COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of December 17-19, 1992
Asheville, North Carolina

The winter 1992 meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Asheville, North Carolina on Thursday, Friday, and Saturday, December 17-19, 1992. The following members were present:

Judge Robert E. Keeton (chairman)
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Alan W. Perry, Esquire
Chief Justice Edwin J. Peterson
Judge George C. Pratt
Judge Dolores K. Sloviter
Judge Alicemarie H. Stotler
William R. Wilson, Esquire

Also present were Dean Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office. Judge Thomas S. Ellis, III, Professor Charles Alan Wright and Deputy Attorney General George J. Terwilliger, III, were unable to attend. Paul Cappuccio attended the meeting to represent the Department of Justice in the absence of Paul Terwilliger.

Representing the advisory committees in attendance were:

Advisory Committee on Appellate Rules - Judge Kenneth F. Ripple, chairman, and Professor Carol Ann Mooney, reporter;

Advisory Committee on Bankruptcy Rules - Judge Edward Leavy, chairman, and Professor Alan N. Resnick, reporter;

Advisory Committee on Civil Rules - Judge Sam C. Pointer, Jr., chairman, and Dean Edward H. Cooper, reporter; and

Advisory Committee on Criminal Rules - Judge William Terrell Hodges, chairman, and Professor David A. Schlueter, reporter.

Also participating in the meeting were Joseph F. Spaniol, Jr. and Brian R. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, and William B. Eldridge, director of the Research Division of the Federal Judicial Center.

INTRODUCTION

Judge Keeton reported that the Judicial Conference at its September 1992 meeting had approved all the rule amendments submitted by the standing committee, with the exception of civil rule 56. He noted that some members of the Conference had argued that the summary judgment rule was working well in its present form and that judges had become familiar with the language of the rule and the current case law. He also detected a criticism by some Conference members that too many changes were being proposed in the rules. Judge Pointer added that some members seemed not to like the case law on Rule 56 and might not have wanted to enshrine it in the rule.

Judge Keeton reported that the Advisory Committee on the Rules of Evidence had just been reactivated and that the Chief Justice had named Judge Ralph K. Winter as chairman. The other committee members and cross-members from the other advisory committees had not yet been named, however. Judge Keeton added that he and Judge Winter had made initial plans for the first meetings and public hearings of the new committee.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Ripple presented the report of the advisory committee, as set forth in his memorandum of December 1, 1992. (Agenda Item II). He recommended that the standing committee: (1) approve the proposed amendments to Fed.R.App.P. 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 32, 33, 35, and 41, plus a proposed new rule 49, (2) join these amendments with amendments to rules 25, 28, 38, and 40 approved by the standing committee in June 1992, and (3) include all the above in a single package for publication and public comment.

Judge Ripple opened his remarks with two points regarding the amendments proposed by his committee:

(1) Most of the proposed amendments were derived from the work of the local rules project.

(2) Some of the proposed amendments were technical in nature, dealing with the form of papers on appeal.

The standing committee proceeded to consider and approve the package of proposed amendments, making the changes described in the following paragraphs.

Fed.R.App.P. 26.1

At the suggestion of Mr. Wilson, Judge Ripple agreed to substitute the word "different" for the words "greater or lesser" in the committee note to rule 26.1. The change would conform the note to the usage in the text of rule 26.1 and rule 30.

Fed.R.App.P. 9

The committee discussed in detail the language of rule 9, focusing in large part on the interrelationship between its subdivisions (a) and (b) (dealing with appellate review of release orders before and after judgment, respectively). The committee voted: (1) to eliminate the words "of conviction" in the heading of subdivision (a); (2) to eliminate the words "the terms of" on line 19; (3) to insert the words "a copy of the judgment of conviction" on lines 20-21 in lieu of "a record of the offense or offenses of which the defendant was convicted and the date and terms of the sentence"; (4) to place the heading to subdivision (c) in italics; (5) to eliminate the third sentence of the paragraph of the committee note; and (6) to insert a comma before the words "if possible" at the end of the second sentence of that paragraph.

