COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of July 12 and 13, 1990

The summer 1990 meeting of the Judicial Conference Committee on Rules of Practice and Procedure was called to order at 9 a.m., July 12, at the Old Town Holiday Inn in Alexandria, Virginia, by its Chairman, Judge Joseph F. Weis, Jr. All members of the Committee attended the meeting except Judge Robert E. Keeton and Gael Mahony, who were unavoidably absent.

Also attending were Judge Jon O. Newman, Chairman, and Assistant Dean Carol Ann Mooney, Reporter, of the Appellate Rules Advisory Committee; Judge John F. Grady, Chairman, and Dean Paul D. Carrington, Reporter, of the Civil Rules Advisory Committee; Judge Lloyd D. George, Chairman, and Professor Alan N. Resnick, Reporter, of the Bankruptcy Rules Advisory Committee; and Judge Wm. Terrell Hodges (attending on behalf of Judge Leland C. Nielsen, Chairman), and Professor David A. Schlueter, Reporter, of the Criminal Rules Advisory Committee. The Reporter to the Committee, Dean Daniel R. Coquillette, and Mary P. Squiers, Director of the Local Rules Project, attended the meeting. Also present were James E. Macklin, Jr., Secretary to the Committee and Deputy Director of the Administrative Office; William B. Eldridge, Director, Research Division, Federal Judicial Center; and David N. Adair, Jr., Patricia S. Channon, and Thomas C. Hnatowski of the Administrative Office.

I. Report on the Status of Committee Work

A. Appellate Rules - Judge Jon O. Newman

Judge Weis opened the meeting by noting that Judge Newman would be arriving late to the meeting and asked that Dean Carrington begin the discussion of the civil rules by reporting to the Standing Committee the status of the proposed amendments to the Civil Rules, beginning with Rule 77(d).

B. Civil Rules - Judge John F. Grady

Dean Carrington explained that the revision to Civil Rule 77(d) would conform the rule with the proposed revision of Appellate Rule 4, which would enable the district courts to deal with the problem of parties receiving no notice of unfavorable judgments from which appeals might be taken. Dean Carrington reported that, at the request of the Appellate Rules Committee, the Civil Rules Committee had looked at the problem and had found a rash of cases in which an appeal was not filed because of lack of notice. The proposed amendment to Appellate Rule 4 would allow the district court to reopen the time for appeal for a limited period upon a finding that the notice was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. Dean Carrington indicated that it was his understanding, however, that the Appellate Rules Committee had received criticism from court clerks that the time for appeal might be kept open too long under the proposal, and had decided that the proposals should be delayed for further consideration. Professor Wright suggested that there had not been any other significant negative comments to the proposal and that there

was much support for it. Judge Weis suggested that the discussion of Rule 77 be continued in connection with the amendment to Appellate Rule 4.

Dean Carrington then discussed the proposed changes to Civil Rule 4, which would significantly rewrite the rule. The most significant change to the proposal that had previously been before the Standing Committee was an amendment to reflect the change to the venue provisions of 28 U.S.C. § 1391. Other changes were made pursuant to public comment.

A number of additional exceptions to the waiver of service provisions were made. Most significantly was the addition of state, Federal, and foreign governments to the list of those entities to which the waiver of service provisions do not apply. With respect to service on a Government entity, however, the amendment contains a provision that would save a plaintiff from the danger of losing a substantive right because of failure to comply with the complex requirements of service upon the United States. The Committee also decided to increase the time in which a defendant has to respond to a requested waiver from 20 to 30 days, in order to promote a more positive response to the request for a waiver.

Judge Pointer suggested that the removal of the text from current Rule 4(k) dealing with the territorial limits of service leaves a gap in the coverage of the rule. Dean Carrington indicated that the reason the text was struck is because the rule was intended to refer only to the territorial limits of service. Judge Pointer indicated, however, that nowhere does the rule deal with a case in which the jurisdiction is established by Federal statute, as in an antitrust case. Judge Bertelsman added that the same situation would

apply in a Jones Act case. The Standing Committee agreed that a subdivision D should be added to proposed Rule 4(k)(1) to rectify the omission.

Dean Carrington went on to discuss proposed Rule 4(f) dealing with international service of process. One of the original reasons for considering amendment of Rule 4 was to make the provisions dealing with international service of process consistent with the Hague Convention on the Service Abroad of Judicial and Extra-Judicial documents. Dean Carrington noted that there had been some objection from the Securities and Exchange Commission and the Department of Justice regarding these provisions and that the proposal was changed to allow more flexibility. Under the proposed amendment, a court could direct service by a means not consistent with the law of a foreign country or not authorized by an international agreement, "if the court finds that internationally agreed means or the law of a foreign country (A) will not provide a lawful means by which service can be effected, or (B) in cases of urgency, will not permit service of process within a reasonable time." Judge Barker argued that the "reasonable time" provision was too broad. Judge Pratt suggested, and the Standing Committee agreed, that the provision should permit such service when service cannot be otherwise accomplished within "time required by the circumstances."

Justice Peterson expressed concern regarding Form 1A, Notice of Law Suit and Request for Waiver of Service and Summons, which contains a sentence noting that "a summons has been issued by" the court. Justice Peterson indicated that the reference to the word summons was incorrect under the waiver of service provisions. Judge Pointer

suggested and the Committee agreed that the entire sentence be eliminated as unnecessary.

A. Appellate Rules - Jon O. Newman

At the termination of the discussion of Civil Rule 4, Judge Weis noted the arrival of Judge Newman and asked that the discussion of the civil rules be deferred while the proposed amendments to the appellate rules were taken up. Judge Newman first noted the proposed amendments to Appellate Rule 28(a)(2) dealing with the inclusion of jurisdictional statements in appellate briefs, and the proposal to amend Appellate Rule 28(f) to change the rule regarding the designation of appellant and appellee. The rules were approved by the Standing Committee.

With respect to the proposed amendment to Appellate Rule 25, which would permit the filing of papers by facsimile or other electronic means if approved by the Judicial Conference of the United States, Judge Newman suggested that it be tabled if there are no immediate prospects of action by the Judicial Conference. Judge Wiggins noted that the national rules should speak to this problem before inconsistent local rules were adopted. Professor Wright suggested that this amendment should be passed now, so that local rules could be promulgated immediately upon action of the Judicial Conference. Otherwise, given the delays inherent in the rule amendment process, the delay between Judicial Conference action and use of this means of filing would be significant. Professor Wright moved that the amendment be adopted and sent to the Judicial Conference without publication. Judge Barker seconded the motion and it carried unanimously. Judge Newman asked that the minutes reflect that the Appellate Committee took up

consideration of this rule in response to the recommendations of the Judicial Improvements Committee of the Judicial Conference.

Judge Newman noted that there were several typographical errors in the proposed amendments to the appellate rules that were sent for publication and asked that every transmission of operative language from the Standing Committee be first submitted for review to the Chairman of the Advisory Committee to avoid these difficulties.

Judge Newman then reviewed the proposed amendment to Appellate Rule 4 that would attempt to deal with the situation in which an appellant claims that notice of the district court opinion was not timely received. This change was published for comment and received a mixed response. No responses were received from organizations that might be interested in such a proposal. Judge Newman suggested that the proposal be considered for another six months and that the Advisory Committee invite responses from the American Bar Association, the New York City Bar Association, and other organizations composed of attorneys who regularly litigate. Judge Weis noted the problem is a significant one; there have been a number of reported cases in which parties have been prejudiced in circumstances in which a rule like the one proposed would have provided relief. Judge Barker moved that the proposed amendment to Appellate Rule 4 be approved and forwarded to the Judicial Conference. The motion passed unanimously.

Accordingly, the Standing Committee agreed to forward amendments to Rules 4(a), 6, 10(c), 25, 26(a), 26.1, 28(a), (b), and (h), 30, and 34(d) of the Federal Rules of Appellate Procedure to the Judicial Conference for approval and transmission to the

Supreme Court for its consideration with the recommendation that they be approved by the Court and transmitted to Congress pursuant to law. Dean Mooney also requested, and the Committee agreed, to ask that the Judicial Conference recommend that Congress amend 28 U.S.C. § 2107 to conform to the proposed amendment to Rule 4(a) of the Federal Rules of Appellate Procedure, and to eliminate the inconsistency between that section and the current version of Rule 4 of the Federal Rules of Appellate Procedure.

B. Civil Rules - John F. Grady

Dean Carrington then continued his discussion of the proposed amendments to the civil rules. With respect to the proposed amendments to Rule 5 dealing with service of pleadings and other papers, Professor Wright asked about the meaning of the term "private courier," which was proposed as an alternative to mail delivery in proposed Rule 5(b). Judge Grady indicated that the term was intended to be all-inclusive. Judge Bertelsman suggested that the addition of private delivery would require an amendment to Rule 6 dealing with the time of service. Judge Barker noted that a party had more control over delivery when utilizing a private delivery service. Deposit in the United States mail may be deemed actual delivery because the party loses control; a party may withdraw a document from a private courier. Judge Grady agreed and suggested that only mail should be complete upon deposit with the entity that is to deliver the papers. Judge Pointer suggested that the amendment was not needed because the current rule provides for delivery generally. Judge Grady accordingly withdrew the proposed amendments to Civil Rule 5(b). Judge Barker suggested that the language regarding filing by facsimile

upon approval by the Judicial Conference of the United States be added to Civil Rule 5. Judge Barker's motion was passed unanimously.

Judge Pointer moved that proposed Rule 5(d) be amended to permit local rules requiring the filing of discovery. The motion failed to receive a second.

Judge Pratt suggested that, based on the removal of the provisions permitting service by private courier, it is no longer necessary to certify the manner of service. Dean Carrington agreed and suggested that the Standing Committee reconsider an amendment to Rule 5(b) to permit the use of a private delivery service that kept records of the actual delivery. Judge Pointer moved to disapprove the proposed amendments to Rule 5(b) and to delete the reference to the "date and manner" of service in Rule 5(d), since such information is normally not in controversy. Judge Barker seconded the motion, and it was passed unanimously. Ms. Squiers noted that there are likely to be local rules prescribing a certificate of service.

Dean Carrington next reported that the proposed amendment to Rule 12 was designed to make that rule work with amended Rule 4. Judge Pointer suggested that the words "from such date" appear after the words "90 days" for purposes of clarity.

The proposed amendments to Rule 14 were in response to the findings of the local rules project. The proposal would require that a third-party defendant receive a copy of all current pleadings filed in the action. Judge Pointer suggested that the Advisory Committee note should clarify that "pleadings" include orders of the court. Judge Barker added that the requirement should be limited to scheduling orders. Professor Wright

suggested that the rule was unnecessary and moved that it not be approved. Justice Peterson seconded the motion, and it was approved unanimously.

Dean Carrington next discussed the proposed amendments to Rule 15, which would extend the relation back of amendments that change the party or the naming of a party. The proposal received a number of comments, but the Advisory Committee declined to adopt most of the suggested changes to the proposal. With respect to proposed amendments to Rule 16, dealing with the scheduling of pretrial conferences, Judge Barker noted that the Advisory Committee will have to continue to monitor Rule 16 practice in light of proposed legislation that would impose certain duties on the courts with respect to the scheduling of civil cases. Judge Wiggins moved that the proposed amendment to Rule 24, which would require the notification of the Attorney General of the state when the constitutionality of any statute of that state affecting the public interest is drawn into question, be changed by eliminating the reference to "public interest." Dean Carrington pointed out that the proposal simply tracks the language of 28 U.S.C. § 2403. Judge Barker seconded the motion. The vote was four for the change and four against, and the motion did not carry.

Dean Carrington noted that there were two proposed changes to Civil Rule 26. The first would amend subdivision (a)(2) to create a preference for internationally agreed upon methods of discovery when such methods are available. This provision received a great deal of comment. The proposal was amended, pursuant to that comment, to clarify that it was intended only to apply to discovery abroad. The other proposed amendment to Rule 26 would have required an elaborate procedure to produce information upon

which a claim of privilege was based. The proposal was based upon a local rule of the Southern District of New York, but received so much negative comment that the Advisory Committee retreated to a more modest proposal. Justice Peterson suggested that the proposal be amended to require that a claim of privilege be made in writing or on the record. Judge Bertelsman suggested that the rule provide that the claim of privilege be made as part of the response to the discovery requested. Professor Wright objected that such provisions would be surplusage, as all objections are already required to be in writing or on the record.

