Minutes of the Advisory Committee
Federal Rules of Appellate Procedure
April 27, 1988

Present were the Honorable Jon O. Newman, Chairman, and members Honorable Myron H. Bright, Honorable Peter T. Fay and Honorable E. Grady Jolly. James M. Spears, Esquire, Deputy Assistant Attorney General, attended on behalf of Solicitor General Charles Fried. Honorable Pierce Lively and Professor Charles A. Wright attended as liaisons from the Judicial Conference Standing Committee on Rules of Practice and Procedure. Professor Carol Mooney, Reporter, and Mr. William Eldrige of the Federal Judicial Center, were also in attendance.

Chairman Newman called the meeting to order at 9:00 a.m.

Organizational matters

Judge Newman began the meeting by addressing the following questions concerning organization and composition of the Committee:

1. Professor Rex Lee's term expires in October. Although the Chief Justice appoints members of the Committee, the Committee may suggest names of persons who might serve as practitioner representatives on the Committee. Judge Newman thinks it may be appropriate to have two members of the private bar rather than only one.

2. Clerks Thomas F. Strubbe of the Seventh Circuit and Robert D. St. Vrain of the Eighth Circuit wrote to Judge Newman concerning the clerks' opportunity to have input into the work of the Committee. Although both Judge Ripple, when he was Reporter to the Committee, and Carol Mooney, in her capacity as Reporter, have attended the clerks' meetings and have served as liaisons between the clerks and the Committee, Judge Newman suggested having the chairman of the clerk's Committee on the Federal Rules of Appellate Procedure attend the Advisory Committee meeting as an observer but not as a voting member. He observed that the presence of the clerks is at least as compelling as that of Congressional staff members. The Committee was in agreement.

3. With regard to the location of the next meeting, Judge Newman suggested that the Committee avoid esoteric locations and stated that given the convenience of the office space and support available in Washington the next meeting probably would be in Washington. The Committee was in agreement.

4. Judge Newman also expressed the opinion that a certain amount of the Committee's work could be conducted by mail; for example, tying up loose ends on an item might be handled by mail rather than waiting until the next meeting. The Committee concurred and also agreed that it might not be necessary to meet every six months.

Bankruptcy Rule

The first substantive matter addressed was the new bankruptcy rule - F.R.A.P. 6 - docket number 86-12. The reporter stated that the committee had approved the new rule at its last meeting and had sent the rule to the Bankruptcy Advisory Committee for its approval. The reporter also stated that the Bankruptcy Committee was scheduled to consider the rule at its May, 1988, meeting. Once the rule is approved by the Bankruptcy Committee, we will send it on to the Standing Committee.

Certificate of Interest

The next item considered was docket number 86-9 concerning a party's disclosure of its corporate affiliates so a judge can ascertain whether he or she has any interests in any of the party's related entities which would disqualify the judge from hearing the appeal. The Committee approved a rule at the last meeting but following the meeting Chief Justice McKusick offered suggestions for further amendment. Therefore, the Committee had before it Justice McKusick's suggestions.

Before discussing Justice McKusick's suggestions however, the Committee reviewed the development of this rule and the reason for proposing a national rule. The original request for development of a national rule came from Otis M. Smith, General Counsel of the General Motors Corporation. Mr. Smith cited two reasons for his request: first, the fact that the local rules in the circuits vary significantly causes inconvenience for those involved in a national practice; second, Mr. Smith stated that some of the rules are unnecessarily broad, for example some rules require disclosure of all of a corporation's subsidiaries which includes wholly-owned subsidiaries. Prior to its last meeting the Committee approved and circulated a draft rule to the circuits. Ten circuits responded to the draft rule. Five circuits approved of the draft, although three circuits suggested amendments. Five circuits disapproved. The principal objection to the circulated draft was the breadth of disclosure required. In light of the response to the circulated draft, the rule approved by the Committee at its last meeting was more narrowly drawn. The Committee decided that the rule it approved represented a minimum requirement which all circuits should meet, and if the circuits want to require additional information they may do so.

Since the composition of the Committee changed significantly between the last meeting and this one, Judge Newman first asked the Committee whether it was in agreement with the predecessor Committee that a national rule is desirable even though some of the circuits may continue to have local rules which require more disclosure than the FRAP rule. The Committee generally agreed that a uniform rule would be desirable. A uniform rule would allow corporations to develop a standard disclosure statement.

Although corporations would still need to check local rules to ascertain if additional information is needed, at least there would be a standard baseline procedure. Also, the Committee thought that the promulgation by the Supreme Court of a streamlined rule might prompt the circuits to winnow their own rules.

The Committee then turned to the precise language of the rule. The rule approved at the last meeting and as further amended by Chief Justice McKusick reads as follows:

Any corporate party to a civil or bankruptcy case or agency review proceeding and any corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of such corporation.

