MINUTES OF THE MEETING

OF THE ADVISORY COMMITTEE ON APPELLATE RULES

OCTOBER 19, 20, & 21, 1995

Judge James K. Logan called the meeting to order on October 19, 1995, at 8:30 a.m. in the Judicial Conference Center of the Thurgood Marshall Federal Judiciary Building in Washington, D.C. In addition to Judge Logan, the Advisory Committee Chair, the following committee members were present: Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the meeting on behalf of Solicitor General Days. Judge Alicemarie Stotler, the Chair of the Standing Rules Committee, and Judge Frank Easterbrook, the liaison member from the Standing Committee, were both present. Mr. Patrick Fisher, the Clerk for the Tenth Circuit attended on behalf of the clerks. Mr. George Pratt, a member of the Standing Committee's subcommittee on style, and Mr. Bryan Garner and Mr. Joseph Spaniol, consultants to the Standing Committee were in attendance. Mr. John Rabiej and Mr. Mark Shapiro, both of the Rules Committee Support Office, were present. Chief Justice Pascal Calogero, a member of the Advisory Committee; Ms. Judith McKenna, of the Federal Judicial Center; and Professor Dan Coquillette, the Reporter for the Standing Committee, joined the meeting later.

Judge Logan began by introducing Judge Frank Easterbrook and Judge George Pratt. Judge Easterbrook is a United States Circuit Judge for the Seventh Circuit and the liaison from the Standing Committee to the Advisory Committee. Judge Pratt recently resigned as a United States Circuit Judge for the Second Circuit. He was a member of the Standing Committee and of its subcommittee on style. Because he had been an integral member of the team that initially worked on the restyling of the appellate rules, he attended the meeting to aid in discussion of the rules under consideration. Judge Logan welcomed Judge Easterbrook and Judge Pratt.

The minutes of the April 1995 meeting were approved as submitted.

Judge Logan announced that discussion of the self-study prepared by the Long Range Planning Subcommittee of the Standing Committee would be discussed the next morning. Judge Stotler distributed a questionnaire about the self-study to the members of the Advisory Committee. She requested that the members complete the questionnaire by the next day so that it might serve as the basis for the discussion.

I.

## Liaisons from the Advisory Committee to the Circuits

Judge Logan noted that the 1987 Judicial Conference Committee Procedures require that each judicial conference committee appoint a liaison for each circuit so that there is someone to whom concerns can be addressed. Chief Judge Gilbert Merritt, Chair of the Executive Committee of the Judicial Conference of the United States, had recently written to the chair of each judicial conference committee requesting that the liaison members be designated. Judge Logan assigned the following members of the Advisory Committee to act as liaisons to the circuits:

Judge Garwood - 3rd, 5th, and 6th circuits;

Judge Kozinski - 7th, 8th, and 9th circuits;

Judge Logan - 1st, 2nd, 10th, and 11th circuits; and

Judge Williams - 4th, District of Columbia, and Federal circuits.

II.

## Style Project

The committee discussion turned next to the restyled rules. Most of the discussion for the remainder of the following two and a half days focused upon specific word changes in the entire set of rules. Whenever the committee believed that a word choice had substantive consequences, it requested that the choice be discussed in the Committee Notes that will accompany the rules. These minutes will not reiterate the discussions that have been incorporated in the Committee Notes or attempt to recount the detailed grammar and word-choice discussions that occupied most of the meeting time.

In attempting to improve the language of the rules, existing ambiguities were unmasked and questions about the meaning of rules arose. In order to complete a new draft, the Advisory Committee ordinarily had to resolve an ambiguity by choosing one of the competing interpretations. Those choices are discussed in the Committee Notes. Some of the questions about the operation of the rules were sufficiently complex that the Advisory Committee decided that it was unnecessary to resolve them as part of this project, but requested that the questions be added to the committee's table of agenda items for future consideration. In addition, review of the rules gave rise to new ideas for substantively improving them. These ideas were also deferred for future consideration.

The committee asked that the following items be added to the agenda for future consideration:

A. Rule 3(d) requires the district clerk to serve a copy of a notice of appeal on all other parties. Similarly, Rule 15(c) generally requires the circuit clerk to serve a copy of a petition for review of an agency decision on each respondent. The Advisory Committee will discuss amending both rules to require that

the appellant, or petitioner serve the copies rather than the clerk.

