MINUTES OF THE APRIL 30, 1992
MEETING OF THE
ADVISORY COMMITTEE ON APPELLATE RULES

The meeting was chaired by Hon. Kenneth F. Ripple. The following committee members attended: Hon. Danny J. Boggs, Mr. Donald F. Froeb, Hon. Cynthia H. Hall, Hon. E. Grady Jolly, Hon. James K. Logan, and Hon. Stephen F. Williams. Mr. Robert Kopp attended as the Solicitor General's representative. Hon. Robert E. Keeton, Chair of the Standing Committee on Rules of Practice and Procedure, was present. Mr. Joseph F. Spaniol, Jr. - the Committee Secretary, Hon. Dolores K. Sloviter - liaison member from the Standing Committee, and Mr. Thomas Strubbe - liaison from the clerk's committee, were also present. Mr. John Rabiej, Ms. Judy Krivit, and Ms. Ann Rustin - all of the Administrative Office - attended, as did Mr. Joseph Cecil of the Federal Judicial Center.

Judge Ripple called the meeting to order at 9:00 a.m. in the sixth floor conference room of the Administrative Office.

I. GAP REPORT

Judge Ripple began the meeting with a consideration of the draft Gap Report. In August 1991, the Standing Committee published proposed amendments to nine appellate rules. The period for public comment on those amendments ended February 15, 1992. Public hearings on the amendments had been scheduled for December 4, 1991, in Chicago, but were cancelled for lack of interest.

The draft Gap Report included summaries of all of the comments received. The Advisory Committee's task was to review the comments and consider whether to amend the draft rules in light of the comments. The Reporter had prepared suggested changes for the Committee's consideration.

A. Item 86-10 and 86-26, amendment of Rules 4(a)(4) and 4(b) to eliminate the need for a new notice of appeal after disposition of posttrial tolling motions and
Item 89-2, amendment of the filing rules in light of the decision in Houston v. Lack.

Rule 4

The suggested amendments to Rule 4 serve two main purposes: 1) to eliminate the trap for a litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending, and 2) to "codify" the Supreme Court's decision in Houston v. Lack, holding that a notice of appeal filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail system, with postage prepaid, on or before the filing date. No comments were submitted regarding proposed Rule 4(c), dealing with inmate filings. Several commentators had suggestions for improving Rule 4(a)(4).

1. The first suggestion was to include a cross-reference in paragraph (a)(1) to alert a reader to the fact that the time for filing a notice of appeal may be extended by the provisions in (a)(4). The reporter proposed adding, "Except as provided in (a)(4) of this Rule 4" to the beginning of the first sentence of paragraph (a)(1). The committee had a brief discussion about the suggestion during which both Mr. Strubbe and Mr. Kopp expressed the opinion that the change should be made. A vote was taken and the changed was approved by a vote of six to two.

Two changes to subparagraph 4(a)(4)(iv) were considered.

2. The published draft stated that the time for filing a notice of appeal would be extended by a motion "under Rule 54 for costs or attorney's fees if a district court under Federal Rules of Civil Procedure 58 enters an order delaying entry of judgment and extending the time for appeal; . . ." With regard to the language describing an order under Rule 58 as one "delaying entry of judgment," a commentator pointed out that ordinarily a district court must enter judgment "forthwith" and may not thereafter delay entry of a judgment that has already been entered. The Committee considered whether to change "delaying entry of judgment" to "delaying finality of judgment" or whether to use a description that more closely tracks that in Proposed Civil Rule 58, such as "giving a motion for attorneys' fees the same effect as a timely motion under Rule 59." Judge Keeton suggested simply deleting the words "delaying entry of judgment and" from the published draft so that subparagraph (iv) read as follows: "(iv) under Rule 54 for costs or attorney's fees if a district court under Federal Rule of Civil Procedure 58 enters an order extending the time for appeal." Judge Keeton's suggestion was approved unanimously.

3. The second change to subparagraph 4(a)(4)(iv) which the Committee considered was to delete the reference to "costs." Because Proposed Civil Rule 58 does not authorize a district court to delay finality of a judgment when there is a motion for costs, the reference to costs would be misleading. The Advisory Committee's original objective, to make it clear in the text of Fed. R. App. P. 4(a)(4) that motions for costs (as well as motions for attorneys' fees) do not extend the time for filing notices of appeal, would be undercut by the change, but the inaccuracy would be removed. Also, the Committee's objective will be substantively accomplished by the fact that proposed Civil Rule 58 makes it clear that motions for costs do not extend the time for appeal. The change was unanimously approved.