The proposal to amend Rule 30 would conform the rule to the revision of Rule 4 by postponing depositions in actions in which the defendant has waived service of process. Dean Carrington advised that more extensive amendments to Rule 30 were temporarily withdrawn by the Advisory Committee in light of the comments received.

The proposed amendment to Rule 35 reflects a change in the rule made by Congress in 1988. This amendment permits clinical psychologists to perform mental examinations conducted pursuant to the rule. The Advisory Committee originally proposed amending the rule to permit using any individuals licensed by the state. The Department of Justice, however, suggested that the license should be in the area subject to the examination. The Committee then considered permitting examinations by a physician or suitably licensed psychologist, but that proposal would permit an individual to challenge the suitability of the licensing of a psychologist but not the credentials of a physician. Dean Carrington suggested that the rule, therefore, include a "suitably licensed physician, psychologist or other examiner."

Judge Wiggins moved to eliminate reference to a physician or psychologist and leave only the term examiner. Judge Barker seconded the motion and it was passed. Judge Pointer suggested that the Advisory Committee notes discuss the types of examiner that the Advisory Committee had in mind.

Dean Carrington reported that the Advisory Committee had abandoned the suggestion of the Local Rules Project to amend Rule 38 regarding jury demands.

The amendment to Rule 45 would constitute a substantial rewrite of the rule. Dean Carrington noted, for example, that the requirement of a seal of the court would be eliminated. Since attorneys may serve the subpoena, it makes little sense to require them to go to the clerk for a seal. Judge Weis suggested that the language of the proposal as drafted seems to provide that the court is issuing the subpoena. Dean Carrington agreed to make technical changes to eliminate that implication. With respect to the amendments regarding the quashing of a subpoena, Judge Pointer noted that the second part of proposed Rule 45(c)(3)(B)(ii) permits the quashing of a subpoena that requires the disclosure of information not describing specific events or occurrences in dispute which results from a study not made at the request of a party. The first part of the subsection is limited to an expert's opinion, but the second seems to apply to the results of any study. Dean Carrington indicated that the provision was intended to apply only to studies conducted by experts. Judge Barker moved that the provision be amended to specifically refer to an "experts study." The motion was seconded by Judge Pointer and carried. With respect to the proposed amendment to Rule 48 dealing with the number of jurors, Dean Carrington noted that the only change from the version of the proposed

amendment submitted for public comment was the addition of a maximum number of jurors of twelve. Professor Wright suggested that the phrase "no fewer than" replace the language of the rule, "at least." Dean Carrington agreed to substitute that phrase.

The proposed amendment to Rule 50 was intended to enable the court to render judgment at any time during a jury trial when it becomes clear that a party is entitled to such judgment. Judge Pointer suggested that the phrase "as a matter of law" be added to Rule 50(a)(1) to clarify the meaning of that provision. Judge Weis suggested that instead of a change in the proposed amendment, the Advisory Committee note specifically state that this provision is not intended to change the law but simply articulate the standard for granting a motion for judgment.

With respect to the proposed amendment to Rule 52(c), dealing with judgments on partial findings, Judge Pointer suggested that the language be amended to clarify at the outset that it applies to a trial without a jury. Dean Carrington agreed to make the amendment. Judge Bertelsman suggested that language similar to language in Rule 41(b), regarding the judge's authority to determine facts after the presentation of plaintiff's evidence, should appear in the body of Rule 52(c). Dean Carrington agreed to make that change.

With respect to the proposed amendment to Civil Rule 63, Dean Carrington noted that this amendment had been published twice previously for comment and that a number of changes were made based on the comments received. For example, a clause was added regarding the recalling of a witness.

Dean Carrington suggested that Rule 71A should be amended to comport with the amendments to Rule 4, but that no publication of such changes had been made. The Standing Committee agreed that those technical changes should be made and submitted to the Judicial Conference without publication.

Finally, Dean Carrington reported that the proposed amendments to the forms were gender neutralizing. Judge Weis questioned why the forms should be gender neutral since they were simply guides which would be adapted to the circumstances of a particular case. Justice Peterson moved that the forms not be so amended. The motion was carried.

Judge Barker moved that the proposed amendments to the Federal Rules of Civil Procedure 4, 5, 12, 15, 16, 24, 26, 28, 30, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 71A, 72 and 77; new Rule 4.1; Chapter Headings VIII and IX; and amendments to the Appendix of Forms to the Federal Rules of Civil Procedure and the amendments to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims, as amended by the Standing Committee, be forwarded to the Judicial Conference for approval and transmission to the Supreme Court for its consideration with a recommendation that they be approved by the Court and transmitted to Congress pursuant to law.

C. Bankruptcy Rules - Judge Lloyd D. George

Judge George described to the Standing Committee the process of amending the Rules of Bankruptcy Procedure that had occupied the Advisory Committee for the last two and one-half years. The amendments were necessary to effect the provisions of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986,

which, inter alia, created the United States trustee system. One of the primary goals of the United States trustee system was to remove the responsibility for the administrative and supervisory tasks of bankruptcy from bankruptcy judges and place it in the Executive Branch. The amendments would do away with Part X of the bankruptcy rules, which dealt with the United States trustees, and would integrate the trustee system into the rules generally. Although comments were received regarding many of the rules, Judge George highlighted only the more significant ones. For example, many comments were received regarding Chapter 12 time limits and time limits of proposed Rule 2002 were expanded in reaction.

Changes to the proposed amendment to Rule 5009 were made as a result of the comments from the clerks' representative, who was deeply involved in the amendment process. However, the Standing Committee has received a communication from the National Conference of Bankruptcy Clerks regarding the proposed amendment. Specifically, the clerks noted a resource problem with respect to the closing of estates. The current proposal reflects a compromise on that issue, but Judge George indicated that the Advisory Committee was willing to reconsider in light of the clerks' concerns. Professor Resnick indicated that Rule 5009 had received a great deal of attention from the Advisory Committee. The Bankruptcy Code requires that, in Chapter 7 and 13 liquidations, a trustee must file a final report and account. Previously, the clerk would review the report, pass it to the court, and the court would order it closed. The Code now requires that the report be filed with the United States trustee's office and with the clerk. In 1988, the Judicial Conference indicated that the court should not be required

to review the final report after it was reviewed by the United States trustee's office. The judge should be able to rely on the certificate by the United States trustee's office. Accordingly, the clerks were advised that they should not be required to review this report. The United States trustee's office, however, has protested that it does not have the resources to provide the appropriate review. The Advisory Committee decided that if the trustee certified the report to the court and there was no objection, a presumption would arise that the case was fully administered and the court could close the case. Once the trustee has given its certificate, the United States trustee has 30 days to review. If neither the United States trustee nor any party reacts, the court can close the case. The National Conference of Bankruptcy Clerks is concerned that, under this provision, a judge may not be satisfied with the presumption and might ask the clerk for a review. Professor Resnick noted that the United States trustee's office was satisfied with this provision. Mr. Bader suggested that there has been ample time for comment on this issue and that additional consideration would not be fruitful. Professor Wright moved that the current provision be adopted, Judge Barker seconded, and the motion was carried unanimously.

Judge George then noted that the 7000-series bankruptcy rules tracked the civil rules, but not entirely. Specifically, he noted that service by mail has worked out well and that there has been no movement for change. Although consistency is generally to be strived for in the rules, the Advisory Committee has not wanted to amend the bankruptcy rules to track the new service of process provisions proposed in Civil Rule 4.

The Advisory Committee has also approved a reduced number of forms. After those forms have been approved, the Administrative Office will prepare any additional forms that are necessary with the approval of the Advisory Committee.

Professor Resnick indicated that Rule 7004, dealing with service of process in contested matters, would be reviewed, but that the Advisory Committee did not want to propose an amendment to Rule 7004 until after the Standing Committee passed on Civil Rule 4. Rule 7004(b) contains a reference to the provisions of Civil Rule 4. Professor Resnick suggested that current Rule 7004, in effect, freezes the reference to Rule 4 to the current version of Rule 4. Justice Peterson moved to approve the proposed amendment to Rule 7004 that would refer to current Civil Rule 4. Judge Barker seconded the motion, and it was carried.

Judge Pointer suggested an amendment to the caption of Rule 3006 to correctly reflect the body of the rule, which was accepted by Judge George. Judge Pointer also noted that Rule 9006, like the other rules, referred to state legal holidays as well as Federal legal holidays. Judge Pointer also suggested that this issue should be considered by all of the Advisory Committees. Judge Pointer suggested, with respect to removals under Rule 9027, that the Advisory Committee note include a comment to avoid confusion that may develop on removal because of the reference to Federal or state law. He noted that the only Federal action that may be removed is an action that was in D. C. Superior Court or like courts. Professor Resnick stated that the Advisory Committee had taken the position that it not attempt in the Advisory Committee notes to instruct litigants on bankruptcy law, but that the Advisory Committee would consider such a note.

Judge Pointer also suggested that the Advisory Committee notes to Rule 9035 reflect the position of the Judicial Conference that Congress should not phase out the current systems in the states of Alabama and North Carolina, in which the United States

Professor Resnick indicated that Rule 7004, dealing with service of process in contested matters, would be reviewed, but that the Advisory Committee did not want to propose an amendment to Rule 7004 until after the Standing Committee passed on Civil Rule 4. Rule 7004(b) contains a reference to the provisions of Civil Rule 4. Professor Resnick suggested that current Rule 7004, in effect, freezes the reference to Rule 4 to the current version of Rule 4. Justice Peterson moved to approve the proposed amendment to Rule 7004 that would refer to current Civil Rule 4. Judge Barker seconded the motion, and it was carried.

Judge Pointer suggested an amendment to the caption of Rule 3006 to correctly reflect the body of the rule, which was accepted by Judge George. Judge Pointer also noted that Rule 9006, like the other rules, referred to state legal holidays as well as Federal legal holidays. Judge Pointer also suggested that this issue should be considered by all of the Advisory Committees. Judge Pointer suggested, with respect to removals under Rule 9027, that the Advisory Committee note include a comment to avoid confusion that may develop on removal because of the reference to Federal or state law. He noted that the only Federal action that may be removed is an action that was in D. C. Superior Court or like courts. Professor Resnick stated that the Advisory Committee had taken the position that it not attempt in the Advisory Committee notes to instruct litigants on bankruptcy law, but that the Advisory Committee would consider such a note.

Judge Pointer also suggested that the Advisory Committee notes to Rule 9035 reflect the position of the Judicial Conference that Congress should not phase out the current systems in the states of Alabama and North Carolina, in which the United States

trustee system is not in effect. It was agreed that the note refer to the phase-out of the system in those states in terms of "if," rather than "when."

Judge Weis noted that the rules would be effective as of August 1, pursuant to 28 U.S.C. § 2075. Pat Channon indicated that the bankruptcy forms could be effective as of the date of their approval, but suggested that they should be effective as of the date of the amendments to the rules. Judge Barker so moved and the motion was carried.

Accordingly, the Standing Committee agreed to forward to the Judicial Conference the amended Federal Rules of Bankruptcy Procedure for approval and transmission to the Supreme Court for its consideration with a recommendation that they be approved and transmitted to Congress pursuant to law.

The Standing Committee also agreed to request the Judicial Conference to approve the amended Official Forms to take effect on the effective date of the amended Federal Rules of Bankruptcy Procedure.

D. Criminal Rules - Judge Wm. Terrell Hodges for Judge Leland C. Nielsen

Judge Hodges reported that there were three proposed changes to the Criminal Rules being circulated for public comment. The proposed amendment to Rule 16 would expand provisions with respect to the Government's production of statements of witnesses. The proposed amendment to Rule 24(b) would equalize peremptory challenges to six for both sides. The proposed amendment to Rule 35(b) would permit the Government to file a motion to reduce a sentence within one year of sentence, and beyond one year under certain circumstances. The proposed amendment to Rule 404(b)

would require the Government to give notice in advance of trial if it intends to introduce evidence of other crimes.

Judge Hodges also reported that the Federal Courts Study Committee had recommended consideration of an amendment to Rule 35(b) to permit the court to correct a sentence within 120 days, or to amend a sentence within 120 days based upon new evidence. An ad hoc subcommittee of the Advisory Committee took up these recommendations and recommended to the Advisory Committee a much more restrictive provision. The suggested amendment would permit the court to amend a sentence within seven days for clear technical errors. The subcommittee did not adopt the 120-day recommendation because it was concerned that the longer period would encourage relitigation of sentencing issues and would confuse the jurisdiction of the court of appeals. The subcommittee did not accept the recommendation to permit the reopening of the sentence upon the discovery of new evidence because such a provision would be directly contrary to the concept of determinative sentencing and would invite relitigation of sentencing issues. The Advisory Committee accepted the recommendation of the Subcommittee. Judge Hodges asked that the recommended changes to Rule 35(b) be published for a shortened comment period, so that the amendment could go forward with the other amendments to the criminal rules previously submitted for comment. The Standing Committee approved the publication of the proposed amendment for the shortened comment period.

E. Study of Local Court Rules and Admiralty Local Rules - Dean Daniel R. Coquillette and Mary P. Squiers, Esq.

Dean Coquillette reported on the progress of the Local Rules Project. Dean Coquillette noted that the local civil rules report had been distributed to the courts and that the Project had prepared a discussion and analysis of existing local admiralty rules. Thirty-seven districts have local admiralty rules, and the Project has analyzed those rules in the same manner as the civil rules. Six model admiralty rules have been proposed as part of the Project's report. Dean Coquillette asked the Committee to approve the model rules and to approve the distribution of the local admiralty rules report to all 94 districts. Justice Peterson asked if the six model rules were all that were needed to handle admiralty cases in a local district. Ms. Squiers responded that the six do not constitute all of the rules that would be advisable, but that they constitute those rules that admit of uniformity among the districts.

Judge Pointer noted that the report was too assertive in places regarding inconsistency with national rules. He suggested that the language of the report be adjusted to avoid conflict. Professor Wright moved that the report go to all 94 districts. Judge Barker seconded the motion, and it was carried by the Committee. Judge Pointer moved to approve the model rules. Judge Barker seconded the motion, and the motion was carried.

Dean Coquillette noted that the Local Rules Project would finish the report on local appellate rules and would present the draft of that report at the next meeting, regardless of the fact that the Project was terminating at the end of the fiscal year.

III. Proposal to Index and Microfilm Committee Records - Mr. James E. Macklin, Jr.

Mr. Macklin reported on the proposal of the Congressional Information Service to obtain materials of the Committees on Rules of Practice and Procedure beginning in 1934 and place them on micro fiche. The materials would be indexed, and the Administrative Office would be provided with two copies. He reported that the Office of the General Counsel had advised that it may be necessary to advertise for this service. Dean Carrington would write a forward to the material. Judge Barker moved that the Administrative Office advertise for this service. Professor Wright seconded the motion, and it was carried. Judge Pratt suggested that it be clear that the service that obtained the records for microfilming not receive an exclusive right to such material.

IV. Proposed Amendment to Committee Procedures - Mr. James E. Macklin, Jr.

Judge Weis noted that the procedures for the conduct of business by the Judicial Conference Committees on the Rules of Practice and Procedure currently require that records of the Committees be retained at the Administrative Office for five years. The Administrative Office has requested that the rules be amended to require retention for only two years. Judge Barker moved that the Standing Committee recommend that the Judicial Conference approve such amendments to paragraphs 6(b) and 9(b) of the procedures. Judge Wiggins seconded the motion, and it was carried unanimously.

V. New Business

Mr. Macklin proposed that the Standing Committee consider Department of Justice representation on the Committee by means of a new voting member on the Committee. He also noted that the Bankruptcy Committee had no litigators from the Department of

Justice. In addition, the Department of Justice had complained that it was being outvoted by defenders on the Advisory Committee on Criminal Rules. Judge Pratt noted that the Department of Justice views might at times be helpful to the Standing Committee. Judge Weis agreed that he would pass the suggestion to the Chief Justice.

VI. Time and Place of Next Committee Meeting

Judge Weis noted that his term as Chairman of the Committee expires in October. He suggested that there might be no need to have a winter meeting and that the new chairman of the Committee would determine the date of the next meeting.

Respectfully Submitted,

Joseph F. Weis, Jr., Chairman
Georgw C. Pratt
Charles E. Wiggins
Sarah Evans Barker
William O. Bertelsman
Robert E. Keeton
Sam C. Pointer, Jr.
Edwin J. Peterson
W. Reece Bader
Thomas E. Baker
Charles Alan Wright
Gael Mahony