The Committee generally approved Justice McKusick's suggestions but had some questions concerning the content of the disclosure. Judge Newman questioned the need to disclose subsidiaries. He noted that if U.S. Steel is a party and owns 10% of a corporation and a judge owns two shares of that subsidiary, the judge does not have a financial interest that would be substantially affected by the outcome of the appeal. However, Judge Newman noted that most circuits require disclosure of subsidiaries, other than wholly owned subsidiaries, and that it is probably better for the Committee to go along with the approach adopted by most circuits.

Mr. Spear inquired whether government entities should be excluded from the rule. Mr. Spear noted that in earlier versions of the draft rule governmental parties were excluded and that the local rules in a number of circuits exclude governmental entities. The Committee concluded that there could not be any private shareholders of subsidiaries of a governmental body and thus the conflict of interest problem could not arise. Therefore, the Committee decided to insert the words "non-governmental" before the word "corporate" in both lines one and two.

Judge Bright was concerned that the rule does not require disclosure of partnership interests and of other non-corporate disqualifying interests under §455. Although §455 clearly states that a variety of non-corporate interests may require a judge to recuse himself or herself, the Committee noted that the Circuits opposed the originally circulated rule because of the breadth of disclosure required. The Committee felt that a narrower rule would be needed in order for the rule to gain acceptance. Of course some circuits may require additional disclosure and the uniformity hoped to be gained from a national rule could be eroded. However, the Committee felt it unwise to allow the most elaborate local rule to set the pattern. The Committee also concluded that the FRAP rule should set the minimum standard for disclosure.

Justice McKusick had suggested adding one more sentence stating: "A negative report is also due." The Committee decided not to include that sentence. The Committee felt that people should not be required to file papers that say nothing.

Professor Wright also urged the insertion of a comma in line 5 after the close of the parentheses. The Committee agreed.

The Committee then considered the timing of the disclosure statement. The suggested language, appearing in the memorandum at page eight, was as follows:

> The statement shall be filed with a party's main brief or upon filing a motion in the court of appeals, whichever first occurs. The statement shall be included in front of the table of contents in a party's main brief even if the statement was previously filed with a motion.

Judge Newman noted that some circuits may wish to have the information come sooner. He suggested inserting the following language on line 9 after the word occurs: "unless required by local rule to be filed earlier". Judge Newman pointed out that in general a FRAP rule can in effect be amended by a local rule which imposes greater requirements, and he did not want to suggest that a circuit cannot require more absent an express statement of authorization to do so. However, the draft language says a statement shall be filed upon the occurrence of A or B whichever first occurs. That language could support an argument that a circuit is not free to say that a statement must be filed earlier. Judge Newman compared the timing language with the language in the first part of the rule which says a party shall file a statement; that language does not imply that the party shall file only a statement. In contrast, the timing language says the statement shall be filed upon the first of two occurrences and may imply that a circuit cannot require the statement to be filed earlier. The Committee discussed the desirability of establishing a uniform time for filing the statement and the desirability of setting that time as early as possible. The Committee considered various options but ultimately decided that because of variation in local practice it would be difficult to set an earlier uniform time for the filing of the appellee's statement. The Committee decided to use the first sentence of the draft language with the amendment suggested by Judge Newman. The Committee also decided to strike the last three words of the last sentence. The Committee considered striking the last sentence entirely because some circuits may require the statement prior to the filing of the brief. However, the Committee decided that inclusion of the statement in the briefs acts as a fail safe. The judges related that upon occasion they have caught a conflict at the last minute and that inclusion of the statement in a party's main brief may prove useful.

The rule as approved by the Committee reads as follows:

Any non-governmental party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of such corporation. The statement shall be filed with a party's main brief or upon filing a motion in the court of appeals, whichever first occurs, unless required by local rule to be filed earlier. The statement shall be included in front of the table of contents in a party's main brief even if the statement was previously filed.

Jurisdictional Statement and Standard of Review

The Committee then turned its attention to docket item 86-20. Item 86-20 involves the suggestion that briefs include a jurisdictional statement and a statement of the standard of review. At its previous meeting the Committee decided that such statements were desirable and requested that the Reporter prepare language for consideration at this meeting. The Reporter drafted the following rules:

A. The Reporter suggested that the jurisdictional statement be treated as a separate requirement under F.R.A.P. 28(a) and be included as sub-paragraph 28(a)(2) and that the current sub-paragraphs (2) through (5) be renumbered as (3) through (6).

DRAFT RULE 28(A)(2)

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of the basis for subject matter jurisdiction in the district court or agency whose action is the subject of review; (ii) a statement of the basis for jurisdiction in the Court of Appeals with citation to applicable statutory provisions and with reference to relevant filing dates establishing the timeliness of the appeal, (iii) a statement that the judgment or decree appealed from finally disposes of all claims with respect to all parties or, if it does not, a statement that the judgment or decree is properly reviewable on some other basis.

B. The Reporter also suggested that F.R.A.P. 28(b) should be amended. If the jurisdictional statement in the appellant's brief is complete and correct, there would be no need for the appellee to repeat the statement. On the assumption that the F.R.A.P. 28(a) sub-paragraphs would be renumbered as suggested in

A. above, the Reporter's draft read as follows:

DRAFT RULE 28(b)

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivisions (a)(1) and (3)-(5), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant. The brief of the appellee shall state explicitly whether the jurisdictional statement in the brief of the appellant is complete and correct; if it is not, the appellee shall provide a complete jurisdictional statement.

C. With respect to a statement of the standard of review, the Reporter suggested amending current F.R.A.P. 28(a)(4) by adding to it a requirement that the argument contain a discussion of the standard of review. The Reporter suggested adding the following sentence to 28(a)(4):

Discussion of each issue shall be preceded by a statement of the applicable standard of review by the court of appeals.

Before the Committee began its discussion of the drafts, Judge Newman suggested some wording changes to the Draft Rule 28(a)(2). On line five following the word "review", Judge Newman suggested adding: "and the relevant facts to establish such jurisdiction". Similarly on line nine, he suggested that the following language be added after the word "appeal": "and all other relevant facts to establish appellate jurisdiction". Judge Newman also suggested striking "properly reviewable" in line 13 and substituting therefor "appealable".

Judge Bright expressed initial opposition to such a rule. He expressed the opinion that such matters are better covered by local rules which can be more quickly amended. He also opposes adoption of rules which are not going to be uniform.

Judge Jolly expressed the opinion that such a rule would have the salutary effect of encouraging lawyers to think about jurisdiction. If the lawyers do spend time thinking about jurisdiction, judicial time can be conserved. The FRAP rules can serve an educational role by forcing lawyers to address fundamental questions.

Professor Wright believes that litigants should be required to state something about jurisdiction but believes that an elaborate recital is not usually necessary. He favored a very simple rule like those in effect in the eighth and tenth circuits. The content of those rules is similar to the draft but stated more succinctly.

Mr. Spear stated that the Justice Department will continue to include jurisdictional statements in its briefs whether or not required by rule and has no objection to adoption of a formal

rule. Mr. Spear pointed out that the draft rule gives litigants more notice of what is required than the shorter rules give.

Judge Newman suggested that rather than try to redraft the rule today, that he and the Reporter work together to draft a tighter version and circulate that rule to the Committee.

With regard to the rule governing the appellee's brief, it was decided that the second sentence could be deleted if the first sentence were amended by inserting "of jurisdiction," after the word "statement" on line 3.

With regard to the proposal that a statement of the standard of review be included in the briefs, several members of the Committee expressed the opinion that they did not favor such a rule. The standard of review is a different type of issue than jurisdiction. Without jurisdiction the party is not properly in court. In contrast, standard of review has a lot to do with the outcome of the case. Asking a party to state the standard of review may be analogized to requiring by rule that a party indicate the level of scrutiny required in a equal protection case. In defense of the proposal Judge Fay noted that the local rule in the eleventh circuit has been helpful. It has educated the lawyers and prepared them to discuss the standard of review. Judge Jolly agreed that the rules may serve an educational purpose which in turn may improve the efficiency of the court and may also improve the quality of oral argument.

Since the Committee opinion was divided, Judge Newman suggested that when the jurisdictional statement rule goes out for general review, the Committee might direct a letter to the circuits and say that in connection with review of the jurisdictional statement rule we invite you to consider the proposal that briefs include a statement of the standard of review and include with the letter copies of both the Seventh Circuit and Eleventh Circuit rules. The Committee decided to table the proposal and invite the reaction of the Circuits at a later time.

Coram Nobis

The Committee then took up the Coram Nobis question, item 86-22. The question is whether the time period for noticing an appeal in a coram nobis case is governed by the criminal rule in F.R.A.P. 4(b) or the civil rule in F.R.A.P. 4(a). Judge Newman first asked whether the Committee thought the problem is of sufficient recurrence to warrant rulemaking. Committee members expressed the opinion that mention of coram nobis in a rule could have the undesirable effect of lending credence to the writ. After a brief discussion, the Committee decided to take no further action.

Miscellaneous

Judge Newman then turned the Committee's attention to a number of minor matters:

1. Item 86-11 is a proposal to delete the word "reply" from the title of F.R.A.P. 27(a). F.R.A.P. 27 governs motions; paragraph (a) speaks of the content of motions and provides that any party may file a response in opposition to a motion. Since there is no provision for filing a reply to a response, the Committee thought it appropriate to delete the word "reply" from the title. In fact, the previous FRAP Committee had already approved the deletion but had no other changes to send on to the Standing Committee and therefore had not forwarded that change.

2. Item 88-5 is a proposal to revise F.R.A.P. 26 to extend the filing time because of inclement weather. The Civil, Criminal and Bankruptcy Rules all have identical language providing that when computing a time period during which a paper must be filed in court, the last day shall not count if the "weather or other conditions have made the office of the clerk of the ... court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days." The Committee voted to amend F.R.A.P. 27 to include language identical to that included in Civil Rule 6.

The Committee also discussed the fact that F.R.A.P. 26 still provides that when the period of time is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. The Civil, Criminal and Bankruptcy Rules all have changed that provision to apply when the period of time is less than 11 days. However, the Bankruptcy Committee is unhappy with the 11 day rule and would like to return to the 7 day rule. The Committee decided that the time period should be standardized but expressed no preference for either 7 or 11 days.

The Committee also noted that F.R.A.P. 26 still refers to Washington's Birthday which is now officially Presidents' Day. The Committee voted to change the reference to Presidents' Day.

F.R.A.P. 4(a)(4) & 4(b)

The Committee then turned its attention to the F.R.A.P. 4(a)(4) problem, items 86-10 and 86-24. F.R.A.P. 4(a)(4) provides that a notice of appeal has no effect if it is filed prior to the disposition of certain post-trial motions.[1] A new notice of appeal must be filed after entry of the order disposing of the motion. This creates a trap for unsuspecting litigants who file a notice of appeal while a post-trial motion is pending

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[1] Motions under Rules 50(b), 52(b) or 59 of the Fed. R. Civ. P.

but fail to refile after the disposition of the motion. Unless a new notice is filed within the prescribed time after the disposition of the post-trial motion, the court of appeals lacks jurisdiction. There is general agreement that the trap ought to be moderated if not eliminated.

At the Committee's last meeting the Committee approved an amendment to F.R.A.P. 4(a)(4) which would make a notice of appeal filed before disposition of a post-trial motion effective upon the date of entry of an order finally disposing of the motion. The Committee circulated the proposal to the circuits and received only a limited response. Judge Newman expressed some hesitation about the amendment. He spoke with clerks in district courts and courts of appeals around the country and became convinced that the proposed amendment would create significant administrative problems. In some circuits when a 10 day motion is filed after a notice of appeal, the court of appeals never knows about it. There is nothing in the rules telling a district court clerk to send notice to the court of appeals when a post-trial motion is docketed.

Judge Newman suggested a different approach:

1. Include in the rules a requirement that a district court clerk send to the court of appeals clerk a copy of any post-trial motion and the docket entry of the motion.

2. Upon receipt of the papers the court of appeals should dismiss the appeal without prejudice to a timely request to reinstate it after the disposition of the motion. Upon filing the new notice, the district court should not require the appellant to pay a new filing fee.

Judge Newman's suggestion puts the burden of activating the appeal back upon the appellant. Under the approach discussed at the last meeting the appellant would not need to do anything to revive the notice of appeal; upon disposition of the motion the appellant's notice would be revived automatically. Although it places a burden upon the appellant, Judge Newman's approach has advantages over the clerks proposal. The clerks suggested that when the district court disposes of a post-trial motion, the district court should tell a party who previously filed a notice of appeal that if the party still wishes to bring an appeal the party must file a new notice of appeal. The advantage of Judge Newman's proposal is that the litigant would receive notice that his appeal is dismissed and the direction to file a new notice would come from the court of appeals. Whereas, under the clerks proposal the appeal would not be dismissed and the instruction to file a new notice of appeal would come from the district court and the litigant may simply conclude that the two courts do not communicate and that there is no need for a new notice.

Judge Bright suggested an alternative approach which would be to require a notice of appeal to state whether the party intends to file any of the enumerated post-trial motions. If the party states an intent to file one of the motions, the district court is put on notice that the appeal is ineffective. The virtue of this approach is to avoid a good deal of paper

shuffling. Unfortunately the Committee noted a couple of snags. The first problem is that the opposing party, rather than the appealing party, may file a post-trial motion. Secondly, there is a body of law which states that jurisdiction passes to the court of appeals upon the filing of a notice of appeal even if the paperwork is not transmitted to the court of appeals.

Professor Wright noted that although we tend to think of jurisdiction as being in one court or the other, cases often have to be in both courts at once. For example, a court of appeals may act on a motion for a stay although, without the courts knowledge, a post-trial motion was filed previously. Under the current rule, the filing of the post-trial motion rendered the notice a nullity and the court of appeals lacked jurisdiction. We cannot pretend that the court of appeals did not act. It did act. Professor Wright believes that we should never treat a notice of appeal filed after judgment as a nullity. We cannot pretend that the ball is always in one court or another. Professor Wright expressed the opinion that we need a rule which explains what happens when a case is pending in both a district court and in a court of appeals

Judge Fay agreed with Professor Wright and noted that an ineffective notice of appeal ripens into an effective appeal under the criminal provision in F.R.A.P. 4(b) and presumably the clerks handle the administrative problems in that context. There is apparently no real problem in having a notice of appeal which is neither immediately effective nor a nullity.

Judge Newman raised the question of whether the Committee has the power to propose a rule which deals with the question of jurisdiction residing simultaneously in both a district court and a court of appeals. He pointed out that the Rules Enabling Act provides that the Rules Committee does not have power to expand or limit the jurisdiction of the courts of appeals. However, there was some belief among the Committee members that rules resolving such problems would be within the Committee's rulemaking authority.

Judge Bright suggested yet a different approach. Presently entry of judgment begins the time for filing post-trial motions. He suggested delaying entry of judgment until after resolution of all motions. He suggested that after announcement of a decision in a case, there could be 10 days to file motions, including motions for attorneys fees, and that judgment should not be entered until the disposition of all the motions. This approach would require a drastic restructuring of the notion of entry of judgment but might solve a number of problems, not simply the problem currently before the Committee.

Another solution would be to build a 10 day gap into the process -- the Committee considered this option at its last meeting. After judgment is entered, there is a 10 day period for filing motions; a notice of appeal may not be filed prior to the end of the 10 day period. Any notice filed during the motion period is a nullity. With regard to that proposal, the Committee came to the same conclusion as the previous Committee -- that

such a time gap would simply create a different trap for the same people who have trouble with the current rule. An additional problem with the proposal is that it creates a 10 day delay not only for those cases in which post-trial motions are filed but also in the majority of cases in which there are no post-trial motions.

Judge Fay introduced yet another solution. He suggested that the notion of excusable neglect be built into F.R.A.P. 4(a). The problem with that approach is that the failure to file a new notice will not be noticed within 30 or even 60 days of the disposition of the motion. The person who is trapped by the current rule is the person who files a notice of appeal which is nullified by a motion and who fails to refile after the disposition of the motion. The party does not become aware of the mistake until the party attempts to file some paper in the appellate court, which usually is more than 60 days after the disposition of the motion, and which is beyond the excusable neglect period.

The Committee digressed slightly into a discussion of the question of whether attorney fees are costs or not and whether a judgment is final before the award of attorney fees. The fuzziness of this area causes problems in determining when judgment is final and whether an appeal is timely. The Committee was in agreement that the question needs to be solved.

Judge Jolly noted that there are many procedural traps which should not exist. He also agreed with Professor Wright that the Committee should attempt to address the problem more broadly and especially address the problem of attorney fees.

The Committee sentiment was that it should work toward a larger solution. It was decided to pause over the pending proposal and see if the Committee can come to some basic agreement about what the solution should look like before turning to drafting. The Committee returned to the discussion of whether the rules can solve such problems. It was decided that if the Committee can come to a conclusion about how the system should be changed and if the Committee concludes that the solution cannot be handled by rule, the Committee can approach Congress with a request for legislation.

Professor Wright stated that if there is to be any amendment of F.R.A.P. 4, he hoped that the reporter would remember the point included in her memorandum regarding motions for acquittal. Through oversight at the time of drafting Rule 4(b), motions for judgment of acquittal do not extend the time for filing a notice of appeal in a criminal case. The omission was unintentional and should be corrected.

Equal Access to Justice Act

The Committee then moved to a discussion of docket 86-13, a proposal to enact a rule to govern fee applications under the Equal Access of Justice Act. The Committee considered the following draft rule:

F.R.A.P. 39.1

Application to a Court of Appeals for an Award of Fees and Expenses under the Equal Access to Justice Act.

(a) Time for Filing. An application to a court of appeals for an award of fees and other expenses pursuant to 28 U.S.C. § 2412(d) shall be filed with the clerk of the court of appeals, with proof of service on the United States, within 30 days of final judgment in the action, For purposes of the 30-day limit, a judgment shall not be considered final until the time for filing an appeal on the merits, or for filing a petition for writ of certiorari, has expired, or the government has given written notice to the parties and to the court that it will not seek further review, or judgment is entered by the court of last resort.

(b) Content. The application shall: (1) identify the applicant and the proceeding for which the award is sought; (2) show that the party seeking the award is a prevailing party and is eligible to receive an award: (3) show the nature and extent of services rendered and the amount sought, including an itemized statement from any attorney representing the party or any agent or expert witness appearing on behalf of the party, stating the actual time expended and the rate at which fees are computed, together with a statement of expenses for which reimbursement is sought; and (4) identify the specific position of the United states which the party alleges was not substantially justified.

(c) Objections. Objections, if any, to the application shall be filed by the United States within 30 days of service on the United States, unless the time is extended by the court.

Judge Newman questioned whether the Committee should treat EAJA fee applications in isolation or whether the Committee should draft a rule governing all types of fee applications.

The Committee ultimately decided that a rule governing only EAJA fees is appropriate. EAJA fee applications differ from ordinary fee applications and the rule would standardize the content of the applications. EAJA fees present special problems because a number of cases come to the court of appeals directly from administrative agencies. Since a case may come directly from an agency, the court of appeals is the first court to be involved in the dispute and must make the initial determination

on the fee application. This differs from other fee applications which usually are handled initially by a district court. There is also a difference in that the court must make a threshold determination of whether the government's position was substantially justified. Although there may be problems in determining who is a "prevailing party" -- the determination which must be made in other fee applications -- the question of whether a party was substantially justified is quite different.

