ADVISORY COMMITTEE ON APPELLATE RULES

Minutes of the Meeting on October 26, 1989

The meeting of the Advisory Committee on Appellate Rules was called to order at 9:00 a.m., October 26, 1989, at the Conference Room at the Administrative Office of the United States Courts in Washington, D.C. The following members of the Committee were present: the Chair, Judge Jon O. Newman, Judge Myron H. Bright, Judge Peter T. Fay, Mr. Donald F. Froeb, Esquire, Judge E. Grady Jolly, and Judge Kenneth F. Ripple. The Honorable Kenneth W. Starr, the Solicitor General was unable to attend, but he sent a representative from the Justice Department. Professor Charles Alan Wright, liaison from the Standing Committee on Rules of Practice and Procedure, was present, as was Mr. Robert St. Vrain, Clerk of the United States Court of Appeals for the Eighth Circuit, who was present as a liaison from the clerks' committee on appellate rules. Also attending were the Reporter to the Committee, Professor Carol Ann Mooney; Mr. James E. Macklin, Jr., Deputy Director of the Administrative Office and Secretary to the Committee; and Mr. William Eldridge of the Federal Judicial Center.

The meeting was called to order at 9:00 a.m. and the minutes of the April 27, 1988 meeting were approved. Professor Mooney then gave a summary of the progress of Committee business since the last meeting.

**Oral Argument - statement of the case**

The first item on the agenda, 88-10, was a suggestion that Fed. R. App. P. 34(c) be amended by deleting the requirement that

at oral argument the first argument "shall include a fair statement of the case". A memorandum discussing the suggestion was circulated last May. The written responses of the committee members to that memorandum were divided and so the item was held over for discussion until this meeting. Some members felt that a statement of the case is sometimes useful to the panel and those members opposed simple deletion of the requirement. Other members thought that perhaps the rule should be amended to require counsel to prepare a statement of the case in the event that such a statement were requested by the court. Finally it was resolved to delete the requirement from the rule but to accompany that change with an advisory note indicating that deletion of the requirement does not indicate disapproval of the practice and that the circuits are free to adopt a local rule that reflects local practice. The Reporter was asked to draft the change and the advisory note.

**In Banc Review**

The second item, 88-13, was a suggestion to amend Fed. R. App. P. 35(a) regarding the procedures for granting in banc review of a case. The American Bar Association suggested that a majority of the judges participating in a case should have the power to grant in banc review provided that the participating judges constitute a majority of the judges in regular active service. Like the preceding item, a memorandum was circulated in May discussing this issue and the committee response to the memorandum was divided and the matter was held over for

discussion. The Committee first discussed whether it is appropriate to attempt such a change by rule. In 1973 the Judicial Conference recommended that a majority of the judges eligible to participate in a case should be sufficient to grant in banc review but the Conference took the position that Congress should amend Section 46(c), 28 U.S.C. § 46(c), to so provide. In addition, the Supreme Court in Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247 (1953), and Shenker v. Baltimore & Ohio Railroad Co., 374 U.S. 1 (1963), made statements that could be read to indicate that each Court of Appeals should have discretion to determine how the power of in banc review should be exercised. The Committee thought that regional variation in the procedures for granting in banc review is undesirable and decided to send the proposal forward to the Standing Committee and the Supreme Court and to allow those bodies to react to the suggestion.

The Committee discussion then shifted to the second part of the ABA suggestion, that the voting judges must constitute a majority of all the judges in regular active service in the circuit -- the quorum proposal. After debating the question, the committee concluded that the draft should include a quorum provision. Judge Newman undertook to redraft the amendment and to prepare the accompanying advisory note.

**Electronic Filing**

The third agenda item, 89-3, dealt with electronic filings. The Judicial Improvements Committee prepared a report that

recommended identical amendments to the Civil, Appellate and Bankruptcy Rules that would provide as follows:

> The court may, by local rule, permit papers to be filed by facsimile or other electronic means, consistent with guidelines promulgated by the Judicial Conference of the United States.

The Judicial Conference Committee determined that use of such filing methods should be a matter of local option so long as minimum technological standards are established and the potential impact on the clerks' offices is considered before allowing routine filing by such means as facsimile.

The proposed amendment would be appended to the end of Fed. R. App. P. 25(a). Although the Advisory Committee sentiment was that it would be prudent to move slowly in this area, the Committee approved the amendment in substance recognizing that the amendment would authorize experimentation in selected courts and would require establishment of standards by the Administrative Office. However, the Committee thought that the language of the rule should be redrafted noting in particular that the Judicial Conference does not "promulgate regulations" as suggested by the amended language. The Committee asked the Chair and the Reporter to redraft the language.

**Agenda Items Four and Five**

At Judge Newman's suggestion, the Committee delayed discussion of agenda item four, dealing with sanctions, until later in the meeting. Item five, 88-8, was a suggestion that the Fed. R. App. P. be amended to include authorization for a court of appeals to vacate a district court's stay of its own order

pending appeal. The Committee, having the considered the memorandum discussing the issue, voted down the proposal. Judge Newman undertook to write to Judge Seitz, who submitted the suggestion, informing him of the Committee's action.

Prisoners' Filings - Houston v. Lack

The next agenda item, 89-2, dealt with the issue of prisoners' filings as highlighted by the Supreme Court decision in Houston v. Lack, __ U.S. __, 108 S.Ct. 2379 (1988). In that case, the Supreme Court held that *pro se* prisoners' notices of appeal are "filed" at the moment of delivery to prison authorities. That ruling conflicts with the general rule that receipt by the court clerk constitutes filing.

The proposal that Judge Weis asked all of the Advisory Committees to consider suggested fundamental rethinking of the concept of "filing." The proposal noted that the Supreme Court recently redefined the term "filing" so that a document is deemed timely filed if it is deposited in a United States post office or mailbox within the time allowed for filing, so long as a member of the Supreme Court bar files a notarized statement detailing the mailing and stating that to the attorney's knowledge the mailing took place on a particular date within the permitted time. The suggestion was to use a similar approach in all the rules and, in addition, to permit proof of transmission by means even more expeditious than the U.S. mail. With regard to the particular problem of prisoner filings, it was further suggested that delivery to a custodial official within the time allowed for

filing shall be deemed timely filing.

Prior to the meeting the Reporter prepared draft amendments to the Federal Rules of Appellate Procedure that would treat timely mailing as timely filing and that would permit the use of private carriers in addition to the use of the United States Mail. Those drafts treated timely delivery to prison officials as timely filing. The Reporter also prepared separate drafts that addressed only the problem of prisoner filings.

The Committee did not favor a general mailbox rule, although it did think that the current mailbox provision in Fed. R. App. P. 25(a) for filing briefs should be retained. The Committee did favor adoption of a rule governing the filing of papers by prisoners believing that a rule would ease the administrative problems. The Committee had several suggestions for improving the Reporter's draft. The pertinent portions of the Reporter's draft read as follows:

> If a party is imprisoned and is not represented by an attorney and if that party delivers a notice of appeal to appropriate prison personnel for forwarding to the court within the time allowed for filing a notice of appeal, the notice shall be deemed timely filed.

The Committee's collective, non-substantive suggestions would result in a redrafted provision as follows:

> If, within the time allowed for filing a notice of appeal, a party who is imprisoned and not represented by an attorney delivers a notice of appeal to appropriate prison personnel for forwarding to the court, the notice shall be deemed timely filed.

In addition the Committee made a number of substantive suggestions. First, the Committee thought that it might be

useful to broaden the rule to include persons confined to other institutions such as mental hospitals. Second, the Committee wondered whether requiring delivery to "appropriate personnel" might prove troublesome. Judge Newman noted that in some prisons there is a box for prisoner mail. One possible solution offered was to require delivery "as designated by the institution". Judge Newman undertook to speak with the Bureau of Prisons with regard to language that would cover the variety of procedures used in the prisons for legal mail. The Reporter was asked to redraft the provision to cover persons confined to mental institutions.

Discussion of agenda item seven, 86-10 and 86-26, proposals to amend Fed. R. App. P. 4(a)(4) and 4(b) regarding "early" notices of appeal was deferred until later in the meeting.

**Early Designation of Appendix Material**

The next item, 88-11, was a suggestion to amend Fed. R. App. P. 30 to require early designation of material from which the appendix would be prepared. There was no Committee sentiment in favor of the rule.

**Standard of Review**

The Committee then discussed item 86-25, a proposal to amend Fed. R. App. P. 28 to require that briefs contain a statement of the standard of review on appeal. At the last meeting, the Committee decided to circulate the draft language requiring parties to include a statement of the standard of review in their briefs. The Committee wanted the draft circulated at the same

time as the amendment requiring a jurisdictional statement was published. Because the jurisdictional statement proposal was recently published, the Reporter brought the issue back to the Committee's attention. Judge Fay, whose circuit has a local rule requiring a statement of the standard of review, stated that the rule proves helpful in many cases. Judge Newman undertook to contact the clerks in those circuits having such a local rule so that his transmittal letter accompanying the draft can give some indication of how the local rules are working.

**Caption of Fed. R. App. P. 10(c)**

The caption to Rule 10(c) should read "Statement of the Evidence" not "Statement on the Evidence" as it is currently published. The next report to the Standing Committee will request that the correction be made.

**Sanctions for Frivolous Appeals**

The Committee had before it three separate proposals. The first proposal was to amend Rule 38 to state that if an appeal is frivolous a court may require damages and/or costs to be paid by the appellant's attorney. The Committee agreed that an amendment, such as the one at page 18 of the memorandum prepared for the meeting, would be appropriate.

