ADVISORY COMMITTEE ON THE CIVIL RULES
Meeting February 12-13, 1987
Minutes of the Reporter

PRESENT: Committee Members Bader, Grady, Holbrooke, Linder, Pfaelzer, Rosenberg, Skinner, Weis, Zimmerman; Reporter Carrington; Guests Burke, Cecil, Feidler, Hovelson, Hutchison, Macklin, Regan, and Summitt.

The meeting was chaired by Judge Weis. An introductory discussion concerned the frequency of the committee's reports. It was agreed that reports should be less frequent in the future, giving the bench and bar more time to assimilate change. Changes should be made in sufficient number and importance at any one time that study of changes by the bar is worthwhile. Assuming that the Supreme Court will soon clear its deck of pending rule changes, it was suggested that the committee aim at early 1989 as the date for the next public circulation of rules for comment.

The draft of changes in Rule 72 was considered. The point was made that the proposal may be ungrammatical and is at least less clear than it should be. It was agreed to use the second sentence of the second paragraph of Rule 72(b) as a model for the revision of Rule 72(a).

It was also agreed that there should be a waiver of any points not specified in the objection to the magistrate's action. Language comparable to Rule 51 will be added to Rule 72 unless it appears that the F.R.App.Pro. adequately deals with the problem.

The new draft of Rule 63 was next considered. It was agreed that the last sentence of the draft could be deleted as unnecessary. After extended discussion, the committee agreed to the following text:

> If a trial or hearing has been commenced and for any reason the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or a trial without a jury, the successor judge has discretion to recall any witness.

The various options for the proposed change in Rule 50 were next considered. The Reporter was directed to revise the Committee Note to call attention to the general preference for nov over directed verdicts. There was a division on the importance of allowing a party who had rested his proof to reopen in light of a motion for directed verdict or judgment nov. The committee agreed that it did wish to overrule the Davila case referred to in the draft Committee Note: motions for directed

verdict at close of plaintiff's case should be renewable after verdict. Concern was again expressed regarding the political wisdom of overruling a constitutional decision by rule of court. After extended discussion, Committee expressed a desire to consider a new form of motion for judgment in accordance with law, which might be made at any time from the beginning to the end of the action.

Consideration was next given to the proposed reform of Rule 77 to save the right to appeal of an appellant not notified by the clerk of an adverse judgment. It was agreed that no device for notice by the clerk seemed assured of success. The Reporter was directed to change the focus of attention to Rule 58, which might be re-written to require a return of service of notice prior to entry of the judgment on the docket of the court. This would place the responsibility for notice on the appellee as well as the clerk.

Discussion was next addressed to the gender neutralization of the Forms. It was agreed to consider abrogating Rule 84 and deletion of the official forms. It was observed that this would require amendment of the mail summons device of Rule 4 which presently incorporates Form 18-A by reference.

A report was heard on proposed amendments to the Rules Enabling Act. There was general agreement that the proposed changes regarding the local rules were benign; support was expressed for the idea that local rules be varied for the purpose of controlled experiments. It was also agreed that the text of the changes regarding committee procedures is unobjectionable. Concern was expressed regarding some of the elaboration on that text contained in hearing remarks of Congressman Kastenmeier, it being agreed that an advisory committee composed of members having representative functions would be handicapped in its ability to give primary consideration to the sound working of the judicial system. Finally, concern was expressed over the supercession clause revision; the Committee agreed to urge the Standing Committee and the Judicial Conference to consider whether opposition to this revision should not be communicated to the Senate Judiciary Committee as well as to the House.

Consideration was next given to Rule 4. The proposals regarding the US marshals were generally approved in principle, with the omission of the new language in lines 23 and 24 of page 38 of the Committee materials. A question was raised regarding the use of the phrase "having the warrant" at several places in the Admiralty rule revisions; the Reporter will further consider deletion of that phrase. The revisions reflecting the Hague Conventions were discussed briefly, further discussion to await the outcome of pending Supreme Court decisions. The problem of long-arm jurisdiction over federal question decisions was discussed inconclusively, although no objection was stated to the new language suggested on page 54 of the Committee materials. Concern was expressed over the use of pendent jurisdiction to

extend the federal reach over state law claims. Two pending Supreme Court decisions are expected to illuminate the problem further. There was equally extensive discussion of the mail service rules added by Congress in 1983. The changes suggested by the Reporter were not disapproved, but they failed to stimulate the enthusiasm of the Committee. At this point in the discussion, attention shifted to the draft revision of Rule 4 set forth on page 69 and following. The Committee concluded that it would like to consider a complete re-writing of Rule 4, and the Reporter was directed to proceed accordingly.

Attention was next given to Rule 56 and related matters. It was agreed that the deletions suggested by Judge Schwarzer were desirable. It was agreed that the Rule should not require a hearing on a Rule 56 motion. It was agreed that that an opposing party should be allowed 28 days to submit opposing material, and that the moving party should have 7 days to respond. Hope was expressed that these timing requirements could be accommodated to an oral practice such as that described by Judge Grady. The Reporter was directed to include in the notes, at least, some reference to the problem of degrees of persuasion as presented in Anderson v. Liberty Lobby. The Reporter was also directed to add a clarifying note that depositions are not necessary to secure a favorable ruling on the motion.

With respect to the draft language on page 92 of the Committee materials, it was agreed that the phrase "identifying all issues" on line 8 overstated the requirement. "Specify" was recommended as a better verb, as in "specify any genuine issues or controlling legal principles." The point was emphasized that summary judgment often rests on a pure legal question, e.g., the applicable statute of limitations. It was suggested that the "and" beginning line 14 should be "or". Also suggested was introductory language: "A party may at any stage move for summary judgment as to all or part of the issues in a case. The motion may be based on law or the absence of evidence to raise a genuine issue of fact. The old sentence beginning on page 10 was criticized as inconsistent with the requirement that the relevant material be specified; Judge Schwarzer's draft rule 56(f) was commended, as were lines 32-38 on page 129. It was agreed that the adjective reasonable in line 18 should be replaced by the adverb reasonably relocated in front of the infinitive. It was suggested that the sentence added in lines 15-19 be recast in the affirmative. It was also suggested that the distinction between inference and credibility issues be addressed, at least in the Committee Note.

Turning to the material on page 117, it was agreed that the discretionary nature of summary findings should be emphasized; such motions should require leave of court. The relation to Rule 36 should be spelled out in the Committee Note. It was suggested that the second sentence of (e)(3), appearing on page 121 at line 35, should be left to the Committee Note, being possibly subject to question under the Rules Enabling Act. The Committee also

preferred Judge Schwarzer's language to (d)(1) as it appears on page 120. An argument was presented that the clear error test should be applied to review of summary findings.

Other proposed changes in Rule 56 (Part E), 16 and 52, met with general approval of the Committee. The Committee expressed the inclination to see all the changes in Rule 56 in place, and also to consider the possible changes in Rule 50 in relation to those in Rule 56.

As it became apparent that the agenda would not be completed, the committee attended to the items of new business. It was agreed that the ABA proposals regarding Rule 64 should be tabled pending Congressional action. It was agreed that attention should be given to Rule 15(c). Consideration of other items should await completion of work on the old business, and probably await the next package of amendments perhaps forthcoming in 1993.

The Committee resolved to meet again on June 29-30, 1987. The chair will later designate the place.