COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of January 12-14, 1994
Tucson, Arizona

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Tucson, Arizona on Wednesday, Thursday, and Friday, January 12-14, 1994. The following members were present:

Judge Alicemarie H. Stotler (chair)
Professor Thomas E. Baker
Judge William O. Bertelsman
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Irving B. Nathan, Esquire (for Deputy Attorney General Philip Heymann)
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Judge George C. Pratt was unable to reach the meeting because of transportation problems caused by inclement weather.

At the invitation of the chair, former members Judge Robert E. Keeton and Professor Charles Alan Wright participated in the meeting.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, and John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules:
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules:
Judge Paul Mannes, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules:
Judge Patrick E. Higginbotham, Chair
Dean Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules:
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on the Rules of Evidence
Dean Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan R. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; and William B. Eldridge, director of the Research Division of the Federal Judicial Center.

EXECUTIVE SESSION

The committee voted to conduct an executive session on Wednesday, January 12, during which the members discussed the mission and purpose of the rules committees and the internal operating procedures of the committees and the Judicial Conference.

INTRODUCTORY REMARKS

Judge Stotler welcomed the members and thanked the reporters and advisory committee chairs for getting their materials to the committee under a very short deadline. She stated that budget concerns must be taken into account in making arrangements for future meetings. The Judiciary's funds are limited, and the Director of the Administrative Office has tight policies on travel by staff of the Administrative Office.

Mr. McCabe reported that the rules office had seen a substantial increase in the number of telephone calls and requests for rules information. He attributed the increase in large measure to the recent, controversial amendments to the civil rules.

Judge Higginbotham stated that Dean Cooper's article explaining the December 1993 amendments to the civil rules was exceptionally well written and was very popular. He added that much of the initial apprehension regarding the recent civil rules amendments subsided once it was realized that courts could opt out of certain rules entirely and that judges could opt out in individual cases. He also pointed out that only the mandatory disclosure provisions of the amendments had caused real apprehension.

Judge Jensen reported that little interest had been expressed by bench and bar regarding the recent changes to the criminal rules.

Judge Mannes and Mr. McCabe pointed out that the bankruptcy courts had expressed substantial interest in the new civil rules. Mr. McCabe noted that the amendments apply to adversary

proceedings in bankruptcy cases and to contested matters unless a judge "otherwise directs." He added that several bankruptcy judges had voiced the opinion that the provisions of Fed.R.Civ.P. 26 made no sense in most contested matters.

Mr. Rabiej stated that the Rules Committee Support Office had received a request from the media to attend the scheduled public hearing on the proposed amendments to Fed.R.Crim.P. 53, dealing with cameras in the courtroom. Judge Stotler inquired as to what action should be taken if the media were to ask to videotape the hearings. Judge Jensen replied that his immediate reaction was that there would be no problem in allowing them to do so.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved the minutes of the June 17-19, 1993 meeting, with the addition of the language set forth in Mr. McCabe's January 7, 1994 letter to Judge Stotler, concerning Judge Keeton's resolution on facsimile filing.

Judge Keeton's resolution had been approved by the committee with one dissent. At the time he offered it during the course of the June 1993 meeting, Judge Keeton did not have before him: (1) the specific language of the Judicial Conference's existing guidelines on fax filing, and (2) a summary of the concerns of the advisory committee regarding the proposed new guidelines. It was agreed by the committee that detailed language regarding these two matters would be added to the resolution following the meeting.

In the interest of making the minutes of the June 1993 meeting as complete and self-contained as possible, the committee voted without objection to approve the following amendments to the draft minutes to incorporate the specific language added to the resolution after the meeting:

At the bottom of page 3 of the draft minutes, in lieu of "Here add a summary of the resolution," substitute the following:

> "Effective December 1, 1991, the Judicial Conference authorizes any court to adopt local rules to permit the clerk, at the discretion of the court, to accept for filing papers transmitted by facsimile transmission equipment; provided that such filing is permitted only:
>
> (1) in compelling circumstances, or
> (2) under a practice which was established by the court prior to May 1, 1991."

At the top of page 4 of the draft minutes, in lieu of "Here add a summary of the committee's concerns," substitute the following:

"(1) potential abuse by pro se litigants;
(2) the likelihood that extensive local rulemaking would be necessary to resolve issues left outstanding under the guidelines; and
(3) the consequences for failing to comply with specific provisions of the guidelines, e.g., using equipment not prescribed by the guidelines."

REPORT OF THE SUBCOMMITTEE ON LONG RANGE PLANNING

Professor Baker presented the report of the subcommittee, as set forth in his memorandum of December 13, 1993. (Agenda Item V) At the June 1993 meeting, the committee had authorized the long range planning subcommittee to undertake a thorough examination of the federal rulemaking process. Professor Baker explained that the study had four components:

(1) A descriptive narrative of existing rulemaking procedures.

(2) A summary of criticisms of the rulemaking process, including a search of the literature, a review of legislative history and Congressional testimony, and the results of a survey conducted through questionnaires.

(3) An articulation of the goals and norms for rulemaking.

(4) An identification of issues and problems in federal rulemaking, together with a list of alternative solutions for consideration by the committee.

Professor Baker stated that the fourth component would constitute the heart of the subcommittee's report. He added that a choice must be made as to the appropriate distribution of questionnaires. On the one hand, the committee could authorize a limited in-house study of the rulemaking process. On the other hand, it might choose broad distribution of questionnaires to lawyers, members of Congress, and others. The committee might also wish to hold hearings.

Professor Hazard recommended that the committee reach out widely to solicit suggestions for improvements in the rulemaking process. He advised specifically that the committee seek the views of bar associations. These views were endorsed by several other committee members.

Mr. Perry stated that lawyers generally are interested only in specific amendments to the rules, particularly amendments perceived as likely to affect their interests or those of their clients. They do not appreciate the balance and objectivity required of the rulemaking process. Accordingly, he suggested that the committee consider ways to reach out to lawyers -- to educate them and involve them in the rulemaking process.

A number of participants endorsed this view. Judge Stotler noted that the new AO pamphlet on the federal rules was very effective and should be distributed as widely as possible to the bar. Professor Hazard suggested that a copy of the pamphlet be included with each questionnaire so the recipient will have a basic knowledge of the rulemaking process when responding.

Judge Mannes stated that the advisory committees generally only hear from judges and lawyers who do not like a particular amendment. He recommended that the committees encourage comments from people who favor particular rule amendments.

Several members expressed regret that certain members of the bar had politicized the rules process for self interest. Judge Higginbotham pointed out, however, that the committee cannot escape politics. If a specific rule amendment hits a nerve center or touches economic interests, political actions are likely to override the rules process.

Judge Ellis stated that bar groups were now more interested in the rulemaking process. This was a direct result of the controversy surrounding the recent amendments to Fed.R.Civ.P. 26. The amendments represented a watershed event for the process.

Professor Baker reported that he had requested the members of the committee to list the concerns or issues they saw regarding the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure. He summarized the responses of the members as follows:

- How the rules committees relate to other Conference committees
- The role of the Supreme Court in the rulemaking process
- The timetables established for the rulemaking process
- The job description of the committee chair
- The future of the style subcommittee and the role of style
- The local rules project -- how to follow through and monitor it
- Integration of the various sets of federal rules
- Coordinating the work of the advisory committees and their liaisons
- Education of the bench, bar, and public
- Setting goals for rulemaking

RELATIONS WITH OTHER JUDICIAL CONFERENCE COMMITTEES

Judge Stotler reported that Judge Ann Williams, chair of the Court Administration and Case Management Committee, had written to Judge Gerry, chair of the Executive Committee, expressing concern that the rulemaking process could interfere with the ongoing work of the program committees. Judge Williams referred in her letter to the parallel, but not coordinated, efforts of the Advisory Committee on Criminal Rules and the Court Administration and Case Management Committee regarding cameras in the courtroom.

Professor Coquillette stated that there were indeed several areas where the rules committees and the program committees had common interests. He mentioned as the prime example the ongoing RAND study commissioned by the Court Administration and Case Management Committee. The study is required by the Civil Justice Reform Act and is designed to provide empirical data to the Judicial Conference to assist it in deciding whether to initiate rule changes that would mandate specific litigation management practices in the district courts. He pointed out that the rules committees had not been invited by the Court Administration and Case Management Committee to participate in implementation of the Act, but should request consultation in the RAND study.

Judge Easterbrook stated that the rules committees needed data from the RAND study and should act promptly to obtain it. Several other members expressed strong agreement with this suggestion.

Judge Ellis moved that the committee appoint an ad hoc subcommittee to ascertain what RAND and the Court Administration and Case Management Committee are doing with regard to implementation of the Civil Justice Reform Act and to seek input into the RAND study.

The committee voted to approve this motion without objection.

Mr. Eldridge stated that the Federal Judicial Center could be of assistance to the rules committees since it is familiar with the RAND study and is conducting its own study of the Civil Justice Reform Act demonstration districts.

Mr. Rabiej stated that section 471 of the Civil Justice Reform Act required the Judicial Conference to submit two reports to the Congress by December 31, 1995:

(1) on the demonstration program, and
(2) on the pilot program, with a study by RAND.

Mr. Rabiej pointed out that the Judicial Conference must recommend whether any of the six principles of case management enunciated in the statute should be mandated nationally and whether the federal rules should be amended to accomplish this result. He added that he had prepared a section-by-section comparison between section 473 of the Civil Justice Reform Act and the recent amendments to the civil rules. Four of the six principles of case management set forth in the Act

arguably had been satisfied by the civil rules amendments that took effect December 1, 1993. The only two principles in section 473 not addressed explicitly in the new rules were: (1) case tracking, and
(2) an 18-month trial date.

INTERNAL COMMITTEE PROCEDURES

Judge Stotler said that it would be helpful to establish a regular format for committee meetings that would first address action items for Judicial Conference approval, followed by action items for publication and comment, followed by information items (i.e. amendments pending at the Supreme Court or in Congress and proposals published for public comment). She also stated that the docket system used by the Advisory Committee on Appellate Rules was very effective and should be considered for use by the other advisory committees.

Judge Ellis noted that many lawyers and academics had complained that the rules committees appeared to act in a piecemeal fashion and tended to make too many changes in the rules.

Professor Hazard recommended that amendments to the rules be processed only on a regularly scheduled basis, perhaps with amendments batched for approval every five years or so. He stated that emergency changes must be accommodated, but they are few in number. He argued that under this type of fixed schedule approach, the bar could regularly expect a package of rule amendments every five years, rather than piecemeal changes each year.

Judge Easterbrook stated that the cyclical approach had a serious problem because the terms of committee members and chairs were simply too short. Three-year terms for the chairs, in particular, were just not enough time to assure continuity in the rulemaking process and to see a package of amendments through from start to finish. Several of the members agreed strongly with this statement.

Mr. Spaniol sympathized with the desire for a regular cycle of rules changes, but he argued that the committee would just have to "play it by ear." He suggested that if a plan were developed calling for omnibus amendment packages every several years, the committees would soon have to depart from it out of necessity. Other members agreed with his observation.

Dean Cooper stated his concern that the Congress at times bypasses the rulemaking process and enacts rules by statute. He argued that the committees must be able to respond to political needs and prepare quality amendments to the rules in a reasonably prompt fashion.

Professor Coquillette argued that the committees needed to be active politically. They should work cooperatively with the Congress and the Executive Branch and convince them of the need to

respect the Rules Enabling Act process. He added that the committees need to demonstrate that they are addressing the legitimate concerns of the bar and the social policy needs of the other two branches of government.

REPORT OF THE STYLE SUBCOMMITTEE

Professor Wright noted that the original style subcommittee had consisted of himself, Judge Pratt, Judge Stotler, Judge Keeton, and Joe Spaniol, with Bryan Garner as a consultant. Mr. Garner had prepared the first drafts of the restyled rules. Each member reviewed Mr. Garner's drafts thoroughly, and then the style subcommittee discussed each proposal in depth during telephone conferences. He emphasized that the restyled civil rules are much clearer and more easily citable than the existing rules.

Professor Wright stated that the style subcommittee was concerned about publishing too many changes in the federal rules at one time. Accordingly, at first the subcommittee had thought of restyling only proposed amendments to the rules. But the Advisory Committee on Civil Rules asked the style subcommittee to redraft the entire body of civil rules as one omnibus package.

He added that it is crucial for the advisory committee to communicate clearly to the bench and bar that the restyled rules are intended to effect no substantive changes. Nevertheless, choices must be made when ambiguities are discovered as part of the restyling process. He concluded that the bar would accept the new rules on their merits.

Judge Keeton pointed out that different style formulations appeared throughout the federal rules because they were drafted by different people at different times. He argued that the rules committees needed to coordinate usage and make it consistent. The restyled draft of the civil rules, for example, was far more readable, understandable, and "user friendly" than the current rules.

Judge Keeton stated that style subcommittee had turned up a number of ambiguities in the civil rules that would have to be addressed and clearly identified. He suggested that when the restyled draft is circulated for public comment, members of the bench and bar inevitably will perceive changes in substance even when no changes are intended.

Mr. Garner stated that when one focuses on style, substance is normally improved as a byproduct through the elimination of vagueness and ambiguities. He pointed out that the style subcommittee had simplified the civil rules from a 12th Grade reading level to a 9th Grade reading level, which would foster uniform interpretations.

Mr. Garner noted that he had been working on a set of guidelines for rule drafting that would cover structure, sentence order, word choices, and special conventions. The guidelines were designed for the use of the reporters to the advisory committees.

Mr. Spaniol stated that the committee must address how it will handle style in the future. He argued that style should be left basically to the reporters. If they draft the rules in good style at the outset the system will work efficiently.

Judge Stotler stated that the committee must address two important issues:

(1) the timing of the restyled rules packages, and
(2) whether style should be a separate process or integrated into the existing structure.

Judge Bertelsman cautioned that there was a general feeling in the legal profession that rules revisions had been too frequent. The opinion had been expressed most vocally by law professors. He stated that he was very much in favor of the style revisions, but was concerned that publishing a whole package of style changes at one time in the near future would be a mistake.

Judge Logan stated that the Advisory Committee on Appellate Rules preferred to have the appellate rules restyled as a package and would like to keep drawing on the talents of Bryan Garner.

Judge Wilson and several other committee members stated that the style project was vital and must be continued.

Mr. Perry suggested that all five sets of rules might be rewritten according to a prescribed schedule over the next several years. The committee might wait until all the revisions were completed and then issue all the rules together as a single package. The consensus of the committee, however, did not favor this approach.

Judge Easterbrook cautioned that it might be best to see how well the revisions in civil rules are received before tackling the other sets of rules. He expressed concern over hidden substantive changes made in the guise of style.

Judge Mannes stated that the Advisory Committee on Bankruptcy Rules had restyled all the official bankruptcy forms a few years ago with great success.

Judge Higginbotham stated that "extraordinary" effort and talent had been devoted to the project to revise the civil rules. Nevertheless, the project had proven to be far more difficult than anticipated. The advisory committee had to make difficult policy choices as it proceeded to address the rules one at a time. This had slowed down the revision process considerably. He stated that a set of official drafting conventions would be very valuable.

Judge Stotler asked whether it would be desirable to have more than one set of rules under style revision at the same time. Judge Logan replied that the Advisory Committee on Appellate Rules would like to complete the style revisions of the appellate rules as soon as possible, perhaps even

before the civil rules have been completed. Judge Higginbotham suggested that each advisory committee act independently, without a set time frame, coordinating with each other as necessary as they go along. He argued that there is no need for seriatim consideration of the rules revisions.

Judge Stotler suggested that the style revisions should be circulated to the various advisory committees. She also proposed to distribute background information, style conventions, and the pertinent decisions of the style subcommittee.

LOCAL RULES PROJECT

Professor Coquillette explained that the local rules project had begun in 1986 in response to a Congressional initiative. Concern had been expressed both by the bar and the Congress that the number of local court rules had grown beyond reason and that local procedural requirements were not generally available to the bar. He declared that the most common complaint he had received from lawyers had been about the proliferation of local court rules.

He stated that the local rules project had now completed a local rule numbering system, and a growing number of courts were following it. In this regard, the committee had adopted Judge Weis' advice that progress on local rules should be achieved through persuasion rather than force. It was time, though, for another poll to ascertain what progress was being made by the district courts. He argued that time was running out for the Judiciary, since the Congress might act on its own to do something about local rules.

Professor Coquillette reported that the issue of local bankruptcy court rules had been left to the Advisory Committee on Bankruptcy Rules, rather than the local rules project. On the other hand, the Advisory Committee on Criminal Rules would like to have the local rules project proceed to address local district court criminal rules.

He stated that another, very controversial problem had arisen with regard to local rules -- that of bar admission and attorney conduct. The local rules project was prepared to address the problem for the committee. The Department of Justice had expressed serious concerns over local barriers to government attorneys. Mr. Rabiej added that the Senate version of the pending omnibus crime bill had provisions for attorney conduct in violent crime cases.

In conclusion, Professor Coquillette summarized the plan of the local rules project as follows:

(1) To poll the district courts again.
(2) To begin work on reviewing the local criminal rules.
(3) To begin work on attorney admission and conduct.

Mr. Nathan, on behalf of the Department of Justice, urged action on attorney conduct rules. He noted that the practice of the federal courts to incorporate state attorney conduct rules had caused serious problems for the department. Government attorneys were forced to deal with more than 50 different sets of rules and were concerned that local attorney conduct rules affected procedure.

Chief Justice Veasey stated that the state courts were very much interested in preserving their authority in this area. The Conference of State Chief Justices had discussed the matter with the Department of Justice and would debate the matter at its next meeting. He recommended that the rules committee address attorney conduct, and he noted that it had constitutional and comity implications. The states clearly would not like to see a federal trump of attorney conduct matters, either by the Department of Justice or by local federal court rules.

Chief Justice Veasey emphasized that the states did not want a confrontation on the matter and wished to work with the Department of Justice and the rules committees. Moreover, the public was upset with attorney conduct in general. Accordingly, if the committee, the department, and the states failed to work together, a vacuum would be created for the politicians to fill.

Judge Bertelsman observed that the issue of attorney conduct may well be substantive in nature and beyond the power of the rules committees to address. Professor Wright pointed out that 28 U.S.C. § 1654 authorized each court to regulate attorney admission and practice,. Judge Bertelsman agreed but added that this subject was not part of the Rules Enabling Act process.

Professor Hazard stated that some aspects of attorney conduct were beyond the power of the committee because they did not constitute practice and procedure. Yet, other parts clearly lay within the committee's authority.

Mr. Nathan noted that the Department of Justice accepted the fact that every government attorney was bound by the bar rules of the jurisdiction in which he or she appeared, except where there were higher federal prosecution needs in certain limited instances. He suggested that there should be an examination of local rules to see which were proper and which were not, i.e., those affecting substantive matters.

Judge Easterbrook added that there is a larger question, beyond the question of the need of the Department of Justice prosecutors, regarding ethical rules that interfere with substantive rights.

Mr. Nathan reported that the Department of Justice was working on a new regulation governing the conduct of government attorneys and wished to work cooperatively with the states and the rules committees. Chief Justice Veasey expressed appreciation that the department was now using a surgical approach, rather than a broad brush approach to attorney conduct.

Judge Stotler concluded that there was a consensus in the committee to have Professor Coquillette proceed with attorney conduct issues and with a poll of the district courts. Judge Jensen added that he would also like to have Professor Coquillette begin work on the district court's local criminal rules.

FAX FILING

Judge Stotler reported that the rules committees, the Automation and Technology Committee, and the Court Administration and Case Management committee were all involved in the fax filing issue. She emphasized that the Judicial Conference was expecting the committees to cooperate and present a report and appropriate recommendations at the September 1994 session.

Professor Mooney summarized the history of the fax filing guidelines. She stated that the task of producing new guidelines had fallen to the Advisory Committee on Appellate Rules, since it was the first rules committee to hold a meeting following the September 1993 Conference session. The appellate committee's document eliminated procedural issues from the proposed guidelines. The committee decided that strictly technical matters were appropriate in guidelines, but that procedural requirements should be set forth only in federal or local court rules. The committee, therefore, drafted a model local court rule to address the pertinent procedural issues.

Professor Mooney stated that the Advisory Committee on Civil Rules, on the other hand, was more concerned about national uniformity and had recommended that the Rules Enabling Act problem be solved by the Judicial Conference determining the content of the local fax filing rules.

Judge Stotler declared that the integrity of the Rules Enabling Act was very important. She pointed out that the Automation and Technology Committee was also opposed to fax filing, largely on the grounds that fax represented old technology.

Judge Higginbotham stated that the Advisory Committee on Civil Rules did not have a major concern with the Rules Enabling Act. Rather, it was more concerned about fostering uniformity of practice among the district courts. Accordingly, the national guidelines would have to address procedural content.

Professor Resnick stated that the Advisory Committee on Bankruptcy Rules was opposed to fax filing in the bankruptcy courts in any form. He referred to the new federal bankruptcy rule that authorizes electronic noticing and stated that the advisory committee wants to leapfrog fax technology in favor of electronic filing.

Judge Keeton declared that the reporters' draft from the June 1993 meeting was a vast improvement over the original guidelines. He pointed out that the Judicial Conference had rejected the proposed guidelines, largely on the basis that they would bypass the Rules Enabling Act process.

He said that if the Judicial Conference itself violated the Act, it would surely undercut the judiciary's standing when it cautions the Congress against enacting rules by statute. Nevertheless, the Conference was expecting final action on fax guidelines by September 1994. Thus, the rules committees must produce some document.

Judge Keeton complimented the appellate advisory committee for excellent work in producing redrafted guidelines and a model local rule that separated technical matters from procedural directions. The latter surely should be set forth in rules, which are required to be published and made available to the bar.

Mr. Perry inquired as to whether the committee was dealing with fax filing on a routine basis or fax filing only in exceptional situations. Judge Logan responded that the appellate committee had prepared alternate drafts to cover both possibilities. Judge Stotler added that the charge to the committee was to address fax filing on a routine basis.

Mr. Perry moved that the committee recommend to the Judicial Conference that fax filing not be allowed on a routine basis. Judge Ellis seconded the motion, arguing that fax filing would be a disaster if allowed on a routine basis. He recommended that the committee oppose fax filing generally, but provide guidelines to take care of emergency and special situations only.

Judge Easterbrook suggested that one possible course of action for the committee would be to draft a model local rule, append it to the federal rules, publish it for public comment, but note in the comments that the committee was generally opposed to fax filing, and recommend against it to the Conference. He summarized the reasons against fax filing:

(1) Attorneys will be inclined to fax file at 4:30 in the afternoon.
(2) Attorneys will file loose papers by fax, rather than stapled documents,
(3) Fax documents are of low quality compared to documents prepared by word processing.

He recommended that the committee proclaim that fax filing is a bad idea, but allow it in emergency situations.

Mr. Perry restated his motion as follows:

(1) To express the committee's opinion that routine fax filing is not advisable, giving the reasons why.
(2) To draft a rule authorizing fax filing in routine situations.
(3) To draft an alternative rule for fax filing only in emergency situations.
(4) To publish these draft rules for public comment.

Judge Easterbrook recommended that the committee work from the draft prepared by the Advisory Committee on Appellate Rules. Several members stated, however, that it would not be appropriate for the committee to publish a rule it disfavored. Others recommended that more time and care be taken in drafting an appropriate rule. They cautioned that rulemaking should be deliberate, even if the process were to take more time than the Judicial Conference would wish.

Judge Wilson observed that the entire membership appeared to be opposed to fax filing on a routine basis. Accordingly, he moved that the committee simply reject fax filing on a routine basis. He added that the other issues could be addressed in later motions.

The committee unanimously approved Judge Wilson's motion.

Judge Easterbrook moved that the proposed guidelines and model local rule be published for public comment. He added that his motion was a concept motion and that the exact language could be decided upon later.

Professor Wright explained that there had been many instances in the past where alternate drafts had been published by an advisory committee for public comment. Publication did not commit the committee to any specific action.

Judge Easterbrook pointed out that the proposed guidelines prepared by the appellate committee were not limited to district or appellate courts. Judge Logan added that they could be adapted for all levels of court.

Judge Easterbrook's motion failed by a vote of 5-6.

The committee's deliberations on fax filing were then continued to Friday to allow Judge Logan, Judge Easterbrook, Professor Mooney, Mr. Spaniol, and others to make overnight changes in the guidelines and model local rules prepared by the Advisory Committee on Appellate Rules.

On Friday Judge Logan distributed a clean copy of the revised guidelines and model rules to the members. He noted that the ad hoc drafting committee's overnight changes had included substituting the term "standards" for "guidelines," striking references to the bankruptcy rules and 28 U.S.C. § 2075, rewriting the technical standards contained in sections 1(b) and 2(a), and eliminating Part IV, dealing with court resources. Judge Logan stated that it would be appropriate for the style subcommittee to make additional changes in the product and that it would not have to be published for public comment.

Judge Logan stated that Mr. Spaniol had arrived at a possible solution to the fax guidelines that would give the chair of the standing committee a product to give to the Judicial Conference in September and would avoid the need to publish rules for comment.

Mr. Spaniol then presented the following draft resolution:

> Your Committee, after full consideration of the views of its members, and the chairs and reporters of the various Advisory Rules Committees, voted unanimously to recommend against facsimile filing "on a routine basis."
>
> It is the view of your Committee that facsimile filing in emergency or unusual situations is appropriate. The recent amendments to Rule 25 of the Federal Rules of Appellate Procedure and Rule 5(e) of the Federal Rules of Civil Procedure now authorize the courts of appeals and the district courts to adopt local rules permitting "papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards approved by the Judicial Conference of the United States." These new provisions provide ample authority for receiving documents by facsimile transmission.
>
> The Advisory Committee on the Federal Rules of Appellate Procedure reviewed the proposed guidelines referred to your Committee, made amendments to them, and submitted them to your Committee along with a proposed uniform local appellate court rule. This proposed rule could also be adapted for use by a district court.
>
> After full consideration, your Committee decided to refer these two draft proposals to the Automation and Technology Committee and the Court Administration and Case Management Committee for their review, with the suggestion that if they approve, the draft proposals be recommended by them directly to the Conference for adoption.

Mr. Spaniol asserted that if routine fax filing were allowed, the guidelines would be very important. If, however, only emergency filing were allowed by fax, the guidelines would not be important. In that case, the guidelines needed to say only that for technical purposes the equipment must be compatible with the equipment in the clerk's office.

Mr. Perry circulated his own proposed draft for consideration by the committee. Some members stated that they liked Mr. Perry's approach, but they preferred the revised draft of the appellate committee.

Judge Stotler summarized Mr. Spaniol's recommendation, stating that it proposed to send the guidelines and model local rules to the Court Administration and Case Management Committee and the Automation and Technology Committee for their consideration and then to the Judicial Conference.

Judge Wilson moved to approve Mr. Spaniol's recommendations and the concept of the appellate committee's guidelines, as revised.

Judge Easterbrook and Mr. Perry offered a number of changes in the guidelines and model local rules, which were approved without objection. Mr. Perry added the words "transmissions directly to the clerk" in lieu of "filing" on line 5 of Part V of the guidelines. The words "directly to

the clerk" were also added in model local rule --.1. Judge Easterbrook added a provision that additional copies of the papers must be mailed or delivered to the clerk before the end of the next business day. The local rules were also clarified regarding service by elimination of model rule --.8 and including a provision in model rule --.6 that all applicable rules governing service must be followed.

The committee then approved the proposed guidelines and model rules, as amended, and voted to send them to the Court Administration and Case Management Committee and the Automation and Technology Committee.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of December 9, 1993. (Agenda Item XI)

Fed.R.Crim.P. 16

Judge Jensen reported that the advisory committee had approved a proposed amendment to Fed.R.Crim.P. 16 requiring the government, on request of the defendant, to disclose the names, addresses, and statements of witnesses at least seven days before trial. He noted that a similar proposed rule change had been approved by the Supreme Court in 1974, but had been rejected by the Congress as a result of vigorous opposition from the Department of Justice.

Judge Jensen stated that there was a natural tension between the need for a fair trial and the need to protect government witnesses. The draft rule approved by the advisory committee presented a good balance between these two principles. The rule provided a presumption of disclosure, but allowed exceptions freely in the unreviewable discretion of the United States attorney where there could be danger to witnesses or obstruction of justice.

He added that a series of changes had been made in the criminal rules over the years to require disclosure of information before trial, all with the theme of eliminating surprise, including Fed.R.Crim.P. 12.1 (notice of alibi), 12.2 (notice of insanity defense or expert testimony of defendant's mental condition), and 12.3 (notice of a defense based on police authority). He pointed out that the changes had been promoted by the Department of Justice to prevent surprise to the government at trial. He added that surprises occurring during a trial lead to interruptions in the process in order to obtain additional information.

Judge Jensen noted that in the state courts there was a clear movement towards greater disclosure. State systems generally provide for open disclosure, with exceptions made for security reasons. In most federal prosecutions, too, open file discovery prevailed. So, as a practical matter, disclosure of witnesses and other information already occurred in most cases.

He explained that the 1974 rule proposal had contained a provision for protective orders. The current rule, however, went much further to protect the government. It recognized the good faith of the prosecutor and made the prosecutor's determination unreviewable. This would avoid collateral litigation. It would also require reciprocal discovery, for the defendant must disclose witnesses when the government must.

Judge Jensen stated that the advisory commitee had discussed a potential conflict between the proposed rule and the Jencks Act. Nevertheless, the committee saw Jencks as just a timing issue. Moreover, Congress always has the prerogative to reject the proposal, just as they did in 1974.

In summary, Judge Jensen concluded that the thrust of the rule was to prevent surprise at trial and to strike a proper balance between competing considerations.

Professor Schlueter stated that the vote in the advisory committee to approve the amendments to Rule 16 was overwhelming, at 9-1. The matter had been discussed by the committee at two previous meetings and had been considered by a subcommittee consisting of Professor Saltzburg and Judge Wilson. Action had been deferred by the committee expressly to allow Attorney General Reno an opportunity to study and comment on the proposal. Yet, the Department of Justice returned to the committee with a very hard position against any change.

Mr. Nathan stated that he had read in the advisory committee reports criticism of the Department of Justice for being too partisan. This, he stated, was clearly not Attorney General Reno's wish. He pointed out that the department wore two hats: (1) to work for the good of the justice system, and (2) to prosecute criminal offenses. It had an obligation to protect the second interest.

Mr. Nathan complimented Judge Jensen for a great job on the proposal, stating that the current draft was far superior to the 1974 proposal. It was well balanced, but the Department still had problems with it and would like to work with the committee to address these problems. He requested that the proposed amendments be deferred for one more meeting and not be published in their current form.

Mr. Nathan stated that the Department saw a direct conflict with the Jencks Act. The proposal effectively would amend the Act by rule.

Mr. Nathan pointed out that the reason for the Department's delay in responding to the committee's proposal was that it did not have an Assistant Attorney General for the Criminal Division. The new Administration would like to take a fresh look, particularly at local disclosure practices in the federal courts. The Department was sincere on the matter, wished to obtain additional information, and wanted to reach an accommodation with the committee, if possible.

He emphasized that if the committee and the Department were able to work out their differences, the proposal would have much more credibility in the Congress since it would have Department of Justice support. He concluded, though, that if the proposal as presently written were to be published, the Department would have to oppose it. Moreover, publication would harden positions.

Judge Wilson stated that he recognized that there was a danger to witnesses in some criminal cases. But in white collar crimes, the idea of going to trial without pretrial disclosure of the names of witnesses was ludicrous. He argued that the proposal of the Advisory Committee on Criminal Rules was very modest and promoted fundamental fairness. He asserted that he was extremely skeptical that the Department of Justice would change its position at the next meeting.

Chief Justice Veasey stated that he came from an open disclosure state and had found the issue to be controversial only as to its inconsistency with the Jencks Act.

Several other members expressed their support for the proposed amendment on its merits, but were also concerned about the Jencks Act problem. Professor Wright pointed out that 28 U.S.C. § 2072(b) provided that the amended rule would supersede the Act in any event.

Judges Ellis and Easterbrook stated that they were troubled about the supersession clause in the Rules Enabling Act and suggested that it might be unconstitutional. Judge Easterbrook added that the advisory committee note was not completely candid. He suggested that the issue was whether the committee should openly confront the Jencks Act problem and rely on the supersession mechanism.

Judge Ellis moved to defer publication of the amendments to Fed.R.Crim.P. 16 until the next meeting of the committee, subject to the Department of Justice's planned study of current practices and problems.

The motion was approved without objection.

Internal Operating Procedures

Judge Jensen reported that the advisory committee had adopted two internal operating procedures:

(1) In discussing proposals for rules amendments, the burden would be placed on the reporter to provide a history of prior, similar proposals for consideration of the members. Issues may be raised anew, but the members should be made aware of past actions of the committee on similar suggestions.

(2) The appropriate place for people to make oral presentations to the advisory committee was at the scheduled public hearings, rather than at committee business

meetings. Yet, if people are present at the meetings, they may be asked, in the committee's discretion, to participate in discussions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of December 10, 1993. (Agenda Item VIII)

Professor Resnick reported that the advisory committee had no recommendations for action by the standing committee. He pointed out that the advisory committee had deferred seeking authority to publish additional rules amendments because it was sensitive to the perception that there had been too many recent changes in the rules. He added that the committee was anticipating a busy meeting in February 1994 and had an active subcommittee on technology. The subcommittee was in the process of examining the state of technology in the courts and the legal profession and exploring the need for future rules amendments to accommodate improvements in technology.

REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Dean Berger presented the report of the advisory committee, as set forth in Agenda Item IX. She stated that the committee had no action matters for the standing committee.

Dean Berger commented that Congress was considering several rules amend-ments to deal with sexual violence issues. The advisory committee had published a revised Evidence Rule 412 that would address these issues comprehensively in both civil and criminal cases.

She stated that the advisory committee was concerned about restyling the Federal Rules of Evidence because it would require lawyers to make adjustments. She added, however, that the committee might have to revisit the issue.

Professor Wright noted that on pages 14 and 15 of the minutes of the advisory committee's last meeting it was reported that a majority of the committee had been opposed to updating a committee note in the absence of a revision to the pertinent rule. He stated that while the practice had been followed many years ago, it was clearly undesirable to change a note without a specific rule amendment. Changing the notes, he explained, was a form of changing the rule without action by the Supreme Court and Congress.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum of December 1, 1993. (Agenda Item XII)

Rule 68

Judge Higginbotham reported that the Court Administration and Case Management Committee had approved in principle a bill introduced by Senator Grassley that would expand substantially the offer of judgment procedure contained in Fed.R.Civ.P. 68. The advisory committee had studied the proposal at length at its last meeting and had decided that the proposal was a bad idea. The committee, however, agreed to obtain empirical data and study the matter in further depth.

Dean Cooper reported that the Federal Judicial Center was conducting a study of settlement behavior that might shed some light on the matter. The Center also planned to survey lawyers on how they thought revised proposals regarding offers of judgment might work in practice.

Judge Higginbotham stated that the advisory committee recommended that the Conference rescind its approval of the bill. This would put the Conference in a neutral position pending further study.

The committee approved the recommendation.

Other Rules Under Consideration

Judge Higginbotham reported that the advisory committee was also looking at Rule 23. with regard to its use in mass multi-district tort cases, and at Rule 53, with regard to possible expansion of the use of masters for pretrial management.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Professor Mooney presented the report of the advisory committee, as set forth in Judge Logan's memorandum of December 10, 1993. (Agenda Item X) She reported that the advisory committee had no requests for approval before the standing committee, other than the fax filing guidelines, discussed earlier.

Professor Mooney stated that the last two packages of appellate rule amendments had been based largely on the work of the local rules project and were designed to promote uniformity among the circuits. She provided a brief summary of some of the matters under active consideration by the advisory committee, including changes to F.R.A.P. 27, dealing with motions, and to F.R.A.P. 35, dealing with the grounds for in banc consideration.

NEXT MEETING OF THE COMMITTEE

Judge Stotler stated that the date for the next meeting would be Thursday, Friday, and Saturday, June 23, 24, and 25, 1994, in Washington, D.C. She added that the committee could have a short, informal meeting on Wednesday, the day before, if necessary.

The next winter meeting of the committee was scheduled tentatively for January 12-14, 1995. The location of the meeting would be determined later.

Respectfully submitted,

Peter G. McCabe,
Secretary