COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting on January 19 and 20, 1989

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was called to order by its Chairman, Judge Joseph F. Weis, Jr., at the United States District Court for the Northern District of California in San Francisco, California, at 9 a.m., on Thursday, January 19, 1989. All members of the Committee attended the meeting except Judge George C. Pratt and Wayne R. LaFave, who were unavoidably absent. Also present were the Chairman and Reporter of the Civil Rules Advisory Committee and the Chairman and Reporter of the Criminal Rules Advisory Committee. The Chairman of the Bankruptcy Rules Advisory Committee attended briefly. Also present were the Reporter to the Committee, Dean Daniel R. Coquillette of Boston College Law School; William B. Eldridge, Director, Research Division, Federal Judicial Center; David N. Adair, Jr., Assistant General Counsel of the Administrative Office; and Mary P. Squiers, Director of the Local Rules Project.

I. Opening Comments and Tribute to United States District Judge Edward Gignoux

The Chairman opened the meeting by requesting a moment of silence in honor of the Standing Committee's past Chairman, United States District Judge Edward T. Gignoux, who died

November 4, 1988. The Chairman directed that the Reporter prepare a tribute to Judge Gignoux to be sent to Judge Gignoux' family on behalf of the Standing Committee.

II. Implementation of the Rules Enabling Act of 1988

David Adair reported on the Rules Enabling Act, which was enacted November 19, 1988, as Title IV of the Judicial Improvements and Access to Justice Act. Mr. Adair reported that the new legislation requires that the "Procedures for the Conduct of Business by the Committee on Rules of Practice and Procedure" be promulgated by the Judicial Conference and that provisions requiring public notice and certain technical changes require adjustments to those procedures. It was suggested that notices of upcoming meetings of the committees be published in the Federal Register, as well as proposed rules amendments. Such notice would be in addition to the current circulation to interested parties made by the various committees. It was noted that wider publication would entail greater cost to the Judiciary. The publication of the last round of rule changes, for example, would have cost approximately $4,500 to publish in the Federal Register.

Judge Pointer moved that the proposed amendments to the "Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure" be approved and sent to the Judicial Conference with a recommendation that they be approved by the Conference. The motion was seconded by Mr. Bader and approved by the Committee.

Mr. Adair also reported that the legislation now requires that local rules promulgated by the various United States courts of appeals be reviewed by the Judicial Conference for their consistency with law and that the Judicial Conference is empowered to modify or abrogate any inconsistent rule. Judge Pointer moved to recommend to the Judicial Conference that it delegate to the Standing Committee its authority to review the local rules of appellate procedure. The Standing Committee would, in turn, ask the Advisory Committee on the Federal Rules of Appellate Procedure to conduct an initial review. Any recommendations to modify or abrogate local appellate court rules would be forwarded by the Standing Committee to the Judicial Conference for action. Judge Barker seconded the motion and it was unanimously approved.

Dean Carrington proposed that drafts of proposed rules amendments be deposited in certain libraries, including the law libraries of the American Association of Law Schools. Judge Pointer suggested that such a distribution might be unnecessarily broad. Judge Weis indicated that he would appoint a member of the Committee to look into the matter of the deposit of drafts of proposed rules and report back to the Standing Committee.

The Committee also authorized that letters be sent to the courts of appeals and district courts by the Administrative Office informing them of the impact of the Rules Enabling Act on local rulemaking.

III. Report on the Status of Advisory Committee Work

A. Civil Rules - Judge John F. Grady

Judge Grady reported that the Advisory Committee had recommended that a number of amendments to the Civil Rules be approved by the Standing Committee for public notice and comment. Judge Grady called upon Dean Paul Carrington, the Reporter to the Advisory Committee, to explain the proposed amendments to Civil Rule 4. Dean Carrington pointed out that the rule has been so frequently amended as to lose any intelligible structure. The proposed amendment would, therefore, substantially rewrite the rule. Section (e) of the proposed revision would provide a means of service anywhere in the world. It would not establish jurisdiction of the court over the person of the defendant, but would simply provide for service without the necessity to refer to state long-arm legislation. The proposed revision is also designed to be in conformity with the 1969 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.