The committee considered whether it was advisable to delete the words "a copy of" in line 6. Judge Easterbrook pointed out that the legal distinctions between originals and copies were no longer meaningful. While considerable support was expressed for the general principle of eliminating the word "copy" throughout the rules, the committee decided that elimination of the term at this time might create confusion and inconsistencies. By a vote of 6-2, the committee voted to retain the term "copy" in the text of the proposed amendment to rule 9, at lines 6 and 20-21, and to refer the matter of usage of the term to the style revision project.

The committee also considered whether the term "shall" should be changed to "must" in rule 9 to conform with the current usage of the style subcommittee. Concern was expressed, however, that the text of other amendments distributed for public comment had not yet been "stylized," and that confusion could be created because of different usages in the different packages. By a vote of 4-1, with several abstentions, the committee decided not to make the change from "shall" to "must." Judge Pointer advised that the word "must" in line 20 was in fact consistent with prior usage of the style subcommittee (i.e., that the papers "must" include a copy of the judgment).

General support was expressed by the members for a suggestion of Judge Sloviter that the first sentence of rule 9, which requires a district judge to state the reasons for an order regarding release or detention of a criminal defendant, would be more effective if placed in the Federal Rules of Criminal Procedure (or perhaps in both the appellate and criminal rules). Judge Hodges agreed to place the matter on the agenda of the next meeting of the Advisory Committee on Criminal Rules.

Fed.R.App.P. 21

The proposed amendments to rule 21 would: (1) prescribe that a petition for mandamus not bear the name of the lower court judge, (2) presume that the trial judge would not wish to appear before the court of appeals, and (3) require that the judge be represented pro forma by counsel for the party opposing the relief. General support was expressed by the members regarding the essential purposes of the amendments. Professor Mooney pointed out, moreover, that six of the circuits currently have local rules in place similar to the proposed rule 21.

Considerable discussion ensued as to the manner in which the revised rule would operate in an individual case, particularly where a district judge wished to appear in the action. Judge Bertelsman argued that a district judge should have the right to appear in the exceptional case where the parties are not inclined to support a judge's procedural rulings.

Judge Easterbrook suggested that there was no reason for treating mandamus actions differently from appeals. He recommended that rule 21 be recast to reflect the reality that:

(1) The district judge is not a party in a mandamus action, as it is really akin to an appeal.

(2) The parties should represent themselves.

(3) If the judge wishes to be a party, the judge may ask the court of appeals to participate.

Judge Ripple agreed to withdraw the proposed amendments to rule 21(a) and (b) and take the matter back to his advisory committee because the changes discussed by the standing committee would represent a substantial change from the advisory committee draft. Rule 21(d), however, would remain in the package for publication.

Fed.R.App.P. 32 and 33

The committee voted to delete the words "not exceeding" on line 17 of rule 32, dealing with the size of pages in briefs.

Judge Ripple agreed to withdraw the last sentence of the proposed amendments to rule 33, addressing the confidentiality of statements made in settlement discussions and their non-disclosure to judges of the court. He stated that the sentence was not necessary since the court of appeals is given sufficient authority in the preceding sentence to enter orders controlling the course of proceedings or implementing settlement agreements.

The standing committee voted unanimously to publish the proposed amendments to the appellate rules -- together with the amendments in rules 25 and 38 approved in June 1993 -- and to seek public comment during a period that would end on April 15, 1993.

ACCELERATED PUBLIC COMMENT PERIOD

Judge Keeton stated that the committee needed to make a specific finding of need for an accelerated public comment period with regard to each of the sets of rules. He pointed out that the Procedures for the Conduct of Business by the Rules Committees specify that the public comment period should be at least six months unless a shorter period is approved by the standing committee or its chairman when they determine that "the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period." The procedures then require that whenever such an exception to the comment period is made, the standing committee must advise the Judicial Conference of the exception and the reasons for it.