4. Judge Logan suggested adding the words "announcement or" at line 53 of the amended draft before the word "entry" to tie it into paragraph (a)(2). The suggestion was unanimously approved.

5. Proposed subdivisions 4(a) and 4(b) differ concerning the need to file an amended notice in order to appeal from an order disposing of a posttrial motion. Subdivion (a) requires a party to amend a previously filed notice of appeal if the party desires to appeal the disposition of the motion in addition to appealing the underlying judgment. Subdivision (b) does not require an amended notice; a notice filed before disposition of the motion is sufficient to bring both the original judgment and the disposition of the motion before the

court of appeals. The Committee reviewed its earlier discussions concerning the difference and reiterated its view that more liberal treatment is warranted in criminal cases. At lines 56 and 57 of the amended draft the reporter suggested adding the words "effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal." A commentator had suggested that addition believing it would make it clearer that in civil cases a notice of appeal is effective to appeal only from whatever judgments or orders it specifies and that to perfect an appeal from any postjudgment order, an earlier filed notice of appeal must be amended to specify such additional orders. The change was unanimously approved.

6. At line 60 of the amended draft the reporter suggested changing the sentence to provide that obtaining "[a]ppellate review of" an order disposing of a tolling motion requires amendment of a party's previously filed notice of appeal. The published draft did not speak of "appellate review of" such orders but stated that "[a]n appeal from " such orders required amendment of any previously filed notice of appeal. A commentator pointed out that in some circuits, some or all of the decisions on posttrial motions are not independently appealable, but are reviewable only on appeal from the final decision. The language change reflects that reality. The suggestion was unanimously approved.

7. At lines 66 and 67 of the amended draft the reporter suggested including language stating that "[n]o additional fees will be required when a party files an amended notice of appeal." Two commentators stated that the fees question will arise and should be answered by the draft. The addition was unanimously approved.

At the conclusion of the Committee's review of the language of the rule, the reporter pointed out that the draft she prepared for the meeting included changes in the Committee Notes to conform the notes to the suggested changes in the rule. The Committee agreed that the changes were appropriate. The reporter further suggested that the statement concerning the statistical treatment of a notice of appeal that is held in abeyance under the new rule should be deleted from the notes. One commentator had suggested deleting the statement contained in the published notes. The commentator, a clerk of a circuit, stated that there are many types of appeals held in abeyance -- those awaiting decisions of the Supreme Court, or further proceedings in a district court, or settlement, etc. -- and that they have not needed special statistical handling. The Committee concurred with the reporter's conclusion that it would be better to omit any suggestion as to the statistical classification of such appeals, and to allow the court administrators to determine such questions as the need arises.

The Committee considered the suggestion made by one commentator that the 4(a)(4) trap should be approached in an entirely different manner. The commentator suggested retaining Rule 4(a)(4) in its current form but amending Rule 26 so that a party caught in the trap could ask the court to suspend the provision in Rule 4 which invalidates a notice of appeal filed prior to the disposition of any of the enumerated motions. The Committee rejected the suggestion for two reasons. First, the solution is ad hoc, requiring a court to make a discretionary determination. The Committee wants to eliminate the trap. Second, it was not clear that the suggestion could work. There are cases indicating that it is not the

language in Rule 4(a)(4) that makes a notice of appeal premature if it is filed during the pendency of a posttrial motion, but rather, it is the motion itself that makes the appeal premature because the motion suspends the finality of the underlying judgment.

With regard to subdivision 4(b), Judge Logan noted that lines 106-111 provide that when an appeal by the government is authorized, a notice of appeal may be filed within 30 days after the entry of judgment or the filing of a notice of appeal by any defendant. Judge Logan noted that the provision in the rule allowing the government to bring an appeal within 30 days after the filing of a notice of appeal by a defendant conflicts with the statutory provision found at 18 U.S.C. § 3731. Section 3731 states that the government appeals authorized in that section "shall be taken within thirty days after the decision, judgment or order has been rendered . . ." The Committee briefly discussed the problem and the rules preemption provision in 28 U.S.C. § 2072. Because the published amendments do not make any substantive changes in the lines in question, the committee decided not to address the problem at that time. Instead, it decided to give the issue a docket number and to consider it at a later time. Judge Ripple asked Mr. Kopp to get the views of the Solicitor General. It was further decided that discussion of this issue should include prejudgment appeals.

Style. The Standing Committee has a new subcommittee on style. The Style Subcommittee reviewed the published rules and submitted recommended changes to the Advisory Committee. The Chair and Reporter received the recommendations shortly before the meeting, but the committee members did not see the recommendations until the morning of the meeting. Therefore, it was decided that as each rule was discussed the committee as a whole would review the changes suggested by the Style Subcommittee.

The Committee discussed the following changes to Rule 4, recommended by the Style Subcommittee:

1. At line 6 of the Style Subcommittee's redraft of Rule 4 (all line references in the discussion of the Style Subcommittee's recommended changes will be to the Style Subcommittee's redraft of the rules, unless otherwise stated), the Style Subcommittee recommended that the sentence state: "A notice of appeal filed after the judge announces a decision . . .." The Advisory Committee noted that this change would be inconsistent with line 124 where the Style Subcommittee recommended the following language: "A notice of appeal filed after the court announces a decision . . .." The Advisory Committee unanimously decided to use "the court announces" (rather than "the judge announces") in both instances.

2. At line 8-10, the Style Subcommittee recommended changing "shall be treated as filed after such entry and on the day thereof" to "is treated as filed on the date of entry." The Advisory Committee believed it important to make it clear that a notice will be treated as filed after entry of judgment. Therefore, the Advisory Committee unanimously approved changing the language to: "is treated as filed on the date of and after the entry." The Committee also approved the same change at line 93.

3. At lines 11-12, the Style Subcommittee recommended changing "[i]f a timely notice of appeal is filed by a party . . ." to "If one party files a timely notice of appeal. . . " The change was unanimously accepted.

4. At lines 14-15, the Style Subcommittee recommended changing "within 14 days after the date on which the first notice of appeal was filed . . ." to "within 14 days after the date when the first notice was filed . . ." The change was unanimously accepted.

5. At line 24, the Style Subcommittee recommended changing "order disposing of the last of all such motions" to "order disposing of the last such motion." The Advisory Committee recognized that either formulation left it unclear whether the reference is to the motion that was filed last, or to the last motion outstanding. Therefore, the Advisory Committee voted unanimously to change the language to "order disposing of the last such motion outstanding." The Committee also approved the same change at lines 67-68, 79-80, 100 and 130.

6. At lines 64-66, the Style Subcommittee recommended changing "shall be in abeyance and shall become effective upon" to "is ineffective until." The Committee unanimously approved the change but wanted to insure that the Committee note made direct reference to the notion that an appeal filed before the disposition of a posttrial tolling motion would be "in abeyance" or "suspended" until the disposition of the motion.

7. At line 99, the Advisory Committee changed "an order disposing of the last such motion" to "the order." The same change was approved at line 129. (These changes are consistent with the language already used at lines 23, and 79.)

8. At lines 139-142, the Style Subcommittee recommended language changes. The Advisory Committee discussed the changes and concluded that they would destroy the parallelism in the two phrases and that because this segment of the rule will be considered further (in light of the statutory question noted above) the language changes should not be currently adopted.

9. At line 161, the Style Subcommittee recommended adding "a person" between "inmate" and "confined." The Advisory Committee concluded that the apparent suggestion would be improper and was probably the product of an earlier draft and should be disregarded.

10. In the committee note to Paragraph (a)(3), the Style Subcommittee suggested deleting the language stating that the amendment "is technical in nature" and instead stating that the amendment "merely tightens the phrasing." The Advisory Committee concluded that describing an amendment as "technical in nature" is a long standing practice that is well understood. The Committee decided that the change was ill-advised and unanimously rejected it.

11. In the third paragraph of the Committee Note accompanying subdivision 4(b), the Style Subcommittee recommended splitting the third sentence into two sentences. The Advisory Committee decided that would change the meaning of the sentence and voted to retain the third sentence as a whole.

12. In the second paragraph of the Committee Note explaining subdivision 4(c), the Advisory Committee voted to change "inmates" to "an inmate" to conform to the other changes recommended by the Style Subcommittee.

Rule 4, as amended, was approved for submission to the Standing Committee with a recommendation that it be forwarded to the Judicial Conference.