Subdivision (k) of the new rule would provide for a Federal long-arm in cases arising under Federal law. Dean Carrington indicated that, although this revision would not affect as many cases as might be supposed, it would be sufficiently significant that the Advisory Committee had recommended that the adoption of this aspect of the revision be conditioned upon Congress amending 28 U.S.C. § 1331 to approve the principle of Federal jurisdiction

over all defendants against whom claims arising under Federal law are made. Failure of Congress to enact such a change, however, would permit other provisions of the amendment to go forward.

The new rule would also expand the use of mail in the commencement of a Federal action. The revision would permit a simple notice to be mailed to a defendant, to which the defendant would be asked to respond by waiving formal service. Failure to return the waiver form would result in the defendant becoming liable for the cost of formal service, unless good cause were shown as to why the waiver was not returned. Dean Carrington also noted that this use of the mail could result in simpler service in those countries which, at present, object to the service by mail currently provided in Rule 4.

The revision would also reduce the need for the services of the United States marshals by limiting their use in actions brought by the United States. The Advisory Committee also suggests that service upon the United States should not have to be effected by service on both the United States Attorney and the Attorney General.

Justice Peterson suggested that subsection (k), which provides for a Federal long-arm, not be dependent on an amendment to 28 U.S.C. § 1331, but simply be accompanied by a note that recommends that Congress amend section 1331. Judge Wiggins agreed, noting that the proposed change is a considered action that is justified under the rulemaking authority.

Professor Wright, however, opined that while such a fundamental change is within the rulemaking power, it would be a mistake to go forward under the rulemaking power without Congress' approval. Judge Pointer suggested the report accompanying the proposed amendment could highlight that this is a matter of which Congress should take special note and that it be pointed out that the other amendments to the rule would stand should Congress decide not to approve this particular provision. The Committee agreed to Judge Pointer's suggestion.

Justice Peterson suggested that the use of the term "Federal law" in the section dealing with the Federal long-arm is ambiguous. Judge Keeton pointed out that "Federal law" might be read to include Federal common law. Professor Wright noted that the Supreme Court has held that Federal common law is covered under section 1331.

Professor Wright also suggested that the language of subparagraph (k) of the proposed amendment could be read to preclude pendant cases. Judge Grady indicated that the Advisory Committee did not intend that the amendment to Rule 4 change the current law on the issue of subject-matter jurisdiction over pendant cases. After discussion, the Standing Committee agreed that the amended rule should deal affirmatively with this issue. Judge Pointer moved that language be drafted to provide that, if the case arose under Federal law, service would be effective on the pendant claim if effective on the Federal

question claim. The Advisory Committee Note would be modified accordingly and would, in addition, point out that the rule would not deprive the court of discretion to dismiss the pendant claim for appropriate cause. Judge Pointer's motion was carried.

Judge Pointer suggested that the elimination of the use of state law mechanisms for effecting service could result in more difficult service in those states that permit mail service of process. Judge Barker added that counsel make extensive use of these state mail procedures, and Judge Keeton noted that most counsel who practice in Federal courts also practice extensively in state courts and are frequently most familiar with state court procedures.

Judge Grady asked if the Advisory Committee should redraft the provision to permit the use of state law procedure. Judge Pointer suggested that the Advisory Committee redraft the section to provide for service within the judicial district consistent with the state law in the state in which the court sits.

Judge Weis asked for a vote on whether the rule should restrict use of state law to the state of the forum or permit the use of state law of the forum and the state where service would be effected. The Committee voted that the rule should provide for use of state law of the forum and the state of service.

Judge Grady noted that proposed Rule 4(m), which deals with the time limit on service, would permit the court to decline to dismiss a case if the time period for service ran. Judge Keeton

suggested that the rule, as drafted, was confusing with respect to the various types of plaintiffs covered by the rule. Professor Wright suggested that the Advisory Committee Note should explain the use of the term "plaintiff." The Committee agreed that Dean Carrington would make such an adjustment.

Judge Pointer suggested that the rule provide that a dismissal be "with prejudice" since the court has discretion as to whether or not to dismiss. Judge Wiggins expressed the view that it was draconian to permit dismissal with prejudice for failure to serve. The Committee voted that the amendment provide for dismissals "without prejudice."

Dean Coquillette suggested that the proposed Form 1-A, which would constitute the form of notice of a pending action to be mailed to the potential defendant, constitutes legal advice from an attorney to an adverse party and could be a violation of certain states' disciplinary rules. To avoid this problem, the notice should be sent by someone other than the attorney for the plaintiff. Judge Grady expressed concern that the form not be signed by the clerk since it constitutes a request that a party waive certain important rights. Judge Pointer suggested that the notice be a standard Administrative Office form that would set out the appropriate information.

Dean Carrington then discussed proposed new Rule 4.1. This new rule would incorporate provisions dealing with service of process of other than summonses that previously were found in Rule 4 but that did not precisely fit the subject matter of

Rule 4. It would further provide for nationwide service of an order committing a party for civil contempt. Judge Keeton pointed out that Rule 5 also deals with service and suggested that another rule dealing with service was unnecessary. Judge Weis suggested that the provisions of proposed new Rule 4.1 could be split and placed in Rule 4 and Rule 5.

IV. New Business

The Chairman interrupted the discussion of the Civil Rules to take up a matter of new business and other matters on the agenda to accommodate Advisory Committee attendees. Judge Weis reported that interest had been expressed in amending the rules to permit filing by facsimile transmission. A related question is filing by electronic transmission. He indicated that he would get a report on these questions.

VI. Time and Place of Next Committee Meeting

It was decided that the next meeting of the Committee on Rules of Practice and Procedure would be held in New England, most likely Boston, on July 17 and 18, 1989.

III. Report on the Status of Committee Work

C. Criminal Rules - Judge Leland C. Neilsen

The Reporter to the Advisory Committee on the Federal Rules of Criminal Procedure reported that there were three proposed amendments to the Criminal Rules that had been submitted for public comment and were ready for consideration by the Standing Committee for transmittal to the Supreme Court and

Congress. The proposed amendment to Rule 11(c)(1) would add a requirement that the trial judge advise an accused during plea inquiries that the court is required to consider applicable sentencing guidelines. The proposed amendments to Rule 32 include an amendment to Rule 32(c)(1) which would clarify that a presentence report may be disclosed not only to the court, but also to the defendant and to the defendant's counsel prior to the acceptance of the guilty plea, with the written consent of the defendant. Rule 32(c)(3)(A) would be amended to provide that copies of the presentence report be made available to defendant and its counsel. In accordance with this change, Rule 32(c)(3)(E), which requires that the presentence report be returned to the court, would be deleted. An additional proposed amendment to Rule 32(c)(3)(A) would incorporate the 10-day disclosure requirement for presentence reports established in 18 U.S.C. § 3552(d).

The Advisory Committee also proposed an amendment to Rule 41(e) that would permit a property owner to obtain a return of lawfully seized property, but permit the Government to protect its legitimate law enforcement interests in such property.

Judge Barker moved to submit to the Supreme Court the proposed amendments to Rules 11, 32, and 41 with the recommendation that they be approved and transmitted to Congress pursuant to law. Judge Lively seconded the motion and it was passed unanimously.

In addition, the Advisory Committee proposed amendments to Federal Rule of Evidence 609. These amendments would clarify the approach to impeachment of witnesses in civil cases and Government witnesses in criminal cases. It was noted, however, that the ambiguity in Rule 609(a) is currently at issue in a case pending before the Supreme Court, Green v. Bock Laundry Machine Company, No. 87-1816. The Committee unanimously approved the amendments but decided to hold Rule 609 and not submit the amendments to the Supreme Court pending the decision in Green v. Bock Laundry Machine Company.

Dean Schlueter reported that the Advisory Committee also proposed to submit amendments to Rule 41 and a new rule for public comment. Proposed amendments to Rule 41(a) would provide for nationwide search authority. The amended rule would provide a mechanism whereby a warrant may be issued in the district for a person or property that is moving into or through a district or might move outside the district while the warrant is being sought or executed. It would further clarify the authority of Federal magistrates to issue search warrants for property that is relevant to criminal investigations being conducted in a district and, although located outside the United States, that is in a place where the United States may lawfully conduct a search.

The Advisory Committee has also proposed for circulation a new Rule 58 that would replace the "Rules of Procedure for the Trial of Misdemeanors before United States Magistrates" with a

single rule of criminal procedure. The rule would provide for procedures much the same as current procedures, but would be more easily locatable within the Federal Rules of Criminal Procedure and also take into account changes made by the Sentencing Reform Act of 1984.

Judge Barker moved to approve the recommendation of the Advisory Committee to circulate for public comment amendments to Criminal Rule 41(a) and new Criminal Rule 58. Judge Lively seconded the motion and the motion passed unanimously.

D. Study of Local Court Rules - Dean Daniel R. Coquillette

Dean Coquillette reported that the ABA Journal had published an article dealing with the local rules project. Dean Coquillette then noted that the local rules project had completed a number of items that were ready for distribution to the courts. The uniform numbering system for local rules was approved by the Judicial Conference at its last meeting. The treatise identifying local rules that are either potentially inconsistent with national rules or repetitive of those rules has been completed. Also ready for distribution is a set of model local rules which would be available for consideration by the district courts in the process of renumbering their local rules pursuant to the uniform numbering system.

In addition, the local rules project has prepared a manual of administrative rules and forms. The manual would contain administrative rules and forms that would constitute a "safe

harbor" for practitioners. The administrative rules would deal with subjects that should be nationally consistent but that are too technical to be included in the national rules. These topics include such matters as preparation of the civil cover sheet, size of paper, size of margins, and proof of service. Although the promulgation of such a manual would remove some discretion from local courts, the topics covered are only those for which there should be national consistency. Dean Coquillette noted, however, that the promulgation of such a manual would require an amendment to Civil Rule 84 that would permit the administrative rules and forms to be promulgated by the Judicial Conference. This procedure would amend current Rule 84 by adding administrative rules to its scope and by removing the necessity that administrative rules and forms be submitted to Congress, as is the case with rules of practice and procedure. In addition, Dean Coquillette reported that the local rules project was proceeding to study bankruptcy local rules and appellate local rules.

Judge Weis commented further on the manual. He indicated that the matters to be included in the manual would be matters that, in general, Congress would not care to review. The manual would, however, be submitted for public comment just like the rules of practice and procedure.

Judge Pointer moved that the draft Rule 84 and the draft manual be submitted for public comment. Mr. Bader seconded the motion and it carried unanimously.

Judge Barker suggested that, in addition to simply distributing local rules project materials, it might be helpful for someone from the local rules project or the Standing Committee to attend circuit judicial conferences to explain the project. Professor Wright indicated that there was precedent for Reporters to the Rules Committees to speak with the courts regarding pending matters.

E. Appellate Rules

In the absence of the Chairman or Reporter to the Advisory Committee on Appellate Rules, Judge Weis reported that the Advisory Committee had submitted for final approval new Appellate Rules 6 and 26.1; and technical and conforming amendments to Rules 1, 3, and 28(g). The proposed new Rule 6 is designed to reflect changes made to title 28 of the United States Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (28 U.S.C. § 158). The new rule provides for a new Appellate Form 5 for notice of appeal in bankruptcy cases. The amendments to Appellate Rules 1 and 3 are designed to conform those rules with new Rule 6.

New Rule 26.1 would require a party to disclose corporate affiliates so that a judge may ascertain whether he or she has any interest in any of the party's related entities that would disqualify the judge from hearing the appeal. The amendment to Rule 28(g) would conform that rule to new Rule 26.1. All the rules had been submitted for public comment.

Judge Lively moved that the proposed amendments to these rules be sent to the Supreme Court with the recommendation that they be approved and transmitted to Congress pursuant to law. Judge Barker seconded the motion and the motion was carried unanimously.

A proposed amendment to Rule 26 would have changed the time periods from which intervening weekends and holidays are excluded. Based on adverse comment to the proposal, it was withdrawn.

The Advisory Committee also submitted amendments to three rules for Standing Committee approval for public comment.