Judge Keeton stated that some history was in order. In October, in the closing days of the last Congress, proposals had been advanced in the House Judiciary Committee to change the rules of evidence to include new proposals dealing with violence against women. Judge Marcus, chairman of the Federal-State Jurisdiction Committee, attended the House hearings and coordinated his remarks with Judge Geary, chairman of the Executive Committee, and Judge Keeton. Judge Marcus pledged that the proposed rule changes would be placed before the rules committees of the Judicial Conference for handling on an accelerated basis.

The committee thereupon approved the following resolution formulated by Judge Easterbrook:

> The standing committee is shortening the normal time period for public comment because representations were made to the Congress that the Judicial Conference would proceed on an accelerated basis to consider appropriate revisions to the rules of evidence regarding the admissibility of evidence of a victim's past sexual behavior or predisposition.

On the suggestion of Judge Sloviter, the committee adopted the following resolution with regard to the need to consider the proposed revisions in the appellate rules on an accelerated basis:

> It is in the public interest to shorten the time for public comment with respect to these rules so that they can be considered along with other proposed rules, which together constitute a comprehensive package of proposed rules directed to the Federal Rules of Appellate Procedure.

The committee subsequently adopted the same resolution with regard to the other sets of rules to be published for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Pointer presented the report of the advisory committee, as set forth in his memorandum of November 20, 1992. (Agenda Item IV) He offered three items for consideration:

(1) A brief status report on the style revisions being made to the civil rules (for information purposes only).

(2) A request for authority to publish proposed revisions to rules 83 and 84, noting that: (a) these two rules had been before the standing committee before, and (b) they directly affected the work of the other advisory committees.

(3) A joint proposal, with the Advisory Committee on Criminal Rules, to rewrite evidence rule 412, governing evidence of past sexual behavior or predisposition of an alleged victim of sexual misconduct.

Style Revisions

Judge Pointer noted that the style subcommittee, chaired by Professor Wright, had just completed a proposed redraft of the Federal Rules of Civil Procedure that included all the civil rules other than the amendments currently pending before the Supreme Court. He reported that the advisory committee had considered the redraft at its November meeting and was very positive about the changes. The committee devoted its attention to the proposed style conventions and concepts adopted by the style subcommittee and did not attempt to approve actual changes in language.

Judge Pointer added that he had prepared a style redraft of the amendments pending before the Supreme Court. His redraft would first be sent to three ad hoc subgroups of his advisory committee for detailed analysis and markup and then to the full committee. Judge Pointer stated that the advisory committee preferred not to make these draft revisions public at this point in order to avoid confusion, since different text is pending before the Court. He argued that when the style revisions are complete, they should be published with a 9-month public comment period.

Judge Keeton suggested that it might be preferable to send Judge Pointer's redraft first to the style subcommittee before consideration by the subgroups. Judge Pointer responded that he preferred to expedite the process by having Brian Garner make a quick review of the document, rather than pass it through the style subcommittee. He added that the subcommittee could best use its scarce time in redrafting the admiralty rules.

Fed.R.Civ.P. 83 and 84

In discussing the proposed amendments to rule 83, the standing committee engaged in considerable discussion regarding the undesirability of local standing orders. Judge Easterbrook pointed out that there are two problems with standing orders. First, no notice is given to the parties to enable them to protect themselves against local procedural traps. Second, standing orders do not comply with the local rules approval process, as prescribed in statute and national rule.

Several members argued that attorneys are entitled either: (1) to publication of procedures in the local rules of a court, or (2) to service of an order on them in each individual case.

The committee decided to have the advisory committee chairs and reporters get together during the Friday lunch break to prepare common rules for consideration by the standing committee. The rules would then be sent back to the various advisory committees for consideration.

Fed.R.Evid. Rule 412

Judge Pointer stated that the primary impetus for amending evidence rule 412 was essentially to forestall action by the Congress and to avoid a bypass of the Rules Enabling Act process. He pointed out that the Advisory Committee on Civil Rules had considered a draft of rule 412 prepared by the Advisory Committee on Criminal Rules and had offered certain changes in the text of both the rule and the advisory note. He added that there were only three remaining, non-substantive differences between the two committee versions:

(1) The criminal committee draft was based on the current two-part structure of rule 412, which begins with a general rule that evidence of past sexual behavior or predisposition is not admissible. The draft then proceeded to state the exceptions to the rule in a separate subdivision. The civil committee draft, on the other hand, collapsed the two statements into one as a matter of style and conciseness.

(2) The criminal committee version provided that evidence must not be "admitted" unless there is a sealed motion. The civil committee version provided that evidence must not be "offered."

(3) There were minor differences between the respective committee notes.

Judge Pointer recommended the alternate formulation for subdivision (a)(4) found in footnote 1 of his draft, but he pointed out that it had not been considered by his advisory committee.

Judge Easterbrook expressed concern that subdivisions (b)(3) and (b)(4) of the distributed draft, when read together, might create an implication that one may violate constitutional rights in civil cases, but not in criminal cases. He suggested that (3) and (4) could be merged to provide that evidence be admitted in both civil and criminal cases if essential to a fair and accurate determination. Judge Pointer responded that this solution would be politically unacceptable to the supporters of the pending legislation. He added that the constitutional standard found in (3) could be added to (4), but the advisory committee consciously decided to adopt a more lenient standard of admissibility in civil cases.

Judge Ripple echoed Judge Easterbrook's concern about the different standards that would apply in civil and criminal cases. He suggested that the public comments might well be enlightening on this point and expressed concern that the comment period would be less than the usual six months. Judge Keeton agreed that the short period was a problem, but he stated that the Judicial Conference had made a clear representation to the Congress that the rules committees would consider evidence rule 412 on a fast track basis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Hodges noted that the proposed amendments to rules 16 and 29 had been approved previously by the standing committee for publication. He directed the committee's attention to proposed amendments to evidence rule 412 and criminal rules 32 and 40. (Agenda Item X)

Fed.R.Evid. 412

Professor Schlueter stated that a subcommittee of the advisory committee had been working on potential changes in the evidence rules for a year and a half. The proposed reformulation of rule 412 had been prepared as an alternative to pending Congressional proposals. It was superseded by later drafts, prepared in consultation with the Advisory Committee on Civil Rules. Professor Schlueter informed the committee that his remarks would be directed to the "Fall 1992 Draft" version of rule 412 circulated to the committee earlier in the meeting.

He reiterated Judge Pointer's observation that the two advisory committee drafts before the standing committee were virtually identical except for style. The criminal committee's version contained separate subdivisions (a) and (b) in order to emphasize the strong policy of excluding evidence of sexual behavior. In this respect, the criminal committee draft was closer to the Congressional intent, although it took more words to say the same thing as the civil committee draft.

In consultation with Judge Hodges, Professor Schlueter agreed to adopt the civil committee's use of the word "offered," rather than "admitted" on line 50 of the draft, since it would strengthen the general policy of exclusion. The committee agreed to the change.

Professor Schlueter stated that the few remaining differences between the respective committee notes could be worked out readily.

Judge Sloviter recommended eliminating the words "including evidence in the form of reputation of opinion" from lines 43-44 of the draft. She urged caution in drafting because the committee could in effect be writing the first explicit rule sanctioning the admissibility of reputation evidence regarding sexual behavior. Presently, the matter is left to ad hoc determination by the courts. She added that her concern related only to criminal cases because reputation evidence was appropriate in a civil case where reputation itself is an issue. Professor Schlueter added that evidence may be excluded by a judge under rules 402 and 403 as irrelevant or prejudicial.