The second proposal was to require notice and opportunity to respond before imposing sanctions. Although the Committee agreed that notice and opportunity to respond is proper and that a rule is needed, the Committee disagreed about the level of formality required. Judge Newman noted that Second Circuit takes the

position that a request for sanctions in an appellee's brief is sufficient notice and that the appellant has sufficient opportunity to respond in the reply brief or at oral argument and that no other notice is required. Other members felt that requests for sanctions have become so routine that a party should be given notice by the court that the court is contemplating imposing sanctions. Some members thought that a separate hearing regarding sanctions is undesirable because it would unnecessarily protract appeals. Some expressed the opinion that discussion about the appropriateness of sanctions between the court and counsel at the time of oral argument would satisfy due process requirements. However, Judge Ripple noted that if an attorney is required to discuss the sanctions issue at oral argument, that could create a conflict of interest. Counsel could be put in the position of having to choose between undercutting the substantive argument advanced on behalf of the client or failing to offer a defense against the request for sanctions. If at oral argument an attorney states that he or she recognizes that the argument advanced is not the strongest argument, but that it is at least creditable and therefore sanctions are not appropriate, the attorney seriously undermines the effectiveness of the position advanced at oral argument.

A number of members felt that if a court intends to impose sanctions other than normal costs, formal notice and opportunity to respond, such as an order to show cause, should be required. Although it had not come to a conclusion about the second

proposal, the Committee moved on to discuss the third proposal.

The third proposal was to adopt a Rule 11 for appeals. The Justice Department representative expressed the department's opposition to the proposal. The department expressed the opinion that such a rule would have a chilling effect and should be carefully studied before going forward with the proposal. The other members of the committee also felt that given the sensitivity of the sanctions issue, it would be wise to proceed slowly and carefully. The Committee ultimately decided to seek the opinions and assistance of the circuits. Judge Newman will draft a letter to the circuits, identifying some of the options the committee is considering and also asking the circuits to keep the reporter informed about what is currently being done in the circuit courts. Before circulating the letter to the circuits, Judge Newman will send the draft letter to the Committee members to solicit their reactions.

**Rule 4(a)(4)**

The Committee has been working for some time to eliminate the trap created by the provision in Fed. R. App. P. 4(a)(4) that states that a notice of appeal has no effect if it is filed prior to the disposition of certain post-trial motions. The Committee earlier considered and later rejected an amendment that provided that notices of appeal filed before disposition of the post-trial motions would become effective upon disposition of the motions. At this meeting the Committee approved in substance a proposal that would require a court of appeals to dismiss any appeal that

is filed before disposition of the post-trial motions. Such dismissal would give the appellant notice of the necessity of filing a new notice of appeal.

The Committee made suggestions for the reworking of the draft on page 12 of the memorandum and concluded that provisions similar to the following should be added to 4(a)(4):

> Whenever one of the above motions is timely filed in a district court in any case in which a notice of appeal a) has been filed, or b) is filed after the filing of such motion but before its disposition, the district court clerk shall forward a copy of the motion and its docket entry to the clerk of the court of appeals. Upon receipt of the motion and docket entry, the court of appeals shall dismiss the appeal without prejudice to a timely filing of a new notice of appeal.

The Committee also approved further amendments to Rule 4(a)(4) to eliminate the uncertainty of whether a motion filed within 10 days of entry of judgment extends the time for filing a notice of appeal. The Committee approved the following changes in Rule 4(a)(4):

> If a ~~timely~~ motion under the Federal Rules of Civil Procedure is filed in the district court by any party within 10 days after the entry of judgment: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) ~~under Rule 59~~ to alter or amend the judgment, other than for award or determination of costs or attorney's fees; or (iv) ~~under Rule 59~~ for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

Because the relief available under Fed. R. Civ. P. 59(e) and 60(b) is overlapping, it is often difficult to determine whether a post-trial motion filed within 10 days after entry of judgment

is a Rule 59 motion or a Rule 60 motion. Removing reference to Rule 59 in subpart (iii) would eliminate that characterization problem. The proposal would make all motions filed within 10 days of entry of judgment, without regard to whether they are Rule 59 or Rule 60 motions, tolling motions. However to be consistent with Supreme Court decisions, a provision was inserted excluding motions for costs and attorneys' fees from the class of motions that extend the filing time and render ineffective notices of appeal filed before disposition of the motions. Similarly, the proposal deletes the reference to Rule 59 from subpart (iv) dealing with motions for new trials.

In order to eliminate the problem illustrated by the Supreme Court's decision in Acosta v. Louisiana Dept. of Health & Human Resources, 478 U.S. 251 (1986) (per curiam), one further amendment was approved. The Committee voted to add the following sentence to Fed. R. App. P. 4(a)(4):

> A notice of appeal filed after the announcement of a decision on any of the above motions but before the entry of the order shall be treated as filed after such entry and on the day thereof.

Because some redrafting of the proposals was done during the meeting and because parallel changes to Fed. R. App. P. 4(b) also must be made, the Committee asked the Reporter to polish the drafts and recirculate them to the Committee before submission of the proposals to the Standing Committee.

Other Business

At the end of the meeting, Mr. St. Vrain noted that some amendment of Fed. R. App. P. 35 might be useful. He stated that

many attorneys seem to believe that a suggestion for a rehearing in banc is, and should be treated as, a petition for rehearing in banc.

The meeting adjourned at 1:30 p.m.