Rule 6

The Advisory Committee then discussed proposed changes to Fed. R. App. P. 6(b)(2)(i). The changes would conform the rule to the proposed changes in Rule 4. The reporter stated that Professor Alan Resnick, the reporter for the Bankruptcy Advisory Committee, had contacted her and conveyed the Bankruptcy Committee's request that, in light of the changes being made in 4(a)(4), the Appellate Committee consider adding analogous language to Rule 6. The reporter stated that although Rule 6 has never stated that a notice of appeal is a nullity if it is filed before disposition of a motion for rehearing, there is case law holding that such a notice is premature. Therefore, the same trap exists in Rule 6 and should be eliminated.

The Committee considered the draft at p. 19 of the reporter's memorandum dated April 13. The Committee unanimously approved the draft, with changes needed to conform Rule 6 to changes just made in Rule 4. The following changes were made: 1) at line 7 the word "announcement" was added between the words "after" and "entry;" 2) at lines 9-12 the words "shall be in abeyance and shall become effective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, upon the date of" were struck and were replaced by "is ineffective until.."

The Advisory Committee decided that the proposed draft should go to the Bankruptcy Committee for their consideration and that if approved by the Bankruptcy Committee a decision would need to be made regarding a recommendation as to publication.

Rule 3

The proposed amendments to Rule 3 are needed to coordinate Rule 3 with the proposed changes in Rule 4. There were no public comments on the proposed amendments to Rule 3, therefore there were no changes for the Advisory Committee to consider other than those recommended by the Style Subcommittee.

The Advisory Committee unanimously voted to retain the rule's current language rather than follow the Style Subcommittee's suggestion at lines 3-4 of its redraft that the words "serve notice of the filing of by mailing a copy thereof" be changed to "send a copy of." The Committee discussed the fact that the word "serve" is a term of art that has substantive implications and the Committee concluded that such a change would need further exploration. Similarly, the Committee voted to retain the verb "serve" and not replace it with "sent" at lines 28, 31, and 38.

At line 13, the Style Subcommittee suggested deleting "named in the notice." The Advisory Committee voted unanimously to retain that language. The Advisory Committee was of the view that a notice of appeal should designate the court to which the party believes appeal lies. The rule should clearly indicate where the clerk of the district court should send a notice of appeal. It is for the court of appeals to determine whether it has jurisdiction under the applicable statute.

At several points throughout the rule the Style Subcommittee suggested that "district clerk" or "appellate clerk" replace "clerk of the district court" or "clerk of the court of appeals." The Advisory Committee unanimously decided to retain "clerk of the district court" and "clerk of the court of appeals" to avoid confusion. The term "district clerk" could include a bankruptcy clerk, and "appellate clerk" could refer to a clerk in a district court whose assignment is to prepare the district court papers for appeal.

At line 44, the Advisory Committee voted to retain the published language so that there would be no unintended substantive change.

Rule 3 was approved for submission to the Standing Committee.

The Committee adjourned for lunch at 12:40 p.m.

The Committee resumed business at 1:00 p.m.

B. Item 91-1, changing "magistrate" to magistrate judge" in Fed. R. App. P. 3.1 and 5.1.

There were no public comments on either Rule 3.1 or Rule 5.1. The Committee considered the recommendations from the Style Subcommittee and ultimately accepted all of the recommendations. However, before that vote, the Committee discussed the fact that the Style Subcommittee recommended deletion of the language in Rule 3.1 making it clear that although a judgment may be entered at the direction of a magistrate, it is a judgment of the district court. Judge Logan remarked that when the use of magistrates was new, such language was useful; but now that the practice is well established and understood, there is no need to retain the language. The Committee concurred.

Rules 3.1 and 5.1 were approved for submission to the Standing Committee.

C. Item 90-5, technical amendment of Rule 10(b)(3).

There were no public comments regarding the proposed amendment of Rule 10; the amendment simply corrects a printer's error. The Committee therefore turned its attention to the recommendations made by the Style Subcommittee. The Advisory Committee unanimously accepted all but one of the recommendations. At lines 13-15 of the Style Subcommittee's redraft, the subcommittee suggested that the second sentence of paragraph (b)(3) state: "An appellee who desires a transcript of other parts of the proceedings shall . . . file and serve on the appellant a designation of the additional parts . . .." The Advisory Committee concluded that dropping the word "necessary" from the second sentence of paragraph (b)(3) would be a substantive change. The Advisory Committee unanimously agreed to change the sentence as follows: "An appellee who believes that a transcript of other parts of the proceeding is necessary, shall . . ."

The Advisory Committee also unanimously decided to retain the "technical amendment" language in the Committee Note rather than make the change recommended by the Style Subcommittee.

Rule 10 was approved for submission to the Standing Committee.

D. Item 89-2, amendment of the filing rules in light of the Supreme Court's decision in Houston v. Lack

The published amendment to Rule 25 extends the holding in Houston v. Lack to all papers filed by persons confined in institutions. No public comments were submitted regarding the amendments. The Advisory Committee unanimously adopted all of the Style Subcommittee's suggestions.

When reviewing Rule 25, one member of the Committee noted that the mailbox rule for filing briefs requires a party to use "the most expeditious form of delivery by mail, excepting special delivery." The member questioned whether a party must use overnight mail. The Committee decided to add review of the mailing requirements to the table of agenda items for consideration at a future meeting.

The Committee approved Rule 25 for submission to the Standing Committee.

E. Item 86-25, amendment of Rule 28 to require a statement of the standard of review in briefs

The published amendment to Rule 28 requires that a party's opening brief include a statement of the standard of review. Only one comment was received and it was not directed at the substance of the amendment. The commentator urged that the Advisory Committee further amend Rule 28 to state that the requirements of Rule 28 are exclusive and cannot be altered or supplemented by local rules. Mr. Kopp, on behalf of the Department of

Justice, spoke in favor of the suggestion. He stated that there have been twenty years of experimentation with Rule 28 and he believed it was time to either put an end to the experimentation or to limit it. Judge Logan pointed out that his circuit has a Rule 11 type provision governing briefs and that his circuit would definitely be unhappy to be forced to abandon it. Judge Ripple suggested that the committee deal with the text of the rule and put the commentator's and Mr. Kopp's suggestions over to the committee's broader uniformity discussion.

The Committee noted that the Style Subcommittee's redraft of Rule 28 includes only those portions of the rule which were published. The apparent intent of the Style Subcommittee is to review and revise the rules that the advisory committees propose amending. The Advisory Committee was favorably impressed with the work done by the Style Subcommittee. However, the Advisory Committee had some hesitation about the advisability of making style changes in some but not all rules, and in some parts, but not all, of a given rule. The Committee noted that the Style Subcommittee put rule headings and subheading in initial capitals in each of the rules containing proposed amendments. That could mean that until the Advisory Committee has proposed amendments to each of the 48 appellate rules, there will be inconsistent capitalization of the headings. In Rule 28, that could mean that there will be initial caps in the heading of one subdivision, but not others. There was significant committee sentiment that it would be better to redo all the rules at one time.

The Advisory Committee unanimously adopted the Style Subcommittee's suggested changes to Rule 28, and then approved the submission of Rule 28 to the Standing Committee.

F. Item 88-10, amendment of Rule 34(c) deleting the requirement that an opening argument include a statement of the case

The published amendment deletes the requirement that an opening argument include a statement of the case. No public comments were submitted. The Advisory Committee unanimously accepted the changes recommended by the Style Subcommittee. Before the vote, however, there was discussion of the fact that the Style Subcommittee recommended, at line 5 of its redraft, changing "[c]ounsel will not be permitted to read . . ." to "[c]ounsel may not read . . ." The Committee wondered whether the change softened the rule. Mr. Spaniol read from the Supreme Court's rule which states in italics that the court "looks with disfavor on oral argument read from a prepared text." Judge Logan noted that a court's ability to sanction counsel would probably be the same under a rule stating that counsel "may not" read, as under one stating that counsel "will not be permitted" to read. Mr. Froeb stated that in his opinion, counsel arguing an appeal for the first time need a little latitude. The Committee ultimately accepted this recommendation along with the others made by the Style Subcommittee.

Rule 34(c) was approved for forwarding to the Standing Committee.

G. Item 88-13, amendment of Rule 35(a) to provide that a majority of judges eligible to participate in a case shall have the power to grant in banc review.

Before beginning the discussion of item 88-13, Judge Ripple pointed out that it is one of three items on the agenda dealing with the in banc rule. Combined items 89-5 and 90-1 (listed as "action items"), are suggestions to amend Rule 35 to treat suggestions for rehearing in banc like petitions for panel rehearing so that a request for a rehearing in banc will suspend the finality of a court's judgment and toll the period for filing a petition for certiorari. The Solicitor General had submitted a new suggestion for amending Rule 35 (listed as a "discussion item"). The Solicitor General's suggestion was to delete the language in Rule 35 stating that a rehearing in banc is disfavored. The Solicitor further suggested that the list of reasons for granting rehearing in banc should be expanded to include instances when the decision of a court is in conflict with the decision of another federal court of appeals.

The published amendment to Rule 35 would create a uniform method for calculating a majority for purposed of hearing or rehearing a case in banc. The proposal does not count vacancies or recusals when determining whether a majority favors granting an in banc hearing. However, it provides that the number of judges participating in an in banc vote must be a majority of the active judges, including any who may be recused.

Five comments in opposition to the proposal were submitted during the comment period. The Chief Judges of four circuits wrote in opposition to the proposal. Because Chief Judge Sloviter was one of the opponents, Judge Ripple asked her to speak.

Chief Judge Sloviter stated that the rule in her circuit differs from the published rule. Her circuit counts recused judges in the base. However, she stated that her opposition to the published rule was not based upon its difference from her circuit's rule. Rather, her position is that the question should be left to the individual circuits. She stated that this issue is not one that requires uniform treatment. She outlined the two reasons she believes uniformity is generally important. Uniformity is needed so that lawyers know how to practice when they cross circuit lines. The way that a circuit computes a majority does not affect the way a lawyer practices. Second, she stated, uniformity is also important when one rule is clearly superior to other options. On this particular issue the circuits are fairly evenly divided, undercutting any argument that one rule is clearly preferrable to another.

Judge Logan stated that one reason to have a national rule is to eliminate the need for a local rule in each of the thirteen circuits. He further noted that under those local rules that count recusals in the base, a recusal actually counts as a negative vote. However, because the practice is currently so divided, Judge Logan concluded that it may not be a good idea to try to impose a uniform rule at this time.

Mr. Kopp stated his belief that there should be a uniform rule. He believes that the

existence of different rules on such a fundamental matter gives the appearance of justice by happenstance.

A motion to withdraw the rule was made. During discussion of the motion the Committee concluded that the topic is not ripe for rulemaking. In addition to the division among the circuits, the Supreme Court has stated that the matter is one within the power of the individual circuits. Seven members voted to withdraw the rule and request that the Standing Committee not forward it to the Judicial Conference; none voted in opposition; and there was one abstention.

At that point the Committee had concluded its consideration of the items out for public comment, except the Torres rules that had been published in February, 1992. That topic was taken up later in the meeting.

II. ACTION ITEMS

A. Items 89-5 & 90-1, amendment of Rule 35 to treat a suggestion for rehearing in banc like a petition for panel rehearing so that a request for a rehearing in banc will suspend the finality of a court's judgment and toll the period for filing a petition for certiorari

A petition for panel rehearing suspends the finality of a judgment until the rehearing is denied or a new judgment is entered on the rehearing. Therefore, the time for filing a petition for certiorari runs from the date of the denial of the petition or the entry of a subsequent judgment. In contrast, a suggestion for rehearing in banc does not toll the running of time for seeking certiorari.

The reporter reviewed the Committee's discussion at its December 1991 meeting. At that time the committee considered draft amendments under which a suggestion for rehearing in banc would toll the time for filing a petition for certiorari. The drafts made it clear that if a suggestion for rehearing in banc tolls the time for filing, there must be a date certain from which the time begins to run anew. The Committee noted that under current culture, courts have no obligation to vote or otherwise act upon suggestions for rehearing in banc. To require any sort of action within a time certain would disturb that culture, which could have an undesirable impact upon collegiality and the give and take process of shaping opinions. Therefore the Committee decided to take a different approach. In December, the Committee decided to insert language in Rule 35(c) alerting parties to the fact that the pendency of a suggestion for rehearing in banc does not extend the time for filing a petition for certiorari. The reporter was asked to prepare a draft.

The Committee considered the draft contained in the reporters memorandum dated April 22, 1992. The draft was approved unanimously, without amendment.

The Committee was unable to take up consideration of the remaining action items. Consideration of the Style Subcommittee's recommendations had lengthened the process of reviewing the Gap Report. The Committee postponed consideration of the other action items until its fall meeting.

III. DISCUSSION ITEMS

A. Solicitor General's suggestion regarding rehearings in banc

As previously stated, the Solicitor General had written to the Chair of the Committee requesting that the Committee consider amending Rule 35 so that if a panel decision conflicts with the decision of another federal court of appeals, that inter-circuit conflict would serve as a ground for seeking a rehearing in banc.

Mr. Kopp stated that the rule would benefit the system as a whole. The Supreme Court may not be able to decide all inter-circuits conflicts and, even if it can, to the extent that the Court devotes its energies to such cases it is unable to take others.

Judge Boggs noted that there are a number of occasions where an in banc could not eliminate inter-circuit conflict because two other circuits are already in conflict. And, of course, even if the panel decision sought to be reheard in banc is the decision that created a conflict, there is no guarantee that when the court sits in banc it will change the panel's decision. In fact, if the conflicting decisions are both from in banc courts, the contrary positions may be especially entrenched precisely because they were issued by in banc courts.

Members of the committee discussed the methods their circuits use to avoid inter-circuit conflicts. In some circuits all published opinions are circulated to all active and senior judges in the circuit before the opinion is issued so that all members of the court may review the opinion and have an opportunity to request a rehearing in banc. Other circuits circulate only those opinions that would create a conflict with another circuit or that would overrule circuit precedent.

Judge Ripple suggested that the Solicitor General's request be given an agenda item and that it be brought before the committee at a later meeting. Prior to that discussion Judge Ripple noted that the Committee would need to know what internal procedures the courts of appeals use to prevent the creation of inter-circuit conflicts. He pointed out that sometimes a circuit fails to reconsider its position even when the weight of authority is contrary. Judge Ripple asked Mr. Kopp, Judge Logan, and Judge Williams to serve as a consultative committee with the reporter concerning this issue.

Mr. Cecil, of the Federal Judicial Center, stated they had collected information on a related topic and some of that information might be of assistance.

Once again, because of the late hour, the other discussion items were postponed until the fall meeting.

IV. REQUESTS FROM THE STANDING COMMITTEE

At its January 1992 meeting the Standing Committee had asked the Advisory Committee on appellate rules to take action on four items, three of them prior to the Standing Committee's meeting scheduled for June.

A. Item 92-1, rule requiring uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules.

The Standing Committee asked each of the Advisory Committees to draft amendments to the rules within their purview that would require uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules. In addition, the committees were asked to consider whether the rules should address the proper use of internal operating procedures and standing orders.

The reporter had prepared two drafts for the Committee's consideration. The only substantive difference between the drafts was that the first draft required the circuits to number their local rules to correspond with the most closely related federal rule; whereas, the second draft required the circuits to number local rules in conformity with a uniform system prescribed by the Judicial Conference. The other differences were stylistic.

The Committee decided to work with draft one. The Committee unanimously approved the draft, with amendments, for forwarding to the Standing Committee. The amendments made in the draft are as follows:

1. At lines 3-4, delete "from time to time."
2. At line 5, change "not inconsistent" to "consistent."
3. At line 5, insert "but not repetitive of" between the words "with" and "these"
4. Move the second sentence (lines 6-9) to the end of the rule.
5. Change the third sentence to read as follows: "All generally applicable directions to parties or their lawyers regarding practice before a court must be placed in local rules rather than in internal operating procedures or standing orders."
6. Change the fourth sentence to read as follows: "Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure shall be numbered to correspond to the related federal rule."
7. Move the example (lines 16-20) to the Committee Note.
8. Delete the sixth and seventh sentences (lines 20-24).
9. Change the last sentence to read as follows: "The clerk of each court of

appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure prescribed by the court at the time of its promulgation or amendment.

As amended, the draft read:

Rule 47. Rules by court of appeals

After giving appropriate public notice and an opportunity for comment, each court of appeals by action of a majority of the circuit judges in regular active service may make and amend rules governing its practice that are consistent with, but not repetitive of, these Federal Rules of Appellate Procedure. All generally applicable directions to parties or their lawyers regarding practice before a court must be in local rules rather than internal operating procedures or standing orders. Any local rule that relates to a topic covered by the Federal Rules of Appellate Procedure shall be numbered to correspond to the related federal rule. The clerk of each court of appeals must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure prescribed by the court at the time of its promulgation or amendment. In all cases not provided for by rule, a court of appeals may regulate its practice in any manner not inconsistent with these federal rules.

B. Item 92-2, proposed rule to dispense with the need for full procedures (review by the Supreme Court and Congress) whenever there is a need to correct a typographical or clerical error in a rule.

The Standing Committee also asked each of the Advisory Committee's to consider the possibility of amending the rules within their purview to authorize technical changes without the need to follow the full procedures, including Supreme Court and Congressional review.

The reporter had prepared two drafts for the Committee's consideration. However, because the Style Subcommittee had prepared new drafts for consideration by all of the rules committees, the Committee considered only that draft.

The Style Subcommittee's proposed draft was as follows:

RULE 49. Technical and Conforming Admendments.

The Judicial Conference of the United States may amend these rules to correct errors or inconsistencies in grammar, spelling, cross-references, typography, or style, to make changes essential to conforming these rules with statutory amendments, or to make other similar technical or conforming changes.

The Committee discussion revealed concern about the breadth of the proposed rule. The Committee had just spent a considerable amount of time reviewing recommended "style" changes and recognized that the line between style and substance can be rather elusive. The ability to make changes essential to conform with statutory changes without full procedures also raised concern. Changing "magistrate" to "magistrate judge" with less formality than is currently required was seen as appropriate. However, every time the bankruptcy code is amended, sweeping changes need to be made to the bankruptcy rules. There was consensus that such changes should not be made without observing the full procedures. The proposed rule made no distinction between the two situations.

Because of the hour some members of the Committee had already left and there was no longer a quorum. Judges Williams, Jolly, and Ripple suggested that it might be helpful to insert the word "technical" at the beginning of line 5, before the word "changes." Mr. Kopp expressed the opinion, that even with that amendment, the rule was too broad.

C. Item 90-4, amendment of Rules 3(c), 15(a), and Forms 1, 2, and 3 in light of the Torres opinion.

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear an appeal of a party not properly identified as an appellant and that the phrase "et al." is insufficient to identify an unnamed party as an appellant. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant.

Judge Ripple briefly reviewed the history of the proposed amendments. At the Advisory Committee's December 1991 meeting, the Committee approved draft amendments essentially requiring a notice of appeal to name each appellant, with an exception for class actions. Because of the importance of the Torres problem, the Standing Committee approved immediate publication of the proposed amendments at the January 1992 meeting. The Standing Committee further approved shortening the usual six month publication period to three months. Although the Standing Committee had expedited the process for the Advisory Committee's draft, the Standing Committee had requested that the Advisory Committee review its draft and consider developing an alternative that would better preserve the right to an appeal on the merits.

Public hearings on the amendments were scheduled for April 8, 1992, but were canceled due to lack of interest. Because the publication period would not end until mid-May, Judge Ripple informed the Committee that it would be necessary to hold a telephone conference to finalize the Committee's decision on the proposals.

The reporter had prepared summaries of the public comments received thus far. One of the commentators was Judge Easterbrook from the Seventh Circuit, whose comments

included an alternative draft modeled upon the Supreme Court's rule. The Supreme Court's rule essentially provides that once any party brings an appeal, all other litigants are parties to the appeal.

Judge Boggs indicated that he favored the Easterbook suggestion. He stated that he prefers administrative inconvenience to having a party lose the right to appeal because an attorney failed to include the party's name.

Judge Logan stated that there may be some difficulties translating the Supreme Court's rule to the courts of appeals. However, he noted that prior to the Supreme Court's decision in Torres any lack of specificity did not seem to cause problems.

Judge Williams indicated that he would like to work toward a draft that generally tries to save appeals. A party could clear up any uncertainty by demanding that a lawyer state who the lawyer represents.

Judge Jolly stated that there are two sides to the problem -- a client who may suffer because a lawyer mistakenly omits the clients name from a notice of appeal, and an appellee who has a right to know who is bringing the appeal and on what grounds. A rule requiring that each appellant be named gives a lawyer clear and simple directions.

Discussion of the drafts based upon the Supreme Court rule revealed several problems. The drafts attempt to resolve the problem of the lost appellant by providing, in essence, that, once any party brings an appeal, all other litigants are parties to the appeal as appellees. It leaves to the court of appeals the task of sorting out those who actually have an interest in being active parties in the appellate litigation. It also requires the court of appeals to realign the parties for purposes of briefing schedules, etc.

Mr. Kopp suggested using the published rule as an interim solution. The Committee may not be able to come up with a workable alternative before the Standing Committee's June meeting. Until a better solution is achieved, the published rule would provide clarity.

Judge Ripple pointed out that the published rule has not elicited much comment; that may be some indication that a rule requiring each appellant to be named is not controversial.

One of the commentators had suggested that with regard to class actions, the rule should require a notice of appeal to name at least one person qualified to take the appeal. The committee members present agreed and approved the following language:

> In class actions, whether or not the class has been certified, it shall be sufficient for the notice to name as representative of the class one person qualified to bring the appeal.

Final work on the amendments would have to await the close of the comment period. Judge Ripple indicated that he would contact the Committee members to set up a telephone conference in May.

Judge Ripple thanked the members of the Committee for their hard work and the meeting adjourned at 4:45 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter