MINUTES OF THE MEETING

OF THE ADVISORY COMMITTEE ON APPELLATE RULES

APRIL 15, 1996

Judge James K. Logan called the meeting to order on April 15, 1996, at 8:30 a.m. in the Fairmont Hotel in San Francisco, California. In addition to Judge Logan, the Advisory Committee Chair, the following committee members were present: Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp attended the meeting on behalf of Solicitor General Days. Judge Alicemarie Stotler, the Chair of the Standing Rules Committee, and Judge Frank Easterbrook, the liaison member from the Standing Committee, were both present. Mr. Patrick Fisher, the Clerk for the Tenth Circuit, attended on behalf of the clerks. Mr. Peter McCabe, the Committee Secretary, and Mr. John Rabiej, Chief of the Rules Committee Support Office, were present. Ms. Judith McKenna of the Federal Judicial Center was in attendance. Chief Justice Pascal Calogero, a member of the Advisory Committee, joined the meeting later in the morning. Mr. Cole Benson, the Supervising Deputy of the Ninth Circuit Clerks, attended as a guest.

Judge Logan noted the recent publication of the restyled rules and thanked all the committee members once again for all their hard work on that project. He announced the public hearings scheduled on July 8 in Washington, D.C. and August 2 in Denver, Colorado. Judge Logan invited all committee members to attend the hearings.

The minutes of the October 1995 meeting were approved as submitted. Judge Logan then asked the reporter to begin discussion of the proposed rule amendments that had been published in September 1995.

Rule 26.1

Rule 26.1, as published, was divided into three subdivisions to make it more comprehensible. The rule continued to require disclosure of a party's parent corporation but the amendments deleted the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, added a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party.

Eleven letters commenting on the proposed amendments were received; the letter from the American Bar Association Section of Intellectual Property, however, included separate suggestions from two committees so there was a total of 12 commentators. Of the 12, four supported the amendments, none generally opposed the amendments, but 8 suggested revisions.

The Advisory Committee had specifically requested that the Committee on Codes of Conduct review the proposed amendments. The Committee on Codes of Conduct approved the proposed draft. Given that approval, the new draft prepared by the reporter at the close of the comment

period did not make any fundamental changes in the disclosure requirements. Specifically, the requirement that a party disclose "subsidiaries" and "affiliates" was not reinstated even though 2 of the commentators urged reinsertion of that requirement.

The new draft also continued to require disclosure of a stockholder that owns 10% or more of the party's stock if the stockholder is publicly held. One commentator said that this provision "over-extends" the assumption of disqualification because a judge's interest may be extremely minimal. The disqualification statute is, however, quite demanding. The statute requires a judge to disqualify himself or herself if the judge has a "financial interest" in a party "however small" the interest may be, if the interest could be "substantially affected by the outcome of the proceeding."

The new draft did not require the party to disclose all of the party's stockholders that are publicly held (as one commentator suggested) but continued only to require disclosure of those corporations that own 10% of the party's stock.

The ten percent threshold makes the judge's interest in the stockholder a financial interest in the party. The new draft made it clear that the rule applies only when a single corporate stockholder owns at least 10% of the party's stock.

The new draft also required disclosure of "all" of a party's parent corporations rather than "any" parent corporation. The intent of the change was to require disclosure of grandparent and great-grandparent corporations. Corresponding changes were made in the Committee Note.

One of the members stated that the definition of a parent corporation is crucial. Although it was noted that the SEC has a fairly precise definition, the consensus was that in this context it is not necessary to make the definition more scientific by designating the percentage ownership that makes one corporation a parent of another. Nor was there sentiment that the rule needs to be expanded beyond corporations to other organizations. None of the members were familiar with instances in which a judge has been unable to ascertain the judge's interest in limited partnerships, etc.

With regard to the suggestions that the rule should continue to require disclosure of subsidiaries and affiliates, it was noted that none of the persons who suggested retention of that disclosure requirement had been able to identify an instance when failure to provide disclosure would be problematic.

The new draft was approved unanimously. It was agreed that the changes made after publication were not substantial and that there was no need to republish the rule.

Rule 29

The rule governing amicus briefs was entirely rewritten prior to publication. The former rule granted permission to conditionally file an amicus brief with the motion for leave to file. The

published rule required the brief to accompany the motion. In addition to identify the applicant's interest and the reasons why an amicus brief is desirable, the published rule required that the motion state the relevance of the matters asserted to the disposition of the case.

The published rule also specified the contents and form of the brief. The published rule limited an amicus brief to no longer than one-half the maximum length of a party's principal brief.

Seventeen commentators submitted statements about the proposed rule. Of the seventeen, none generally opposed the amendments; 3 supported the amendments without reservation; 13 suggested revisions; and 1 made no substantive comment.

Seven of the commentators who suggested revisions were unhappy with the provision limiting an amicus brief to one-half the length of a party's brief. The new draft prepared at the close of the comment period did not change the limit except to provide 1) that permission granted to a party to file a longer brief has no effect upon the length of an amicus brief, and 2) that a court may grant an amicus permission to file a longer brief.

Four commentators opposed the requirement that the brief accompany a motion for leave to file. The new draft deleted that requirement so that the cost of preparing a brief need not be incurred unless the amicus knows that it will be permitted to file its brief.

The existing rule requires an amicus curiae to file its brief `within the time allowed the party whose position as to affirmance or reversal the amicus brief will support" unless: 1) all parties otherwise consent, or 2) the court for cause shown grants leave for later filing. The published rule dropped the exception based upon consent of all parties, but otherwise left the time for filing the brief unchanged. Four commentators opposed the requirement that the brief be filed within the time allowed the party being supported. Because the Committee had spent considerable time on the timing issues when developing the published amendments, the new draft did not adopt any of the alternative approaches suggested by the commentators and retained the same filing schedule as the published version.

Both the existing and the published rules permitted the filing of an amicus brief by leave of court or when the brief is "accompanied by written consent of all parties." Rather than requiring the applicant to file the written consent of all the parties, the new draft adopted the suggestion that it would be sufficient to submit a statement that all parties consent to the filing of the brief.

In subpart (a) of the new draft the District of Columbia was added to the list of entities allowed to file an amicus brief without consent. The new draft also made it clear in subpart (f) that an amicus may request leave to file a reply. The Committee began its discussion by considering the length provisions at lines 56-62 of the new draft and the intersection of that provision with the time for filing. One member reiterated some of the arguments advanced by the commentators who urged the Committee to increase the length. He argued that an amicus does not always have an opportunity to review the party's brief; that the party and the amicus may not agree about the way to approach the issues; and, in instances in which the amicus is a better advocate than the party, the amicus brief may become the equivalent of one of the main briefs in the case.

He further noted that the length limitation interrelates with whether or not the amicus must file at the same time as the party or is permitted to file later. The shorter limitation is more acceptable if the amicus files after the party being supported.

Another member responded that the most helpful amicus briefs are short and to the point.

Two other members responded to the suggestion that a staggered briefing schedule should be considered. They stated that in their experience the party and the amicus ordinarily work cooperatively. They argued, therefore, that the rule should not delay the briefing schedule.

Other members said that they were persuaded by those who argued that if the amicus brief must be short and not repetitious of the party's brief, the amicus should have some short period of time after the party's brief is filed to fine-tune the amicus brief.

A vote was taken on the substantive question of whether an amicus should be permitted to file after the party being supported. The vote was 5 in favor of the staggered schedule and two in opposition. Accordingly the language at lines 66-70 of the redraft was amended to state:

> The brief shall be filed no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae who does not support either party shall file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed.

That new language was approved unanimously. The passive voice --- "is filed" -- was used deliberately. The filing date of a brief is a bit confusing. A party or amicus can send its brief to a court for filing; although it is timely under Rule 25 if mailed within the filing time, it is not filed until the court receives it. It would be incorrect to say that the brief is due 7 days after "the party files" its brief because filing is done by the court not by the party. It was understood that the amicus may need to contact the court in order to ascertain the filing date.

One member suggested that with a staggered briefing schedule the amicus should be required to effect same day service of the brief on the parties so that the party has sufficient opportunity to address in its responsive brief the issues raised by the amicus. The suggestion was not adopted, however, because same day service on out-of-town parties is possible only by fax and even that may not be possible. Fax machines are not always operational and even when they are, they are often busy.

The language of lines 56-62 was redrafted and unanimously approved. As amended those lines read as follows:

> Except by the court's permission, an amicus brief may be no more than one-half the maximum length of a party's principal brief that is authorized by these rules. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

Lines 73 and 74 of the redraft were amended to read as follows: "Except by the court's permission, an arnicus curiae may not file a reply brief." The published draft had said that an amicus "is not entitled to file a reply brief." The "is not entitled" language carried the implication that an amicus could seek permission to file a reply. But with the addition of the introductory phrase -- "except by the court's permission" -- the opportunity to seek the court's permission is made express and the "may not file" language is appropriate.

The discussion then turned to lines 35-38 of the redraft. The redraft said: "In addition to the requirements of Rule 32, the cover shall identity the party or parties supported or indicate whether the brief supports affirmance or reversal." (emphasis added). One member suggested replacing the word "or" with "and" so that both types of information are required. In the rare instances in which the amicus does not support any party, the amicus could simply so indicate. That change was approved by acclamation.

Lines 23-27 of the redraft make a post-publication change. The published rule, like the existing rule, said that an amicus may file a brief only with the court's permission or if the brief is accompanied by the written consent of all the parties. Three commentators suggested changing the provision dealing with consent of the parties. The redraft eliminated the need to file the other parties' written consent and provided that it would be sufficient for the brief to state that all parties have consented to its filing. The Committee accepted that change but amended those same lines to improve the syntax. As amended lines 23-27 read as follows: "Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing."

The Committee then discussed the time for an amicus to file its motion for leave to file. One member proposed that lines 28 and 29 should state that the motion may be filed on or before the date the amicus brief is due. It was pointed out that in some circuits any such motion is held until the case is assigned to the panel and, therefore, the would-be amicus does not get a response to the motion until after the brief is presented for filing. The Committee decided, by a vote of 5 in favor and 2 abstentions, to return at lines 28-29 and lines 63-64 to the published draft and require that the brief accompany the motion. That means that the motion must be filed no later than the time for filing the brief.

With regard to participation of an amicus in oral argument, the language of lines 76-78 was amended. The Committee agreed that it is common to allow an amicus to participate in oral argument when the party being supported cedes some of its time to the amicus. The Committee, however, wanted to retain court control over the ability of an amicus to participate, rather than permitting an amicus to participate whenever a party is willing to cede some of its time leaving the final decision in the court's hands may lessen the ability of an amicus to exert undue pressure on the party. The published rule said that a motion to participate is granted only for "extraordinary reasons." The Committee agreed to change the language to more accurately reflect current practice. As amended subpart (g) says: "An amicus curiae may participate in oral argument only with the court's permission." The reporter was asked to prepare an accompanying change in the Committee Note indicating that unless a party is willing to cede some of its time to the amicus, oral argument by an amicus will only be permitted in extraordinary circumstances.

Rule 35

The proposed amendments to Rule 35 treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of a court of appeals' judgment and extend the period for filing a petition for writ of certiorari. The sentence in the existing rule stating that a request for rehearing en banc does not suspend the finality of the judgment or stay the mandate was deleted. The term "suggestion" for rehearing en banc was changed to "petition for rehearing en banc."

Fifteen comments on the proposed amendments were received. Six of the commentators addressed the criteria for granting a rehearing en banc. Because these provisions had been the subject of careful negotiation among the Committee members, the only post-publication changes recommended by the reporter were intended to: 1) make it clear that intercircuit conflict is only one example of a question of "exceptional importance," 2) eliminate any implication that a court should grant en banc reconsideration whenever there is an intercircuit conflict, and 3) avoid the implication that a case cannot present a question of exceptional importance unless it conflicts with every other federal court of appeals.

Justice Calogero, who had experienced travel delays, joined the meeting. Judge Logan began the discussion with the "spelling issue," that is with the change from "in banc," as used in the existing rule, to en banc" as used in the published draft. On a vote to retain the "en banc" spelling, 6 members voted in favor of that spelling and one abstained. The Committee generally expressed hope that the spelling question not become an issue that might prevent the rest of the proposed changes from moving forward. The reporter had prepared a new paragraph for insertion in the Committee Note which would explain the reason for the change. The Committee decided that the explanation should be part of the Advisory Committee's report to the Standing Committee, but not part of the Committee Note accompanying the rule.

The Committee then turned its attention to the changes made in part (b)(l)(B) dealing with the "exceptional importance" criteria. The redraft struck the word "every" at the end of line 37, so that the intercircuit conflict example said that a proceeding may present a question of exceptional importance "if it involves an issue as to which the panel decision conflicts with the authoritative decisions of other federal courts of appeals that have addressed the issue." The published draft had limited the example to instances in which the panel decision conflicts with the authoritative decisions of every other federal court of appeals."

The dropping of the word "every" was responsive to a comment that objected to the implication that a court should grant en banc rehearing whenever a panel decision conflicts with the decision of even a single other circuit. It was noted, however, that dropping the word "every" also cuts the other way and may imply the desirability of an en banc hearing even when the panel decision only joins one side of an already existing conflict. The Committee voted unanimously to return lines 37 through 39 to the wording used in the published rule. Those lines having been changed, subparagraph (b)(l)(B) was approved unanimously.

One member was concerned that the rule does not authorize a court to hold an en banc hearing to correct an error. Others responded that a party seeking an en banc hearing for such a purpose argues that the proceeding involves a question of "exceptional importance."

Lines 8-10 were amended to read: "en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or". That change eliminates the phrase "consideration by the full court" which the Committee found inconsistent with the statutory authorization for en banc consideration by less than all the members of a court (i.e. the mini en banc hearings authorized in the Ninth Circuit).

Discussion then turned to lines 47-52 which state that when a party files both a petition for panel rehearing and a petition for rehearing en banc, together they cannot exceed 15 pages even if they are filed separately. It was pointed out that some circuits require the use of two separate documents and in such circuits it would be difficult to include all necessary information in both documents and meet the 15 page limit. The Committee, therefore, unanimously voted to amend line 52 by adding the words "unless separate filing is required by local rule."

There was discussion of the retention of "page" limits in this rule as contrasted with the proposed limits in Rule 32 that are based upon word or character counts. The consensus was that the additional complications of the Rule 32 methods, including attorney certification of the length, are not necessary in this context.

Lines 89-92 of the redraft were amended. The redraft said that a vote need not be taken on a petition for rehearing en banc unless a judge in regular active service or any other member of the panel that rendered the decision calls for a vote on the petition. It was noted that at least one circuit permits a senior judge to call for a vote even though a senior judge cannot vote on the petition.

The statute is silent about who can call for a vote on the petition even though the statute prohibits a senior judge from voting on the petition unless he or she was a member of the panel rendering the decision. It is Judicial Conference policy that senior judges should be treated like active judges to the extent consistent with statute. The Committee unanimously approved changing line 91 so that "a judge" can request a vote. It was decided that it was unnecessary to discuss that change in the Committee Note.

With regard to the Committee Note it was decided to delete all references to specific local rules. As local rules change over time, the citations become obsolete.

Also, the portion of the Committee Note explaining subdivision (c), which discusses the interrelationship between the changes in Rule 35 and Supreme Court Rule 13.3, was deleted. The Committee Note, as published, said that the changes in Rule 35 did not mean that the filing of a request for a rehearing en banc would extend the time for filing a petition for writ of certiorari and that amendment of Supreme Court Rule 13.3 would be necessary to accomplish that objective. The Committee agreed with the commentators who felt that the proposed changes arguably would have that effect. Supreme Court Rule 13.3 says if a "petition for rehearing" is

timely filed the time to file a petition for a writ of certiorari runs from the date of the denial of the petition or, if the petition is granted, from the entry of judgment. The Supreme Court Rule further says that a "suggestion ... for a rehearing en banc is not a petition for rehearing within the meaning of [Rule 13] unless so treated by the United States court of appeals."

The Committee believed that the change in name from "suggestion" for rehearing en banc to "petition" for rehearing arguably affected the desired change in the time for filing a petition for certiorari. It was, however, the Committee's intent to inform the Supreme Court that amendment of its Rule 13.3 would help prevent potential confusion.

Rule 41

In keeping with the objective of the amendment to Rule 35 that a request for a rehearing en banc be treated like a request for a panel rehearing, the published amendments to Rule 41 provided that the filing of a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court for a writ of certiorari delay the issuance of the mandate until the court disposes of the petition or motion. The published rule also provided that a mandate is effective when issued. The published rule further provided that the presumptive period for a stay of mandate pending petition for a writ of certiorari would be 90 days.

Nine commentators submitted letters discussing Rule 41. Six of them approved the amendments without reservation. One made no substantive comments. Two suggested revisions.

The post-publication redraft adopted the suggestion that the language of the rule be modified to make it clear that the party, not the Supreme Court Clerk, has the burden of notifying the court of appeals when a petition for certiorari has been filed.

The other suggestion, that the rule should specify when the mandate issues if a petition for rehearing or a petition for rehearing en banc is granted, resulted in an addition to the Committee Note.

Lines 48-57 were amended by the Committee to reflect the fact that ordinarily the court of appeals learns about the filing of a petition of certiorari by telephone conversation with the office of the Clerk of the Supreme Court. The actual notice that a cert petition has been filed is often not received until after the original stay has expired. As amended those lines read:

> The stay shall not exceed 90 days, unless the period is extended for good cause, or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk during the period of the stay.

Rule 41, as amended, was approved for submission to the Standing Committee.

Need for Republication?

Judge Logan then asked whether any of the post-publication changes made to the rules were substantial; if so, those rules must be republished. Only the staggered briefing schedule for amicus brief was discussed as possibly substantial. The Committee consensus, however, was that because the changes made would not extend the briefing schedule, even that change did not require republication.

Timing?

Judge Logan asked the Committee to consider, in light of the recent publication of the restyled rules, the time at which these rules should be moved forward to the Standing Committee and the Judicial Conference.

Judge Logan recommended sending them forward this summer because delaying would put these changes on the same schedule as the restyled rules. There are already 3 rules in the restyled packet that contain substantive changes. If these 4 are delayed, then the packet would contain 7 substantively altered rules. If the restyled packet were to fail, then these 7 rules would be further delayed another year.

Committee reaction was mixed. Several members said that it is easier to have changes come all at once. Another member urged going forward now because we do not know what the reaction will be to the restyled rules. If the restyled rules become very controversial, the substantive changes proposed in the 4 rules dealt with at this meeting may be unduly delayed.

A motion was made to submit the rules to the Standing Committee for its approval but to ask the Standing Committee to hold these rules and send them to the Judicial Conference with the restyled rules. It was noted that there are changes in the 4 rules dealt with at this meeting that are not reflected in the restyled rules. It would be easier to reconcile the rules all at once. Indeed, if these 4 rules were to become effective on December 1, 1997, they would need to be amended again on December 1, 1998, if only to change "shall" to "must." The only urgent problem addressed in the 4 rules is the timing trap created by the current difference between a petition for panel rehearing and a suggestion for rehearing en banc. Even that problem is cured in many circuits by local practice that automatically treats a suggestion for rehearing en banc as containing a petition for panel rehearing. The motion passed by a vote of 5 to 3.

Form 4

Mr. William K. Suter, the clerk of the Supreme Court, wrote to the Committee to recommend amendment of Form 4, the affidavit that accompanies a motion to proceed in forma pauperis. Mr. Ster. suggested that the form is deficient in several respects. Judge Logan had asked Mr. Fisher to prepare a draft of a more complete form.

The Committee spent only a brief time considering the draft when it decided that it wanted to make more sweeping changes and that attempting to rewrite the form on the floor of the

Committee was unwise. It was suggested that Mr. Fisher use the form developed by the IFP pilot project in bankruptcy as a model for a new draft for later consideration. It was also suggested that special effort be taken to use simple, clear language.

Judge Stotler said that there is a need across the judiciary for a generic IFP/CJA form. She was uncertain whether the development of such a form falls within the jurisdiction of the FRAP Advisory Committee or any of the rules committees, but the need exists nonetheless. She further noted that the development of such a form must be undertaken with the understanding that any such form could be fertile ground for discrimination suits and thus one needs to give careful consideration to the information that is actually essential. The project may be a very large one. The CJA form was developed by the Defender Services Committee.

Given the possible delay of this project, Judge Logan introduced the topic of the need for a fall meeting. The Advisory Committee had earlier decided to delay any new projects until at least the completion of the publication period for the restyled rules. Since that period does not conclude until the end of December, Judge Logan and Mr. Rabiej had earlier discussed the possibility of not holding a fall meeting. Would consideration of a new Form 4 create a need for a fall meeting? It was suggested that this sort of item could probably be handled by mail or by conference call. A phone conference was scheduled for May 1 at 4:00 EDT.

Judge Stotler pointed out that amendment of the FRAP forms currently requires compliance with the full Rules Enabling Act procedures followed for amendment of the rules. In contrast, Bankruptcy Rule 9009 confers on the Judicial Conference the power to approve bankruptcy forms without the need for approval from the Supreme Court and Congress. Bankruptcy Rule 9009 says:

> The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The forms shall be construed to be consistent with these rules. (emphasis added)

She wondered whether the FRAP should have a similar provision. Adoption of any such FRAP provision would not affect adoption of this particular form, but could make future changes easier.

The Committee noted that bankruptcy forms present unique problems because the bankruptcy forms are mandatory and they are keyed at many points to the statutes which Congress has frequently amended. Without the ability to quickly change the forms following a statutory amendment, there would be substantial confusion.

FRAP Form 4 is not mandatory for a party seeking to proceed IFP in the court of appeals. FRAP 24(a) says that a party desiring to proceed IFP in the court of appeals shall file a motion "showing, in the detail prescribed by Form 4 of the Appendix of Form, the party's inability to pay fees and costs or to give security ..." FRAP Form 4 is, however, mandatory for a party seeking to

proceed IFP in the Supreme Court. Supreme Court Rule 39 says that a party seeking to proceed IFP in the Supreme Court "shall file a motion for leave to do so ... in the form prescribed by the Federal Rules of Appellate Procedure, Form 4."

Other than FRAP Form 4 the other forms are so bare bones that the consensus was that they are unlikely to need amendment.

Civil Rule 23(f) Interlocutory Appeals

At its spring meeting, the Civil Rules Advisory Committee planned to consider amendments to Rule 23. The proposed amendments would add the following provision to Rule 23:

> **(f) Appeals**. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

At present FRAP deals with permissive appeals in Rule 5 (dealing with appeals under 28 U.S.C. § 1292(b)) and Rule 5.1 (dealing with the second appeal from a judgment entered upon direction of a magistrate judge). None of the existing rules would govern the new 23(f) appeals. The reporter prepared two drafts for the Committee's consideration. The first included the 23(f) appeals within Rule 5.1. (Because Rule 5 has provisions relating to specific features of § 1292(b) appeals, the 23(f) appeals did not fit as well into Rule 5.) The second was a separate draft Rule 5.2 dealing exclusively with 23(f) appeals.

The Committee fairly quickly decided that it would prefer to combine Rules 5 and 5.1 and broaden new Rule 5 so that it would cover all discretionary appeals. The Committee members said that the Rule 23(f) proposal is likely only the first of possibly several rule changes that would authorize interlocutory appeals and it would be preferable to try to handle all of them with a generic rule. The Committee asked the reporter to prepare such a draft for consideration during its upcoming telephone conference call.

The reporter noted that Rules 5 and 5.1 provide different time periods for filing a response to a petition for leave to appeal. Rule 5.1 provides a 14-day period for filing a response to a petition under § 636(c)(5) whereas Rule 5 gives only 7 days for filing a response to a petition for leave to appeal under § 1292(b).

There does not appear to be a statutory basis for the 14-day response period in Rule 5.1; it may be based, however, upon the 14-day response period provided in Civil Rule 74(a), governing an appeal to a district court from a decision made by a magistrate judge. A preliminary vote was taken on the response time that should be included in the generic draft. Although there was some support for l0-day or 14-day periods, more members preferred a 7-day period than any other.

Given that the petition itself must be filed within 10 days after entry of the order, there was some sentiment that it would be anomalous to give a longer response period. Also since the rule would

deal with interlocutory appeals and with the second appeal from a magistrate's decision, a longer period did not seem either necessary or desirable.

Rule 22

Judge Logan reported that a senate bill that would amend FRAP 22, along with making statutory changes regarding habeas and § 2255 actions, has passed both the house and the senate. There are inconsistencies in the language amending Rule 22. Last winter when the bill was in the development stage Judge Logan sent a letter to senate staffers working on the bill; the letter pointed out the inconsistencies and recommended ways to cure them. Unfortunately, the inconsistencies still remain in the bill. Judge Logan wrote this spring to each member of the conference committee again pointing out the inconsistencies and recommending ways to cure the inconsistencies. He hopes that before the bill is signed the problems will be corrected.

Restyled Rules

Mr. Rabiej asked the Committee for suggestions of people to whom the restyled rules should be sent.

Judge Williams noted that unless Judge Logan's Chairmanship is extended by the Chief Justice, this will be Judge Logan's last meeting. Judge Williams led the Committee in thanking Judge Logan for his leadership and hard work. Judge Stotler, however, expressed her hope that the Chief Justice would extend Judge Logan's term for a year so that he could complete the first cycle of work on the restyled rules.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Carol Ann Mooney

Reporter