motion passed unanimously.

Mr. Levy stated that the discussion revealed a difference of opinion with regard to the application of Rule 26.1 to trade associations. Judge Ripple asked the Reporter to add a discussion of that issue to the Committee's docket.

5. Amicus Brief in Support of a Petition for Rehearing

The last issue discussed with respect to amicus briefs was whether a court should accept an amicus brief offered in support of a petition for rehearing. Judge Ripple indicated that his circuit receives such briefs. Little attention may be paid to a case until the court enters its judgment. Thereafter, an amicus may join the party in trying to explain the error of the decision.

Judge Hall asked whether the question should be limited to petitions for rehearing or also should include requests for an in banc hearing or rehearing. Judge Ripple responded that he hoped the Committee would address all such issues.

Mr. Munford suggested amending the draft rule so that it uses the language in the current rule requiring an amicus to file within the time allowed the party supported. There would be no express reference to the party's principal brief or to petitions for rehearing, etc. but the language would be broad enough to encompass all such instances. He further suggested that it is unnecessary to discuss instances in which an amicus supports neither party. Several judges responded, however, that there many instances in which an amicus takes no position as to affirmance. Mr. Munford therefore suggested that the sentence be amended to state that in such instances the amicus must file within the time allowed the appellant -- dropping the reference to the appellant's principal brief.

Judge Logan expressed hesitation to specifically mention that an amicus brief may be filed in support of a petition for rehearing. He feared that any such statement would encourage the filing of such briefs. On the other hand, he expressed support for Mr. Munford's language changes that would make the rule broad enough to cover the timing of such briefs. Judge Ripple suggested that a vote be taken on whether specific mention should be made of the possibility of filing an amicus brief in support of a petition for rehearing, etc. Five members supported that approach and two members opposed it.

Mr. Munford suggested that the language of lines 33 and 34 should be amended in accordance with his earlier suggestion. The Committee agreed. With regard to the second sentence, Mr. Munford noted that there could be difficulty with simply requiring a party that does not support either party to file within the time allowed the appellant. In some situations there is no appellant; for example, in a petition for mandamus. He suggested that the amicus be required to file within the time allowed the appellant or petitioner.

Mr. Froeb asked whether an amicus brief must confine itself to the record. He said that in his experience an amicus often attempts to raise facts that are not part of the record. He asked whether the rule should deter or prohibit the introduction of matters that are not part of the record.

Judge Ripple pointed out that the difference between constitutional facts and adjudicative facts can become quite blurry with an amicus. Discussion of background or contextual facts is permissible but that an amicus should not be talking about adjudicative facts that are part of the cause of action.

Judge Keeton expressed strong hesitation to address the issue. He said that the typical, useful amicus brief deals with constitutional facts or legislative facts -- facts about the economic, social, or political realities that have a bearing on the law making decision. It would be a very complex area to deal with in a rule.

Because she would not be able to attend the meeting the next day and was concluding her term as liaison to the Committee, Chief Judge Sloviter thanked the Committee for its hospitality and Judge Ripple thanked her for her valuable participation.

Judge Keeton distributed documents for the Committee's consideration in connection with the discussion it would have the following morning concerning facsimile filing.

The meeting adjourned at 5:00 p.m..

The meeting resumed at 8:30 a.m. on September 23rd in rooms B & C of the Education Center of the Federal Judiciary Building.

Judge Ripple opened the morning by outlining the matters he hoped to discuss during the remainder of the meeting. He indicated that the first matter for discussion would be the special assignment from the Judicial Conference dealing with filing by facsimile. Upon completion of that discussion, he stated that he would take up items 91-25 and 92-4, both of which deal with Rule 35 and suggestions for rehearing in banc. Because the Committee had already approved some changes to Rule 35, Judge Ripple thought it would be desirable to complete all other items bearing on the in banc rule so that all changes could move forward together. Judge Ripple indicated that he would reserve some time at the end of the meeting for the Reporter to discuss the items listed as "Report Items" on the agenda.

Judge Ripple then asked Judge Keeton to begin the discussion of the facsimile filing materials.

Fax Filing

1. Background

Judge Keeton explained the need to get a proposal ready, if possible, for consideration by the Judicial Conference in September 1994. That meant that if any rule amendments are needed, they must be approved by the Advisory Committee at the September meeting and published by November 1 along with the rules approved by the Standing Committee at its June meeting. Judge Keeton stated that approval for publication of any proposed rule changes bearing on facsimile filing would likely be handled by the Standing Committee by telephone.

In order to facilitate that process Judge Keeton had prepared and distributed the previous evening a redraft of existing Rule 25. He worked from the draft of the rule just approved by the Judicial Conference for submission to the Supreme Court. Judge Keeton's redraft read as follows:

Rule 25. Filing and Service.

(a) Filing.

(1) A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished

(A) by mail addressed to the clerk;

(B) by facsimile transmission, by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States, if the court of appeals by local rule or by order in a particular case has approved facsimile transmission; or

(C) by filing with a single judge, with that judge's permission, a motion that may be granted by a single judge, in which event the judge must note thereon the filing date and give it to the clerk.

(2) Filing is not timely unless the paper is received by the clerk or the single judge, or the facsimile transmission is received by the clerk, within the time fixed for filing, except that briefs and appendices are treated as filed on the date of mailing if the most expeditious form of delivery by mail, other than special delivery, is used.

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

(4) The clerk must not refuse to accept for filing any paper presented for that purposed solely because it is not presented in proper form as required by these rules or by any local rule or practice.

* * * * *

(c) Manner of Service. Service may be personal, by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case. Personal service is complete on delivery of a copy to a clerk or other responsible person at the office of counsel. Service by mail is complete on mailing. Service by facsimile transmission is complete upon electronic acknowledgement of receipt by means meeting the standards then in effect under Guidelines for Receiving Facsimile Transmissions promulgated by the Judicial Conference of the United States.

(d) Proof of Service.

[insert, in line 43 of the draft approved by the Judicial Conference in September 1993, after "Mailing" the words "or facsimile transmission," and in line 44, after "mailed" the words "or transmitted."]

Judge Keeton indicated that he would ask the Committee to focus first on the redraft of Rule 25. He noted, however, that the Committee also must look at the Guidelines for Facsimile Filing that were presented to the Judicial Conference. Judge Keeton stated his belief that the Guidelines need further revision.

Judge Keeton indicated that he would like the Committee to consider whether there are any parts of the Guidelines that should be included in the rules. He stated that it would be desirable to avoid inclusion of material in the rules that does not need to be there. Inclusion in the rules of technical standards governing the types of machinery to be used, etc. would be especially undesirable because amendment of the rules

is both cumbersome and time consuming and it would be difficult for the rules to keep pace with technological advancements.

Judge Keeton indicated that authorizing the Judicial Conference to amend the Guidelines without review by the Supreme Court and Congress presents an issue similar to the one the Committee previously discussed concerning delegation to the Administrative Office of printing standards. He indicated, however, that he believes there is a strong argument that establishing technical standards in Guidelines promulgated by the Judicial Conference is not inconsistent with the Rules Enabling Act. Judge Keeton stated, however, that the Committee might want to consider that issue.

In addition to any question about the Rules Enabling Act, Judge Keeton, said that he also was concerned about accessibility of the Guidelines. He indicated that he would like the Guidelines to be printed for public comment at the same time as the proposed rule amendments. He also believes that the Guidelines should be transmitted to both the Supreme Court and Congress. He further suggested that they might be printed as an appendix to the rules or in the notes.

As a last matter, Judge Keeton suggested that he would like to further amend his redraft of the Guidelines. His original objective had been to remove any mention of "filing" from the Guidelines because he believes that all "filing" rules should be contained in the rules. As a consequence, he had changed the title from "Guidelines for Filing by Facsimile" to "Guidelines for Receiving by Facsimile." He indicated that he thought a better title would be "Guidelines for Facsimile Transmission."

For clarification Judge Logan asked about the origin of the Guidelines. Judge Keeton responded that the original draft had been prepared by the Court Administration Committee. Judge Logan then asked whether it would be appropriate for a rules committee to suggest changes in the Guidelines. Judge Keeton responded that he believes such recommendations would be appropriate. In fact, the draft from which he was working was altered last summer by a working group composed of the advisory committee reporters who redrafted the Guidelines in an attempt to minimize the conflicts between the Guidelines and the rules. Judge Keeton reported that there had been some sentiment at the Standing Committee's June meeting to simply disapprove the draft Guidelines because of the conflicts between the Guidelines and the rules. Judge Keeton had opposed a simple rejection of the Guidelines because he feared that there would be members of the Judicial Conference who favored getting the guidelines in place and might adopt them as originally drafted rather than suffer any further delay. Therefore, he had organized the drafting subgroup during the Standing Committee meeting.

Discussion followed concerning possible problems with the Rules Enabling Act. Judge Keeton believes that delegation by rule to the Judicial Conference of power to fashion guidelines differs from the Committee's earlier problems with delegation of printing standards. In this instance, the Judicial Conference has already promulgated Guidelines. Those Guidelines permit the courts to accept facsimile filings in emergencies. The current proposal is, therefore, simply to amend those Guidelines. So, the Conference has already taken an affirmative position on its power to promulgate guidelines.

With regard to the proposed amendments to Rule 25, Judge Keeton suggested that there be another change to Rule 25(e) to accommodate the fact that parties are often required to provide multiple copies of the document filed. Judge Keeton suggested adding the following language to Rule 25(e):

"and, when facsimile transmission is permitted, may allow extra copies to be presented within a reasonable time after the facsimile transmission is received."

That addition would allow a clerk to refuse to receive more than one copy by facsimile transmission and require that the party follow the facsimile transmission with hard copies.

Judge Logan asked whether the style subcommittee would be able to review the draft rules before publication. Judge Keeton stated that Mr. Brian Garner and the style subcommittee would be occupied with the Civil Rules Committee until after that committee's meeting in late October. Therefore, the amendments would be prepared for publication without review by the style committee.

Having finished its preliminary discussion, the Committee turned its attention to the task of approving some version of Rule 25 and of the Guidelines.

2. Guidelines vs. Rules

Judge Ripple discussed the importance of the distinction between information that should be in the Guidelines versus that which should be included the national rules. Judge Ripple emphasized that he would like to keep everything that a practitioner needs to know in the rules. In contrast, he stated that provisions regulating court conduct need not be in the rules and, therefore, could appropriately be included in the Guidelines. Judge Ripple questioned whether the material in parts V, VI, and VII of the draft Guidelines should be there. He stated that a requirement that certain items be included on a cover sheet is so basic that it should be found in either the national or local rules.

Judge Keeton suggested the possibility that some of the information in the Guidelines could be placed in a form that would follow the rules. Mr. Munford suggested that placing the Guidelines in an appendix to the rules might also serve the same purpose. Judge Keeton indicated, however, that the drawback of either approach is that amendment of either a form or appendix requires the full procedures under the Rules Enabling Act.

Judge Williams noted that if everything a practitioner needs to know should be in the rules rather than the Guidelines, then even all the technical standards in part III of the draft Guidelines would need to be in the rules.

Mr. Munford pointed out that not all information that practitioners need is included in the rules. With regard to the fee for filing a notice of appeal, the rules simply refer to the statute setting the fee. The amount of the fee is not included in the rules. Judge Keeton stated that the statute actually does not set the fee; the statute authorizes the Judicial Conference to set the fee schedule and, in fact, the fee schedule set by the Conference is not as readily accessible as he would like. Parties and lawyers who are unfamiliar with the fee schedule usually receive the information from the clerk's office.

Judge Ripple argued that the last sentence of existing Rule 25(a) means that the technical standards need not be included in the rule. That sentence states: "A court of appeals may, by local rule, permit papers to

be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States." That sentence was approved by Congress and has the force and effect of law. The intent of that sentence was to authorize the Judicial Conference to establish technical standards. Further, the technical standards do not impact the daily practice of law. Rather, a practitioner acquiring a piece of machinery has a one time question about whether the equipment meets the federal standards. Judge Ripple argued that parts V, VI, VII, and VIII(1) & (2) should be in the rules.

Mr. Froeb and Mr. Munford indicated agreement with Judge Ripple's basic principle that directions to practitioners should be easily accessible. Mr. Froeb asked, however, whether it is important that all the information enumerated in part VII of the Guidelines be on the cover page of a fax transmission. Mr. Strubbe replied that the court probably needs all of that information. Judge Keeton asked whether it is truly necessary that all of the information be included on the fax cover sheet as distinguished from the rest of the document. Judge Keeton suggested that perhaps all of part VII could be omitted.

Judge Logan suggested that both parts V (Original Signature) and VI (Transmission Record) should be included in the national rules but that perhaps all other matters could be covered by local rules.

Mr. Kopp suggested breaking the whole issue down into two tracks. The courts that are interested in permitting fax filings on a routine basis need guidelines so that they can do so. As soon as there are guidelines those courts can proceed by local rule. While there may be some need for uniformity in this area as in others, the only matter as to which there is urgency is the technical standards. Therefore, he suggested that the rules process may proceed to develop uniform national rules but not on such a fast track as the guidelines.

Judge Keeton responded that it would be consistent with the objectives of the Court Administration Committee to have a national rule that authorizes local facsimile filing rules. He expressed continuing concern, however, about the possibility that there might be an intervening standard (the Guidelines) that would restrict a local court's authority to develop such rules. In other words, there remains the possibility that even if a national rule grants broad authority to fashion local rules, the Guidelines could be adopted and narrow the scope of local rulemaking authority on the topic.

Judge Keeton stated that it might be possible to retain parts I, II, and III of the Guidelines, along with Rule 25(a)(1)(B), and recommend that the rest of the matters currently covered by other parts of the Guidelines could be referred to the local courts for adoption as local rules.

Judge Logan agreed. Because Rule 25(a) requires a local rule, it can be the responsibility of the circuit adopting such a rule to include in it all information needed by a lawyer who files by fax. He suggested, therefore, that the national rule need do nothing more than authorize local rules permitting fax filing. Eventually the Committee may feel ready to establish national standards but because of the newness of the entire process this may be an appropriate topic for local experimentation.

Judge Keeton suggested that if the Committee favors such an approach it should make a recommendation as to the limitations of the guidelines. That is, the Committee should identify that material that it believes

is appropriate for the Guidelines and recommend that all other matters be covered either by national or local rule.

Judge Ripple then stated that the first question the Committee should address is whether, as a matter of principle, matters that affect the conduct of practitioners should be in rules rather than the Guidelines. If the vote is that such matters should be incorporated in the rules, then it would be appropriate to discuss whether they should be in the national rules or local rules. If the vote is that it is not necessary to include practitioner related directions in rules, then the Committee could discuss simple coordination of all the information.

To move the discussion along Judge Ripple moved that all matters concerning the conduct of litigation should be in either national or local rules. Judge Logan seconded the motion. Judge Williams asked whether the motion was subject to Judge Ripple's earlier *caveat* on technical requirements such as the type of machines. Judge Ripple replied affirmatively.

Mr. Kopp voiced strong agreement with the motion. He pointed to the original signature provision in the proposed Guidelines. That provision says that if the original signed document is not filed, it must be maintained until the litigation concludes. Mr. Kopp stated that any such requirement should be as accessible as possible and, therefore, should be included in a rule.

Mr. Froeb agreed in principle but argued that there are many matters that practitioners know intuitively and it may not be necessary to have all of the detailed directions currently found in the Guidelines.

The discussion having concluded, Judge Ripple called for a vote on the motion to include directions to practitioners in rules rather than the Guidelines. The motion passed unanimously.

3. National Rule vs. Local Rules

Following the decision-making matrix he had announced earlier, Judge Ripple stated that the next question was whether any necessary directions to practitioners should be in national or local rules. He suggested that Judge Keeton's draft of Rule 25 serve as a starting point and he specifically asked the Committee to focus on draft Rule 25(a)(1)(B). Judge Ripple noted that the language of that subparagraph differs from the corollary provision in current Rule 25(a) and he asked Judge Keeton whether he intended to accomplish something different. Judge Keeton stated that his intent was the same but that he had simply attempted to restructure the rule in the manner of the style subcommittee. Given that understanding, Judge Ripple suggested that the Committee discuss whether some matters should be governed by national rule and whether others (and which ones) could be subject to local variation.

On the basis of prior discussion, Judge Ripple suggested that one possibility would be to recommend that:

1. the national rules simply continue to authorize local rules;

2. the Guidelines include only parts I, II, and III of the current draft guidelines (*i.e.*, all practitioner conduct should be excised from the Guidelines); and

3. local rules be used to regulate practitioner conduct.

Mr. Froeb moved that approach; the motion was seconded by Judge Hall.

Judge Hall suggested that the Committee might expedite the local rules process by sending the circuits a model rule. The suggestion was taken as a friendly amendment to the motion.

Judge Logan expressed support for the motion. He focused upon the original signature requirement. While he had originally thought that such a requirement should be in the national rule, upon reflection he had changed his mind. Because it is necessary to have a local rule authorizing facsimile filing, he thought that it would not be inappropriate for some courts to say that a person who files by fax must file the original by next mail while others might be content to allow the party to simply retain the original until the conclusion of the litigation.

Vote was taken on the motion and it passed unanimously. Judge Ripple summarized the Committee's understanding of that vote as follows: 1) the question of practitioner conduct with respect to facsimile filing should be covered by local rule, at least for the near future; 2) the Committee adopted that approach because local experimentation would provide an opportunity to perfect the local rules before going to a national rule; and 3) the Committee would prepare a model rule or checklist to be used by the circuits in the development of their local rules.

4. <u>The Guidelines</u>

The discussion then turned to the draft Guidelines and an effort to identify those provisions that should remain in the Guidelines and those that should be excised.

Upon examining part I, Mr. Strubbe suggested that part I paragraph (3) might arguably govern attorney conduct and therefore should be excised from the Guidelines. That provision is entitled "Prohibited Documents" and provides:

Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.

Judge Keeton offered a proposed modification of that provision which he thought could make its retention consistent with the Committee's intent:

A communication by facsimile transmission must not be treated by a clerk as received for filing unless the court has expressly authorized facsimile transmission by local rule or by order in a particular case.

Judge Ripple noted that even the amended provision comes close to the line that the Committee had decided to draw. If the effort is to keep the Guidelines fairly stark, perhaps this could be eliminated from them.

Mr. Munford stated that he believed that any such provision would conflict with the Rule 25 provision prohibiting a clerk from refusing to file a document because it is not in proper form.

Judge Ripple moved that part I paragraph (3) be deleted from the Guidelines. Judge Logan seconded the motion. It passed unanimously.

The discussion moved to part II of the Guidelines. Judge Keeton suggested that his handwritten material be substituted for part II paragraph (2). Judge Keeton's proposed part II paragraph (2) would define "Receive by facsimile" as follows:

(2) "receive by facsimile" means a clerk's receiving by one or the other of the following means:

(A) receiving by a facsimile machine in the clerk's office of a facsimile transmission of a document;

(B) receiving in the clerk's office a printed copy of a document sent by facsimile transmission to a facsimile machine located outside the clerk's office."

Judge Keeton indicated that the latter provision would allow a local rule to receive a document lacking an original signature because it was sent to a fax machine outside the clerk's office and that document was presented for filing.

Mr. Munford asked whether the provision for documents received by a facsimile machine located outside the clerk's office has anything to do with facsimile filing. He stated that in his view it makes no difference whether a document has a facsimile of a signature or an original signature. Mr. Munford further indicated that in his opinion the clerk would not be free to refuse a document under the new provision in Rule 25 prohibiting a clerk from refusing to file a document because it fails to comply with a requirement of form. The Committee discussed the issue and there was clear division of opinion. Judge Ripple concluded that the signature question clearly must be addressed in the model local rule.

Judge Keeton's redraft of part II subparagraph (2)(B) was amended by deleting the words "printed copy of a" so that it read, "receiving in the clerk's office a document sent by facsimile transmission to a facsimile machine located outside the clerk's office." Having approved that change, part II was unanimously approved for retention in the Guidelines.

The Committee then turned its attention to part III of the Guidelines, the technical requirements provisions. Judge Logan noted that it governs sending as well as court receipt of facsimile transmissions. Judge Ripple noted once again his belief that Rule 25 currently authorizes the Judicial Conference to establish such technical standards and that Judge Keeton's redraft of Rule 25(a)(1)(B) retains that provision.

Because Committee attention had returned to Rule 25, Judge Keeton noted that if the title of the Guidelines is changed to Guidelines for Facsimile Transmission then there would need to be a language change in Rule 25(a)(1)(B). In the second line of that paragraph the word "receiving" should be stricken as well as the "s" at the end of the word transmission in the third line. The same changes were approved in 25(c).

Mr. Kopp asked whether the technical requirements in Part III should apply to transmission to an outside agency as well as those directly to a court. The Reporter stated that clearly some of them should apply even to the outside agency because they affect the quality of the document received. The Committee concluded that the provisions of part III should be retained in the Guidelines.

The Committee considered part IV governing resource availability. Part IV indicates that courts will not receive additional personnel or funds for equipment due to adoption of a fax filing policy. Because that part of the Guidelines is so clearly addressed to the courts and not to practitioners, there was agreement that it belongs in the Guidelines.

Judge Ripple moved that part V -- dealing with original signatures -- be made part of the model rule because it deals with practitioner conduct; Judge Boggs seconded the motion. The motion passed unanimously.

For clarification, Mr. Strubbe asked whether the rules should require, as the Guidelines suggest, that in the absence of a local rule authorizing facsimile transmissions on a regular basis, a court order would be necessary to permit facsimile filing. Mr. Strubbe noted that in his court such requests are currently handled by the clerk's office rather than by a judge. Judge Ripple suggested that when preparing a model local rule, that issue will need to be addressed, but that the Committee's current concern was simply to determine which material should remain in the Guidelines and which should be excised.

Judge Ripple moved that part VI -- dealing with transmission records -- should be deleted from the Guidelines and considered as part of the rulemaking process. The motion was seconded by Mr. Munford. Mr. Froeb suggested that such a requirement would be unnecessary even in the rules. The motion passed unanimously.

Judge Ripple then moved that part VII -- dealing with cover sheets -- should be deleted from the Guidelines and made part of the rulemaking process; Judge Hall seconded the motion. It passed unanimously.

The Committee focused upon part VIII, dealing with collection of filing fees and authorizing additional fees for facsimile filing. Mr. McCabe pointed out that the pertinent statutes, §§ 1913, 1914, 1915, and 1930, say that the Judicial Conference shall prescribe all fees and the clerks may only charge fees authorized by the Judicial Conference. Judge Keeton concluded that the statutory directives make it unnecessary to include the provisions in part VIII in either the national or local rules. Judge Ripple moved that part VIII be left intact and that it be retained in the guidelines; the motion was seconded and passed unanimously.

At 10:30 a.m. the Committee took a 15 minute break.

Judge Ripple continued the discussion of facsimile filing by noting that although the Guidelines make no mention of "service" by fax, some members of the Judicial Conference anticipated that the rules would address the question of service by facsimile. Judge Ripple suggested that in light of the decisions already

made by the Advisory Committee, it would be consistent to let local rules govern service by facsimile, at least in the first instance. He asked the Committee, therefore, to turn to Judge Keeton's draft of Rule 25(c) and suggested that the first sentence be adopted. "Service may be personal, ~~or~~ by mail, or by facsimile transmission if permitted by the court of appeals by local rule or by order in a particular case." The last sentence of Judge Keeton's draft of that paragraph was considered unnecessary. Judge Keeton explained that he had drafted the last sentence before the Committee's decision to omit from the Guidelines any matter bearing on an attorney's conduct.

Judge Ripple moved adoption of the first amended sentence. It was seconded by Judge Hall and unanimously approved.

Judge Logan volunteered to head the subcommittee to draft a model local rule. He expressed the desire to complete the work within the next month. He asked the Reporter, Judge Hall, and Judge Boggs to join him on the subcommittee.

Judge Logan asked whether the Committee had adopted the change in 25(c) and the additional sentence in 25(e). Judge Keeton stated that in light of the items taken out of the Guidelines, there were no substantive changes made by his draft except the one sentence in 25(c) dealing with service. Therefore, it was concluded that only the one sentence change in Rule 25(c) needed to go out for publication.

At the conclusion of the discussion of the fax filing issues there was approximately one hour remaining in the meeting time. Judge Ripple suggested that the Committee spend that time discussing Item 91-25, regarding the contents of a suggestion for rehearing in banc, and Item 92-4, adding intercircuit conflict as a basis for granting hearing or rehearing in banc, because the Committee had recently worked on other amendments to the in banc rule, Rule 35.

Item 91-25

The Local Rules Project recommended that the Advisory Committee examine local rules adopted by nine circuits which outline the form of a suggestion for in banc determination. When responding to the Local Rules Project, the Fifth Circuit recommended that the Advisory Committee consider adoption of 5th Cir. R. 35. The Advisory Committee initially discussed both suggestions at its December 1991 meeting. At that time the Committee expressed no strong interest in specifying the contents of a suggestion for in banc consideration. Since that time, however, two members of the Advisory Committee had indicated interest in the earlier proposals.

The Reporter began the discussion by explaining the two drafts presented in her memorandum. Draft one, found at page 4, involved some reorganization of the rule as well as one major substantive change in subdivision (b). The heart of the draft was a new requirement that a petition for in banc review must begin with a statement demonstrating that the case meets the criteria for in banc consideration. It said that a petition must begin with a statement that either

(1) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (citations to the conflicting case or cases is required) and that

consideration by the full court is necessary to secure and maintain uniformity of the court's decisions; or

(2) the appeal involves one or more questions of exceptional importance; each such question must be concisely stated, preferably in a single sentence.

Draft two, beginning at page seven of the memorandum, would require the same statement demonstrating that the case is appropriate for in banc consideration and also added a list of items that must be included in any such petition, for example a corporate disclosure statement, statements of the issues and of the case. It also included a length limitation applicable to all such petitions.

Judge Ripple suggested that the Committee first consider whether it is interested in making the sort of changes suggested in either of the Reporter's drafts and then address the Solicitor General's suggestion.

Judge Logan expressed a preference for draft one if any changes are to be made. He thinks that the detail specified in draft two is unnecessary. He questioned, however, the need to make any changes. Mr. Munford agreed that the level of detail in draft two is unnecessary.

Judge Hall said that she likes draft one but would like to add to it the page limitation in draft two.

Consensus developed to concentrate on draft one but to include the page limitation in draft two.

With regard to moving the paragraph dealing with length from draft two, it was suggested that subdivision (b) of draft one be structured in the same way as draft two. That is, that subdivision (b) should have two paragraphs: paragraph (1) dealing with the contents of the petition and paragraph (2) dealing with length. It was further suggested that if paragraph (b)(2) (lines 34-38) were moved to draft one, that it be shortened so that it ends after the words "15 pages" on line 35. Several judges indicated, however, that they find a table of contents and authorities important in such petitions and that those items should not count against the page limits.

Judge Ripple indicated that the intent of a limitation on length is to limit the number of pages that a judge must read and consider in deciding the case. He said that the items excepted from the page limit in the draft generally are important to have in a petition for rehearing in banc and help a judge to understand and organize the material in the text. Judge Logan asked whether it would be sufficient to limit the petition to 15 pages "of text." He feared that the explicit exceptions in the draft for corporate disclosure statements, tables of contents, and table of authorities would raise an inference that a petition should contain those items and it is not the practice in the Tenth Circuit to include them.

Mr. Munford suggested using the language in the petition for rehearing rule, Rule 40(b). The limitation does not have any exclusions. It says:

The petition shall be in a form prescribed by Rule 32(a), and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages.

The possibility of including no page limit in Rule 35 was also considered on the theory that Rule 40(b) would govern because a request for in banc consideration is, in 99% of the cases, a petition for rehearing. (The other 1% are those cases in which there is a request that the initial hearing be in banc.)

Because Rule 40 focuses heavily on petition for panel rehearing, both Mr. Munford and Judge Williams stated that there should be a separate length limitation in Rule 35 even if it were only a cross-reference to Rule 40(b). Mr. Munford suggested, however, that Rule 35 may need to require a corporate disclosure statement because new judges will be participating and they need to be informed about the parties affiliates.

Judge Ripple summarized the alternatives before the Committee as follows:

1. the page limitation provisions in draft two could be moved in their entirety to draft one;

2. a petition could be limited simply to fifteen pages;

3. a petition could be limited to fifteen pages of text; or

4. the length provision could simply cross-reference or be modeled upon Rule 40(b).

Judge Ripple called for a straw vote indicating each member's preference. Alternative one received one vote; alternatives two and three each received two votes; and alternative four received four votes.

After additional discussion, a final vote was taken on the options receiving the most support during the discussion, options three and four. On final vote, a limitation to fifteen pages of text received four votes, and a provision modeled on Rule 40(b) received five votes. The provision approved specifically stated that

Except by permission of the court, or as specified by local rule of the court of appeals, a petition for hearing or rehearing in banc may not exceed 15 pages excluding those pages excluded by Rule 28(g).

Item 92-4

The Committee then addressed the Solicitor General's suggestion that intercircuit conflict should be made an explicit ground for granting an in banc hearing.

Mr. Kopp recounted the history of the proposal which has been narrowed since it was originally submitted by Solicitor General Starr and which, in its present form, has the support of current Solicitor General Days. He noted that four circuits already have rules or internal operating procedures that recognize a conflict with another circuit as a legitimate basis for granting a rehearing in banc. Existing Rule 35(a) provides that a matter of "exceptional importance" is grounds for a rehearing in banc and that language allows a petitioner to argue that intercircuit conflict raises an issue to the level of exceptional

importance. Mr. Kopp noted that the proposal would not require a court to grant an in banc hearing whenever there is an intercircuit conflict. It would simply make it clear that the existence of such a conflict is an appropriate consideration weighing in favor of granting in banc review and may help a lawyer to focus his or her argument.

Mr. Kopp also used broader philosophical arguments to support the proposal. The existence of an intercircuit conflict means that federal law is being interpreted differently in different parts of the country simply because there is an administrative division of the federal courts into circuits. Although the Supreme Court is the institution intended to resolve such conflicts, given the limited ability of the Supreme Court to grant certiorari there are conflicts among the circuits that are not being resolved by the Supreme Court. In an era when significant structural reforms, such as the intercircuit tribunal, are being proposed to deal with this problem, Mr. Kopp argued that it would be better for the existing courts to use every device they have at their disposal to address the problem before there is consideration of major restructuring.

Mr. Kopp moved that the Solicitor's proposal be incorporated in draft one. Judge Ripple seconded the motion.

Judge Logan indicated that he would include a reference to intercircuit conflict in (b)(2) - that an appeal involving one or more questions of exceptional importance may be appropriate for in banc hearing. He indicated, however, that he would not include such a reference in (b)(1) - that when a panel decision is in conflict with a decision of the U.S. Supreme Court or of the court to which the appeal is addressed an in banc rehearing is appropriate. The panel issuing a decision, obviously does not believe that it conflicts with holdings of the United States Supreme Court or of the circuit, because it would be inappropriate to issue such a decision. However, a panel may enter a decision in direct conflict with a decision of another circuit. Because the former are grey and the latter may be clear, Judge Logan stated that he feared inclusion of a reference in (b)(1) to panel decisions in conflict with decisions in other circuits might give rise to an inference that an in banc hearing must be granted whenever a panel decision conflicts with the opinion of another circuit.

Judge Ripple expressed general support for the proposal but agreed with Judge Logan's reservation. Mr. Kopp emphasized that the draft was not intended to make the granting of a hearing in banc mandatory.

Because the draft had been prepared prior to the Item 91-24 drafts, it was not integrated with those new drafts. The Reporter asked Mr. Kopp for clarification as to whether the proposal was to amend Rule 35(a) or (b). Mr. Kopp responded that the proposal is to amend 35(a) but that if it were accepted, some adjustments would need to be made to 35(b). He emphasized again that the proposed amendment to 35(a) was not intended to create any category of mandatory in banc review, and that any such implication should be avoided.

Judge Williams suggested that intercircuit conflict might be treated as a separate category of cases as to which in banc review would be appropriate.

Judge Ripple indicated that there seemed to be a consensus that the Rule should include some reference

to intercircuit conflict as grounds for granting rehearing in banc. Given the late hour and the fact that the Committee had decided upon a new draft of Rule 35, he suggested that the Committee take a vote in principle on the suggestion and ask the Reporter to work out the language for consideration at the next meeting. Judge Boggs so moved and Judge Hall seconded the motion. The motion passed unanimously.

Mr. Strubbe indicated that the caption to (a) probably should be changed from "When Hearing or Rehearing in Banc Will Be Ordered" to "When Hearing or Rehearing in Banc May Be Ordered." Judge Ripple also suggested that on page 6, line 40 probably also needs revision. The provision that "a vote need not be taken to determine whether the cause will be heard or reheard in banc unless a judge requests a vote" could permit a senior judge or a judge sitting by designation to call for a vote on a rehearing in banc.

The Reporter noted that proposed amendments to Rule 35 were forwarded to the Standing Committee last summer and are scheduled to be published this fall. She inquired whether it would be appropriate to request that those proposals not be published at this time but be held until these additional changes to Rule 35 are ready for publication; that would allow all changes to be published at the same time and avoid confusion.

Mr. Rabiej stated that the Standing Committee had given the Chairman discretion to determine the publication date of the proposed amendment so that Judge Keeton had authority to withhold publication of any or all of the rules. Judge Keeton approved the withdrawal of the Rule upon the request of the Advisory Committee.

Miscellaneous

The Reporter circulated the latest version of the "uniform" rules on technical amendments and uniform numbering of local rules. She described the changes that had been made since the last time the Advisory Committee reviewed the rules. The changes were made to conform the appellate version to the versions approved by the Standing Committee last June. She asked that if any members had any strong objections to any of the provisions, they contact her as soon as possible in view of the November 1 publication date.

The Reporter also indicated that the November 1 publication packet would include a FRAP proposal that had not been previously considered by the Advisory Committee. The proposal conforms Rule 4(a)(4) to changes proposed in Civil Rules 52, 59, and 60. Those rules are currently inconsistent as to whether posttrial motions must be "served" within 10 days, "filed" within 10 days, or "served and filed" within 10 days. The Civil Rules Committee will publish proposed amendments requiring that all ten day posttrial motions must be "filed" within 10 days. Conforming amendments to Fed. R. App. P. 4(a)(4) will also be published.

As the Committee prepared to adjourn, Judge Logan expressed his appreciation for Judge Ripple who has served the Committee as Reporter, Member, and Chair, for fourteen or fifteen years. Mr. Froeb was also concluding his six year term on the Committee, and Judge Logan expressed his gratitude to him for all his work. There was a round of applause for both.

Judge Ripple wished Judge Logan good luck and thanked Mr. Rabiej for all his work. Judge Ripple also thanked Judge Keeton for all of his support and all that he did to make the Rules Committees run smoothly and effectively.

Respectfully submitted,

Carol Ann Mooney