B. Rule 4(a)(5) permits a court to extend the time to file a notice of appeal if a party files a motion for an extension within 30 days after expiration of the time prescribed for filing by Rule 4(a). The rule requires the party to show excusable neglect or good cause. Some courts have taken the position that a "good cause" extension is not available after expiration of the original appeal period. A member of the committee wants to discuss whether a showing of "good cause" should be sufficient when the motion for extension is filed after expiration of the original time to file a notice of appeal.

C. Rule 4(a)(7) says that a judgment or order is entered when it is entered in compliance with Rules 58 and 79(a) of the civil rules.

Rule 58 requires that "[e]very judgment shall be set forth on a separate document" and is "effective only when so set forth. . . ."

Rule 79(a) requires the district clerk to keep a docket. All "orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action . . . These entries shall be brief but shall show the . . . substance of each order or judgment . . . . The entry of an order or judgment shall show the date the entry is made. . . ."

Can Rule 4(a)(7), in conjunction with Civil Rules 58 and 79(a), be read to repeal the collateral order doctrine?

D. The time for preparing a transcript and the record on appeal derive from the date of filing the notice of appeal. Under Rule 5 (dealing with interlocutory appeals under § 1292(b)) and Rule 5.1 (dealing with discretionary appeals after an appeal as of right to a district court from a decision entered upon direction of a magistrate judge) no notice of appeal is filed. Should Rules 5 and 5.1 be amended to provide that the time for ordering the transcript, etc., runs from the date of entry of the order granting permission to appeal?

E. Rule 4(a)(4) has been amended to preserve an appeal that is filed before disposition of one of the posttrial tolling motions. In contrast a petition for review of an agency action that is filed before the agency disposes of a petition for reconsideration, rehearing, or reopening is still treated, in some circuits, as premature and null. The committee will consider whether Rule 15 should be amended to provide that a petition for judicial review of agency action should be held in abeyance until resolution of the administrative motion, at which time the petition would ripen into a valid petition.

After adjourning Thursday evening at 5:45, the meeting reconvened Friday morning, October 20, at 8:30 a.m.

III.

Self-Study

Judge Logan turned the floor over to Judge Stotler for discussion of the self-study. She explained that the questionnaire she had distributed the preceding day contained the 18 recommendations made in the report of the self-study subcommittee. She noted that several of the members had already returned their questionnaires to her and many of them contained annotations.

She said that recommendation five was generally received as noncontroversial to the extent that it urges use of electronic means of communication to disseminate committee proposals. There has been objection, however, to the second part of the proposal - that comments on the proposals could be submitted to the committee electronically. She invited comments on this item and whether submission of comments via e-mail would create problems with the committee's obligation to respond to all comments.

Judge Stotler said that she did not need to elicit comments on any particular part of the self-study but was willing to hear general comments or simply work with the written responses to the questionnaire.

A very brief discussion followed at the conclusion of which Judge Stotler requested that those who have not already done so, submit their completed questionnaires to her.

IV.

## Marketing the Restyled Rules

Judge Stotler also led discussion concerning the "marketing" of the redrafted rules. She explained that the memorandum she prepared last spring was intended simply to capture a number of ideas that had surfaced about paving the way for introduction of the style project. The one question that she wanted to raise with the Advisory Committee concerned the possibility of previewing the redrafted rules with the Judicial Conference at its March 1996 meeting. If the entire set of appellate rules is ready and presented to the Standing Committee in January and approved by it for publication, Judge Stotler asked whether the Advisory Committee would object to an informal presentation of the packet to the Judicial Conference prior to publication. Although proposed amendments ordinarily are not submitted to the Judicial Conference prior to publication, it was suggested that given the nature of this undertaking it might be better to consult the chief judges prior to publication and have their blessing on the project, however tentative that might be.

V.

## Committee Notes

Judge Stotler also asked the Advisory Committee to discuss the problem that arises when a Committee

Note, drafted by the Advisory Committee to explain its proposed amendments, no longer "fits" the rule because the Standing Committee makes substantial changes in it. This particular question is really a subpart of the larger question -- whose note is it? Judge Stotler expressed her personal preference that the note be, to the extent possible, the principal responsibility of the Advisory Committee.

After brief discussion, the consensus of the Advisory Committee was that the note should be treated as an Advisory Committee Note. A motion was made to delegate to the chair and the reporter authority to make whatever amendments to a Committee Note are made necessary by Standing Committee changes to the proposed rule. The understanding was that if controversial changes were made the chair and reporter would attempt to consult with the Advisory Committee. The motion passed unanimously.

VI.

## Uniform Numbering of Local Rules

Amendments to FRAP 47 took effect on December 1, 1995. The amendments state that all local circuit rules "must conform to any uniform numbering system prescribed by the Judicial Conference." Similar amendments took effect in the Bankruptcy, Civil, and Criminal Rules. The Standing Committee asked each Advisory Committee to submit a recommendation concerning uniform numbering. With regard to the local rules adopted by the courts of appeals this appears to be a relatively easy task. All but one circuit has followed the recommendation of the Local Rules Project and renumbered the circuit rules to correspond to the FRAP numbering system.

The Local Rules Project recommended that a local circuit rule be preceded by L.A.R. (standing for local appellate rule), that the rule be numbered to correspond with FRAP, and that it be followed by a decimal after which each local rule having to do with the same national rule be consecutively numbered. For example the first local rule relating to FRAP 28 would be L.A.R. 28.1, the second would be L.A.R. 28.2. The Advisory Committee disagreed with both the L.A.R. and decimal recommendations. Several circuits identify the local rules with the number of the circuit and "Cir. R.", e.g. 7th Cir. R., or 10th Cir. R. The committee believes that such designations are appropriate. The decimal system will pose difficulties because some of the FRAP rules themselves have a decimal, e.g. Fed. R. App. P. 26.1.

A motion was made to recommend only that the local rules have a number that corresponds with the national rule, and that prefixes, decimal points, dashes, etc. should be left to local option. The motion passed unanimously.

VII.

## Sanctions

After the April 1995 meeting, Judge Logan asked Judge Kozinski and Mr. Munford to report on developments under Rule 38. Mr. Munford's subcommittee report summarized the committee's recent treatment of the issue. Over the past 10 years, the committee has considered a number of Rule 38 issues. The questions raised have included, among other things, whether Rule 38 should be revised to include a specific notice requirement, whether it should be revised to conform to Fed. R. Civ. P. 11, and whether attorneys should be specifically listed as persons potentially liable for Rule 38 sanctions.

At the Advisory Committee's December 1991 meeting, the committee voted to revise Rule 38, but to limit the revision to a change that would require notice and opportunity to respond before a court imposes Rule 38 sanctions. By reports dated April 19, 1993, and May 11, 1994, a subcommittee headed by Judge Danny J. Boggs endorsed the notice and comment revision, but concluded that while other new language in the rule might have benefits, "it was not clear that there would be a net benefit to going to a new set of words and abandoning the ones [with] which the participants had become familiar." The notice and comment requirement was added to the rule and became effective on December 1, 1994.

Mr. Munford reported that Mr. Alan B. Morrison, of the Public Citizen Litigation Group, had written the committee short letters on July 17, 1992, and October 13, 1994, urging that Rule 38 be revised to establish more specific standards and to make it more difficult for an appellate court to award sanctions. Mr. Morrison was advised that the committee would continue to monitor Rule 38 developments in light of the adoption of the notice and comment provision and would discuss the matter at its fall 1995 meeting.

A survey of cases dealing with Rule 38 since December 1, 1994, indicates that the courts appear to be applying the procedural requirements faithfully and the recited standards for imposing sanctions are those traditionally reflected in the case law. Mr. Munford's subcommittee report suggested that "[g]iven the committee's extended prior discussion of Rule 38, the recency of the amendment, and the seeming lack of controversy in its current application," Rule 38 be removed from the committee's agenda. A motion to that effect was made and seconded. It passed unanimously.

The meeting adjourned at noon on Saturday, October 21, 1995.

Respectfully submitted,

Carol Ann Mooney

Reporter