Federal Rule of Appellate Procedure 28(a) would require parties to include specific jurisdictional statements in appellate briefs. A conforming amendment to rule 28(b) would be required. The Committee approved Professor Wright's suggestion that the clause designated in the proposed amendment as subsection (iii), which deals with appeals of judgments that do not finally dispose of all claims, be changed to simply provide for a statement that the district court has complied with Rule 54(b) of the Federal Rules of Civil Procedure where appropriate.

The Advisory Committee also suggested a new subparagraph (6) to Appellate Rule 4(a) allowing a district judge to reopen the time for appeal upon a finding that (a) notice of entry of the judgment was not timely received and (b) no party would be prejudiced. The reopening authority could be exercised only

within 180 days of entry of the judgment and would provide a new period of 14 days in which to file a notice of appeal. A conforming amendment to Federal Rule of Civil Procedure 77(d) would be necessary.

Dean Carrington pointed out that the Advisory Committee on Civil Rules had considered amendments to Rule 77 to authorize the court to extend the time for appeal unless the appellee was served with a second notice. Mr. Bader suggested that the reopening authority should be more limited. Judge Grady indicated that a 180-day period was picked simply because some cutoff was necessary, but that once an appellant receives notice, he should be diligent regardless of when he receives such notice. Judge Keeton suggested that, under the proposed draft, a party could receive a 180-day delay in filing the notice of appeal simply because notice was received one day late. The district judge should be authorized to grant additional time only if the individual has acted diligently after receiving notice. Other solutions were discussed. Judge Weis suggested that the Appellate Rules Committee should redraft the provision in cooperation with the Civil Rules Advisory Committee.

D. Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules had proposed at the last meeting of the Standing Committee an amendment to the time computation rule, Bankruptcy Rule 9006(a). The amendment would change the language concerning the exclusion of intervening

weekends and legal holidays to provide that such exclusion applies when the period of time prescribed or allowed is less than 8 days instead of the current 11 days. The current rule had been amended in 1987 to conform that rule to Federal Rule of Civil Procedure 6(a). The unintended result was to inhibit the prompt administration of bankruptcy cases. The approval of the proposed amendment was held up while the other Advisory Committees considered amending the various time computation rules to bring them into conformity with the proposed bankruptcy time computation rule. Those proposed changes, however, received adverse comment and were withdrawn. The Standing Committee approved the proposed amendment to Bankruptcy Rule 9006(a) by acclamation. The proposed amendment will be submitted to the Supreme Court with a recommendation that it be approved and transmitted to Congress pursuant to law.

A. Civil Rules - Judge John F. Grady

The discussion of proposed amendments to the Civil Rules was then resumed. Dean Carrington suggested that the Advisory Committee on Civil Rules reconsider the proposed amendments to Rule 4 and the other rules based on the comments of the Standing Committee, make appropriate changes, and resubmit the rules at the next meeting of the Standing Committee. Dean Carrington then reported on other proposed amendments to the Civil Rules and asked for input so that the Advisory Committee could consider all of the Standing Committee's suggestions prior to re-submitting the proposed amendments.

Civil Rule 12 would be amended to comport with Rule 4. The proposed amendment to Rule 15 is an attempt to correct the situation brought about by Schiavone v. Fortune. The amendment is designed to assure the use of the relation-back principle to protect plaintiffs who erroneously named the defendants against whom they claim. Judge Pointer asked about the situation involving a state law claim when the state law provided for a broader relation-back rule. Could state law be used under the proposed draft in this situation? Dean Carrington answered that the amendment was not intended to address any Erie questions. Judge Keeton suggested that the Advisory Committee Note discuss the Erie problem in the context of this proposed amendment and state that the rule was not intended to deal with that problem. After more discussion, Dean Carrington agreed that the Advisory Committee would take the rule back for redrafting with the idea in mind that the Standing Committee would be sympathetic to a redraft that was somewhat more ambitious in dealing with this question.

The proposed amendment to Rule 26 would establish the principle that discovery in another country should proceed according to the laws of that country unless the results are demonstrably inadequate. This amendment was thought to be necessary in light of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Professor Wright expressed concern that imposing such a restriction would create

inequality, in that the foreign party could use the more liberal American Federal discovery rules while the domestic party would be limited to the Hague Convention rules. There was some discussion of requiring the foreign party to abide by the same rules as the domestic party. Judge Pointer suggested that, when the proposed amendment is circulated for public comment, the language be changed to provide that the application of the rule be limited if discovery conducted by such methods is inadequate or inequitable.