Dean Cooper pointed out that rule 412 currently does not apply in civil cases. What subdivision (4) would do is first expand the exclusion of evidence to civil cases and then make exceptions to the exclusion for civil cases involving reputation. Thus, the amended rule would in effect create a new exclusion for civil cases. He suggested that it would be better to delete the words "including evidence in the form of reputation or opinion," as recommended by Judge Sloviter. Judge Hodges agreed, but added that it was necessary to retain the committee note's reference to reputation and opinion evidence.

Mr. Garner suggested that the antecedent of the phrase "when offered" in line 45 of the draft was ambiguous. He recommended adding the words "either type of evidence is" before the word "offered." Mr. McCabe recommended inserting a comma in line 43 before the words "or other evidence."

Judge Keeton suggested eliminating the words "of the victim" on line 45, and Judge Sloviter recommended eliminating the word "the" on line 44. Mr. Cappuccio suggested adding the word "alleged" before the word "victim" on line 36.

Judge Sloviter recommended that on lines 60-62 the rule should give the trial court discretion to decide whether to impound a motion and record of a hearing, rather than require that they be sealed. She further suggested adding the words ", unless otherwise ordered," on line 61 and deleting the words "in the trial and appellate courts" on line 62.

These various changes were approved by the committee. It thereupon voted to approve the text of rule 412, as amended, and to authorize an expedited comment period to end April 15, 1993. It was further agreed that the reporters for the standing, civil, and criminal committees would work out the final language of the advisory committee note.

Fed.R.Crim.P. 32

Judge Hodges noted that the advisory committee's proposed reformulation of rule 32 would accomplish two results:

(1) It would incorporate elements of the 1987 model rule approved by the Criminal Law Committee of the Judicial Conference.

(2) It would reorganize the rule to place its provisions in a more logical and sequential order.

He pointed out that the rule had some new features:

(1) It would establish a 70-day time period from a finding of guilt to imposition of sentence whenever a presentence investigation and report were ordered. The probation office must complete the report in 35 days, and the report must be given to the court 7 days before imposition of sentence.

(2) Rule 32(d)(2) would require the presence of counsel at the interview of the defendant by the probation officer.

(3) Rule 32(b)(5) would require the probation officer to provide the report to the parties with time for them to file and resolve objections. The probation officer would be given the right to conduct a conference and require the presence of the defendant and counsel to resolve objections.

(4) Rule 32(b)(5)(D) would provide that the court may accept the findings contained in the presentence report if there were no objection.

Judge Hodges stated that the advisory committee, after considerable debate over the course of two meetings, had voted not to include a provision in the rule giving a right of victim allocution at the sentence hearing and certain other explicit victim rights.

Judges Easterbrook and Keeton inquired as to whether 35 days was sufficient time for the probation office to complete the report. Judge Hodges responded that the Probation and Pretrial Services Division of the Administrative Office and other persons had informed the committee that the time period was adequate.

Judge Bertelsman insisted that the rule should make it clear that the 70-day time limit was for the guidance of the court and was not intended to create any new rights for the defendant.

Mr. Wilson argued that victim allocution should be included in the rule. He stated that even though allocution may cause some problems and would rarely be used, it makes victims feel much better about the criminal justice system. No other member of the committee expressed agreement, and several pointed out that a district judge presently has discretion to allow or not allow victim allocution in a given case. Judge Sloviter suggested that the committee note highlight this fact.

Mr. Wilson suggested that there may be an inconsistency in subdivision (d)(2), in that line 194 refers to "property," while line 196 refers to "interest and property." Judge Hodges pointed out that the language came from the present rule, and Judge Keeton advised that the usage should be referred to the style subcommittee.

Judge Stotler stated that subdivision (c)(5) contained outdated provisions regarding the court's requirement to advise the defendant of the right of appeal. She pointed out that the defendant has the right to appeal any sentence. Accordingly, the committee agreed to eliminate the sentence beginning on line 177 regarding the right of appeal and the words "in a case which has gone to trial on a plea of not guilty" on lines 172-173.

During the lunch break, Judge Hodges and Mr. Garner made additional changes in the language of the rule, most of them addressing the language of the existing, unchanged portions of the rule. Mr. Garner suggested that further changes could be made overnight to improve the syntax and style of the entire rule and to remove all ambiguities. Professor Schlueter argued that the additional changes should be made promptly to avoid another year's delay in promulgating the revisions. Judge Stotler added strongly that it was most important to complete the revisions during the meeting and not wait another year for an improved rule 32.

Judge Keeton stated that the committee note should specify that the committee had considered, but rejected a provision requiring the district court to permit the victim's allocution at sentence.

The committee then approved, with one dissent, a motion by Judge Easterbrook to approve the recommendation of the advisory committee not to make victim allocution compulsory.

Judge Hodges agreed to add a sentence to the last paragraph of the committee note that would read as follows: "Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence."

Following overnight drafting with Mr. Garner, Judge Hodges presented a final version of proposed rule 32 for consideration on Saturday morning. The committee then voted to approve for publication the draft submitted by Judge Hodges with one minor change suggested by Judge Pratt to change the word "proceeding" to the plural in the title on line 13 of page 4.

Fed.R.Crim.P. 40

The committee approved the change proposed in rule 40 that would make it clear that a magistrate judge has the authority to set conditions of release in cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction over the defendant.

The committee then approved publishing all four proposed rules (16, 29, 32, and 40) on an accelerated basis in a package with the other proposed rule amendments.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Leavy presented the report of the advisory committee, as set out in his memorandum of November 16, 1992. (Agenda Item IX) He proposed amendments to rules 8002 and 8006.

The changes in Rule 8002 would permit a post-trial motion for relief from a judgment or order to toll the time for appeal. (Bankruptcy rule 9024 generally incorporates civil rule 60.) The changes were intended by the advisory committee to conform to the 1993 amendments to appellate rules 4(a)(4) and 6(b)(2)(ii) and eliminate the "trap" of rule 4, which requires appellants to file a new notice of appeal if certain post-trial motions are filed.

The change in rule 8006 would suspend the 10-day period to designate the record if a timely post-judgment motion is made and the notice of appeal is superseded by operation of rule 8002.

Professor Resnick pointed out that the bankruptcy rules specify a short 10-day appeal period, compared to the 30-day appeal period of the civil rules. He stated that in appeals from the district court to the court of appeals there is little practical difference between filing and service. In bankruptcy, however, the appealing party must act quickly and be certain as to whether a post-trial motion has been filed. He added that the Advisory Committee on Bankruptcy Rules would consider amending rule 9023 at its February 1993 meeting.

Judge Keeton expressed concern over having to amend the rules piecemeal and asked whether there was a way to take care of the problem of the notice of appeal "trap" at one time. Professor Resnick responded that the better way to solve the problem would be to amend civil rule 59 and not amend the bankruptcy rules at all.

The members then noted several inconsistencies in current usage in the civil rules, e.g., rules 50, 59, and 60, a number of which are incorporated by the bankruptcy rules. Some refer to motions being "made," while others speak in terms of service, or filing, or both. Accordingly, the standing committee decided to ask the Advisory Committee on Civil Rules to conduct a general review of the inconsistent usage of these terms in the current rules.

The committee then approved bankruptcy rules 8002 and 8006 and voted to include them in the same package as the other rules, with an accelerated public comment period to end April 15, 1993. The committee further agreed that the proposed changes in the bankruptcy official forms be made without public comment because they consist merely of conforming amendments required by a recent statute, clarification of instructions to the forms, and changes to facilitate the processing of cases.

REPORT OF THE STYLE SUBCOMMITTEE

Mr. Garner reported that the style subcommittee had prepared a complete revision of the Federal Rules of Civil Procedure and had achieved an 18% reduction in the number of words. (Agenda Item V) In the process, the subcommittee had discovered a number of ambiguities in the language of the rules that merit attention by the advisory committee.

Judge Keeton stated that the new draft was much more readable and clear. He added that neither the advisory committee nor the style subcommittee was ready to submit any style changes for public comment at this point.

REPORT OF THE SUBCOMMITTEE ON SUBSTANTIVE AND NUMERICAL INTEGRATION OF THE RULES

Judge Pratt reported on the activity of his subcommittee to consider integration of the federal rules. The subcommittee's report laid out four potential options to achieve this goal. (Agenda Item VII)

Judge Pratt stated that the subcommittee was concerned that with all the matters pending before the standing committee, and in light of the potential criticism that the rules committees were tinkering too much with the rules, it would be best not to take formal action on integration at this time. Instead, the subcommittee decided to send the matter back to Dean Coquillette and Mary Squiers for a long range report and the development of new ideas. The subcommittee, however, retained as a conscious guide the eventual removal of inconsistencies throughout the rules and other eventual improvements in the rules.

The committee voted unanimously to accept Judge Pratt's report and recommendations. Judge Keeton ruled that the subcommittee would not be dissolved, but would not be expected to perform any functions by the next meeting.

UNIFORM NUMBERING OF LOCAL RULES

Dean Coquillette reported that two competing, mutually exclusive forces were at work. On the one hand, the district judges of the Fourth Circuit recently had voted to oppose uniform numbering of local rules, stating that numbering should be left exclusively to local prerogative. On the other hand, representatives of the bar had criticized local court rules strongly for their lack of uniformity. He pointed out that uniform numbering of local rules was essential because it offered the only practical way for out-of-state lawyers to learn about local court procedures without exhaustive research. He added that a good deal of success had been achieved by the district courts on a voluntary basis in adopting the recommended uniform numbering system. He estimated an acceptance level of about 30%.

Several members suggested sending a letter to the courts seeking progress reports on their local rule renumbering efforts. The consensus of the committee, however, was for Dean Coquillette and Professor Squiers to make telephone calls to the circuit executives and present a progress report to the committee at its June meeting, coupled with any recommendations they wish to make.

PROPOSED UNIFORM RULE ON TECHNICAL AMENDMENTS

The five reporters, plus the chairmen of the appellate and bankruptcy advisory committees and staff, convened as an ad hoc subcommittee during the Friday lunch break and agreed upon common language for the various sets of rules regarding:

(1) the authority of the Judicial Conference to make technical changes in the rules,

(2) the authority of the Judicial Conference to prescribe a common numbering system for local court rules, and

(3) the authority of local courts to regulate proceedings before them through local rule and procedure.

With regard to a common rule on technical changes, the subcommittee adopted the proposed draft of Appellate Rule 50, making changes in it to: (1) narrow the rule by removing the words "inconsistencies in grammar," (2) change the word "nonsubstantive" to "technical," and (3) remove the words "or to make other similar technical changes."

With regard to a common rule on uniform numbering of local rules, the subcommittee decided to propose Option 1 of Dean Coquillette's draft. (Agenda Item VI B) It provided that local rules must conform to any uniform numbering system prescribed by the Judicial Conference.

With regard to a common rule on the authority of local courts to regulate practice before them, the subcommittee decided that there had to be some differences in wording among the different sets of rules. The bankruptcy committee participants, for example, favored a reference to "these rules," rather than a specific statutory reference, as preferred in the civil rules. They also pointed to the need to make a special reference to the bankruptcy official forms. The appellate committee participants pointed out that the appellate rules needed to adopt a modified version of the common language because a court of appeals does not act by individual judges. Moreover, the circuit courts do not have a problem of standing orders because they have internal operating procedures.

It was agreed that the proposed common rules be returned to the respective advisory committees for consideration.

REPORT OF THE SUBCOMMITTEE ON LONG RANGE PLANNING

Judge Easterbrook presented the subcommittee's report on behalf of Professor Baker, who was absent. He stated that several documents regarding planning were presently available and should form the starting point for the committee's long range planning efforts. The documents, which explore improvements in court procedures, are: (1) the report of the Federal Courts Study Committee, (2) the report of the Council on Competitiveness, i.e., the Quayle or Starr committee report, (3) the ABA blueprint to improve the civil justice system, (4) the ongoing work of the ALI complex litigation project, and (5) the report of Subcommittee No. 3 of the Long Range Planning Committee of the Judicial Conference. He recommended that the advisory committees review these documents.

Two members of the committee expressed the view that the communication from the Long Range Planning Committee (Agenda Item XI) was too vague to be of guidance. Others pointed out, however, that the planning committee was merely initiating the process of soliciting the views of the other Judicial Conference committees as to what were the appropriate long range planning issues for the Judiciary and which committees should develop them.

Judge Keeton recommended that the reporter and chair of each advisory committee write back to him and to Dean Coquillette by January 4, 1993 with their identification of: (1) which of the issues identified by the Long Range Planning Committee were presently on their agenda, and (2) which longer range issues were likely to be part of their future agendas.

THE COMMITTEE'S ROLE AND PROCEDURES

The committee discussed Judge Stotler's letter of July 31, 1992 regarding the philosophy of the task of the standing committee. (Agenda Item VIII) At the chairman's request, Mr. Spaniol presented a history of the rules committee process, including background on the drafting of the 1958 rules enabling legislation and the composition and work of the rules committees from 1960 to the present.

There was widespread agreement among the members that Judge Stotler's points regarding the role of the committee were well taken and should be discussed in further depth at future committee meetings.

Judge Keeton observed that the rules process had become more "political" than in the past, as more individuals and organizations had become interested in the outcome of rules amendments. Accordingly, the rules committees needed to be more alert to the political process. He also stated that the rules process had now become so active that concern had been expressed that there were too many changes and too frequent adjustments in the rules.

Judge Easterbrook stated that the prescribed 6-month public comment period, coupled with the normal January and June meeting dates of the standing committee, created serious operational difficulties. He suggested that the work of the committee could be streamlined either by changing the dates of the committee meetings or shortening the normal public comment period.

Judge Stotler suggested that the committee needed more automation assistance at its meetings, such as computers and a projecting screen so the members could review drafts on the spot.

Judge Easterbrook noted his concern regarding the interaction of style and substance. He argued that the standing committee was spending too much time on drafting and should spend more time on substance, rather than style.

Judge Hodges stated that he was concerned about last-minute, sometimes hectic rewriting of rules in order to meet pressing publication deadlines. He suggested that the advisory committee chairs might wish to address the problem jointly.

Judge Bertelesman pointed out that the agenda of the standing committee was very heavy and produced fatigue. He suggested exploring the advisability of more than two standing committee meetings a year to avoid fatigue.

Judge Keeton suggested that the standing committee might meet in September, after the Judicial Conference has acted on pending proposals and before new members are appointed. The public comment period might be shortened to four months, from November 1 through February 28, subject to a longer comment period for certain complex or controversial rules.

Judge Keeton added that he might consider appointing a subcommittee to review the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure and present recommendations at the June committee meeting. He invited the members to submit suggestions for improvements to Dean Coquillette for consideration at the June meeting.

ATTORNEY GENERAL BARR'S LETTER

The committee considered a letter from Attorney General Barr to the Chief Justice asking for assistance in eliminating the requirement in several court rules requiring government attorneys to pay local attorney admission fees.

At the suggestion of Judge Keeton, the committee decided to refer the letter to the civil, criminal, and appellate advisory committees, with an information copy to be sent to the bankruptcy advisory committee.

NEXT COMMITTEE MEETING

The committee decided to hold its next meeting on Thursday, Friday, and Saturday, June 17-19, 1993, at the Administrative Office in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary