COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 19-20, 1996
Washington, D.C.

Minutes

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 19-20, 1996. All committee members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank H. Easterbrook
Judge Thomas S. Ellis, III
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Alan C. Sundberg, Esquire
Chief Justice E. Norman Veasey
Judge William R. Wilson

Deputy Attorney General Jamie Gorelick was unable to be present. Ian H. Gershengorn, Special Assistant to the Deputy Attorney General, participated in the meeting as the voting representative of the Department of Justice.

Supporting the committee were Professor Daniel R. Coquillette, reporter to the committee, Peter G. McCabe, secretary to the committee, John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, senior attorney in the rules office, and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division.

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
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules -
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Ralph K. Winter, Chair
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. 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.

INTRODUCTORY REMARKS

Judge Stotler reported that the Chief Justice had accepted the request of Sixth Circuit Court of Appeals Judge Leroy J. Contie, Jr. to be relieved of service as a committee member for health reasons.

The chair stated that the Judicial Conference, at its March 1996 meeting, had approved the committee's proposed uniform numbering system for local rules, although some members had expressed opposition to the concept of uniform numbering. Following the Conference's action, the Administrative Office distributed a package of materials to the courts explaining how the system was expected to work and providing explanatory materials prepared by the local rules project and the advisory committees.

Judge Stotler reported that the Conference had decided that the courts of appeals should be authorized to decide for themselves whether to allow cameras in appellate court proceedings. It also had requested that the circuits take appropriate steps to prohibit cameras in district court proceedings. The members of the committee then shared information on what actions had been taken in their own circuits to implement these Conference decisions.

Judge Stotler pointed out that the Conference's Committee on Automation and Technology had just launched several initiatives designed to foster the use of automation in the courts, including the filing and service of court papers by electronic means and the application of technology to facilitate courtroom proceedings. She suggested that the committee might wish to establish a special subcommittee to consider these initiatives and asked for volunteers to serve on the subcommittee. Names submitted included the following: Seventh Circuit Judge Frank H. Easterbrook; Professor Thomas D. Rowe, Jr.; Chief Justice E. Norman Veasey; Bankruptcy Judge James J. Barta, Eastern District of Missouri; and Bankruptcy Clerk Richard G. Heltzel, Eastern District of California. Judge Stotler also pointed out that the Advisory Committee on Bankruptcy Rules had established an

automation subcommittee several years ago which had provided effective leadership to the rulemaking process in the areas of electronic noticing and filing.

Judge Stotler and the committee expressed their appreciation to Judge Higginbotham and Judge Mannes for their significant contributions to the rulemaking process during their terms as chairs of the Advisory Committee on Civil Rules and the Advisory Committee on Bankruptcy Rules, respectively.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve as written the minutes of the last meeting, held on January 12-13, 1996.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), as set out in his memoranda of May 13, 1996. (Agenda Item 3) He stated that his office and the AO's Office of Congressional, External, and Public Affairs had been following closely several pieces of legislation in the 104th Congress that would have an impact on the federal rules.

He reported that section 235 of the newly-enacted Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104-132) contained a provision requiring that closed-circuit television coverage be provided to victims of a crime whenever the venue of a trial is moved out-of-state and more than 350 miles from the place where the prosecution would have taken place originally. He stated that the judiciary had been successful in narrowing the scope of the provision and that, as enacted, it would apply to about 10 cases a year. He pointed out that section 235 sunsets when the Judicial Conference "promulgates and issues rules, or amends existing rules [under the rulemaking process], to effectuate the policy addressed by this section." He noted that the provision has been placed on the agenda of the next meeting of the Advisory Committee on Criminal Rules.

Mr. Rabiej said that the judiciary had not been successful in persuading the Congress to reconcile two internally inconsistent provisions of the new Act. Section 103 amended Rule 22 of the Federal Rules of Appellate Procedure, permitting a district judge or a circuit judge to issue a certificate of appealability in a habeas corpus proceeding. Section 102 of the Act, though, amended the underlying statutory provision to permit only a circuit justice or judge to issue the certificate. Although the Congress had been alerted to the discrepancy on several occasions, including through correspondence from the chair of the Advisory Committee on Appellate Rules, it had failed to correct the problem.

Judge Logan stated that the conflicting provisions could create a statutory interpretation problem in almost every habeas corpus case and every section 2255 proceeding. In addition, he pointed out that the Act added proceedings under 28 U.S.C. § 2255 to the list of those requiring a certificate of appealability. Moreover, the caption to FED. R. APP. P. 22, as amended by the Act, refers to "section 2255 proceedings." Yet, the text of the rule enacted by the statute contained no reference to section 2255 proceedings. Judge Logan stated that the Federal-State Jurisdiction Committee of the Judicial Conference had been alerted to these defects in the statute and that he was in regular contact with the chairman of that committee.

One of the members suggested that the committee might solve these problems eventually by amending Rule 22 through the Rules Enabling Act process. He observed, too, that the Act might eventually require rule making because it requires the district courts to make findings regarding the grounds for dismissal of prisoner suits.

He added that there was another issue raised by the new legislation. The Act provided that an appeal in a habeas corpus proceeding is permitted only if there is a violation of the Constitution. The former law, however, also had permitted appeal when there was a violation of a statute or treaty of the United States. Thus, it appeared that claims that a prisoner's custody violates the laws and treaties of the United States would no longer be appealable. He questioned whether such a result had been intended.

Mr. Rabiej reported that the Administrative Office had advised Congress of the discrepancy between FED. R. CIV. P. 4(m), which requires service of process within 120 days, and 46 U.S.C § 742, the Suits in Admiralty Act, which requires that a party "forthwith serve" process on the United States in admiralty cases. He added that the Supreme Court had resolved the issue recently in *Henderson v. United States*, but that efforts were continuing to resolve the matter by legislation in order to eliminate any future confusion.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eldridge stated that the report of the Federal Judicial Center—providing an update on the Center's publications, educational programs, and research projects—was informational in nature. (Agenda Item 4) He noted that the Center had just been asked to conduct certain empirical research for the committee concerning attorney discipline in the district courts.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of June 20, 1996. (Agenda Item 7)

Amendments for Judicial Conference Approval

Judge Logan reported that the advisory committee was recommending that the standing committee approve amendments to four rules that had been published for public comment. But the advisory committee further recommended that the standing committee defer forwarding these rules to the Judicial Conference until after completion of the public comment process regarding the entire package of restyled appellate rules. He noted that it was possible that additional comments might be received on the four rules during the comment period.

FED. R. APP. P. 26.1

Judge Logan stated at the outset that the word "shall" in the caption of Rule 26.1(a) should be changed to "must."

He explained that the proposed amendment would eliminate the requirement that corporate subsidiaries and affiliates be listed in the corporate disclosure statement. Instead, the advisory committee would require that a corporate party disclose all its parent corporations and any publicly-held company owning 10 percent or more of its stock. He added that the proposed amendment had been sent to the Judicial Conference Committee on Codes of Conduct, which had expressed no objection to it.

FED. R. APP. P. 29

Judge Logan noted that the subject of amicus curiae briefs had attracted substantial interest. He noted that, as a result of the public comments, the advisory committee had decided to retain the limitation that an amicus brief be no more than half the length of a party's principal brief, but it had also decided to amend the proposal to allow the court to make exceptions. In response to objections to the requirement that the amicus brief be filed at the same time as the brief of the party being supported, the committee decided to give the amicus seven days to file its brief following the filing of the principal brief of the party being supported.

Judge Logan noted that the committee had added the District of Columbia to the list of states and other entities authorized to file an amicus brief without court permission. It had also deleted the requirement that the amicus obtain the written consent of all the parties and file these consents with the brief. Instead, the committee substituted a simple requirement that the amicus state in the brief that all parties have consented.

The advisory committee also amended subdivision (c) to require that the cover of the brief both identify the party being supported and indicate whether the brief supports affirmance or reversal. Subdivision (f) would be clarified to provide that an amicus may request leave to file a reply. Finally, in subdivision (g) the advisory committee would delete the provision that an amicus be granted permission to participate in oral argument "only for extraordinary reasons."

FED. R. APP. P. 35

Judge Logan stated that the amendments to Rule 35, governing en banc consideration, had attracted several comments. He explained that the advisory committee had accepted a recommendation from the Solicitor General that the rule provide explicitly that a split among the circuits may be a question of "exceptional importance" warranting a rehearing en banc. He noted that while it had been the intent of the advisory committee to list a split in the circuits as one example of a matter rising to the level of exceptional importance, some commentators had read the amendment as specifying that it was the only grounds for en banc consideration. Accordingly, following the public comment period, the advisory committee amended the rule to make it clear that this was just one example of a situation that raised a question of exceptional importance.

Mr. Gershengorn reported that the Solicitor General had been involved personally in the proposal and was satisfied with the revised language of the proposed amendment.

Judge Logan added that some commentators had interpreted the draft as requiring the court to consider certain matters en banc. In response, the committee revised the amendment and committee note to make it clear that nothing requires a court to rehear any matter en banc.

Judge Logan pointed out that the committee had received two comments opposing the proposed change in terminology from "in banc" to "en banc." He advised that an electronic word search of more than 900 Supreme Court decisions and 40,000 court of appeals decisions had revealed an overwhelming preference for "en banc."

Finally, Judge Logan mentioned that local rules in some circuits require separate petitions for a panel rehearing and a rehearing en banc. The advisory committee, thus, provided that a party is not limited to a total of 15 pages for both documents if a local rule requires separate documents.

FED. R. APP. P. 41

Judge Logan stated that proposed amendments to Rule 41 (mandate of the court) would among other things, make it clear that the party who files a petition for certiorari in

the Supreme Court—rather than the clerk of the Supreme Court—must notify the court of appeals of the filing. He noted that the changes made by the advisory committee following publication were stylistic, except for one, and they had attracted very little public comment.

Judge Stotler stated that the discussion of the proposed amendments to the appellate rules had been very informative, but the committee could defer final approval of the proposed amendments until the entire package of restyled appellate rules is presented to the committee.

She then asked for a straw vote on whether any member of the committee would vote against any of the proposed rules. No member voiced an objection.

Amendments for Publication

Judge Logan stated that the advisory committee had decided to defer consideration of any proposed new rule amendments until after completion of the project to restyle the entire body of appellate rules. Nevertheless, recent events—including new prisoner legislation, a proposal to amend FED. R. CIV. P. 23, and a request from the clerk of the Supreme Court—had caused the committee to recommend for publication a proposed merger of Rules 5 and 5.1 and the complete revision of Form 4.

FED. R. APP. P. 5 and 5.1

Judge Logan stated that the proposed changes had been initiated as a response to a proposal of the Advisory Committee on Civil Rules to amend FED. R. CIV. P. 23 by authorizing an interlocutory appeal from an order granting or denying class certification. The proposed amendment to the civil rule would require a conforming amendment to the appellate rules. In drafting the amendment, the committee was struck by the substantial overlap between Rule 5 (dealing with appeal by permission under 28 U.S.C. § 1292(b)) and Rule 5.1 (dealing with appeal by permission under 28 U.S.C. § 636(c)(5)). It saw an opportunity to combine the two rules and write a new, broader rule that would govern all discretionary appeals, including any additional discretionary appeals that might be authorized in the future.

The advisory committee, thus, decided to revise Rule 5 and eliminate Rule 5.1, regardless of what action might be taken on the proposed amendments to FED. R. CIV. P. 23. In combining the two rules, the committee decided to adopt the provision in Rule 5 that gives a party seven days after service to respond to a petition for leave to appeal, rather than the 14-day period specified in Rule 5.1. Professor Mooney added that the amendment would also make some provisions in Rule 5 broader and less specific than those in the current rule.

Judge Logan accepted some stylistic refinements suggested by Chief Justice Veasey, Judge Parker, Mr. Garner, and Mr. Spaniol. Accordingly, subparagraph (b)(1)(E) would

read: "an attached copy of (i) the order, decree, or judgment complained of and any related opinion or memorandum; and (ii) any order stating the district court's permission to appeal or finding that any necessary conditions to appeal are met." Judge Logan observed that additional style suggestions could be considered following the public comment period.

The committee voted without objection to approve the proposed amendments for publication.

Chief Justice Veasey pointed out that the committee note tied the justification for the amendments to the proposed changes in FED. R. CIV. P. 23. In response, Judge Logan recommended that the committee note be revised to delete any reference to Rule 23.

Professor Mooney then proceeded to make the recommended changes and later distributed a revised draft of the committee note. Following discussion, she and Judge Logan agreed to accept additional language improvements suggested by Professor Cooper, Mr. Perry, and Mr. Garner.

Chief Justice Veasey moved to approve the committee note as revised.

The committee voted without objection to approve the note for publication.

FORM 4

Judge Logan stated that the clerk of the Supreme Court had asked the committee to devise a new, more comprehensive form for the affidavit in support of an application to proceed in forma pauperis that could be used by both the Supreme Court and the appellate courts. In addition, the recently-enacted Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners. Among other things, the statute requires a prisoner to submit an affidavit to the court that includes a statement of all assets the prisoner possesses.

Judge Logan said that the advisory committee had used the bankruptcy in forma pauperis schedules as a model for the revised affidavit form. The applicant would be required to provide the court with a great deal more information than that specified in the current Form 4.

Mr. Garner stated that the language and format of the form could be improved substantially, but it would take time to make the revisions and test them. Several members pointed out that the law had taken effect in April and that prompt action on approving a new form was necessary to bring the courts into compliance with the new statutory requirements.

Mr. Garner suggested that the committee might wish to approve the substance of the form and allow him, Judge Logan, and others to work on improvements in the language and format. Judge Logan noted that another alternative would be for the committee to approve the revised form for publication with only a few essential changes and leave all further improvements for consideration by the advisory committee at its next meeting.

The committee voted without objection to approve the proposed amendments to the form for publication.

After conferring with Mr. Garner, Judge Logan advised the committee that necessary improvements in the form could be drafted in about a month, in time for them to be incorporated into the publication sent to bench and bar. The revised draft would contain the same information, but it would be made easier to read and easier for prisoners to complete. He suggested that he, Professor Mooney, and Mr. Garner work on a revised draft form, submit it for approval first to the advisory committee, and then to the standing committee for final approval before publication.

The committee voted without objection to authorize the advisory committee to make additional changes in the form and submit the changes to the committee by mail or fax for final approval.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum and attachments of May 13, 1996. (Agenda Item 8)

Amendments for Judicial Conference Approval

Professor Resnick explained that the primary purpose of the proposed package of amendments was to implement, or conform to, the provisions of the Bankruptcy Reform Act of 1994. He noted that the advisory committee had received only five public comments on the package and had canceled the scheduled public hearings for lack of witnesses.

FED. R. BANKR. P. 1010

Professor Resnick stated that the proposed amendments to Rule 1010 were purely technical in nature and had not been published for public comment. The amendments would merely correct cross-references in the rule to conform to recent changes made in FED.R.CIV.P. 4 and pending changes in FED. R. BANKR. P. 7004.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference. The committee further voted to approve the amendments without publication.

FED. R. BANKR. P. 1019

Professor Resnick reported that the proposed changes to Rule 1019 were stylistic in nature. He emphasized that the advisory committee recommended deleting from the rule the phrase "superseded case" because it created the erroneous impression that a new case is commenced when a case is converted from one chapter of the Code to another.

FED. R. BANKR. P. 1020

Professor Resnick stated that Rule 1020 was a new rule implementing the provisions of the 1994 Act authorizing a qualified debtor in a chapter 11 case to elect to be considered a small business. The rule would provide the procedure and time limit for the debtor's election.

FED. R. BANKR. P. 2002

Professor Resnick pointed out that Rule 2002(a)(1) would be amended to add a reference to newly-enacted section 1104(b) of the Code, which for the first time would permit creditors in a chapter 11 case to elect a trustee. The amendment would add a reference to section 1104(b) in the general notice provisions of the rules, thereby requiring that creditors be given notice of the meeting convened to elect a trustee.

In addition, language would be added to Rule 2002(n) requiring that the caption of every notice given by the debtor to a creditor include the information required by newly-enacted section 342(c) of the Code, i.e., the name, address, and taxpayer identification number of the debtor.

FED. R. BANKR. P. 2007.1

Professor Resnick stated that the proposed amendments to Rule 2007.1 would establish the procedures to be followed for the election of a chapter 11 trustee. He added that the language of the amendment had been modified by the advisory committee following the public comment period to take account of concerns expressed by the Executive Office for United States Trustees. He pointed out that the Executive Office was now in agreement with the language of the proposal.

FED. R. BANKR. P. 3014

Professor Resnick explained that the proposed amendment was technical. It would provide the deadline for secured creditors to elect application of section 1111(b)(2) of the Code. Under the current rule, the election must be made by creditors before the conclusion of the hearing on the disclosure statement. Under the 1994 Act, however, a hearing on the disclosure statement is not always required if the debtor is a small business. The amendment would provide a different deadline for making the election in those cases.

FED. R. BANKR. P. 3017

Professor Resnick stated that the proposed amendments to the rule were mostly stylistic. The rule would also be amended to give the court some flexibility to determine the record date for distributing vote solicitation materials in a chapter 11 case. The current rule requires that these materials, such as ballots, be sent to record holders on the date the court enters its order approving the disclosure statement. The amendment would give the courts discretion to set another date, if circumstances warrant.

FED. R. BANKR. P. 3017.1

Professor Resnick noted that Rule 3017.1 was a new rule to implement section 1125(f) of the Code, enacted by the 1994 Act. The new statute authorizes the court to approve a disclosure statement in a small business case conditionally, subject to final approval after notice and a hearing. The court may combine the hearing on the disclosure statement with the hearing on confirmation of the plan. If the court approves the disclosure statement conditionally, and no timely objection to it is filed, there is no need for the court to hold a hearing on final approval.

FED. R. BANKR. P. 3018

Professor Resnick stated that the proposed amendment to Rule 3018, dealing with voting in chapter 11 cases, was similar to the proposed change in Rule 3017. It would allow the court some flexibility to set the record date for determining which holders of securities are entitled to vote on the plan.

FED. R. BANKR. P. 3021

Professor Resnick explained that the proposed change in Rule 3021 was similar to the proposed amendments to Rules 3017 and 3018. It would give the court some flexibility to set the record date for determining which holders of securities are entitled to share in distributions.

FED. R. BANKR. P. 8001

Professor Resnick stated that Rule 8001, dealing with appeals to the district court or the bankruptcy appellate panel, had two proposed changes. The first, in subdivision (a), would implement the 1994 statutory provision authorizing an appeal as of right from an interlocutory order of a bankruptcy judge increasing or reducing the exclusive time periods under 11 U.S.C. § 1121.

The second proposed amendment, to subdivision (e), would make the rule conform to the 1994 amendment to § 158(c)(1) of the Code, providing that appeals from a bankruptcy judge be heard by a bankruptcy appellate panel (if one is available) unless a party elects to have the appeal heard by the district court.

FED. R. BANKR. P. 8002

Professor Resnick said that Rule 8002(c) would be changed in three ways. First, it would require that a request for an extension of time to file a notice of appeal be *filed*, rather than *made*, within the applicable time period. Second, it would give the court discretion to allow a party to file a notice of appeal more than 20 days after expiration of the time to appeal, but only if: (1) the motion to extend the time were timely filed; and (2) the notice of appeal were filed within 10 days after entry of the court's order extending the time. Third, the amendment would prohibit the court from granting an extension of time to file a notice of appeal from certain designated categories of orders.

FED. R. BANKR. P. 8020

Professor Resnick stated that proposed Rule 8020 was a new rule, adapted from FED. R. APP. P. 38. It would make it clear that a district court, when sitting as an appellate court, or a bankruptcy appellate panel may award damages and costs for a frivolous appeal. There had been some uncertainty in case law as to whether a bankruptcy appellate panel had that authority.

FED. R. BANKR. P. 9011

Professor Resnick stated that Rule 9011 would be amended to conform to recent amendments to FED. R. CIV. P. 11. He pointed out, though, that the 21-day "safe harbor" provisions of Rule 11 would not apply if the improper paper complained of were the bankruptcy petition commencing a case.

FED. R. BANKR. P. 9015

Professor Resnick said that proposed new Rule 9015 would implement the newly-enacted provision of the 1994 Act authorizing bankruptcy judges conduct jury trials. It would make certain Federal Rules of Civil Procedure applicable, and it would provide the

procedure for obtaining the consent of the parties to have a jury trial tried before a bankruptcy judge.

FED. R. BANKR. P. 9035

Professor Resnick explained that the proposed amendment to Rule 9035 was a technical change dealing only with the six judicial districts in North Carolina and Alabama, where there are no United States trustees. The amendment would provide that the bankruptcy rules apply generally in those states, unless they are inconsistent with "any federal statute." This is a broader term than that used in the existing rule, which refers only to titles 11 and 28 of the United States Code. The 1994 legislation had enacted certain provisions not codified in either title 11 or title 28 that relate to bankruptcy administration matters in these districts.

The committee voted without objection to approve all the proposed amendments to the bankruptcy rules and send them to the Judicial Conference.

Official Forms - Amendments for Publication

Professor Resnick stated that the advisory committee recommended several changes in the Official Forms, as set forth in Agenda Item 8-B. He added that the advisory committee, acting on a recently-received request from the Committee on the Administration of the Bankruptcy System, also recommended one further, minor change. The proposal would add another box to the statistical information section of the petition form to provide better statistical information on estimated assets of debtors in very large cases.

The committee voted without objection to approve the proposed amendments to the forms for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum and attachments of May 7, 1996. (Agenda Item 5)

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 16

Judge Jensen reported that the Judicial Conference at its March 1996 session had rejected generally the proposed amendments to Rule 16. He added, however, that the opposition voiced at the Conference had been directed exclusively to the proposed

amendments to Rule 16(a)(1)(F), which would have required the government to disclose the names of its witnesses before trial.

Following the Conference's action, the advisory committee considered anew the other proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C), requiring reciprocal disclosure of information on expert witnesses when the defense gives notice under Rule 12.2 that it intends to present expert testimony on the defendant's mental condition. The advisory committee decided to approve these amendments once again, without further publication, and forward them for approval by the Judicial Conference.

Some members pointed out that there appeared to be a stylistic inconsistency between the language in lines 17-21 ("The summary provided under this subdivision") and that in lines 53-56 ("This summary"). They pointed out that different language had been used to express the identical meaning. **Judge Parker moved to change the language in lines 17-21 to make it consistent with that in lines 53-56. The motion died for lack of a second.**

Concern was also expressed as to whether references in the amendments to the Federal Rules of Evidence were accurate. **Mr. Schreiber moved to change line 16 to state "under Article VII of the Federal Rules of Evidence," rather than "under Rules 702, 703, or 705 of the Federal Rules of Evidence." The motion died for lack of a second.**

Judge Easterbrook moved to change the word "and" to "or" in lines 16 and 43 and to send the amendments to the Conference otherwise as written. The motion carried, and the committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5.1 and 26.2

Judge Jensen stated that the proposed changes to Rules 5.1 and 26.2 would require production of a witness' statement after the witness has testified at a preliminary examination hearing. The amendments were parallel to similar changes made in 1993, requiring the production of witness statements at various other evidentiary hearings, including hearings on suppression of evidence, sentencing, detention, revocation or modification of supervised release, and section 2255 motions. He pointed out that, technically, these amendments, like the 1993 amendments, raised a Jencks Act question because the witnesses' statements would be required before trial.

Rule 26.2 would be amended to add a cross-reference to Rule 5.1. It would also be amended to correct a cross-reference to Rule 32, which had been amended recently.

One of the members suggested that the words "may not," appearing on line 8, were ambiguous. Mr. Garner explained that the style committee's convention was to use the words "must not," or "shall not," when describing a prohibition against specified action. The members agreed generally that the latter terminology would improve the rule, but Professor Schlueter advised against changing the language because the wording "may not" appeared in several other parallel rules.

Judge Easterbrook moved that the proposed amendments to Rules 5.1 and 26.2 be published for public comment as written. He added that the advisory committee could resolve the language issues after completion of the public comment period. **The motion was approved without objection.**

FED. R. CRIM. P. 31

Judge Jensen stated that the current rule did not provide a particular method for polling a jury, thereby permitting a jury to be polled collectively. The proposed amendment would require that jurors be polled individually.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 33

Judge Jensen stated that the proposed amendment would change the triggering date for newly-discovered evidence to be used as the basis for a new trial. The deadline for filing a motion for a new trial under the current rule is two years from the "final judgment." Case law has interpreted the rule to provide a deadline of two years from the final judgment of the court of appeals or from the issuance of the appellate court's mandate. The advisory committee recommended that the rule be amended to provide that the two-year period run from "the verdict or finding of guilty" in the district court.

Mr. Garner suggested that the language of the rule could be improved in a number of ways. It was the consensus of the committee that his proposed improvements should be taken into account by the advisory committee after the public comment period.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 35(b)

Judge Jensen explained that if a defendant provides substantial assistance to the government before sentencing, the court may—upon motion by the government—make a

downward departure in imposing sentence. If the defendant provides substantial assistance after sentencing, the court may reduce the sentence under authority of Rule 35(b). The proposed amendment would authorize a reduction of sentence: (1) if the defendant provides some assistance before sentencing and some assistance after sentencing, and (2) each stage of the assistance, considered separately, may not be substantial, but in the aggregate they are substantial.

He pointed out that the advisory committee had considered the potential problem of a defendant "double-dipping" by obtaining a reduction for assistance at the time of sentencing and then seeking additional credit for the same assistance on a motion for reduction of sentence. He explained that the government can take care of the problem by not making the motion for reduction.

Judge Jensen agreed to a suggestion that the words "to the Government" be deleted from the third line of the committee note. The deletion would avoid taking a stand on the substantive issue of whether substantial assistance warranting a reduction of sentence includes assistance rendered by the defendant to state and local authorities, as well as to the federal government.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 43

Judge Jensen stated that the proposed amendment would specify with greater clarity the resentencing proceedings that require the presence of the defendant. The rule would require the defendant's presence at a Rule 35(a) resentencing, i.e., when there has been a reversal by the court of appeals and a remand to the district court for resentencing. On the other hand, the defendant would not have to be present for resentencing under: (1) Rule 35(b), when the government moves to reduce the sentence in return for the defendant's subsequent assistance, (2) Rule 35(c), when the court must correct the sentence for clear error, or (3) 18 U.S.C. § 3582(c), when the court may reduce the sentence after the Sentencing Commission lowers the applicable sentencing range or where the Bureau of Prisons moves to reduce the sentence for extraordinary and compelling reasons.

The committee voted without objection to approve the proposed amendments for publication.

Information Item

FED. R. CRIM. P. 24

Judge Jensen reported that following the public comment period on proposed amendments to FED. R. CRIM. P. 24(a), dealing with attorney participation in voir dire, the advisory committee decided not to proceed with seeking Judicial Conference approval of the amendments. In this respect, the committee's action paralleled that of the Advisory Committee on Civil Rules, which decided not to proceed with companion amendments to FED. R. CIV. P. 47(a).

Judge Jensen stated that the Rules Enabling Act process had worked very well. The proposed amendments had attracted a large body of thoughtful and informative comments, including responses from many federal judges and from every major attorney association in the country. The advisory committees decided that proceeding with the proposed amendments was not the most effective way to proceed. Rather, the best way to improve the voir dire process was to initiate new programs to educate judges in the most effective ways of conducting voir dire. Judge Jensen added that both he and Judge Higginbotham had spoken to Judge Rya Zobel, Director of the Federal Judicial Center, about presenting voir dire programs both at orientation sessions for newly-appointed judges and at workshops for experienced judges.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Higginbotham presented the report of the advisory committee, as set forth in his memorandum and attachments of May 17, 1996. (Agenda Item 10)

Amendments for Judicial Conference Approval

FED. R. CIV. P. 9(h)

Judge Higginbotham reported that the proposed amendment would resolve an ambiguity in the rule by authorizing an interlocutory appeal in an admiralty case regardless of whether the order appealed from disposes of an admiralty claim or a non-admiralty claim.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

FED. R. CIV. P. 48

Judge Higginbotham reported that the proposed amendments to the rule would restore the 12-person jury in civil cases, albeit without alternate jurors. He stated that a number of judges had voiced opposition to the proposal during the public comment period.

He noted that concern had been expressed about the cost of implementing the amendment, especially at a time when appropriated funds for the Judiciary were limited. He explained that the advisory committee had attempted to quantify the costs of the proposal, but in the final analysis costs were not a major consideration when weighed against the value of returning to 12-person juries.

He pointed out that one of the most compelling reasons in favor of the proposal was the greater inclusion of minorities on juries. He emphasized that it was important public policy to have a cross-section of the community participating in the jury process. He added that the reduction in jury size from twelve persons to six had severely limited the representation of minorities on federal juries.

He noted that the advisory committee had considered the issue of courtroom availability and had found that virtually all courtrooms used by district judges had jury boxes large enough to accommodate at least 12 jurors. On the other hand, a number of magistrate judges did not have their own 12-person jury courtrooms. Nevertheless, they could, when necessary, obtain access to larger courtrooms in their courthouse.

He stated that all empirical studies had shown that the dynamics of the 12-person jury were different from those of smaller juries. Twelve-person juries were less inclined to be dominated by one or two strong-willed persons, and they were less likely to render inappropriate verdicts.

Finally, Judge Higginbotham emphasized that the proposed amendment represented a strong statement in support of the role of the civil jury itself. He added that juries were a fundamental component of the American form of government, and the civil jury was enshrined in the Constitution. The proposed amendment would return the federal courts to centuries of tradition.

One of the members stated that he found the argument regarding diversity to be persuasive, but not the arguments concerning history and custom. He added that a compelling case had not been made that 12-person juries render better decisions than 6-person juries. Moreover, the proposed amendment would in fact allow a verdict to be rendered by as few as six jurors. Another member added that the amendment was an interesting sociological proposal, but that it was opposed by most trial judges and by the Court Administration and Case Management Committee of the Judicial Conference.

Another member countered that his experience in the federal and state courts clearly demonstrated—and the universal opinion of practitioners in his state confirmed—that 12-person juries rendered more rational decisions than 6-person juries.

Several members stated that the *Batson* decision was simply not effective in practice and that the proposed amendment was the best assurance of obtaining representative juries in the federal courts.

Mr. Gershengorn reported that the Department of Justice was strongly of the view that the benefits of 12-person juries—better representativeness and better verdicts—were worth the additional costs.

One of the members stated that he would have preferred an amendment that would have relaxed the requirement of a unanimous verdict among the 12 jurors. Judge Higginbotham responded that the advisory committee had decided at the outset that unanimity would be retained. He added that the unanimity requirement was not the cause of hung juries, and that a very small percentage of juries are hung.

The committee voted by 9-2 with one abstention to approve the proposed amendments and send them to the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 23

1. Committee Process

Judge Stotler pointed out that the Advisory Committee on Civil Rules had been studying class actions for several years, and it had invited many interested parties to participate in its deliberations. In an effort to gather as much information as possible before drafting specific amendments to Rule 23, the committee had convened large meetings tantamount to public hearings to discuss class action issues with interested attorneys, judges, and academics. She complimented the committee on seeking out the best information possible from knowledgeable persons on complicated and controversial issues.

She stated that the advisory committee had only recently decided upon the final language of its draft proposal. She suggested that recent correspondence objecting to publication of the proposal was probably attributable to the recent nature of the advisory committee's action, coupled with the very public nature of its deliberations. She noted that copies of all recent correspondence had been distributed to each member of the standing committee, and she urged the members to take their time and work through the advisory committee's proposal carefully and thoroughly.

Judge Higginbotham noted that correspondence opposing the proposed changes had been received from many members of the academic community. He stated that the views expressed had been made with the best of intentions and should be regarded as very positive

because they demonstrated the importance of the proposed amendments and the public attention they would receive. He added that it was vital that the committee hear from the users of the system. He pointed out, however, that there is a prescribed public comment period, and the commentators could appear at the hearings, present their views in person, and respond to questions.

Judge Higginbotham stated that the advisory committee had begun its review of class actions six years earlier at the direction of the Judicial Conference to study mass tort and asbestos cases. During the first round of consideration, under Judge Pointer's leadership, the committee had approved a set of proposed revisions to Rule 23 based in large part on a proposal by the American Bar Association. The committee, however, had not sought approval of the revisions because of the press of other matters on its agenda.

Judge Higginbotham explained that after he had become chairman, the advisory committee returned to Rule 23 and decided that it needed to reach out widely and learn as much as it could about class actions. This required not just seeking reactions to a particular proposal for amending the rule, but also a broad effort to deal with basic concepts and to explore the practical operation of all aspects of class actions.

Judge Higginbotham pointed out that the advisory committee had invited prominent class action lawyers to attend its meetings and discuss class action issues. It had also convened symposia and meetings on class actions with practitioners and scholars at university settings in Philadelphia, Dallas, New York, and Tuscaloosa. Many people had participated in these gatherings, and they had been encouraged to speak freely and share their differing viewpoints. Judge Higginbotham stated that the lawyers and academics had been generous with their time, and he thanked them for their contributions to the work of the advisory committee.

2. Substantive Issues

Judge Higginbotham pointed out that Rule 23 does not lend itself to neat analysis. It is peculiarly dependent on experience and practice. He emphasized that there are many different categories of class actions, ranging from securities cases, to product liability cases, to tort cases, to civil rights cases. The practical problems of class action litigation and the interests and viewpoints of the participants vary substantially from one category of litigation to another.

He also stressed at the outset that there is a critical difference between (b)(1) and (b)(2) classes, on the one hand, and (b)(3) classes on the other. In a (b)(1) or (b)(2) class, claimants have no right to opt out of the class. On the other hand, the right to opt out is key to the operation of a (b)(3) class. He stated that in the case of a (b)(3) settlement class, plaintiffs have the choice of either accepting the proposed settlement offer or refusing it and

assuming the risk of prosecuting their cases individually. Accordingly, from a plaintiff's viewpoint, a claimant in a (b)(3) settlement action has greater rights than a claimant in a case that is first certified and then proceeds later to settlement.

Judge Higginbotham stated that the advisory committee had considered a number of proposals to revise Rule 23. In the end, the members took a very cautious approach and decided to adopt a "minimalist" draft. As an example, the committee had considered a proposal to require the court to look at the merits of the case and the strength of the proponent's claim as an element in determining whether to certify the class. After examination, though, the committee decided that the price of that inquiry was simply too great, for, among other things, it would require a minitrial.

Judge Higginbotham then described in turn each of the eight proposed changes that the advisory committee would make in Rule 23. He emphasized that the eight changes were stated distinctly, but they were interrelated and reinforced each other.

1. The list of factors pertinent to the court's findings of predominance and superiority would be expanded. A new subparagraph (b)(1)(A) would require the court to consider the practical ability of individual class members to pursue their claim without class certification.

2. Subparagraph (b)(3)(B) would be revised to make it clear that the court must look at alternatives to a class action. The amendment would emphasize the autonomy of individual claimants to determine their own destiny.

3. The word "maturity" would be added to subparagraph (b)(3)(C), thus requiring the court to look not only at the ability of plaintiffs to prosecute their claims, but also at the extent to which there has been development or maturity of the claims.

4. A new subparagraph (b)(3)(F) would be added, requiring the court to weigh the probable relief to individual class members against the costs and burdens of the class litigation.

5. New paragraph (4) would explicitly authorize settlement classes.

6. In subdivision (c) the requirement that the court certify a class "as soon as practicable" after commencement of the action would be changed to "when practicable" after commencement of the action. Read in conjunction with other proposed changes above, requiring the court to look at the maturity of claims and to consider other alternatives to a class action, the amendment

would remove the incentive in the present rule for a judge to certify a class quickly.

7. Subdivision (e) would be amended to require that the court hold a hearing on settlements in class actions. Even though courts routinely hold hearings on settlements, the rule would now explicitly require it.

8. New subdivision (f) would authorize interlocutory appeals of district court orders granting or denying certification of a class.

Finally, Judge Higginbotham pointed out that the advisory committee had decided not to address "futures" classes, which are the subject of ongoing case law development. He also emphasized that the proposed amendments did not deal with (b)(1) or (b)(2) class actions, but only with (b)(3) class actions. The committee had insisted on retention of the right of a claimant to opt out of a settlement class. Moreover, the amendments did not dispense with the Rule 23(a) prerequisites or the notice requirements of (b)(3).

3. Views of the Members

The chair asked the members first for any general comments they had regarding the proposed amendments to Rule 23.

Chief Justice Veasey suggested that it would be helpful if the committee note were expanded to include some of the introduction and background just enunciated by Judge Higginbotham. The note would also benefit by: (1) updating the case law to include the *Georgine* case, and (2) addressing some of the concerns expressed in recent correspondence to the committee. Judge Higginbotham responded that the note could be expanded to discuss *Georgine*, but interested parties were very much aware already of the issues and the case law, and they would submit knowledgeable and helpful comments during the public comment period.

Mr. Perry stated that it was clear from the committee note that the opt-out provision applied to settlement classes. Yet, he asked whether the rule itself should be amended to provide explicitly that a settlement class under (b)(4) is governed by all the provisions applicable to (b)(3) classes, including a right of opt-out.

Judge Higginbotham responded that the text might be expanded, but the advisory committee had concluded that the language of the amendment provided clearly that a settlement class is a (b)(3) class. He added that it could not reasonably be interpreted as dispensing with the opt-out provision and other requirements associated with a (b)(3) class. He suggested that confusion on this point had been introduced because some people who had read the text had not read the committee note. He recommended that the language of the

rule be published without change and that drafting improvements be considered as part of the public comment process.

Mr. Schreiber stated that he had spent 30 years in class action work, as a plaintiff's lawyer, a defense lawyer, a judge, a teacher, and a special master. He argued that the proposed amendments were defendant-oriented and would cripple class actions. The central premise of the advisory committee, he said, had been that something had to be done to address mass tort problems. But by attempting to solve those problems by amending Rule 23, the committee would set up an entirely new class action structure that would spawn many new problems. He added that the proposed amendments would prevent consumer class actions and cause great disturbance in securities and antitrust class actions, unless the advisory note were expanded to identify explicitly what a judge may and may not do under the rule.

Judge Stotler then took up each of the eight suggested amendments to the rule in order, soliciting comments from the members on each.

Mr. Schreiber stated that the advisory note accompanying subparagraphs (b)(3)(A) and (b)(3)(B) had to be expanded to specify that the judge must take into account the tremendous cost of class litigation. For example, an individual plaintiff might have a large claim for $200,000, but the potential relief could well be dwarfed by the cost of maintaining the class action and obtaining discovery, which might may run into millions of dollars.

Mr. Schreiber expressed reservations about subparagraph (C), dealing with the maturity of related litigation involving class members. He alluded to a Seventh Circuit case in which, he said, the trial judge had decertified a class action on the grounds that a handful of the plaintiffs had tried and lost their individual cases and the defendants apparently would have refused to settle the cases under any circumstances. He argued that as a result of the court's decertification of the class and the plaintiffs' inability to pursue a class action, they had to settle for 30-40 percent of what similarly-situated claimants later received in Japan. He strongly recommended that a decision to decertify a class should not be based on only a few cases. He said that he was not opposed in general to the concept that the maturity of related litigation should be a pertinent factor in the court's certification decision, but it should be explained more fully in the advisory committee note.

Judge Easterbrook responded that in the Seventh Circuit case described, there had been 13 trials at the time of the class decertification decision. The defendants had prevailed in twelve cases, and the plaintiff had prevailed in one case, winning about a million dollars. The case ended up being settled for the actuarial value of plaintiff verdicts in the set of 13 litigated cases. He stated that the key issue was that the trial judge must determine in each case the appropriate number of cases that constitute maturity of related litigation.

Mr. Sundberg pointed out that he had been involved in the case personally and believed that the issue of maturity of litigation had not been dispositive of the case. There were many other important factors that had a major influence on the outcome of the case.

Mr. Schreiber stated that if the amendment and committee note were published without change, a huge number of people would testify at the hearings to express their concerns and objections. As a result, the advisory committee would have to reexamine the amendments, correct them, and republish them. Judge Higginbotham responded that the public comment period was a vital part of the rules process. If the public comments demonstrated that changes in the amendments or note were needed, the advisory committee would make the changes and republish the proposal, if necessary.

Mr. Schreiber argued that proposed new subparagraph (b)(3)(F) was the most troublesome provision of all because it appeared to weigh the claims of individual litigants against the total cost of the class litigation. He proposed that the committee note state clearly that the totality of all the claims, rather than each individual claim, be compared to the costs of the litigation. In its present form, he stated, the amendment could literally end all consumer cases. He added that, alternatively, the problems could be resolved by revising the language of the rule itself.

Judge Ellis said that the language of the rule was not clear on the point and might have to be revised. He added, though, that sending the proposal back to the advisory committee would serve no useful purpose since the committee had studied the matter long and hard. Rather, the time had come to solicit the advice of the public and make any needed changes later.

Judge Ellis continued that there was a question as to whether the amendments fell within the bounds of the Rules Enabling Act because it could be argued that they affected substantive rights. He suggested that there was a fundamental ideological fight between people who believe that class actions should be used for certain purposes and people who believe that they ought not to be used for those purposes. He concluded that publication of the amendments would generate a very important debate and lead to helpful suggestions for improvements.

Judge Easterbrook suggested that a court should not compare the probable relief to individual class members against the total costs of class litigation. Rather, it could compare either: (1) individual claims against the pro-rata cost per class member; or (2) the aggregate benefits to all class members against the aggregate costs of the litigation. He added that he believed that the proposed amendment was perfectly clear in this respect, but if the public comments were to show that it was not clear, the language could be adjusted.

Mr. Sundberg said that the language could perhaps stand some clarification, but it should be published in its present form. The bench and bar would understand the issues, provide helpful insights, and suggest language improvements.

Professor Coquillette noted that, as a technical matter, it would aid electronic research if subparagraphs (b)(3)(C) and (b)(3)(D) were not renumbered.

Judge Easterbrook suggested that the text of paragraph (c)(2), referring to paragraph (b)(3), should be amended to include a specific reference to (b)(4). Professor Cooper responded that the advisory committee had decided not to adopt that approach. It had drafted (b)(4) to provide that a settlement class is a class certified under (b)(3). If (c)(2) were amended to include a reference to (b)(4), it would carry the implication that a (b)(4) class is not a (b)(3) class. He added that another way to clarify the matter would be to replace the words "under subdivision (b)(3)," as they appear in (b)(4), with the words "request certification of a subdivision (b)(3) class." Judge Easterbrook concluded that any language changes should be deferred to the public comment period.

Judge Higginbotham added that the advisory committee had decided as a matter of policy not to dispense with the (b)(3) requirements in a settlement class action. Stylistic refinements to reinforce that point could be made after the comment period without requiring publication of the amendments.

Mr. Schreiber stated that he supported the addition of paragraph (b)(4) to the rule. But he recommended that the committee note be expanded: (1) to specify the factors that a judge must consider in determining whether to certify a settlement class, and (2) to address the issue of future claimants. He added that the *Georgine* opinion had discussed these matters well, and they needed to be included in the committee note.

Judge Stotler explained that the *Georgine* opinion had been issued after the advisory committee had settled on the language of the amendment and committee note. She suggested that *Georgine* should be addressed, and it might be advisable to refer to the case in the publication sent to bench and bar.

Judge Higginbotham said that he found the *Georgine* decision to be troubling, and it was in conflict with the holdings of five other circuits. In *Georgine,* the court of appeals would require the trial judge, in considering whether to certify a class, to engage in the hypothetical exercise of determining whether or not the case could be tried. He added that the *Georgine* opinion, applied literally, would bar certification of the breast implant cases and a great many securities cases.

Mr. Schreiber stated that the basis of the *Georgine* holding was that the court had found no typicality on the part of the representative party, who was a present claimant

attempting to represent future claimants. He added that he believed that Judge Becker would find settlement classes appropriate in certain cases.

Chief Justice Veasey stated that the public comment period would be better informed if the committee note were enhanced to discuss: (1) the important cases, including *Georgine*, and (2) the factors relevant to determining whether the probable relief to class members justifies the costs and burdens of class litigation. Judge Higginbotham responded that the committee note could easily be expanded to include a citation to *Georgine*.

Professor Hazard stated that he strongly supported publishing the amendments and agreed with the observations of Judge Easterbrook, Chief Justice Veasey, and Mr. Schreiber regarding revisions to the rule and note. He added, though, that the changes should be made following the public comment period.

He said that he had reached the conclusion that settlement classes were necessary. They appeared to be what most class actions were about. He explained that under (b)(4), the lawyers may negotiate a deal before they file the case and seek certification of the class. The proposed settlement they reach requires court approval to constitute a contract, because if the court does not certify the class, a condition essential to the settlement fails to materialize, and the deal is effectively canceled. In essence, the issue is not one of judicial approval, for the court ultimately must approve every settlement. Rather, the key question is whether the lawyers should be able to bargain without superintendence of the judge or be compelled to bargain under what could be the court's close superintendence.

In other words, it boiled down to the question of whether the rules should legitimate the pre-filing settlement contracting process. He concluded that he was satisfied that there were good reasons for permitting that process. The trial judge still must make a gestalt decision — based on all the facts in each particular case — as to whether the particular class suit, as configured by the lawyers, is on balance a good thing. He emphasized that the subject was multidimensional and involved many variables. Accordingly, it just did not lend itself to an easy, definitive resolution in a rule of procedure.

Professor Hazard added that some of the academics who had written to the committee had misunderstood the rule and the significance of the (b)(3) requirements, which the advisory committee had intended to be applicable in settlement class actions. They had also been unrealistic in addressing what the real social alternatives would be to a settlement class in large, continuing tort situations. He said that he was satisfied that the asbestos cases, for example, had reached the point where settlement was the only sensible way to deal with them.

He argued that the *key* question in *Georgine* should have been whether the proposed settlement was on balance a good thing. He regretted that the opinion had not been more explicit in acknowledging that issue.

Mr. Schreiber said that he approved of the proposed change in subdivision (c). It would replace the current requirement that the court make a decision as to whether the class action should be maintained "as soon as practicable" with a requirement that the court make the decision "when practicable." He pointed out that the change would reflect current reality, since most cases are not certified within 60 or 90 days.

Judge Easterbrook said that the proposed change in subdivision (e), requiring a hearing on dismissal or compromise of a class action, was fine in principle. He questioned, though, whether a hearing is necessary when there is no opposition to the dismissal or compromise. He suggested that the advisory committee might want to consider substituting the words "opportunity for a hearing." Judge Higginbotham responded that the suggestion would be taken into account by the advisory committee.

Mr. Schreiber asked why class certification decisions warranted an interlocutory appeal when: (1) other types of equally important matters cannot be appealed, and (2) the courts of appeals were overburdened. He doubted whether a special exception was needed for class actions. Judge Higginbotham responded that the advisory committee was of the view that class actions as a matter of policy did in fact warrant a special path, at least to the extent that a party could request leave to appeal a certification decision. He concluded that the courts of appeals would have little difficulty in distinguishing between those matters that warrant an interlocutory appeal and those that do not.

Judge Higginbotham pointed out that class action certification issues had come before the appellate courts only in mandamus cases. The proposed new Rule 23(f) would recognize reality and authorize a discretionary, interlocutory appeal, rather than force the appellate courts to continue relying on the extraordinary writ.

Mr. Sundberg strongly supported the interlocutory appeal provision. He said that experience in the Florida state courts—where there is an interlocutory appeal as of right from a certification decision—had demonstrated that these appeals had not created caseload burdens for the appellate courts. Moreover, the proposed interlocutory appeal would be purely discretionary, and it was clearly preferable to having the appellate courts stretch to use the mandamus remedy.

Judge Higginbotham added that the advisory committee had not addressed a number of other issues in the proposed amendments because it had concluded that they should continue to be developed through decisional law. Professor Hazard added that the advisory committee had been wise in deciding not to address the issue of future claims in the proposal.

Judge Stotler called for the vote on sending the proposed amendments to Rule 23 out for public comment, with a citation or two added to the committee note. **The committee voted without objection to approve the proposed amendments for publication.**

Mr. Schreiber requested that the members of the advisory committee be given a report of the standing committee's discussions regarding the Rule 23 proposal. He said that the members had raised serious concerns that needed careful examination. Judge Stotler asked Mr. McCabe to provide a detailed record of these concerns for consideration by the advisory committee. In response, he incorporated a detailed summary of the discussions in the minutes of the meeting.

Informational Items

FED. R. CIV. P. 26

The advisory committee had decided not to seek Judicial Conference approval of proposed amendments to Rule 26(c), governing protective orders. Rather, it had concluded that Rule 26(c) should be held for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45.

Judge Higginbotham pointed out that at one time the standards for document discovery had been more stringent than those for oral discovery, in that they required a showing of good cause. He stated that members of the bar had expressed strong sentiments to the advisory committee that the linkage of the two kinds of discovery had caused problems and should be reconsidered. He added that the issue would be considered at the next meeting of the advisory committee.

Judge Higginbotham reported that the March 1997 meeting of the advisory committee would be held in conjunction with a national conference of lawyers, judges, and professors to discuss the final study and report required under the Civil Justice Reform Act of 1990. He noted that the conference would be sponsored by RAND and the American Bar Association, and it should prove to be very useful for the rules process.

He also reported that the American College of Trial Lawyers and the Litigation Section of the American Bar Association, among others, had appointed liaisons who attend the meetings of the advisory committee and provide constructive comments on rules issues.

FED. R. CIV. P. 47

As noted in the report of the Advisory Committee on Criminal Rules, both the criminal and civil advisory committees had concluded that consideration of the proposed

amendments to FED. R. CIV. P. 47(a) and FED. R. CRIM. P. 24(a), requiring attorney participation in voir dire, should be postponed in favor of efforts to encourage mutual education between bench and bar on the values of lawyer participation in the voir dire examination of prospective jurors.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Winter presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1996. (Agenda Item 9)

Amendments for Judicial Conference Approval

FED. R. EVID. P. 407

Professor Berger explained that the proposed amendment would make two changes in the rule, both of which would reflect the decisional law in effect in most circuits. First, the advisory committee would extend the subsequent remedial measures rule explicitly to cover product liability cases. Second, the committee would make it clear that the rule applied only to remedial measures taken after occurrence of the event producing the injury or harm. The committee had not accepted a recommendation made by several commentators that the rule also apply to remedial measures taken after manufacture of the product, but before occurrence of the event.

Judge Winter stated that the proposed amendments had been more controversial than anticipated. Professor Berger added that the objections raised to the proposal during the public comment period had been directed only to the timing of the remedial measures. No objections had been voiced to extending the rule explicitly to products liability cases.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. EVID. P. 801

Judge Winter stated that the proposed amendment to Rule 801(d)(2) restated the Supreme Court's ruling in *Bourjaily v. United States* that a court must consider the contents of a coconspirator's statement in determining the existence of the conspiracy and the participation of the person against whom the statement is used. The amendment would also provide that the statement of the coconspirator alone would not be sufficient to establish the existence of the conspiracy. The court would have to consider other evidence and the circumstances surrounding the statement. Judge Winter stated that this result was implied in *Bourjaily*, but the advisory committee had thought it wise to address the matter explicitly in

the rule. He added that the amendment would also extend the reasoning to cover statements offered under subparagraphs (C) and (D) of the rule.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. EVID. P. 803, 804, and 807

Judge Winter stated that Rule 803(24) and Rule 804(b)(5) would be transferred to proposed new Rule 807. Relocation of the residual exceptions to the hearsay rule would facilitate possible future additions to Rules 803 and 804.

Mr. Garner suggested that a comma should be inserted after the reference to Rules 803 and 804 on line 3 of the proposed amendment to Rule 807. The suggestion was accepted by Judge Winter.

Judge Winter stated that most of the objections to the amendments during the public comment period had come from commentators seeking changes in the residual exception rule itself. Professor Berger added that, in light of the comments, the advisory committee had agreed to examine how the residual exception is being applied in practice.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. EVID. P. 804(b)(6)

Judge Winter pointed out that the proposed new paragraph (b)(6), labeled "forfeiture by wrongdoing," would address the problem of witness tampering. It would provide that a party who has engaged in, or acquiesced in, wrongdoing intended to procure the unavailability of a witness forfeits the right to object on hearsay grounds to admission of the prior statements of the witness. He explained that the advisory committee deliberately had chosen the broad terms "acquiesce" and "wrongdoing" to avoid both over inclusion and under inclusion and to leave room for common sense interpretation by the courts. He added that Rule 403 is applicable, and it allows a judge to exclude any evidence that is unreliable or prejudicial.

Professor Berger stated that some commentators had interpreted the proposed amendment too broadly and had suggested that it might make admissible any prior statements made by the victim in a murder case. She and Judge Winter emphasized that the rule dealt only with witness-tampering, for it referred explicitly to conduct intended to "procure the unavailability of the declarant as a witness."

Judge Ellis suggested that the committee note be amended to make this point clearer, and Judge Winter agreed to the suggestion.

The committee voted with one objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. EVID. P. 806

Judge Winter stated that the proposed amendment would correct a typographical error in the rule by eliminating a comma.

The committee voted without objection to approve the proposed amendment and sent it to the Judicial Conference.

Informational Item

FED. R. EVID. P. 103

Judge Winter stated that the advisory committee, following the public comment period, had decided not to pursue the proposed amendments to Rule 103. It had published a proposed default rule requiring that a pretrial objection to, or proffer of, evidence be renewed at trial unless the court had stated on the record that its ruling was final or if "the context clearly demonstrates" that the ruling is final.

The proposal had generated several public comments. Differences of opinion had been voiced as to which way the default rule should operate, i.e., whether a pretrial evidentiary ruling should or should not have to be renewed at trial. The same differences existed among the members of the advisory committee itself. Moreover, people on both sides of the issue were uncertain as to what exactly was meant by the language "the context clearly demonstrates." Judge Winter concluded that a default rule would not be appropriate unless it were clear on its face.

Judge Winter noted that three members of the advisory committee had voted to send the proposed amendment to the Judicial Conference as published. Another three members wanted to approve a default rule with the opposite result, i.e., that a pretrial ruling would not have to be renewed at trial. Four members wanted to defer the entire matter and consider whether a new approach might be attempted. The final vote of the advisory committee had been 7-2 to defer action on the proposed amendments to Rule 103 and to seek the advice of the civil and criminal advisory committees.

SPECIAL STUDY CONFERENCE ON ATTORNEY CONDUCT

The committee sponsored a second special study conference to discuss attorney conduct issues, held on Tuesday afternoon, June 18 and Wednesday morning, June 19, 1996. Approximately 25 guests had participated, including a cross-section of interested and knowledgeable attorneys, professors, representatives of professional organizations, and members of other Judicial Conference committees. A similar study conference had been held in conjunction with the committee's January 1996 meeting.

The study conference had been convened as a way to begin a candid dialogue among all interested parties on a series of perceived problems regarding attorney discipline rules in the federal courts. Among the problem areas considered by the conferees were: (1) the "balkanization" of local federal court rules on attorney conduct, (2) the absence of any attorney conduct rules in some federal courts, (3) uncertainty as to what standards of conduct exist in certain districts, (4) choice of law difficulties, particularly in complex cases, and (5) differences between the Department of Justice and the states over the power to regulate the conduct of government attorneys in certain matters.

Professor Coquillette reported that he had presented seven options for addressing attorney conduct in the federal courts, including:

1. *Promulgate a uniform federal rule or rules, through the Rules Enabling Act process, that would establish a single code governing professional conduct in every federal district court.*

   Professor Coquillette reported that this option had attracted no support.

2. *Do nothing at all.*

   Professor Coquillette stated that this option had received almost no support. Rather, there was a sense among the participants that some action should be taken with regard to attorney conduct rules. Ms. Gorelick added, however, that the Department of Justice would prefer to have no action taken rather than have rules promulgated that would adversely impact government lawyers.

3. *Promulgate a uniform federal rule, through the Rules Enabling Act process, that would adopt as the standard for attorney conduct in a federal district court the standards adopted by the highest court of the state in which the federal district is located.*

   Professor Coquillette stated that three participants in an informal straw vote had favored this option, with the understanding that a federal district court could not opt out of a specific state rule of attorney conduct. On the other

hand, four participants had supported this option as long as it explicitly authorized the district court to opt out of specific state rules.

Professor Coquillette emphasized that all participants favored "dynamic conformity" with state law, that is, the federal court would conform to state law as it is amended from time to time.

4. *Prepare a model rule on attorney conduct that would be adopted by the individual district courts on a voluntary district-by-district basis.*

Professor Coquillette reported that five participants had favored this option. He noted that they had found the alternative attractive in large part because it could be accomplished relatively quickly and would not involve either the Rules Enabling Act process or the Congress.

5. *Promulgate uniform federal rules addressing a limited number of important matters that arise frequently and involve the heart of the litigation process, such as conflicts of interest or lawyers serving as witnesses. By default, all other conduct matters would be governed by state law.*

Professor Coquillette reported that this option had been endorsed by five participants.

6. *Promulgate only a uniform federal rule on choice of law.*

Professor Coquillette reported that this option had received no support.

7. *Promulgate a uniform federal default rule providing that if a district court did not adopt a local rule on attorney conduct, state rules of conduct would apply.*

Professor Coquillette reported that this option had been supported by one participant.

Professor Coquillette reported that he had asked the special study conference for guidance as to what course of action they might want to recommend to the rules committee. In response, the participants, by an 11-5 straw vote, recommended that he draft a model local rule on attorney conduct for the district courts. The rule might be generally similar to one approved in 1978 by the Court Administration Committee of the Judicial Conference, specifying that attorney conduct in each federal district should be governed by the rules of the state in which the district is located, except to the extent that the district court chooses to promulgate a different local rule.

He stated that even those participants who favored a uniform federal rule on attorney conduct saw no harm in starting with a model local rule. He further stated that a majority of the special study conference was of the view that no action should be taken to draft uniform rules under the Rules Enabling Act, especially while delicate negotiations were continuing between the Department of Justice and the Conference of Chief Justices.

Professor Coquillette added that the members of the special study conference had asked that he examine reported cases on attorney discipline in the courts of appeals under FED. R. APP. P. 46. He stated that he would also try to distinguish the bankruptcy cases in his decisional law search. The Federal Judicial Center had been asked to gather empirical data on: (1) experience in districts that had adopted the 1978 model rule,; and (2) the frequency with which federal courts have handled discipline matters directly instead of referring them to state disciplinary authorities. The committee asked that the results be available for its June 1997 meeting.

Chief Justice Veasey suggested that another option would be defer taking any action at all, at least as long as the negotiations between the Department of Justice and the state chief justices were continuing. Several other committee members agreed, and Judge Stotler suggested that the reporter proceed with the suggested research and with the drafting of a model rule, and plan to discuss this work further at the next meeting, without making recommendations to the committee.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker stated that the restyling efforts of the subcommittee would be confined to the Federal Rules of Appellate Procedure until completion of the comprehensive project to restyle those rules. He offered the continuing services of the style subcommittee and Mr. Garner to the advisory committees and their reporters to assist in drafting and editing proposed amendments to the rules. He also advised that copies of the *Guidelines for Drafting and Editing Court Rules* had been sent by the Administrative Office to every federal judge, court executive, and member of Congress.

At several points during the meeting, members expressed concern over a tendency by the committee to spend substantial time during its meetings in redrafting the language of proposed amendments and committee notes, including amendments and notes that had not yet been published. Some members expressed the view that it was appropriate for the standing committee to resolve drafting problems, style defects, and inconsistencies in terminology before rules are published for comment. Others, though, voiced the contrary opinion that drafting issues should be deferred for consideration by the advisory committee following the public comment process.

The members reached a consensus that drafting problems ideally should be resolved by the advisory committee before a rule amendment or committee note is submitted to the standing committee for authority to publish. They agreed that: (1) any member who has a concern with particular language in a proposed amendment or note should raise the concern immediately with the chair or reporter of the appropriate advisory committee in time for it to be resolved in advance of the standing committee meeting; and (2) whenever possible, the advisory committees should seek the advice of the style subcommittee and its consultant before submitting proposed amendments to the standing committee.

LONG RANGE PLANNING

Professor Coquillette reported that the Long Range Planning Subcommittee's *Self-Study of Federal Judicial Rulemaking* had been extremely valuable and was being implemented in many different ways. He said that several of the recommendations in the study had been brought to the attention of the Chief Justice at a meeting in December 1995, and several others lay within the special authority of the chair of the committee. All in all, 13 of the study's 16 recommendations had been implemented already or required no further action.

Two of the remaining three recommendations addressed the issue of creating local options in the national rules. The final recommendation called for a change to a two-year cycle as the norm for the rulemaking process. These recommendations would be taken into account by the standing committee and the advisory committees on an ongoing basis.

Judge Stotler noted that the Long Range Planning Subcommittee had been discharged, and she stated that the committee had officially received the subcommittee's report and would publish it. She then thanked the subcommittee for its efforts and accomplishments. She advised that she would write to personally thank Professor Thomas Baker, who was the primary author of the study.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the next meeting of the committee would be held on Wednesday through Friday, January 8-10, 1997, in Tucson, Arizona.

She further reported that the summer 1997 meeting will be held on Wednesday through Friday, June 18-20, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe
Secretary