COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of February 4, 1991

The winter 1991 meeting of the Judicial Conference Committee on the Rules of Practice and Procedure was called to order at 8:30 a.m., February 4, at the offices of the Administrative Office of the United States Courts in Washington, D. C., by its Chairman, Judge Robert E. Keeton. All members of the Committee attended the meeting except Judge Charles E. Wiggins, Charles Alan Wright, and Gael Mahony, who were unavoidably absent.

Also present were Judge Kenneth F. Ripple, Chairman, and Assistant Dean Carol Ann Mooney, Reporter, of the Appellate Rules Advisory Committee; Judge Sam C. Pointer, Jr., Chairman, and Professor Paul D. Carrington, Reporter, of the Civil Rules Advisory Committee; Judge William Terrell Hodges, Chairman, and Professor David A. Schlueter, Reporter, of the Criminal Rules Advisory Committee; and Judge Edward Leavy, Chairman, and Professor Alan N. Resnick, Reporter, of the Bankruptcy Rules Advisory Committee. Judge Edward R. Becker attended as the liaison member of the Long-Range Planning Committee. The Reporter to your Committee, Dean Daniel R. Coquillette, attended the meeting, along with Mary P. Squiers, Esq., Project Director of the Local Rules Project. Scott Schell, who is on the staff of the Senate Judiciary Committee, attended as did two representatives of the defense bar, Benson Weintraub, Esq. of Miami, Florida, and Alan Chaset, Esq., of Alexandria, Virginia. Also present were James E. Macklin, Jr., Secretary to your Committee and Deputy Director of the Administrative Office; Peter G. McCabe,

Assistant Director for Program Management of the Administrative Office; William B. Eldridge, Director, and John E. Shapard, Research Division, Federal Judicial Center; Patricia S. Channon, Bankruptcy Division, Administrative Office; and David N. Adair, Jr., Assistant General Counsel of the Administrative Office.

I. Report of the Status of Committee Work

A. Appellate Rules - Judge Kenneth F. Ripple

Judge Ripple reported that the Advisory Committee on the Federal Rules of Appellate Procedure had nothing to submit to the Standing Committee at this meeting, but noted several issues that the Advisory Committee would take up at its next meeting. Specifically, the Committee will consider an amendment to Appellate Rule 4(a)(4), which would eliminate the so called "4(a) trap." The Advisory Committee will also be considering the definition of "final judgment" for purposes of 28 U.S.C. § 1291. Section 315 of the Judicial Improvements Act (Pub. L. No. 101-650, Dec. 1, 1990) amended 28 U.S.C. § 2072 to authorize the definition of a final judgment pursuant to the Rules Enabling Act.

Judge Ripple suggested that the other advisory committees should be involved in this process, but that the Appellate Rules Advisory Committee should logically have prime responsibility. Judge Keeton agreed and further suggested that the coordination take the form of consultation among the chairman or designee of each of the committees. Judge Keeton asked that the four chairmen confer today or in the near future to determine the manner in which they will coordinate on this issue.

Judge Keeton suggested that the proposed actions contained in the reports of the advisory committees should be considered motions for consideration of the Standing Committee. Accordingly, the suggestion of the Appellate Rules Advisory Committee that the Advisory Committee take the lead in coordinating with the other three advisory committees on formulating the definition of final judgment was treated as a motion and was passed unanimously.

The second matter for discussion, Judge Ripple indicated, was the role of the Appellate Rules Advisory Committee in implementing the final phase of the Local Rules Project, which deals with the local appellate rules. A number of specific areas discussed in that report, particularly those areas that are likely to be controversial, should be studied by the Advisory Committee. It might also be helpful, he suggested, to establish a liaison between designated members of each of the circuit local rules committees and the Appellate Rules Advisory Committee. This would not only assist in the implementation of suggestions in the Local Rules Project Report but would help the Advisory Committee in its task of monitoring local rules changes. Ideally, the Advisory Committee would be aware of and could advise with respect to proposed local rules before they have been promulgated by the court.

Dean Coquillette explained that the only action requested of the Standing Committee by the Local Rules Project was permission to obtain input on the draft Appellate Local Rules Report from the circuits. He asked whether the Appellate Rules Advisory Committee would prefer to seek comment on the report prior to its

circulation for wider comment, or whether the draft report should be sent for comment simultaneously with its submission to the Advisory Committee.

Judge Keeton suggested that before the Standing Committee took action, it should hear from the Appellate Rules Advisory Committee. In addition, since the completion of the Appellate Local Rules Report ended the work of the Local Rules Project, any coordination with the circuits must be handled by the Advisory Committee. Dean Coquillette pointed out that Mary Squiers, the project Director, would remain at Boston College Law School after the completion of the project, and that either she or he could be of assistance in the future. Judge Keeton suggested that the determination of this issue be passed over until the Standing Committee reached the item on the agenda.

B. Civil Rules - Judge Sam C. Pointer, Jr.

Judge Pointer reported that there were a number of matters currently under consideration by the Civil Rules Advisory Committee. Among these are several items dealing with reform and revision of the civil discovery rules, most significantly Rules 26 and 37. In addition, the Advisory Committee is studying Rule 11 pursuant to the Standing Committee's authorization last year. The Advisory Committee has sent out a request for comments, and a substantial number have been received. In addition, the Advisory Committee has scheduled a hearing for February 21 in New Orleans. The Federal Judicial Center is conducting two studies on the issue: a subjective evaluation of the attitudes of district judges regarding Rule 11, and a field study of actions filed in five district courts, which will include approximately sixty thousand cases.

Judge Pointer noted that a bill to amend Rule 11 had been introduced in Congress and that the Director of the Administrative Office has written to suggest that any amendment to Rule 11 should be pursuant to the Rules Enabling Act process.

The Advisory Committee is also considering possible revisions of Rules 54 and 58 to address problems with applications for attorneys' fees. The revision of Rule 56 under consideration by the Advisory Committee retreats from the more extensive changes previously considered. The current proposal would make a number of needed improvements, but would retain the same basic format and terminology as the existing rule.

Judge Pointer also noted that the Advisory Committee was considering technical changes arising out of the Judicial Improvements Act, including the renaming of United States Magistrates as United States Magistrate Judges. Since the Civil and Criminal Advisory Committees share responsibility for the Federal Rules of Evidence, the Advisory Committee has sent suggested technical and conforming changes to the Evidence Rules to the Criminal Advisory Committee for consideration.

Judge Pointer also suggested that the Advisory Committee would take up consideration of Rule 23, which has not been studied for possible amendment for the last 20 years. One aspect of this consideration would be whether the Rule should be modified to ease the 1966 restrictions with respect to mass tort litigation.

The next meeting of the Civil Rules Advisory Committee will be in New Orleans on February 22 and 23, immediately after the Rule 11 hearings. It is

anticipated that actions will be taken at that meeting that could be presented to the Standing Committee at its next meeting.

Finally, Judge Pointer requested that the Standing Committee approve what has been the occasional practice of the Civil Rules Advisory Committee to circulate working drafts of possible revisions to various bar groups and academicians on an informal basis prior to their submission to the Standing Committee for authorization for public circulation and comment. While this procedure has proven to be very helpful, it is arguably inconsistent with the Procedures for the Conduct of Business of the Committees on Rules of Practice and Procedure. Judge Barker moved that the request be approved. Professor Baker seconded the motion and the motion was passed with one vote against.

C. Criminal Rules - Judge William Terrell Hodges

Judge Hodges reported that the Criminal Rules Advisory Committee had proposed four amendments to the Criminal Rules, which had been circulated for public comment. The proposed amendment to Rule 16(a)(1)(A) would expand the duty of the Government to disclose certain oral statements. Judge Hodges reported that the comments received with respect to this Rule had been favorable, except for comments that the amendments should have gone further. Professor Baker asked why the proposed amendment would require a request for disclosure. Judge Hodges responded that Rule 16(b) required reciprocal disclosure and that some defendants might choose not to subject themselves to reciprocal discovery. He also suggested that the Department of Justice would have objected to discovery without request. Professor

Baker responded that the Advisory Committee should consider the idea of automatic discovery generally.

Judge Sloviter suggested that the disclosure be limited to those portions of the written record that contain relevant material. Judge Hodges indicated that the sense of the amendment was to restrict the duty to disclose the statement itself and suggested that the addition of the words "that portion" would clarify the Rule but could invite litigation. Judge Keeton agreed that the Rule as drafted appeared more expansive than intended. Judge Hodges agreed to accept an amendment that would clarify the intent of the Rule by the addition of the words "that portion." The report of the Advisory Committee recommending amendment of Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure, as further amended by the Standing Committee, was treated as a motion. The Standing Committee voted unanimously to forward the amendment to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with the recommendation that it be approved and transmitted to Congress pursuant to law.

Judge Hodges reported that the proposed amendment to Rule 24(b) would equalize the number of peremptory challenges for both sides: twenty for each side in a capital case, six for each side in a felony case, and three each in a misdemeanor case. The Advisory Committee had discussed equalization at eight peremptory challenges on each side for a felony case but had settled on six challenges because eight would accomplish nothing to reduce the number of total challenges and would increase the number of challenges to the Government. The impetus for the

proposed amendment was a legislative initiative that would equalize the number of peremptory challenges, although the proposal had originally been made by the American Bar Association. The Advisory Committee was of the view that the Conference and the Standing Committee supported equalization. The comments received were essentially negative.

Mr. Wilson opposed the change. He asked why a change should be made since, in his view, the inclination of most people to vote for the Government has not changed since the development of the current practice in the nineteenth century. The current ten to six allocation of challenges is intended to "level the playing field" for the Government and the defense. He also opined that equalization would not save a considerable amount of time. Judge Bertelsman asked whether there was a provision to permit extra challenges for a particular reason. It was noted that the proposed amendment provided that each side was "entitled" to six challenges.

Judge Hodges noted that the principal debate in the Advisory Committee was whether the challenges should be equalized at eight or six, accepting the congressional determination that the challenges should be equalized. Professor Baker also opposed the change, noting that the ten challenges for the defense dated back to the Magna Carta and that the change would raise Batson problems. Judge Ellis asked whether voir dire should be expanded if the number of challenges was reduced. Judge Ripple pointed out that Congress should consider the actions of the Rules Committees, just as the Rules Committees consider the actions of Congress, and that the proposed amendments should not be determined by Congressional interest alone. The Advisory

Committee's report proposing to amend Rule 24(b) of the Federal Rules of Criminal Procedure was taken as a motion and was unanimously opposed by the Standing Committee.

Judge Hodges reported that the proposed amendment to Rule 35(b) would expand the time in which the court could reduce a sentence on a motion from the Government that the defendant has provided substantial assistance to the Government. It would permit the court to act after one year if the motion for reduction was filed within one year, and it would permit the filing of a motion after one year when the assistance provided by the defendant that was the basis of the motion involved information not known to him until after one year. The comments to the proposed amendment generally were favorable, except that some comments urged that the defendant be permitted to make such a motion as well as the Government. Professor Baker asked why there should be any time limit to the filing of such motions. Judge Hodges suggested that considerations of finality demanded some limitation and that a time limitation encouraged parties to act quickly. The report of the Advisory Committee recommending amendment of Rule 35(b) of the Federal Rules of Criminal Procedure was treated as a motion. The Standing Committee voted unanimously to forward the amendment to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with the recommendation that it be approved and transmitted to Congress pursuant to law.

Judge Hodges reported that the proposed amendment to Rule 35(c) would permit the sentencing court, acting within seven days, to correct a technical or

clerical mistake in the sentence. This proposed amendment originated with a recommendation of the Federal Courts Study Committee that a correction of sentence or a reduction of sentence based upon newly discovered evidence could be made upon motion filed within 120 days of sentence. The Advisory Committee did not adopt the suggestion of the Study Committee. The Advisory Committee concluded that such a provision would not be consistent with the principle of finality and would invite relitigation concerning the sentence. The comments on the proposed amendment were generally favorable except that some commentators suggested that the former Rule 35(b), which gave more discretion to the court, should be reintroduced.

Judge Sloviter asked whether notice would be provided with respect to a proposed change to the sentence and how a dispute regarding such a change would be handled. Judge Hodges responded that the defendant would be present at any resentencing and that counsel would be able to argue with respect to any proposed change. The report of the Advisory Committee recommending amendment of Rule 35(c) of the Federal Rules of Criminal Procedure was treated as a motion. The Standing Committee voted unanimously to forward the amendment to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with the recommendation that it be approved and transmitted to Congress pursuant to law. Judge Hodges suggested that the Appellate Advisory Committee may wish to consider an amendment to Appellate Rule 4 to provide that filing of a notice of appeal does not result in the loss of jurisdiction of the district court to act under proposed new Rule 35(c).

Judge Hodges reported that the proposed amendment to Rule 404(b) of the Federal Rules of Evidence would require the Government to give notice prior to the use of certain character evidence in criminal cases. This would, in fact, duplicate the practice followed in most district courts. He reported that the comments were generally favorable. The report of the Advisory Committee recommending amendment of Rule 404(b) of the Federal Rules of Evidence was treated as a motion. The Standing Committee voted unanimously to forward the amendment to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with the recommendation that it be approved and transmitted to Congress pursuant to law.

Judge Hodges reported that the amendments to Criminal Rules 32(c)(2)(A), 32(c)(3)(A), 32.1(a)(1), 36(h), 54(a), 58(b)(2)(A), and 58(d)(3) and Evidence Rule 1102 were technical changes. He requested that they be approved without public notice and comment. The report of the Advisory Committee recommending these technical amendments to the Federal Rules of Criminal Procedure and Federal Rules of Evidence was treated as a motion. The Standing Committee voted unanimously to forward the amendment to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with the recommendation that it be approved and transmitted to Congress pursuant to law.

D. Bankruptcy Rules - Judge Edward Leavy

Judge Leavy requested that proposed amendments to Bankruptcy Rules 5011(b) and 9027(e) be approved on an expedited bases without circulation for public

comment. Section 1334 gives district courts jurisdiction over all bankruptcy cases. Subsection (c)(2) requires that, upon motion, a "related to" proceeding subject to a pending state action must be sent back to state court. But such a decision has not been appealable under the provisions of section 1334(c). Accordingly, the Bankruptcy Rules treat an abstention motion as a non-core matter. Bankruptcy judges make only proposed findings and conclusions with respect to such matters. The Judicial Improvements Act, following a Federal Courts Study Committee proposal, removes the prohibition on appeal to the district court of an order by a bankruptcy judge to abstain from hearing a bankruptcy case under section 1334(c)(2). The clear intent of the amendment is now inconsistent with the provisions of Rule 5011(d). The same situation is presented with respect to an order to remand a removed proceeding relating to a bankruptcy case under 28 U.S.C. § 1452(d).

Mr. Macklin pointed out that the current Procedures for the Conduct of Business by the Committees on Rules of Practice and Procedure would appear to require notice and comment even for technical and conforming amendments. Judge Keeton asked if the proposed amendments to the Bankruptcy Rules were, in fact, conforming. Professor Resnick noted that, while the changes were not mandated by statute, the present rules are clearly contrary to the intent of the statutory amendments and that changes were necessary to comply with the legislation. Judge Ripple suggested that although the plain language of the statute did not mandate the rule changes, the proposal was conforming and should go forward on an expedited basis. The report of the Standing Committee, however, should note that it is a conforming

amendment and that it was not circulated for public comment. The Supreme Court and Congress would then be on notice that the proposed amendment had not been submitted for public comment and could reject the proposed amendment if they determined that comment was appropriate. Judge Keeton suggested that an amendment to the procedures of the conduct of business incorporating Judge Ripple's suggestion be prepared for consideration later in the meeting.

The report of the Advisory Committee recommending amendment of Rules 5011(b) and 9027(e) of the Federal Rules of Bankruptcy Procedure without public notice and comment was treated as a motion. The Standing Committee voted unanimously to forward the amendments to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law.

II. Final Report on Local Rules Project - Dean Daniel R. Coquillette

Dean Coquillette reported that the Appellate Local Rules Report completed the Local Rules Project. Although the proposed report could go to Judge Ripple and the reporter to the Appellate Rules Advisory Committee, Carol Mooney, Ms. Mooney suggested that it be sent for comment at this time to the circuits. Some of the suggestions in the report require the reactions of those actually engaged in the appellate court process. Under her proposal, each circuit would receive the report and a list of rules in that circuit which will be cross-referenced to the place in the report where rules on that subject are discussed.

Judge Sloviter questioned whether the report's labeling of local rules as "inconsistent" was appropriate. The determination that a particular local rule is, in fact, inconsistent with the Federal law is often open to question, and perhaps the Appellate Rules Advisory Committee should study these determinations prior to the distribution of the report. She expressed a concern that local rules perceived by some as inconsistencies could actually be constructive experimentation. Some controlled mechanism should be in place so that experimentation could be encouraged. Judge Ripple noted that some of the best appellate rules have originated from local experimentation and that such local experimentation should not be stifled.

Dean Coquillette explained that the courts may agree or disagree with the conclusions of the report. The report was designed to raise questions for consideration. The entire report is advisory, with the exception, if approved, of the uniform numbering system. Such a numbering system was approved by the Conference with respect to local district court rules. Dean Coquillette noted, however, that the level of compliance in the districts is not high.

Judge Sloviter suggested that presentation to the circuits at this time might not be helpful, in that the comments may not be focused. She suggested that the Advisory Committee review the report before circulation. Judge Ripple responded that the concerns expressed by Judge Sloviter were well taken but that the review of the report by the Advisory Committee without input from the courts would be an overwhelming task. The cover letter accompanying the report could highlight the issues to be considered by the various circuits. Judge Ripple expressed the view that there

would be a number of opinions on several issues in the report, including whether repetition of the Federal rules is useful, whether "non-malignant" inconsistencies should be eliminated, and whether the report as a whole shows a bias against local experimentation. Judge Keeton noted that the proposal of the Local Rules Project was that the Committee approve the distribution of the report and that the reporter and Judge Ripple will coordinate the form of that distribution. The request was carried unanimously.

III. New Business - James E. Macklin, Jr.

Mr. Macklin reported that section 321 of the Judicial Improvements Act changed the term "magistrate" to "magistrate judge," and asked if the Standing Committee wished to authorize conforming changes in the Criminal Rules at this time. The Advisory Committee on Civil Rules has already indicated that the Civil Rules Advisory Committee has made the necessary changes to the Civil Rules and the Rules of Evidence. Some changes may be necessary in the Appellate Rules, but there would be no changes necessary to the Rules of Bankruptcy. Judge Pointer asked whether it was necessary to send the amendments to the Supreme Court at this time or whether they should be delayed until such time as a more substantial package of amendments went forward. Mr. Macklin noted that there was no need to expedite the changes. Judge Keeton agreed and suggested that the Standing Committee approve the changes to all of the rules to conform to the statutory change but that the changes not be sent forward for approval until a later date when a significant number of other amendments

were ready for consideration as well. The Standing Committee unanimously agreed to the appropriate amendments and to the delayed submission.

IV. Discussion of a Reexamination of the Rules of Practice and Procedure

Judge Keeton noted the three memoranda he had sent to members of the Committee regarding reexamination of the Rules of Practice and Procedure, suggesting that those memoranda were designed simply as a means of focusing discussion on the general issue of the reexamination of the Federal rules. He then opened the floor for discussion. Judge Ellis, with respect to Judge Keeton's proposal that there be a unified body of rules, suggested that the separate rules work well. The Eastern District of Virginia limits the time for trial with very few exceptions, and the magistrates handle most of the administrative matters. He suggested that when counsel are aware of the strict time restrictions, delays are reduced.

Judge Barker suggested that the judiciary was just preparing to comply with the civil justice expense and delay reduction provisions of the Judicial Improvements Act. Were the Standing Committee to initiate a reexamination before the plans mandated by the Act were devised and in place, the Standing Committee would be acting without sufficient background information.

Judge Sloviter asked that Judge Keeton explain in more detail his suggested reexamination. Judge Keeton indicated that he did not have a settled view as to what was the best way to proceed. He suggested, however, that the Judicial Improvements Act and other recent actions designed to reduce court delay have concentrated on pretrial case management. He suggested that pretrial management

alone would not cure the problems of cost and delay perceived in the system. Cost and delay have an adverse impact on parties. Any reduction in these problems would improve the quality of justice.

At the time the original rules of procedure went into effect in 1937, the average case took less than one week to try. The original rules did not deal with trial but only pretrial procedures. Today most cases take a good deal longer. Many other things have changed since the advent of the Federal rules, including cases, clients, and a different sense of the professional role of attorneys. Advocacy is more aggressive, and the informal controls on conduct of counsel have broken down. Therefore, if something is to be done to reduce cost and delay, the focus must shift to the trial.

Judge Keeton pointed out that any investigation of the trial practice should not result in a relaxation of the work of the Advisory Committees to examine in meticulous detail the workings of the current rules, but that detail is better understood if the broad picture is understood. He also suggested that the time is right for such an examination since there appears to be much current interest in such an examination.

Dean Carrington suggested that the Civil Rules Advisory Committee had conducted its business with an overall view of civil practice in mind for some time. As an example, the package of amendments currently before the Supreme Court was designed to isolate issues to be dealt with at trial. He indicated that what was needed was not a separate set of rules but a new body of ideas to consider with respect to the current rules. Judge Barker indicated that empirical data was needed and Judge Ellis agreed, noting that some districts simply try cases more quickly than others. Empirical

research might isolate the reasons for such differences. Judge Pointer also agreed, noting that the norm for trial in his district was still less than three days. He indicated that he was concerned about having another study group beyond the Case Management Committee and the existing Rules Committees. Some of the ideas suggested by Judge Keeton were already under consideration, and others could be considered by the Case Management Committee.

Justice Peterson agreed with the view that some judges are simply more effective than others in moving cases. Mr. Schell noted that the information generated by the procedures required under the Judicial Improvements Act could help determine such differences.

Judge Ripple noted that the Standing Committee has a mandate to monitor the operation of the rules, which involves not only specific changes but also long-term changes in the rules. A long-term study with input from judges and others would be productive. The study could identify a limited number of difficult issues that at some time would require action. The study should not be overly ambitious; it should maintain a topical focus that avoids intrusion on other jurisdictions.

Judge Becker noted that the Committee on Long Range Planning is also concerned about these problems. He suggested that any inquiry on trial practice should proceed with cooperation of the Federal Judicial Center. Many of the concrete suggestions brought up in Judge Keeton's communications and at the meeting have been dealt with in Federal Judicial Center training. Dean Coquillette suggested that

any study of such project should proceed incrementally. There are entrenched interests involved, and the project should be alert to politically sensitive areas.

The discussion of the reexamination of the rules was set aside for reconsideration of the amendment of the Procedures for the Conduct of Business of the Committees on the Rules of Practice and Procedure. Mr. Adair presented a draft amendment to paragraph 4(d) that would permit the Standing Committee to recommend approval without public notice and comment of technical or conforming amendments to the Rules of Practice and Procedure. Whenever an exception is made to the general rule of public comment, the Standing Committee would, in its report, advise the Judicial Conference of the exception and the reasons for the exception. Judge Barker moved that the proposal be adopted. Judge Pratt seconded the motion, which carried unanimously.

Judge Pointer noted that paragraph 4(b) required a comment period of at least six months, which can be shortened by the Standing Committee. He suggested that the timing of Advisory and Standing Committee meetings made the six-month period awkward and suggested that the normal period for comment be shortened to four months. Judge Ripple asked that the Secretary determine and report to the Standing Committee on the original purpose for the six month period. Judge Keeton agreed and asked that the Secretary report on this issue for the July meeting of the Standing Committee.

The discussion of the reexamination of the rules continued. Professor Baker noted that what is being proposed by Judge Keeton is a long term vision. He

suggested that a part of each meeting of the Standing Committee could include at least one issue that was appropriate for long-term planning and consideration. The issue could be considered and then referred to an appropriate Advisory Committee. In this way the Standing Committee would be pro-active as well as reactive. Judge Keeton asked to what extent outside comment would be invited if Professor Baker's proposal were adopted. He suggested that such comment could come from meetings held in various parts of the country. If such meetings are held, propositions must be formulated so that discussion can be focused. These propositions could be worked out with the reporter and a working group. Professor Baker suggested that there is a wealth of information resulting from the Federal Courts Study Committee. That information should be tapped first. Additional hearings may not be helpful.

Judge Keeton explained that he had for some time thought that there was a need for fundamental rethinking of the rules process, but noted that the Committee does not appear to share his views. Judge Hodges echoed the view that there was reticence on the part of the Committee. He noted that the heart of Judge Keeton's proposal was his proposed Rule 202 dealing with time limits. The Criminal Rules Advisory Committee could consider this as an addition to the Rules of Evidence. This would be a start in the process suggested by Judge Keeton. Judge Keeton asked if it would be more productive to have the Criminal and Civil Advisory Committees both consider this proposal. Judge Pointer suggested that the examination by the Criminal and Civil Advisory Committees could go in parallel directions. He suggested caution, however, in formulating problems for public comment and discussion. The Civil Rules

Advisory Committee did this with Rule 11; they solicited comments on specific questions. He expressed concern that the hearings on Rule 11 might not be as helpful as the written comments on the specific questions.

Judge Sloviter summarized the discussion: the members of the Committee seemed to be in agreement that reducing cost and delay is a problem that should be addressed. The Judicial Improvements Act proposals focus on pretrial problems. Judge Keeton's proposals have as an underlying premise that there is a cost and delay problem with the trial itself. Although the Committee was reticent to accept the proposition that the entire body of Federal rules be reexamined, there have been a number of specific proposals regarding reduction of cost and delay. Judge Sloviter suggested that before empirical studies be undertaken in connection with such proposals, a bibliography of existing information should be compiled so that the Committee is aware of what resources are already available. The bibliography would concentrate on materials that address techniques for shortening trials.

Mr. Eldridge pointed out that studies were underway regarding case weighting. The study will not be completed for some time because the objective of the study is to follow cases from commencement to termination. There is, however, much existing data that could be of assistance. There are ways to massage this existing data to obtain information on particular questions.

Judge Barker suggested that both the Civil and Criminal Committees should look at Judge Keeton's proposals and come back with specific proposed amendments. Judge Pointer noted that, to the extent any changes are needed, all but two of Judge Keeton's suggestions were currently under consideration. The two

exceptions are limitations on cross examination and time limits on some jury trials. Judge Keeton expressed doubt that all of his proposals were, in fact, under consideration.

Judge Bertelsman suggested that Judge Keeton's proposals be referred to the Civil and Criminal Advisory Committees for their reactions. Judge Barker suggested that Advisory Committees come forward with recommendations with respect to specific proposals and an explanation of why other proposals did not result in proposed amendments. Judge Pointer agreed that this was a good idea except that the Advisory Committees should not be required to make such a comprehensive report by the next meeting.

Judge Barker moved that both Committees examine the suggestions of Judge Keeton and in due course present to the Standing Committee proposed rules changes and reaction thereto. Judge Sloviter seconded the motion, and it was carried unanimously.

Judge Barker moved that the reporter review the Federal Judicial Center's studies and other existing studies and make appropriate suggestions for discussion and further study to the Standing Committee. Judge Sloviter seconded the motion, which was carried unanimously.

V. Time and Place of Committee Meeting

Judge Keeton reported that it had been determined that the Standing Committee should meet in mid-January and mid-July. The next meeting of the Standing Committee will be held July 18 and 19 in Washington, D.C., or another

location to be determined by the chairman in consultation with the members of the Standing Committee.

Respectfully Submitted,

Robert E. Keeton, Chairman
George C. Pratt
Dolores K. Sloviter
Charles E. Wiggins
Sarah Evans Barker
William O. Bertelsman
Thomas S. Ellis III
Edwin J. Peterson
Charles Alan Wright
Thomas E. Baker
Gael Mahony
William R. Wilson