Mr. Spear noted that Justice Department was generally happy with the draft rule. The one concern the Justice Department had with the draft involved the government's obligation to file objections to applications for fees. The Justice Department suggested that the draft rule be altered to allow a court of appeals to deny fees without calling for a response from the government, much as the courts of appeals -- under the mandamus provisions of Rule 21(b) and the rehearing provisions of Rule 40(a) -- deny mandamus and rehearing petitions without asking for a response. This would relieve the government of the burden of responding to clearly frivolous applications.

Judge Newman suggested that the U.S. might prefer a bifurcated response. The rule could provide that the government has a given number of days to respond on the issue of liability, that is to argue that the position of the government was substantially justified. If it is decided that the government was not substantially justified, then the government would have an additional period of time to file objections to the amount claimed by the party. Judge Newman noted that the bifurcated approach would be warranted only if a substantial number of cases are decided on the basis of liability. Mr. Spear hazarded a guess that about 50 percent of the cases are decided on the liability issue.

Another similar approach was suggested. Under the alternate approach the government could be given the option to respond in the first instance to liability only or to both liability and amount. The government in a given case might choose not to contest liability and wish only to reduce the hourly rate charged by the attorney.

The Justice Department prepared a redraft of subsection (c) of the proposed rule. The redraft reads as follows:

> (c) Objections. If the court is of the opinion that the application should not be granted, it shall deny the application. Otherwise, it shall request an answer. Objections, if any, to the application shall be filed by the United States within 30 days of service of the court's request on the United States unless the time is extended by the court.

The redraft does not provide a bifurcated approach, but it does allow the court of appeals to knock out the frivolous claims

without a response from the United States.

The Committee discussion returned once again to the question of whether an EAJA rule is necessary and whether it is more urgent to clarify this process as opposed to the many other statutory provisions which are not regularized by national rule. Largely, the draft rule tracks the statute and would preempt variant local rules. With regard to placement of the rule under Rule 39, there was some concern expressed that placing this provision with costs would cause some practitioners and even courts to assume that these fees are costs. That assumption might lead to the further assumption that cost time tables etc. are applicable. It was decided that if this rule were included in FRAP, the title to Rule 39 would need to be amended to read "Fees and Costs".

Judge Newman suggested that the draft rule be sent out to the Circuits as a model local rule. This would allow the Committee to suggest a solution to the variant local rules while the Committee takes a broader look at the fee question. The Committee was in agreement, and felt that it should be communicated to the circuits that this rule was developed after considerable study.

Specific language changes in the rule were suggested:

1. Line 9 there was a typo -- there should be a period after the word action.

2. Line 11 -- omit "on the ". Line 12 -- omit "merits" and "for filing " and insert "a" before writ. Line 13 -- omit the comma after certiorari. The sentence would then read "... a judgment shall not be considered final until the time for filing an appeal or a petition for a writ of certiorari has expired ..."

3. Line 15 -- insert "of appeals" after the word court to identify the court.

4. Line 22 there was a typo -- the colon should be a semi-colon.

5. Line 31 -- change the "which" to "that" and capitalize the "s" in states.

6. Substitute the government's redraft of subsection (c) for the existing subsection with one exception. It was decided that the phrase "unless the time is extended by the court" should be deleted since a court of appeals can always extend time in a given case unless it is jurisdictional time.

Cross-Appeals

The Committee then took up a discussion of items 86-14 and 86-16 dealing with cross-appeals. Judge Newman pointed out that the problems addressed by these items are separate from the cross-appeal problem created in the criminal context by the Sentencing Guidelines; that problem was addressed later in the meeting. The Committee consensus was that the 86-14 and 86-16 proposals generally did not warrant further Committee attention. However, there were two portions of the suggestions which the Committee did want to consider. The first concerned the

designation of the plaintiff below as the principal appellant whenever there is a cross-appeal. That designation may be unfair when the plaintiff is a reluctant cross-appellant. If the plaintiff is the substantial winner in the district court and the defendant files a notice of appeal, the plaintiff may file a defensive notice of appeal so that if the court of appeals reverses the plaintiff has voiced his objections for purposes of the remand. The reluctant cross-appellant is deemed the principal appellant and has the burden of preparing the appendix and the record, etc. The Committee decided that a possible solution would be to designate the party who files the first notice of appeal as the appellant. This would not cause a race to the court house, as a matter of fact it could encourage foot dragging.

The second suggestion which the Committee wanted to address was the lack of a requirement that a cross-appellant notify the appellant of the issues to be explored in the cross-appeal. The Committee thought that the rules should include such a requirement.

The reporter was asked to draft rules, or modifications to existing rules, to implement these two suggestions.

Motions for Extension of Time

The Committee next discussed item 86-15 wherein it was suggested that F.R.A.P. 27(b) be amended with regard to the disposition of motions for extension of time. The Committee once again decided that no rule change is needed. Judge Newman undertook to respond to Mr. Person who submitted the proposal.

Sentencing Act

Judge Newman then moved to items 88-1, 88-2, 88-3, and 88-4, all of which are suggestions submitted to the Committee by Anthony Partridge of the Federal Judicial Center. The suggestions are all outgrowths of the Sentencing Act. Item 88-4 is a suggestion that there should be a cross-appeal time limit in F.R.A.P. 4(b), the criminal appeal rule, similar to the cross-appeal rule in 4(a)(3), the civil provision. The rule is necessitated by the fact that both parties may now appeal from a criminal sentence. The problem that should be addressed may be illustrated by the following example: a defendant is convicted but is placed on probation; the defendant decides not to appeal the conviction because he fears that the government may notice an appeal from the sentence and the court of appeals may not only affirm the conviction but may also impose a stiffer sentence; the defendant allows the ten days to file a notice of appeal pass but then on the 29th day the government appeals the sentence; unless the defendant is permitted to file a cross-appeal, the defendant is denied an opportunity to appeal the conviction. The Committee concluded that a defendant should be able to appeal for 10 days after the government has appealed and the government

ought to be able to appeal for 30 days after the defendant has appealed.

The Committee also decided that this amendment is so important that it should be made more quickly than is possible through normal committee procedures. Judge Newman suggested that the Committee approach Congress with the suggestion that the amendment be made legislatively. The Sentencing Commission is preparing a technical amendments bill and this suggestion might be folded into that legislation. The Committee discussed the advisability of going to Congress to amend a rule. The Committee also discussed whether Congressional amendment of a rule would make Congressional action necessary if further amendment of the rule were needed. The Committee noted that Congress amended Rule 32 in the Sentencing Act, yet the Committee believed that Rule 32 remains within the jurisdiction of the Criminal Rules Committee. The Committee decided to make inquiry into the matter. If Congressional amendment of F.R.A.P. 4 would mean that further amendment of F.R.A.P. 4 would require Congressional action, the Committee concluded that the amendment should follow normal committee process. If the Committee would retain rulemaking authority over F.R.A.P. 4 even following Congressional amendment of it, the Committee favored Congressional amendment. The Committee also noted that it should first seek the advice of the Standing Committee and perhaps the Executive Committee of the Judicial Conference.

With regard to the remainder of the suggestions the Committee decided that no further action is appropriate.

1. Item 88-1 involves a suggestion that there should be a rule to insure bail determination upon government appeal of sentence. The sentencing legislation requires a bail release determination whenever the government takes an appeal. The Committee felt that the absence of a rule would not be problematic.

2. Item 88-2 is a suggestion to amend F.R.A.P. 9 to permit the government to use the motion route to challenge a district court release decision. The Committee discussion disclosed no clear difference between taking an appeal from such a decision or bringing a motion. The Committee concluded that it saw no injustice arising from the fact that a defendant is authorized to bring a motion and the government is not.

3. Rule 9 requires a statement of reasons if a defendant is not released. Item 88-3 involves a suggestion to amend F.R.A.P. 9 to require the district judge to state reasons for release on bail over the government's objection. Although the government has a right to appeal the release decision and there is superficial attractiveness to the idea that the judge should state the reasons for releasing the defendant, such a statement probably would not help the appellate process. It is rather awkward for a district judge to make a finding that there are no problems. The reason for release is likely to be quite simply that the criteria for confinement were not present.

Clerks' Letter

The Committee next considered the suggestions from the clerks' FRAP Committee contained in Mr. Strubbe's letter.

1. The clerks expressed doubts concerning the administration of the proposed amendment to Rule 4(a)(4). The Committee realizes that there is a problem and is trying to deal with it.

2. The docket contains a suggestion for a sanctions rule and the clerks feel that the rule should set forth standards or guidelines for the imposition of sanctions. They also inquired whether the rule would deal specifically with pro se litigants. The Committee decided that it should consider a sanctions rule. and noted that there may be some due process questions and it may be advisable to require a show cause proceeding. Mr. Eldridge said that the Federal Judicial Center has a study on the process of imposing sanctions and when the study is complete it will be available to the Committee.

3. The Bankruptcy Rule is already winding its way through the Bankruptcy Committee. The clerks were puzzled by the fact that the rule calls for a redesignation of the record after the initial appeal although the FRAP rules no longer call for a designation of the record. The reason the rule calls for a redesignation is that the bankruptcy rules continue to require a designation of the record for the first appeal and the Committee thought it might be possible to further hone the materials after the first appeal.

4. The clerks had several suggestions regarding the dates for filing briefs and appendices with the courts. First, the clerks think the 3 day mailing rule in F.R.A.P. 26(c) should be abolished. Adding three days on the assumption that mail takes three days is clearly a fiction. Second, the clerks believe that briefs should not be treated as timely when mailed but should be received in the clerk's office within the time fixed for filing. The Committee felt that there should be consistent treatment across the different rule systems with regard to the timing/mailing rules. It was requested that the Reporter add consideration of these matters to her agenda. Third, the clerks suggested that brief schedules should be lengthened and set in multiples of seven days. The Committee was not interested in making changes in the well established briefing schedules.

5. The clerks raised the 7/11 question discussed earlier in the meeting. They point out that the appellate rules are the only rules which continue to exclude Saturdays, Sundays and legal holidays when a prescribed period of time is "less than 7 days"; all the other rules have changed to an 11 day rule. Once again the Committee expressed its opinion that the rules should be consistent.

6. The clerks think that F.R.A.P. 4(a)(5) should authorize a district court to entertain a motion for extension of time to file a notice of appeal beyond 30 days after expiration of the usual time for filing, if the reason for not meeting the deadline

was the failure of the district court to give notice of its decision, or possibly even if the reason was the failure of delivery of that notice. The Committee agreed that there is a problem which should be addressed.

7. The clerks suggest that Rule 11(b) be amended to require court reporters to serve all parties with copies of any requests for extensions of time to file transcripts. The Committee did not think that there was a problem but asked the Reporter to write to Mr. Strubbe and ask the clerks if they have any experience which indicates that there is a problem.

8. The clerks suggest that if, pursuant to Rule 28(h), the parties to a cross-appeal decide that the plaintiff below should not be deemed the appellant, the parties should be required to file a document indicating that fact. Without such a requirement, in the instance of an overdue filing, the clerk's office does not know which party is late. Since the Committee already decided that it would like to amend the rule governing the designation of parties in cross-appeals, it will deal with this suggestion in connection with that amendment.

H.R. 3152

Title VII of H.R. 3152 would substantially rewrite the statutory rules governing appeals from district court decisions, particularly with regard to the "finality" requirement and the availability of interlocutory review. At its March 15, 1988 meeting the Judicial Conference referred the subject matter of Title VII of H.R. 3152 to the Committee for further study. Before embarking on an extensive study of interlocutory appellate jurisdiction, the Committee preferred to know whether the bill is going anywhere. Judge Newman undertook to prepare a letter to the Executive Committee of the Judicial Conference stating that this bill envisions such major revisions to the concept of appellate jurisdiction that it will require serious study and analysis. The letter will be submitted to the Standing Committee before its transmittal to the Judicial Conference.

Judge Bright's Suggestion

Judge Bright suggested that it is time to undertake a review of the FRAP rules as a whole. The federal rules of appellate procedure have been in effect since July 1, 1968, and have been amended from time to time. However, some rules have not kept pace with changes and do not reflect current practice, at least in some circuits.

The Committee agreed that there are some FRAP rules which are sufficiently outmoded that they have been supplanted by local rules. The Committee also agreed that although the committee's approach of going proposal by proposal has the shortcoming of being fragmented, that approach has the benefits which flow from

doing one thing at a time. To try to do a composite revision would be a time consuming task. The Committee's experience with attempting to revise Rule 30 was cited as an example of the difficulty of fashioning a national rule. The Committee looked at all the local rules on the preparation of an appendix and attempted to use the best of the different approaches. The Committee discovered that many circuits were passionately convinced that their method of preparing and dealing with the appendix was the only right way. It was pointed out that this experience may suggest that there should be no national rule governing the appendix and perhaps other procedures as well.

Mr. Eldridge reminded the Committee that the Standing Committee has a large project examining local rules. That project has not yet addressed appellate rules, but the Committee should check with the Standing Committee to ascertain what plans exist to examine local appellate rules.

Judge Lively noted that when the Standing Committee undertook to study local district court rules, the Committee obtained authority from the Judicial Conference to hire someone to perform the study. If the Advisory Committee undertakes to examine all local appellate rules and compare and contrast them with the FRAP rules, Judge Lively stated that it would be necessary to hire someone to do the study and draft proposals. Judge Newman suggested that the Committee wait until after the July meeting of the Standing Committee when the final report on the district court rules will be submitted.

Conclusion

Judge Newman noted that the broadening of the 4(a)(4) problem to a more universal problem, confronts the Reporter with an uncertain mandate. Judge Newman asked her to identify initially three or four issues and send them out to the Committee members for reaction, so that the Committee's concerns and intentions can be focused a little more clearly. Judge Fay also stated that he would like to speak with his clerk's office and educate himself as to how the process works in criminal cases.

Mr. Spear also noted that if the Committee could clarify whether attorney fees are costs or not, it would solve a good number of problems.

The meeting adjourned at 3:00 p.m.

Respectfully submitted for the Advisory Committee on the Federal Rules of Appellate Procedure

Carol Ann Mooney, Reporter