MINUTES OF THE MAY 26, 1992
TELEPHONE CONFERENCE OF THE
ADVISORY COMMITTEE ON APPELLATE RULES

The conference call began at 2:00 p.m. Eastern Standard Time. The conference was chaired by Judge Kenneth F. Ripple. The following Committee members participated: Judge Danny J. Boggs, Judge Cynthia H. Hall, Judge E. Grady Jolly, Judge James K. Logan, Chief Justice Arthur McGiverin, and Judge Stephen F. Williams. Mr. Robert Kopp participated on behalf of the Solicitor General. Mr. Joseph F. Spaniol, Jr., the Committee Secretary, participated. Mr. Thomas F. Strubbe, the liaison from the clerks of the courts of appeals, also participated.

The purpose of the telephone conference was to complete the Advisory Committee's deliberations about the "Torres" amendments. The period for public comment had concluded and the members of the Committee had all had an opportunity to review the comments. The Committee's task was to approve rules for submission to the Standing Committee. Judge Ripple began the conference by reviewing the history of the Advisory Committee's discussions and of the steps taken by the Standing Committee, including its expedited publication of the proposed amendments and the request that the Advisory Committee consider alternative solutions.

Judge Ripple also reviewed his May 21, 1992, memorandum to the Advisory Committee in which he attempted to reconcile the division of opinion among the members of the Committee concerning the solution to "the Torres problem." He noted that the central problem is to balance sensibly the very real concerns of definiteness, certainty, and ease of administration, with the possibility of inadvertent and excusable loss of appellate rights. The memorandum presented an alternate draft. The new draft retains the requirement that a notice of appeal name the party or parties taking the appeal but allows that requirement to be satisfied in a number of ways. Although the new draft allows an attorney to simply state that a notice is filed on behalf of "all plaintiffs" (or "the plaintiffs," or "plaintiffs A, B, et al.," or "all of the plaintiffs except ...") any ambiguity caused by an attorney's use of such shorthand designations would be rectified by a new requirement in Rule 12 that an attorney file a statement naming each party represented on appeal by that attorney. The draft also states that dismissal of an appeal should not occur when it is "otherwise clear from the notice" that the party intended to appeal.

Judge Jolly stated that the proposal to amend Rule 12 prompted another idea. He continues to like a clear rule that requires a notice of appeal to list the name of each appellant; the problem with such a rule is its harshness. His suggestion was to eliminate the sentence allowing an attorney to use shorthand methods of indicating the persons bringing the appeal and to reinsert the language in the published draft stating that use of such terms as "et al." is insufficient. However, he further suggested inserting a statement that failure to name a party in a notice of appeal is not fatal if the party is named in the docketing statement. In

other words, his suggestion was to provide a second chance to include an appellant's name.

Judge Williams pointed out that Judge Jolly's alternative still has a sudden death consequence; the alternative only provides a second chance to catch an error. In reality, this might only slightly reduce the risk of inadvertent omission.

Judge Boggs stated that he was comfortable with Judge Jolly's intent but he thought that the suggestion produced an odd result. A notice of appeal, the jurisdictional document, initially would not be effective to bring appeal for a party, but later -- after the filing of a docketing statement -- it could be.

Judge Logan pointed out the difference between the use of the representation statement in Judge Ripple's draft and Judge Jolly's suggestion. In Judge Ripple's draft, the representation statement provides clarification. Under Judge Jolly's suggestion, the representation statement would cure a jurisdictional defect.

Judge Hall indicated that she favors the draft. She stated that she had no sense that the clerk's office provides assistance to lawyers filing appeals.

Chief Justice McGiverin stated his preference for the published rule. If, however, the Committee consensus is to follow a different approach, he favored Judge Ripple's new draft.

Mr. Kopp stated that he favored Judge Ripple's draft but would omit lines 20-22 (providing that an appeal should not be dismissed "for failure to name a party whose intent to appeal is otherwise clear from the notice."). He also recommended that the representation statement be filed with the docketing statement.

Judge Logan agreed that it would be helpful if the representation statement were filed with the docketing statement.

Mr. Strubbe pointed out that several circuits do not have docketing statements.

Judge Ripple suggested that the rule could require an attorney to file a representation statement within 10 days unless a circuit requires it at a different time. With regard to Mr. Kopp's suggestion to eliminate lines 20-22, Judge Ripple stated that his intent was to give motions panels some discretion to avoid unduly harsh results.

Judge Williams indicated that he preferred to retain lines 20-22. He observed that lines 20-22 create a reasonableness standard for interpreting the words "such terms" (on line 8).

Judge Logan moved that the Committee vote on Rule 3(c) independently of Rule 12. The motion was seconded. In the discussion following the motion, Mr. Kopp reiterated his opposition to lines 20-22 and moved to delete them. His motion failed for want of a second.

The voted on Judge Logan's motion to approve the new draft of Rule 3(c) passed by a vote of seven in favor and one opposed.

The discussion then turned to Rule 12. Judge Logan made a motion that the draft should be amended to make it possible for a court to include the representation statement as part of the docketing statement, or to have it filed simultaneously with the docketing statement. Judge Hall seconded the motion. It was approved unanimously. The Committee asked the Chair and the Reporter to work out language.

Mr. Spaniol suggested that at line 7 of the draft the words "on appeal" should be inserted after the word "represented." It was so moved and seconded and the motion was approved unanimously.

Mr. Spaniol also asked whether an attorney would be required to file a representation statement even if the attorney represented only one party. The Committee consensus was it would be simpler to always require a statement.

A motion was made to approve Rule 12 as amended. The motion was seconded and passed unanimously.

The reporter told the Committee that there had been no adverse comments on published Rule 15 and that two of the commentators who opposed the naming requirement in Rule 3 supported it in Rule 15. Because the filing of a petition under Rule 15 is the first filing in any court, the Committee consensus was that it should retain the naming requirement in that rule without adding the shorthand references authorized in Rule 3. A motion was made and seconded to approve Rule 15 as it was published. The motion passed unanimously.

The conference concluded at 2:45 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter