COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of July 17-18, 1978

The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States met in the 6th Floor Conference Room of the Administrative Office of the United States Courts in Washington, D. C. The meeting convened at 9:30 a.m. on Monday, July 17. The following members were present during the meeting:

Roszel C. Thomsen, Chairman
Shirley M. Hufstedler
Carl McGowan
James S. Holden
Frank J. Remington
Bernard J. Ward
Richard E. Kyle
Francis N. Marshall

Others attending the session were Judge Bailey Aldrich, past Chairman of the Advisory Committee on Appellate Rules, Professor Jo Desha Lucas, past Reporter for the Advisory Committee on Appellate Rules, Professor Wayne R. LaFave, Reporter for the Advisory Committee on Criminal Rules, and Joseph F. Spaniol, Jr., Deputy Director of the Administrative Office and Secretary to the Rules Committee.

Judge Thomsen welcomed the new members of the Committee referred everyone to the consideration of the Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Criminal Procedure for submission to the Judicial Conference of the United States.

A. Report of the Advisory Committee on Appellate Rules

Rule 1. Scope of Rules

Mr. Marshall pointed out that the reference to Rule 18 in the Advisory Committee Note is inappropriate and should be deleted. The members agreed.

Rule 3. Appeal as of Right--How Taken

The Committee approved the printed amendments to subdivisions (c) and (d).

Mr. Marshall felt the phrase on lines 33-36 of subdivision (e) was too cumbersome and disliked the one on lines 36-38. His suggestion to substitute "the docket fees prescribed by the Judicial Conference of the United States,"for the language on lines 33-36 was adopted. The phrase on lines 36-38 remained as printed.

Rule 4. Appeal as of Right--When Taken

The amendments to paragraphs (1) through (4) of subdivision (a) were approved as printed.

Mr. Marshall felt paragraph (5) should prescribe a time limit upon the district court's action on a motion for extension of time for filing a notice of appeal. Professor Lucas indicated the matter had been discussed at length by the Advisory Committee. Judge Hufstedler and Judge McGowan expressed their views that to try to take care of a slow judge by imposing a time limit would create more problems than it is worth. Mr. Marshall withdrew his

recommendation. His suggestion to split the second sentence into two for easier reading was adopted. He pointed out that the last sentence states "no such extension shall exceed 30 days" without specifying the time from which the 30 days run. Therefore, Professor Lucas added "past such prescribed time" after "30 days" in the last sentence and the members agreed.

In the Advisory Committee Note to Rule 4(a)(6), Mr. Marshall suggested the clerk advise the appellant as well as the district judge. Judge Thomsen pointed out that they should advise all parties and the members agreed. Judge Hufstedler felt the note should be updated by including a reference to the Mallis case and the members concurred.

Rule 5. Appeals by Permission Under 28 U.S.C. § 1292(b)

It was pointed out that the deskbook copy did not show the beginning phrase as crossed out and line 11 was missing. The necessary corrections were made.

Rule 6. Appeals by Allowance in Bankruptcy Proceedings

The Committee adopted Mr. Marshall's suggestion to add "the" before "docket fee" on line 7 to distinguish that fee from others.

Rule 7. Bond for Costs on Appeal in Civil Cases

This rule was not submitted to the bench and bar, however, the members agreed the change is not significant. The amendment was approved as printed in the deskbook.

Rule 10. The Record on Appeal

Approved as printed in the deskbook.

Rule 11. Transmission of the Record

Mr. Marshall suggested "it" be substituted for "the transcript" on line 35 to make it comparable with the language on line 40. Judge Thomsen questioned the lettering of the subdivisions since the provisions in subdivision (d) have been abrogated. Judge Aldrich stated that the letter (d) was inadvertently stricken through in the printed version. The members concurred.

Rule 12. Docketing the Appeal; Filing of the Record

Since subdivision (d) of Rule 11 was stricken, Judge Hufstedler questioned the reference to it in Rule 12. Judge Aldrich explained that this was an error and should be a reference to Rule 11(c).

Rule 13. Review of Decisions of the Tax Court

Approved as printed in the deskbook.

Rule 24. Proceedings in Forma Pauperis

As a matter of style, Mr. Marshall suggested the reference on line 12 be written, "Rule 24(a)" instead of "(a) of this Rule 24." Professor Lucas indicated that this matter was discussed at length both by their style subcommittee and the entire advisory committee. Professor Remington expressed his feeling that the Standing Committee should

not have to engage in decisions regarding style matters. These matters should be decided before, possibly by someone in the Administrative Office. Judge Aldrich felt this could be left to the reporters otherwise a suggested style change might modify the substance of the intended rule. Mr. Marshall then reduced his motion to simply restore the word "subdivision" in line 12 of Rule 24. Professor Lucas pointed out that this style change would have to be made in other rules. After further discussion Mr. Marshall's motion lost.

Rule 27. Motions

The members discussed the same style problem in regard to a change in this rule. Judge Hufstedler moved that since there is not uniformity in the rules a committee on style should be appointed consisting of all the reporters at a time when all the rules are going to be reprinted. Her motion carried. Rule 27 was approved as printed in the deskbook.

Rule 28. Briefs

(g) Length of Briefs. Approved.

(j) Citation of Supplemental Authorities. Judge McGowan felt it was unnecessary to include such details as three extra copies to the clerk in the body of the rule. His motion to substitute, "with a copy to all counsel" was approved.

Rule 34. Oral Argument

The Committee agreed with Mr. Marshall's recommendation to delete the comma in line 5 and to delete "that" from line 18. Judge Hufstedler expressed her dislike of the mandatory requirement of oral argument set out on line 3 of subdivision (a). She preferred "will" to the word "shall." She also pointed out that it is inconsistent with the use of "will" on line 14. Judge Aldrich felt the circumstances referred to in lines 2 and 14 are different. He explained that these standards were taken from the recommendation in the Report of the Commission on the Federal Court Appellate System (Hruska Commission). He did agree that the beginning phrase dealing with a compulsory and voluntary waiver is misleading. Professor Lucas explained that a voluntary waiver can be granted on any basis governed by local rule. Then, Mr. Marshall stated subdivision (a) is inconsistent with subdivision (f). Judge Aldrich suggested the phrase dealing with a voluntary waiver is not necessary. Judge McGowan requested that subdivision (a) be redrafted to deal with oral argument by local rule rather than in general and let (f) deal with the situation in all other cases where there is a voluntary situation. Professor Ward stated that "allowed" might be more appropriate than "heard" in lines 2 and 14. The members agreed.

After the lunch break, a redraft incorporating the above changes was presented to the members by Professor Lucas. Judge Hufstedler felt the title of subdivision (a) should be changed and Mr. Marshall suggested the following: "(a) In General; Oral Argument." Judge McGowan then pointed out the colon after "unless" on line 14 and stated it is unnecessary. Judge Hufstedler questioned the language on lines 22 and 23 regarding the limitation of oral argument to specify issues and it was agreed that this language is not necessary. The members all agreed with the changes discussed.

Judge Hufstedler expressed difficulty with the provisions in lines 27 and 28 which require that the issues be specified in each instance. She explained that the phrase implies the court cannot limit the time without stating the issues. Both she and Judge McGowan felt this should be deleted. Mr. Marshall suggested "therefor" be added at the end of line 25 and "at which it will be heard" be deleted so that the paragraph reads as follows: "The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor and the time to be allowed each side."

Professor Remington felt the Advisory Committee Note was too cryptic, From the discussion he felt the matter seemed too important to leave out an explanation of the reasons for a 3-judge panel and the reasons for their vote

to be unanimous. Judge Hufstedler suggested they delete the first two sentences thereby calling attention to the Hruska Commission Report where an explanation is contained. Judge Aldrich agreed stating that the note appears to be addressed to the judges and should be addressed to Congress. Judge McGowan suggested adding a reference that the Commission was created by Congress. The members agreed and Professor Remington added that a citation to the Report would be helpful to attorneys who might want to read it.

Rule 35. Determination of Causes by the Court in Banc

Judge Hufstedler raised a question dealing with the cross reference to Rule 40. She felt that a provision that the time can be extended which had been suggested by the Department of Justice is necessary in the circuit courts. Professor Lucas stated that the Advisory Committee discussed this, however, it was rejected by a unanimous vote. Judge Hufstedler stated this could perhaps be solved by changing Rule 40 to provide that the time can be changed by local rule. Mr. Marshall moved adoption of Rule 35 as set out in the deskbook and his motion carried. It was pointed out that lines 21-25 were inadvertently left out of the deskbook and should be restored.

Rule 39. Costs

Mr. Marshall felt the first "of" on line 28 was ambiguous and requested that it be replaced by "request by" or

"request to" whichever goes with the intended meaning. Judge Hufstedler suggested they simply state "upon request by the clerk of the court of appeals to the district court." Mr. Spaniol pointed out that it may be the tax court. Rather than include a list of all possible courts, Judge Thomsen suggested they merely delete "the" at the end of line 27 and substitute "by" for the first "of" on line 28. The motion to adopt Rule 39 as modified was carried.

Rule 40. Petition for Rehearing

Judge Hufstedler expressed approval of subdivision (b) but added that subdivision (a) should be amended by adding "or by local rule of court" at the end of the first sentence. The members concurred. Professor Remington pointed out that a note should indicate that this change was made by the Standing Committee for the reason that it conforms the rule to existing practice and they believe the change to be noncontroversial. The members agreed and Judge Thomsen asked him to prepare a note.

B. Report of the Advisory Committee on Criminal Rules

Rule 4. Arrest Warrant or Summons Upon Complaint

Professor LaFave explained that the proposed amendment was not circulated to the bench and bar, however, as stated in the Advisory Committee Note the sentence beginning on line 9 was added to conform this rule to the addition in Rule 9. Judge Hufstedler felt this new sentence may be read more broadly than is intended, therefore, she recommended adding a semicolon after "issue" on line 9 and "in his discretion" should be added after "magistrate." Also, "either" should be added before "warrant" on line 10. Professor LaFave suggested they take a look at the language in Rule 9. After discussion, Professor Remington questioned whether this change to clarify and make Rules 4 and 9 read the same would be worth the controversy in Congress. He recalled Rule 4 was a matter of great controversy in Congress because a prior proposal was to give to the judicial officer the authority to determine whether there was going to be a warrant or a summons and this was opposed by the Department of Justice and rejected by the Congress. He stated in this instance the question will arise as to who will request the warrant or summons. Professor LaFave pointed out that in Rule 9 the attorney for the government always requests the issuance but in Rule 4 that is not always the case. Therefore, Judge Hufstedler moved not to amend Rule 4 because

contrary to the note, Rules 4 and 9 are not alike. The members agreed.

Rule 9. Warrant or Summons Upon Indictment or Information

Because of the previous discussion on Rule 4, it was decided to add "either" after "issue" on line 12 and approve the amendments to Rule 9 for submission to the Conference.

Rule 6. The Grand Jury

As sent to the bench and bar, Professor LaFave indicated the draft provided for the transcript to be in the custody of the court but they were pursuaded by comments that it should remain in the custody of the attorney for the government which is the present practice. Professor LaFave also called attention to an additional sentence beginning on line 63 which recognizes that if the court orders disclosure it may determine the circumstances. Judge Hufstedler moved approval and her motion carried.

Rule 7. The Indictment and the Information

Professor LaFave explained that the amendment has been made simply to clarify the meaning of the rule. A motion to approve the rule was carried.

Rule 11. Pleas

Professor LaFave explained that subdivision (e)(2) has been amended to distinguish the (A) and (C) type agreement from the (B) type. This amendment was approved.

Professor LaFave explained further that the previous language in subsection (6) was too broad and has been made more specific to guarantee the defendant an opportunity to engage in a legitimate type of plea discussion. He stated the change on line 55 recognizes another exceptional situation mentioned in the Federal Rules of Evidence. When Judge Hufstedler stated that the phrase on line 37 is awkward, Professor LaFave explained the the Advisory Committee thought it was less ambiguous there than in line 34. Mr. Marshall felt it sounded better as follows: "is not in any civil or criminal proceeding admissible against the defendant." Judge Hufstedler agreed. Also, line 36 was changed from "was a party" to "was a participant in." Judge Hufstedler moved approval of the language through page 19 and the motion carried.

Professor Remington called attention to the placement of the amendment in Evidence Rule 410. Professor LaFave explained that Evidence Rule 410 is being amended to correspond to the change in this rule. Even though there was some criticism about the same rule being in both the criminal rules and the evidence rules, the Advisory Committee felt the matter was important enough to be included in both places. Professor Remington pointed out that the Supreme Court may wish to make two separate submissions to Congress for Rule 11 and Evidence Rule 410.

Mr. Marshall questioned the phrase, "proceedings in court" on line 42. After discussion he suggested they delete "court" and add "any" before "proceedings." Judge Hufstedler moved approval of his suggestion and the motion carried. Professor Remington asked about the admissibility of presentence investigations in the rule and it was decided to incorporate the presentence report as an example in the Advisory Committee Note.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Professor LaFave indicated he would conform this rule to the changes made in Rule 11 as follows: (1) move the phrase "in any civil or criminal proceeding," (2) change "party" to "participant" and (3) take out "in court" and add "any." Judge Hufstedler pointed out that they should key subsection (3) into Rule 11 and include both Federal court proceedings and state court proceedings. Professor LaFave suggested (3) be written as follows: "any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas." The Committee approved the suggested changes.

Professor Remington questioned how these changes made by the Standing Committee will be indicated. He asked for the views of the members as to whether these changes should be pointed out in the Advisory Committee Note or as a separate

memorandum from the Advisory Committee. As a practical matter, Professor Ward suggested they include an explanation of all the changes in the Advisory Committee Notes but use the term "Rules Committee Note." Judge McGowan did not feel it is necessary to identify the changes made by the Advisory Committee and this Committee. Judge Hufstedler suggested they make this as simple as possible by indicating that the Advisory Committee Note has been changed and put this in the Report to the Judicial Conference. Professor Remington felt the most important note is the one presented to the Congress and therefore it should include what the bar comment was on the proposed amendment. However, for historical purposes, Mr. Marshall felt these changes discussed so far have not been radical enough for a detailed explanation of the changes. Professor Remington suggested that in the future the Reporter should determine when and why the various changes were made.

The meeting adjourned at 4:30 p.m. and reconvened at 9:00 a.m. the next day.

Rule 17. Subpoena

Professor LaFave explained that this new subdivision (h) Information Not Subject to Subpoena, is added because of the new proposed Rule 26.2. The members approved subdivision (h) as set out in the deskbook.

Rule 18. Place of Prosecution and Trial

Professor LaFave indicated that the addition to lines 8 and 9 is necessary to conform the rule to the Speedy Trial Act. The members approved the addition as set out in the deskbook.

Rule 26.2. Production of Statements of Witnesses

Professor LaFave called attention to the Advisory Committee Note explaining that this rule is new but the additions and deletions highlight the difference between it and a similar rule in S. 1437. He stated the rule deals with the subject matter of the Jencks Act which Congress would delete in S. 1437. He added that it would make a two-way street for Jencks Act documents. Mr. Marshall suggested a style change on line 44 by adding "by that party" to conform this subdivision with the terms used in the other subdivisions. Judge Thomsen and Judge Hufstedler preferred the original language because they felt everybody will want to examine the statement. Mr. Marshall withdrew his suggestion. Judge Hufstedler moved approval of the rule and the motion carried.

Professor Remington indicated that the Advisory Committee Note should state that they are transferring the Jencks Act procedure into the rule and explain the reason is that Congress wants the procedural aspects taken out of the title and put into the rules which this committee agrees to. Judge Hufstedler asked that this be added at the beginning of the note to highlight the reasons. She also suggested they add language indicating that the rule does not contain anything to prevent pretrial procedures. The Committee agreed to let the Reporter rewrite the note to include the appropriate explanation.

Rule 32. Sentence and Judgment

(c) Presentence Investigation.--Professor LaFave explained that these technical changes were made because of a revision in the statute. Mr. Marshall moved approval and his motion carried.

(d) Withdrawal of Plea of Guilty.--Professor LaFave explained that the present subdivision covers the standard for withdrawal before and after sentence but does not indicate what the standard is. The revision is an attempt to set out the procedure to be followed for withdrawal. Judge Thomsen felt the term "entry of judgment" is incorrect. Judge Hufstedler concurred and pointed out that there are many reasons why the defendant might want to withdraw his plea and which would be difficult to show that these reasons substantially outweigh any prejudice to the government from

the withdrawal. Judge Thomsen therefore suggested subdivision (d) be reconsidered by the Advisory Committee. Judge McGowan stated that if this procedure could be applied only in the case of a plea bargain it would work. Judge Hufstedler pointed out that the present language is workable and moved that subdivision (d) be remanded. Her motion carried.

(f) Revocation of Probation.--Professor LaFave indicated that this subdivision is being amended to take account of the minimum due process requirements of Morrissey v. Brewer and Gagnon v. Scarpelli with respect to the preliminary hearing and a revocation hearing for probation revocation. Judge Hufstedler suggested a new Rule 32.1 be added in lieu of subdivision (f) because these provisions do not pertain to sentence and judgment, the title of Rule 32. She also pointed out that a separate listing in the index of the subject matter of Rule 32.1 will make it easier to locate for someone who is unfamiliar with the rules. After discussion, Judge Hufstedler made a motion to retitle subdivision (f) as Rule 32.1. Her motion carried. Mr. Marshall suggested this be called, "Revocation or Modification of Probation."

(1) Arrest and Preliminary Hearing. Professor Ward stated there is no hearing unless the person is held in custody, therefore, "Arrest and" should be deleted from the title. He stated that lines 41 and 43 were not clear

as to which hearing they refer. Judge Hufstedler explained that it is the preliminary hearing to determine probable cause. To eliminate confusion, Professor LaFave suggested they delete "At such hearing" from line 41 and add "preliminary" before "hearing" on line 43. Professor Remington then pointed out that the subdivision (b) should be deleted from the reference to 28 U.S.C. § 626 on line 37. The members approved the changes suggested on lines 30, 31, 41, and 43 of subsection (1). Judge Holden questioned whether the magistrate under existing law can revoke probation which is implied in lines 69-70. Judge Hufstedler made a motion to delete, "before the appropriate judge or U. S. magistrate" from lines 69-70 and lines 85-86 thereby leaving it to the general law to determine the appropriate judge. Judge Holden called attention to the same phrase on lines 112-113 and Professor Ward stated he felt the provisions on lines 114a, b, and c were not valid. Judge Hufstedler then added the deletion of subsection (3), Review of Revocation, to her motion and it carried.

Professor Ward expressed approval of the statements in the Advisory Committee Note on page 52 but explained that since the quotation is of a 5th Circuit opinion it implies the Rules Committee's endorsement. He felt this should be in the reporter's position papers but the Advisory Committee Note should be kept to an explanation of what is being done and why. Judge Hufstedler agreed and suggested

they delete the quoted paragraph but leave the citation. Professor Remington suggested that in the future a separate note be prepared for the Standing Committee than the one prepared for the Advisory Committee, otherwise there will be a problem when the rule goes to Congress. Judge Thomsen recommended that the advisory committee notes be discussed by the Style Subcommittee of the Advisory Committee on Criminal Rules. After further discussion regarding the length of the notes and their contents, Professor Ward suggested the citation be put in italics and paragraph headings be added to the appropriate place in the notes. Professor Remington concurred but added that they should prepare a Rules Committee Note designed to go forward to the Judicial Conference and the Congress. The members concluded to recommit the Advisory Committee Note on Rule 32 to the Reporter for editorial changes in light of the commentary.

Discussion continued regarding the title of the notes and the need to explain in some instances, the changes made by the Standing Committee which are not discussed in the note as presented by the advisory committee. Mr. Spaniol recalled a study made by the Judicial Conference as to how they should operate the Rules program when it was first constituted. The study indicated that the Standing Committee has the responsibility for everything and has control over the Advisory Committees. The Standing Committee should be

satisfied with the text of the rules as well as the explanation in the notes. He felt the labels for the notes are immaterial. Professor Ward stated he endorsed everything Mr. Spaniol pointed out. Judge Hufstedler agreed that is is not necessary to change the caption but the Reporter should simply include in the notes the changes made and why they were made. Judge McGowan pointed out that it should include a reference to the commentators. Mr. Spaniol suggested an explanation of the comments received and the decisions based upon them could be set out in a report by the Advisory Committee to be filed with the Standing Committee. Professor LaFave pointed out that a summary of the comments was prepared for the meeting of the advisory committee and it would be easy to expand it by including the decisions reached by the Committee. The members agreed.

Rule 35. Correction or Reduction of Sentence.

Approved as set out in the deskbook.

Rule 40. Commitment to Another District

Professor LaFave explained that this is an updating of subdivisions (a), (b), and (c) to abolish a distinction between arrest in a nearby district and arrest in a distant district. The members approved these subdivisions.

Professor LaFave stated that subdivision (d) adds a provision dealing with arrest of a probationer in a district

other than the district of supervision. Mr. Marshall pointed out that the cross-references should be changed. The Committee agreed.

Professor LaFave explained that subdivision (e) adds a provision dealing with arrest of a defendant or witness for failure to appear in another district. The members approved the subdivision.

Subdivision (f) is a compromise of an earlier version. Professor LaFave indicated it clarifies the authority of the magistrate with respect to the setting of bail where bail had previously been fixed in the other district. Judge Thomsen pointed out that "shall authorize release" is incorrect and it should be changed to "may." Judge Hufstedler suggested they simply delete "shall." Professor Remington indicated that this is covered by Rule 46(a) therefore the entire first sentence could be deleted. Judge Hufstedler called attention to the use of "shall" on line 90. She stated this is mandatory and it was suggested to change it to "will not be bound." Subdivision (f) was approved as modified.

Rule 41. Search and Seizure

It was pointed out that this rule is a codification of existing practice. The Committee approved it.

Rule 44. Right to and Assignment of Counsel

Professor LaFave explained that this is a new provision regarding conflicts of interest in joint representation cases and adopts the position taken by many circuits that it is better to confront the problem initially rather than to have it arise on appeal. Judge Thomsen stated this raises a question of whether the note should be reduced by deleting some of the quotations. He stated the citations may be sufficient. Judge Hufstedler felt even though the quotations are very helpful the quotes of various decisions of the court of appeals should be deleted. The members agreed.

Proposed Amendments to Rules Governing § 2254 Cases and § 2255 Proceedings

Rule 10. Powers of Magistrates

Professor LaFave stated these changes have been made to conform the rules to changes in the Magistrates Act. The members approved both rules.

Rule 11. Time for Appeal

Professor LaFave indicated this change has been approved last year.