The proposed amendment to Rule 28 is a companion to the proposed amendment to Rule 26. It calls attention to the Hague Convention and gives priority to internationally agreeable methods of taking depositions abroad.

The proposed change to Rule 34 is necessary to make that rule consistent with proposed amendments to Rule 45.

The proposed amendment to Rule 35 is responsive to action taken by Congress in 1988 to allow the use of clinical psychologists in the conduct of mental examinations in civil cases. The proposed amendment would permit district courts to make use of any licensed health professionals having skills appropriate to particular cases. Some concern was expressed about the proposed language limiting examination by an examiner licensed by the "law of the place at which the examination is

ordered to diagnose the condition in controversy." Judge Barker suggested that the amendment should provide for an individual licensed in the place of the examination. Judge Grady suggested that the rule permit licensed or certified practitioners.

The proposed amendment to Rule 44 is related to the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents. The proposed amendment would call attention to the simplified process available under the convention. It also eliminates obsolete references to the Panama Canal Zone and the Ryukyu Islands.

The proposed amendment to Rule 45 was originally proposed by the American Bar Association, and the ABA section on litigation has approved the amendment in its present form. The amendment would act to protect non-party witnesses, who frequently are not represented by counsel. The amendment would also provide for a subpoena of documents that can be used independently of a deposition subpoena, and also a subpoena for the inspection of premises. The amendment would, in addition, enable counsel to issue subpoenas in the name of any Federal court without the necessity of submitting them to a district clerk of court for the affixing of seals. Finally, the amendment would clarify the obligations of a non-party witness responding to a subpoena for the production of documents. The amendment contemplates that parts of the rule designed to protect witnesses would be printed on the back of the subpoena.

Judge Keeton noted a difficulty with respect to Rule 34, which was proposed to be amended to be consistent with the amendments to Rule 45. He suggested an Advisory Committee Note that this rule does not preclude an independent action to compel the production of documents or the inspection of premises.

The proposed amendments to Rules 47 and 48 would provide the district court the discretion to fix the size of the jury. That change would eliminate the need for the institution of alternate jurors. If there is no fixed number of jurors, a juror could be dismissed at any time without causing a mistrial. There would be a minimum number of six jurors unless the parties stipulated otherwise. Judge Keeton asked if a local rule could set the number of jurors and reduce the court's discretion under proposed Rule 48 to seat a particular number of jurors. Judge Pointer suggested that if there was concern that a local rule could, in effect, override the discretion of individual judges, the Advisory Committee Notes should make it clear that the rule was not intended to permit such local rules. Judge Keeton also suggested that the court retain discretion regardless of the stipulation of the parties. Professor Wright pointed out that all stipulations must be approved by the court.

The proposed amendment to Rule 63 would enable a successor judge to complete an ongoing trial whatever the cause of the

inability of the original judge to continue. Dean Carrington pointed out that the Criminal Advisory Committee is looking at a similar provision but is concerned whether a judge could ever be substituted in a criminal case.

Proposed amendments to Rules 72 and 77 have been previously before the Standing Committee. The same is true of Admiralty Rules C and E. All of these, however, will be resubmitted for public comment because so much time has passed since their original submission.

Dean Carrington advised that all of the proposed Civil Rule amendments would be taken up by the Advisory Committee in April and resubmitted to the Standing Committee in July.

Judge Weis requested the local rules subcommittee and any other interested members of the Standing Committee remain to work on the Practice Manual, and adjourned the meeting at 4:20 p.m. on January 20, 1989.

Respectfully submitted,

Joseph F. Weis, Jr., Chairman
George C. Pratt
Pierce Lively
Charles E. Wiggins
Sarah Evans Barker
Robert E. Keeton
Sam C. Pointer, Jr.
Edwin J. Peterson
W. Reece Bader
Wayne R. LaFave
Gael Mahony
Charles Alan Wright