COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of the Meeting of July 6-7, 1995
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, July 6-7, 1995. All the members were present:

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

Judge Wilson attended only the Friday portion of the meeting. In addition to Deputy Attorney General Gorelick, the Department of Justice was represented by Geoffrey M. Klineberg, Special Assistant to the Deputy Attorney General. Roger A. Pauley of the Department attended the meeting on Friday.

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, and Mark D. Shapiro, senior attorney in the rules office.

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 C. Roger Vinson, Member
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, Jr., Chair
Professor Margaret A. Berger, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan R. Garner, consultants to the committee, Mary P. Squiers, project director of the local rules project, Judith A. McKenna of the Research Division of the Federal Judicial Center. Additional committee support was provided by Paul A. Zingg, Patricia A. Channon, attorneys in the Office of Judges Programs of the Administrative Office, and Judith W. Krivit and Anne P. Rustin of the Rules Committee Support Office.

INTRODUCTORY REMARKS

Judge Stotler reported that most state bar associations had designated attorneys to serve as their point of contact with the rules committees. She suggested that members of the committee could be helpful in persuading the remaining state bar groups to name points of contact.

Judge Stotler reported on action taken by the Judicial Conference at its March 1995 session with respect to the federal rules, including: (1) the Conference's approval of revised official bankruptcy forms, (2) its recommitment to the committee of proposed amendments to FED. R. CIV. P. 26(c), (3) its approval of a legislative repeal of the service provisions of the Suits in Admiralty Act, and (4) its return without action of the issue of cameras in the courtroom to the Court Administration and Case Management Committee for further consideration. She also reported that the Conference had transmitted to the Congress its recommendations that: (1) the Congress should reconsider FED. R. EVID. 413-415 as a matter of policy, and (2) alternatively, it should enact the committee's substitute amendments. She added, however, that the Judiciary had not succeeded in convincing the Congress to act favorably on the recommendations.

Judge Stotler noted that an adjustment had been made in Recommendation 30(c) of the *Proposed Long Range Plan for the Federal Courts* accommodating the suggestion of the state chief justices that the plan refer specifically to the need for input by the state bench into the federal rules process.

The chair reported that the Supreme Court had adopted generally the proposed rules amendments approved by the Judicial Conference at its September 1994 session. The Court had, however, changed the word "must" to "shall" throughout the amendments. She added that the Chief Justice had stated in correspondence to the chairman of the Executive Committee of the Conference that: "In the revisions of the Supreme Court Rules now in progress, [the Court is] giving consideration to the appropriate use of 'shall.'" The court, moreover, thinks "it sound that terminology changes in the Federal Rules be implemented in thoroughgoing, rather than a piecemeal, way." The Court had also restored the word "made" in FED. R. CIV. P. 83(a)(1) to make it consistent with FED. R. CRIM. P. 57(c).

Judge Stotler stated that she and the Reporter, Professor Coquillette, planned to attend the December 1995 meeting of the Court Administration and Case Management Committee. She emphasized the need to work with that committee to fulfill the Judicial Conference's obligations under the Civil Justice Reform Act. The Act, among other things, requires the Conference to study the results of the procedural experiments in the district courts and to initiate proposals for possible changes in the federal rules.

The Chair issued a statement of policy regarding the participation of visitors at the public meetings and their right to observe and meet with members of the Committee at recess as may be appropriate. The Chair clarified that the Standing Committee meeting is not a meeting where visitors are entitled to speak, because it is a business meeting rather than a public hearing. But, on invitation of the Chair, visitors may be heard.

NINTH CIRCUIT LOCAL RULE 22

Professor Coquillette reported that he had filed a report at the last committee meeting expressing the view that Local Rule 22 of the United States Court of Appeals for the Ninth Circuit, dealing with procedures in death penalty cases, was inconsistent with federal law in two respects. (See January 1995 Committee Minutes, pages 14-15.) The committee concurred in the report and transmitted it to the Ninth Circuit, inviting the court to consider the views of the committee and take whatever steps, if any, it deemed appropriate.

Professor Coquillette reported that in response to the concerns of the committee, the Ninth Circuit had issued a new, interim rule to address the problems cited by the committee. The court had followed suggestions made by the committee: (1) to change the manner of voting for en banc consideration, and (2) to reinstate the requirement of individual consideration of certificates of probable cause. The court was in the process of seeking public comment on the proposed new rule, including comments from the attorneys general who had petitioned the Judicial Conference to abrogate Rule 22.

Judge Stotler stated that the Ninth Circuit was scheduled to address the rule again before the end of the summer. Accordingly, the committee should defer further consideration of the matter until its January 1996 meeting.

CONFERENCE ON ATTORNEY CONDUCT

The committee adopted without objection Professor Coquillette's suggestion that the committee convene a one-day conference to explore attorney conduct issues. The conference would be held in conjunction with the committee's January 1996 meeting. The chair asked Professor Coquillette to work with the Administrative Office in making arrangements for the conference and preparing a proposed list of about 25 knowledgeable and representative invitees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee approved unanimously the minutes of its January 11-13, 1995 meeting.

LEGISLATIVE REPORT

Mr. Rabiej summarized actions initiated in the new Congress that would have an impact on the federal rules, including proposals to amend FED. R. CIV. P. 11 (sanctions) and 68 (offer of judgment). He stated that Judge Higginbotham, Judge Scirica, and Professor Cooper met with Congressional staff and advised them of concerns with several rules-related provisions in pending legislation governing securities litigation.

Mr. Rabiej reported that on February 8, 1995, the Administrative Office had transmitted to the Congress the Judicial Conference's report on FED. R. EVID. 413-415, requesting that the Congress reconsider these rules. By operation of law, the new rules would take effect on July 9, 1995. He stated that a great deal of effort had been undertaken by Judge Winter and others to meet with members of the Congress and their staff and to urge enactment of the Conference's substitute language.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Professor Mooney presented the report of the advisory committee, as set forth in Judge Logan's memorandum of June 5, 1995. (Agenda Item 5)

She noted at the outset that the committee had to make a policy decision regarding the appropriate terminology to use in light of the Supreme Court's recent action in changing "must" to "shall" in several proposed rules amendments. She reported that the advisory committee, in drafting amendments for Judicial Conference approval, had followed the convention of using "shall" when there is an active voice sentence and "must" when there is a passive voice sentence.

Mr. Garner stated that the golden rule of drafting is that a word should have one single meaning and should be used consistently. He stated that the word "shall" has as many as eight different meanings. Accordingly, he argued that it was not appropriate simply to change every "must" to "shall."

Several members stated that it was important to proceed with style improvements and substitute "must" for "shall" wherever appropriate. They emphasized the need to explain clearly to the Supreme Court why the committees were making the changes in terminology.

Judge Logan accepted a suggestion that the proposed amendments submitted for Judicial Conference approval be revised to use "shall" throughout, in light of the Supreme Court's recent action. He added, though, that his advisory committee would proceed expeditiously to restyle the entire body of appellate rules and use "must" as the consistent term to describe a duty to act.

Judge Logan pointed out that the advisory committee had incorporated all the other conventions of the style subcommittee in the proposed amendments, such as the use of shorter sentences and more breakouts of text. He also reported that the advisory committee had voted 7-1 to change the term "in banc" to "en banc," recognizing majority contemporary usage. Judge Pratt noted that he had dissented on this point in the style subcommittee because the governing statute uses the term "in banc."

1. Amendments for Judicial Conference Approval

Professor Mooney stated that the advisory committee was seeking Judicial Conference approval of amendments to four rules - FED. R. APP. P. 21, 25, 26, and 27.

FED. R. APP. P. 21

Professor Mooney explained that Rule 21, dealing with mandamus, had been published for public comment a second time. The major revision in the proposed amendment would eliminate the requirement that the trial judge be named and served as a respondent in a mandamus proceeding. As amended, the rule would reflect the reality that mandamus is, normally, an adversary proceeding between the parties.

Professor Mooney stated that the only controversial issue raised during consideration of the proposed amendments was whether the trial judge should be accorded an explicit right to appear before the court of appeals. She pointed out that the amended rule would require that a copy of the final disposition of the application for the writ be sent only to the clerk of the trial court, who would be expected to give it to the judge. The rule would also be amended to allow the court of appeals to "invite" the trial judge to participate.

Professor Mooney explained that the version of the rule first published by the advisory committee had given the trial judge a right to appear in the mandamus proceedings before the court of appeals. There was strong opposition in the public responses to having the trial judge participate actively in an appellate proceeding. Commentators pointed out that the judge, after having argued against one or more parties in the court of appeals, would have to resume hearing the case between the same parties. Some members of the committee agreed that it was unseemly to put the trial judge in the middle of the controversy, thereby raising concerns as to the judge's neutrality and objectivity. By analogy, they argued that on a "straight appeal" a trial judge would not be allowed to file a brief defending his or her evidentiary rulings or other judicial acts.

Judge Bertelsman stated that he strongly favored the earlier published version of the amended rule, which would have given the trial judge an express right to appear before the court of appeals. He argued that there are cases in which none of the parties is interested in supporting the trial judge's actions. This occurs most often when the trial judge imposes procedural requirements that the parties find burdensome or objectionable. Accordingly, he objected to the amendment to the extent that it would eliminate the trial judge's right to appear.

Judge Logan added that the commentators who had opposed trial judges' participation were particularly concerned about two matters: (1) that the trial judge might ask one of the parties to write the brief supporting the judge's actions, and (2) that participation was counterproductive and inefficient in cases when prisoners file an application for a writ of mandamus to force the trial judge to act quickly on their papers. These applications are numerous and generally are handled without the need for adversary proceedings or an appearance by the trial judge.

Judge Parker stated that sending notice of the mandamus application to the trial clerk alone would not guarantee that the trial judge would actually receive it. Accordingly, he suggested: (1) adding to line 16 the words "and give a copy to the trial judge," and (2) revising the second sentence of subdivision (b)(4) to read: "The trial court judge may request permission to respond, but may not respond unless invited or ordered to do so by the court of appeals."

The committee took separate straw votes on three concepts embodied in the proposed amendments. First, it voted with one objection to require that the trial judge be given a copy of the mandamus petition and the final disposition. Second, it voted 10-4 to amend subdivision (b)(4) to provide that the trial judge may request permission to participate in the appellate proceedings. Third, it voted with one objection against giving the trial judge a right to appear.

On Thursday afternoon Judge Logan distributed a retyped draft of the proposed amendments to Rule 21. Justice Veasey moved approval of the draft. **The committee voted 10-1, over Judge Bertelsman's objection, to approve the proposed amendments and send them to the Judicial Conference.**

FED. R. APP. P. 25

a. Filing and Service by Commercial Carrier

Professor Mooney reported that Rule 25, dealing with filing and service, had been published originally with a provision stating that a party wishing to file a brief or appendix using the "mailbox rule" must file the document by first class mail. In response, several comments from the bar suggested that the use of commercial carriers should also be authorized. Accordingly, the advisory committee amended and republished the rule to allow filing by "reliable commercial carrier." The second round of public comments, however, produced several warnings that litigation would arise over the meaning of the word "reliable."

Thus, the advisory committee's current draft would allow the use of commercial carriers, but omits the term "reliable." It would allow a party to use the mailbox rule if it gives the paper to a commercial carrier who will deliver it within three days. It would also allow service on another party by commercial carrier.

The public comments also pointed out that it would be difficult as a practical matter for recipients of documents to distinguish between personal service and delivery by commercial carrier. Thus, the rule had been further amended to provide that service may be made by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. Rule 26(c) was also amended to provide the 3-day extension regardless of the method of service, unless the document is delivered to the party on the date of service.

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

b. Electronic Filing

Professor Coquillette stated that the reporters had convened twice to draft common language governing electronic filing of documents with a court. Their common language would be included in proposed amendments to FED. R. APP. P. 25(a)(2)(D), FED. R. BANK. P. 5005(a), and FED. R. CIV. P. 5(e). He pointed out, though, that two technical changes in language had to be made to accommodate the bankruptcy rules. First, the proposed bankruptcy version of the rule refers to the filing of "documents," rather than "papers" to clarify that public access requirements under the Bankruptcy Code will apply to electronically filed data that may never be in tangible paper form. Second, the bankruptcy version contains additional references to the Federal Rules of Bankruptcy Procedure themselves, to those Federal Rules of Civil Procedure incorporated by reference into the Bankruptcy Rules, and to § 107 of the Bankruptcy Code.

The committee voted without objection to approve the proposed, common amendments to the appellate, bankruptcy, civil, and criminal rules, dealing with electronic filing, and send them to the Judicial Conference.

FED. R. APP. P. 26

Professor Mooney reported that the proposed changes in Rule 26 were companion amendments to those of Rule 25. They would provide a 3-day extension if a party is served by commercial carrier, unless the party has received the paper on the date of service. The intent was to allow an extra 3 days if delivery is by commercial carrier, but not if the papers have actually been delivered on the date of service.

Some members pointed out a problem with the draft language in that it would seem to include the possibility of a paper being served "before" the date of service. Judge Logan suggested improving the language by closing the proposed amendment with the words: "unless the paper is delivered on the date of service." He also suggested eliminating from the caption the words, "by Mail or Commercial Carrier." Judge Pratt moved to eliminate the words "or acknowledgement" on lines 7-8. **These changes were approved by the committee without objection.**

The committee then voted to approve the revised rule and send it to the Judicial Conference.

FED. R. APP. P. 27

Professor Mooney stated that Rule 27, governing motions, had been entirely rewritten by the advisory committee. The amended rule would require that all arguments be made in the motion itself. Separate briefs would not be allowed. The rule also would

provide a right to reply to a response and would impose page limits on motions and responses. The advisory committee had moved the requirements regarding the form of motions from Rule 32 to Rule 27.

Professor Mooney stated that, upon the advice of Mr. Garner, the words "with the following exceptions" should be removed from lines 86-87 and the two indented paragraphs following should be integrated into the text as additional sentences.

She also pointed out that Judge Stotler had noticed a difference between the language in Rule 27 and the language of the proposed amendments to Rule 32. Professor Mooney stated that the advisory committee would want the language of the two rules to be identical and would change Rule 27 to incorporate the language of proposed Rule 32.

Mr. Perry noted, however, that the proposed amendments to Rule 32 had not yet been published. He suggested that the amendments to Rule 27 be deferred until the public comments had been received on Rule 32. Both rules could then be considered together. Other members suggested that additional drafting changes were needed in Rule 27.

Mr. Perry moved to table approval of Rule 27 until after public comment had been received on Rule 32. The motion was approved without objection.

2. **Amendments for Publication**

FED. R. APP. P. 26.1

Professor Mooney reported that Rule 26.1, dealing with corporate disclosure statements, had been reorganized by the advisory committee to make it easier to understand. The principal substantive change would simplify what a corporate party must disclose. The amendment would eliminate the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. It would require disclosure only of a parent corporation and of any stockholders that are publicly held companies owning 10% or more of the party's stock.

Ms. Gorelick suggested that the rule be matched up with the canons of judicial ethics since there is a high level of public concern on the issue of a judge's financial interests. Judge Easterbrook recommended, and Judge Logan agreed, that the views of the Committee on Codes of Conduct should be solicited expressly during the public comment period.

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

FED. R. APP. P. 28

Professor Mooney pointed out that the changes to Rule 28 were merely conforming amendments to the proposed changes in Rule 32, plus some stylistic improvements and cross-reference changes.

The committee voted without objection to approve the proposed amendments for publication. On request of Judge Logan, however, the committee later decided to withdraw Rule 28 from publication.

FED. R. APP. P. 29

Professor Mooney stated that Rule 29, governing amicus curiae briefs, had been rewritten entirely. The major change would require that the proposed brief be filed with the motion for leave to file the brief. The motion would have to show the relevance of the matters asserted by the amicus, and the brief would have to comply with all the requirements for a brief specified in Rule 32. It would fix a limit on the length of an amicus brief at half the length of the principal brief. It would also make clear that an amicus may not file a reply brief and would not have the right to participate in oral argument.

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

FED. R. APP. P. 32

Professor Mooney reported that the principal changes made in Rule 32 following publication were as follows:

1. The rule, as published, had provided that briefs could be printed on both sides of a page. In response to a great many negative comments, the advisory committee decided to change the rule and allow printing only on one side.

2. In light of criticism from the public that the requirement of 300 dots per inch was too technical for the text of the rule, the matter was moved from the text to the committee note.

3. All references to carbon copies were deleted.

4. The preference for proportional typeface was deleted in light of many comments from judges expressing a preference for monospaced typeface.

5. In response to a large number of comments from appellate judges that the proposed rule had not mandated a large enough typeface, the advisory committee changed the rule to specify a minimum of 14 points.

6. The requirement for monospace typeface was increased to a maximum of 10-1/2 characters per inch since some computers have more than 10 monospaced characters per inch.

7. The provisions for pamphlet briefs were eliminated because these briefs are very rare. Moreover, elimination of the provisions would result in a simpler rule.

8. The maximum length of a brief was fixed at 14,000 words, with an average of not more than 280 words per page.

9. The "safe harbor" provision was eliminated for proportional spacing, but retained for monospaced briefs. As published, the amendment would have required an attorney to certify compliance with the word count. As amended, the certification would be more detailed and would apply to both proportionally spaced briefs and monospaced briefs.

10. As amended, a brief would have to lie "reasonably flat" when open.

11. The restriction on the use of sans serif type was eliminated.

Judge Easterbrook reported that many appellate judges had stated that they would like to receive copies of the disks on which briefs are prepared for the judges' use in writing their opinions. Accordingly, he suggested that Rule 32 might be further amended to require that when lawyers prepare their brief by computer they should provide a disk to the court. Such a provision would not require them to prepare their briefs on a computer, but it would require them to give a disk to the court if they did in fact use a computer.

A straw vote was taken on the concept of requiring that a disk be filed with the court, if one is available. The concept was approved without objection, and Judge Easterbrook was requested to prepare appropriate draft language to be included in the package of amendments to Rule 32.

Judge Logan suggested that it might be better to send the proposal on filing disks back to the advisory committee since it had not considered the issue. Judge Stotler added that it was unusual for the Standing Committee to draft and publish a rule directly. Professor Hazard emphasized that it was essential for the rules committees to take their time and draft proposed amendments in a careful and thorough manner. It was

particularly important to resolve all drafting problems with Rule 32 before distribution for public comment because it had already been published twice before.

The committee voted 8-5 to defer publication of the proposed amendments to Rule 32 pending resolution of all outstanding drafting issues.

Several members stated that they had additional suggestions to improve the language of the rule. In response, Judge Logan proposed having the advisory committee consider all the suggestions and report back to the Standing Committee at its January 1996 meeting with a revised version of Rule 32. **Accordingly, the committee agreed without objection to defer further action on Rule 32.**

Judge Logan stated that the proposed amendments to Rule 28 were dependent on Rule 32. Accordingly, he recommended that Rule 28 also be deferred for further action.

The committee voted without objection to defer taking action on Rule 28.

Judge Logan reported that he was sympathetic with the complaints by the bar that there had been too many changes in the rules. He explained, however, that the Advisory Committee on Appellate Rules had taken the local rules project very seriously and had proposed a substantial number of amendments to the national rules in order to eliminate local court rules and thereby achieve greater national uniformity. He suggested that the effort could result in eliminating as many as half the local appellate rules.

Judge Logan stated that he expected to present a restyled package of the entire body of the Federal Rules of Appellate Procedure for consideration by the Standing Committee at its January 1996 meeting. He suggested that it was very important to document the style improvements and to emphasize that no changes in substance are intended unless clearly identified as such. He suggested that the public comment period should be longer than normal and that the restyling project should be explained carefully to bench and bar.

FED. R. APP. P. 35

Professor Mooney reported that the principal proposed change proposed by the advisory committee was to eliminate a trap in the rule. When a party files a motion for a panel rehearing, the filing tolls the time for filing a petition for certiorari in the Supreme Court. On the other hand, when a party files a suggestion for a hearing en banc, it does not toll the time for filing a petition for certiorari.

The advisory committee decided to eliminate the trap by treating a suggestion for hearing en banc the same as a petition for a panel rehearing. The committee also would

change the term "suggestion" for a hearing en banc to a "petition" to further clarify the rule. Corresponding changes would also be made in Rule 41. Professor Mooney reported that the Supreme Court had been made aware by correspondence of the advisory committee's proposed action and had not voiced any objection to the committee's approach.

Judge Logan added that the pertinent Supreme Court rule provided that if a local circuit rule treated a suggestion for a hearing en banc the same as a petition for a panel rehearing, it would toll the time for filing a petition for certiorari. Thus, the proposed amendments to Rule 35 would supersede local rule variations with a national norm.

Professor Mooney stated that the advisory committee, at the request of the Solicitor General, would also amend the rule to specify that inter-circuit conflicts are a matter of "exceptional importance" that may justify a rehearing en banc. The committee also added a new 15-page limit on the length of petitions.

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

FED. R. APP. P. 41

Professor Mooney pointed out that some of the amendments were designed to coordinate with the proposed amendments to Rule 35. They also contain a new provision, added at the request of the Department of Justice, stating that the mandate is effective when issued. In addition, they would increase the presumptive period for a stay of mandate from 30 days to 90 days. A court, though, is authorized to issue a stay for a period shorter than 90 days.

Judge Easterbrook expressed concern that the language of the proposed amendment could be read as giving a party an automatic 7 days' delay simply by filing a motion to stay the mandate. Moreover, there appeared to be no limit to the number of stay motions that a party could file. Judge Easterbrook suggested, however, that the rule be published in its current form and that the difficulty be addressed after the close of the comment period.

The committee voted with one objection to approve the proposed amendments 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 of May 23, 1995. (Agenda Item 6)

1. Amendments for Judicial Conference Approval

Judge Jensen reported that the advisory committee had published proposed amendments to FED. R. CRIM. P. 16 and 32 and had held public hearings on them. The advisory committee had considered the public comments, made several changes in the proposed amendments, and voted to recommend their approval by the Judicial Conference.

FED. R. CRIM. P. 16

a. *Disclosure of Expert Witnesses*

The proposed amendments to Rule 16(a)(1)(E) and Rule 16(b)(1)(C) had been requested by the Department of Justice. They would require the defendant, on request, to provide pretrial disclosure of information concerning its expert witnesses on the defendant's mental condition. The government would be required to make reciprocal disclosure.

The committee voted without objection to approve the proposed amendments to Rule 16(a)(1)(E) and 16(b)(1)(C).

b. Pretrial Disclosure of Witness Names and Statements

The proposed amendments to Rule 16(a)(1)(F) and Rule 16(b)(1)(D) would require the government to disclose 7 days before trial the names and statements of witnesses that it intends to call during its case-in-chief. Disclosure would not be required, however, if the attorney for the government: (1) believes in good faith that pretrial disclosure of this information would threaten the safety of any person or lead to an obstruction of justice, and (2) files under seal an ex parte, unreviewable written statement to that effect. The amendments would apply reciprocal discovery requirements on the defense.

Judge Jensen reported that at the suggestion of magistrate judges, the advisory committee had restricted application of the rule to felony cases. It had also clarified the rule to provide explicitly that the attorney for the government may decline to disclose either the witness' name or statement, or both.

Judge Jensen asserted that reasonable pretrial disclosure was sound public policy and that the rule would further good trial management. Among other things, it would eliminate the need for a court to stop a case in the middle of a trial. He recognized that the rule presented a potential conflict with the Jencks Act, but argued that it was appropriate to proceed, using the Rules Enabling Act process to bring these important policy matters to the attention of the Congress.

Ms. Gorelick stated that the Department of Justice was strongly opposed to the proposed amendments. She argued that their disclosure requirements were different from, and more extensive than, those required in the Jencks Act. She added that the Department had worked hard to avoid problems of delay and disruption of trial management. It had also engaged in extensive training of prosecutors and cooperation with judges to resolve discovery problems. She stated that the Department instructed its prosecutors to provide the names and statements of witnesses wherever possible, when there is no danger to witnesses.

She emphasized that the requirement in the proposed rule that the United States attorney certify that a witness is endangered was both excessively burdensome and impractical. If a prosecutor were insufficiently sure of a potential threat, he or she might not in good faith be able to file an affidavit. The Department simply did not have the resources to investigate every case before filing a certification. The proposal, in her opinion, would increase the threat of danger to witnesses and would result in less witness cooperation.

She stated that she and the Attorney General had been following the proposal closely and did not believe that there was a systemic problem with disclosure of pretrial information. The Department had received few complaints from judges about pretrial disclosure. She added that when a court ordered pretrial discovery, the Department complied with the order.

Ms. Gorelick concluded that if the proposed rule were approved, the Department would fight it in the Congress because of its concern over the safety of witnesses, especially in violent crime cases. She also stated that victim groups would oppose the proposal.

Professor Schlueter stated that the advisory committee had heard and considered all these concerns in the past and had delayed publishing the draft on several occasions as a courtesy to the Department of Justice. The committee had made several concessions in the draft, including giving the United States attorney the right to avoid pretrial disclosure simply by filing a confidential, unreviewable certification with the court.

Professor Schlueter pointed out that several amendments had already been enacted to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence that require the government to disclose the names and statements of witnesses before trial. He also stated that most state courts and the military courts routinely provide defendants with the names, addresses, and statements of witnesses before trial.

He concluded that the public comments on the proposed rule were overwhelmingly favorable. Ms. Gorelick responded, however, that the United States attorneys were strongly opposed to the amendments, but they had not chosen to submit comments.

Judge Bertelsman suggested and Judge Ellis moved that the court be given

discretion in the rule to set a time for disclosure shorter than 7 days before trial. **The committee approved the motion with one objection (Ms. Gorelick).**

Judge Easterbrook stated that the committee note was not very clear in stating that the proposed amendment was in conflict with the Jencks Act. He stated that he did not believe a good enough case had been made to take the unusual step of relying on the supersession mechanism in the Rules Enabling Act.

After a number of drafting improvements had been accepted, the committee voted 7-6 to approve the rule and send it to the Judicial Conference.

Judge Stotler stated that a minority report should be drafted, and Ms. Gorelick agreed to prepare the report.

Judge Bertelsman then asked to change his vote and have the committee reconsider the rule. He stated that, even though he believed that the amendments were beneficial on the merits, they had no chance of succeeding unless they enjoyed near-unanimous support on the committee.

The committee voted 11-2 to reconsider its vote approving the amendments. It then voted 9-5 against sending the proposal to the Judicial Conference.

Mr. Schreiber moved to avoid a possible conflict with the Jencks Act by revising the proposed amendments to limit pretrial disclosure to the names of witnesses. All references to statements of witnesses would be eliminated. Judge Jensen responded that the advisory committee would probably this proposed revision, although it would be less than the committee had proposed.

Several members suggested that the proposed revision would eliminate any conflict with the Jencks Act. Ms. Gorelick replied that even if the statutory conflict were removed, the Department's policy concerns with the amendment remained.

The committee voted 12-2 to redraft the proposed amendment and limit pretrial disclosure to the names of witnesses. Ms. Gorelick and Professor Hazard were in opposition.

The committee then considered a clean draft of the amendment prepared by Professor Schlueter and Mr. Garner, reflecting the vote of the committee to limit pretrial disclosure to the names of witnesses. The revised draft committee note would eliminate any reference to the Jencks Act. Mr. Pauley stated that the proposed redraft was defective, in that it appeared to allow the courts and defense counsel to challenge the good faith of the United States attorney. He suggested that the courts could expect routine

challenges and satellite litigation. He and several members of the committee suggested substitute language for the text of the rule and the committee note.

Judge Wilson moved to adopt substitute language drafted by Judge Easterbrook. The committee approved the language with one objection.

The committee then voted 9-2 to approve the proposed amendments to the rule and send them to the Judicial Conference. (Mr. Klineberg and Professor Hazard dissented.)

FED. R. CRIM. P. 32

The amendment to Rule 32(d) had been proposed by the Department of Justice. The present rule has been interpreted as not authorizing a court to enter an order of forfeiture before sentencing. The amendment would permit a court to enter a preliminary forfeiture order at any time before sentencing.

No unfavorable comments had been received on the rule during the public comment period. The advisory committee, however, made a number of minor improvements in the rule as a result of the comments.

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

2. Amendments for Publication

Judge Stotler suggested that the committee address as part of a single discussion the proposed amendments that would require attorney participation in voir dire in both criminal and civil cases. (FED. R. CRIM. P. 24 and FED. R. CIV. P. 47).

FED. R. CRIM. P. 24

Judge Jensen reported that the proposed change to Rule 24 would give attorneys a right to engage in voir dire after there has been a preliminary voir dire by the judge. He stated that the advisory committee was of the view that voir dire is better when the attorneys participate in it. Moreover, he said, attorney participation helps the court in dealing with challenges to jurors, and it promotes the goal of a fair jury. He reported that the proposed amendments had been approved by the advisory committee on a 9-2 vote.

He pointed out that the text of the rule drafted by the advisory committee differed in some respects from that prepared by the Advisory Committee on Civil Rules. Under

the language of the proposed criminal version, the court would conduct the "preliminary voir dire," the attorneys would conduct "a supplemental examination" of prospective jurors, and the court could place reasonable limits on—and terminate—the supplemental examination by the attorneys.

The committee engaged in a lengthy discussion of the merits of the proposal. Strong differences of opinion were expressed. Those in favor argued that the bar should be given an opportunity to comment on the proposal. They stated that only judges had made their views known to date, and the committee should publish the proposal in order to benefit from the comments of practicing lawyers.

Those opposed to the proposal emphasized that the current rules permit attorney voir dire, and most judges in fact allow some form of participation by lawyers. They objected to forcing all judges to require attorney voir dire in all cases, regardless of the type of case and the local legal culture. They also argued that there was no empirical basis for mandating a change in current procedure and requiring a single national rule. In summary, they argued that the committee should respect local legal culture and should not attempt to fix something that is not broken.

Some members expressed concern that the proposed rule would create a new right and provide new grounds for an appeal. Professor Cooper pointed out that the civil advisory committee was very sensitive to the issue of appellate review. As a result, the text of the committee's draft attempted to limit appellate review by providing explicitly for "reasonable limits set by the court in its discretion." The committee's proposed note, moreover, referred to the "broad discretion" of the district court, specifying that only a clear abuse by a trial judge would justify a reversal by the court of appeals. Professor Schlueter agreed, stating that it was also the intent of the criminal advisory committee to give maximum discretion to the trial judge.

Members suggested that the language of the rule was uncertain and that there were differences between the respective proposals of the civil and criminal advisory committees. It was unclear, for example, whether the amendments gave an attorney the right in all cases to ask questions orally, as opposed to the right to submit written questions to the court. Professor Hazard recommended clarification of the text of the rule or the committee note.

Mr. Schreiber moved to eliminate the word "preliminary" from line 3 of the criminal version of the amendments. **The committee approved the motion with one objection.** Mr. Schreiber also moved to add the word "however" on line 4 and the word "oral" on line 6. **The committee approved the motion with one objection. It further voted to make these changes in both FED. R. CRIM. P. 24 and FED. R. CIV. P. 47.**

Professor Schlueter stated that both the civil and criminal advisory committees favored publishing simultaneously both versions of the proposed amendments. Ms. Gorelick, however, responded that only one version should be submitted for public

comment, covering both civil and criminal cases.

The committee first voted 8-7, with the chair breaking the tie, to table the proposed rules. It later voted 7-6 to untable the matter, to have Professor Cooper and Professor Schlueter work out differences in language between the civil and criminal versions of the rule, and to have the committee consider the matter further.

Judge Vinson, Professor Schlueter, and Professor Cooper subsequently presented a redrafted, common version of the proposed amendments.

Professor Hazard stated that greater time and care should be spent in drafting the proposed amendments. He suggested that, after preliminary consideration by the Standing Committee, they should be referred back to the respective advisory committees for additional attention. The chair added that it had been the consensus of the Standing Committee in the past that drafting issues generally should be resolved before the meetings, rather than at the meetings.

Other members recommended that the amendments, as revised during the course of the meeting, should be distributed for public comment immediately. Judge Vinson added that he was confident that the civil advisory committee would be satisfied with the revisions made by the Standing Committee.

The committee then approved several drafting changes in the proposed amendment suggested by the members.

The committee voted 8-3 to authorize publication of the revised amendments to FED. R. CIV. P. 47 and FED. R. CRIM. P. 24.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Mannes reported that the advisory committee had prepared for publication several amendments to the bankruptcy rules necessary to implement the provisions of the Bankruptcy Reform Act of 1994. He also noted that the Act had amended FED. R. BANK. P. 7004(h)—over the opposition of the Judicial Conference—to require that service on insured depository institutions in adversary proceedings be made by certified mail, rather than first class mail.

Professor Resnick presented the report of the advisory committee, as set forth in Judge Mannes' memorandum of June 1, 1995. (Agenda Item 10)

1. Amendments for Judicial Conference Approval

Professor Resnick reported that public comment on the proposed amendments had been very light. Only 11 letters had been received, including two from bar associations voicing general approval of the amendments. None of the recommendations was viewed as controversial. The committee canceled the scheduled public hearing for lack of witnesses.

FED. R. BANK. P. 1006

The rule would be amended to provided that the new administrative fee set by the Judicial Conference—and any other fee fixed by the Conference and payable at the commencement of a case—may be paid in installments with court approval.

FED. R. BANK. P. 1007

The rule would be amended to provide that new schedules and statements need not be filed when a case is converted to another chapter of the Bankruptcy Code, regardless of the chapter under which the case was proceeding before conversion. The existing rule applies only to conversions of cases from Chapter 7.

FED. R. BANK. P. 1019

Paragraph 7 of the rule would be abrogated, consistent with the proposed abrogation of Rule 3002(c)(6), *infra*.

FED. R. BANK. P. 2002

Professor Resnick stated that Rule 2002, governing notices, would be amended in several respects. Of particular note was a change that would result in cost savings in administering Chapter 7 cases. Toward the conclusion of a Chapter 7 case, the trustee is required to file a final report and a final account. Under the current rule, both the report and the account must be mailed to all creditors. The advisory committee believed that it would be sufficient to send all creditors just the report, and not the account.

The advisory committee also clarified and significantly restyled subdivision (h), which authorizes the court to send notices only to those creditors who have filed a proof of claim.

FED. R. BANK. P. 2015

Rule 2015(b) and (c) would be amended to clarify that in a Chapter 12 case or a

Chapter 13 case involving a debtor engaged in business the debtor or trustee does not have to file an inventory of the debtor's property, unless the court orders otherwise.

FED. R. BANK. P. 3002

Professor Resnick reported that under the current Rule 3002 an unsecured creditor or equity security holder must file a timely proof of claim or interest in order for the claim or interest to be allowed. He stated that several courts had held the rule invalid on the grounds that it was inconsistent with § 726 of the Bankruptcy Code, which recognizes that in a Chapter 7 case a creditor holding a claim that has been tardily filed may be entitled to receive a distribution. Other courts, however, had upheld the rule. The advisory committee expended a great deal of effort trying to improve Rule 3002 and make it consistent with the Code. It found a way to do so by abrogating subdivision (c)(6) and adding a proposed new subdivision (d) to the rule. These proposed changes had been distributed for public comment on September 1, 1994.

Later in 1994, however, Congress added § 502(b)(9) to the Bankruptcy Code to clarify the rights of creditors who tardily file a proof of claim. As a result, the committee's proposed amendments were no longer necessary and were deleted following the public comment period. The advisory committee, instead, changed the rule to simply conform to the 1994 legislation on filing proofs of claim.

Rule 3002 would also be amended to eliminate any distinction between domestic and foreign governmental units.

FED. R. BANK. P. 3016

Professor Resnick stated that the advisory committee proposed abrogating Rule 3016(a), because it is probably inconsistent with § 1121 of the Bankruptcy Code. The rule could be applied in such a way as to extend the debtor's statutorily prescribed exclusive period for filing a Chapter 11 plan without a finding of cause by the court.

FED. R. BANK. P. 4004

The current rule, among other things, provides that a debtor in a Chapter 7 case must be granted a discharge unless one of four conditions is present. The advisory committee would add two additional grounds for delaying or not granting a discharge, i.e., (1) when a motion is pending to extend the time for filing a complaint objecting to the discharge, and (2) when the debtor has not paid the filing fee in full.

FED. R. BANK. P. 5005

The amendments to Rule 5005(a), authorizing electronic filing of documents with the court, were approved by the committee earlier in the meeting in connection with the approval of FED. R. APP. P. 25, *supra*.

FED. R. BANK. P. 7004

Professor Resnick stated that the current Rule 7004 makes many of the provisions of FED. R. CIV. P. 4 applicable in adversary proceedings. The cross-references in Rule 7004 to Civil Rule 4, however, are to Rule 4 as it existed in December 1990. That rule was later amended in 1993. The advisory committee would amend Bankruptcy Rule 7004 to conform to the 1993 amendments to FED. R. CIV. P. 4.

Professor Resnick also pointed out that the Congress, as part of the Bankruptcy Reform Act of 1994, had added a new subdivision (h), governing service of process on an insured depository institution. In bankruptcy, service is normally made by first class mail. But under this Congressionally enacted rule, certified mail is required for service on an insured depository institution.

FED. R. BANK. P. 8008

Rule 8008 governs the filing of papers in an appeal to the district court or bankruptcy appellate panel. The advisory committee would incorporate into the rule the proposed electronic filing provisions of Rule 5005.

FED. R. BANK. P. 9006

The rule would be amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8) as Rule 2002(a)(7).

The committee voted unanimously to approve the proposed amendments to the bankruptcy rules and send them to the Judicial Conference.

2. Amendments for Publication

Professor Resnick stated that most of the proposed amendments to be published for comment had been designed to implement the provisions of the Bankruptcy Reform Act of 1994, which amended approximately 60 sections of the Bankruptcy Code.

FED. R. BANK. P. 1019

Professor Resnick stated that the current rule, dealing with conversion of cases to Chapter 7 refers to the "superseded case" and the "original petition." It therefore leaves the erroneous impression that conversion of a case to another chapter results in a new case or a new petition for relief. Subdivisions (3) and (5) would be amended to delete these phrases. The advisory committee also reorganized and restyled subdivision (5) to make it easier to read.

FED. R. BANK. P. 1020

The new rule would implement the provision of the Bankruptcy Reform Act of 1994 that permits an eligible debtor to elect to be considered a small business in a Chapter 11 case. The proposed rule would specify the procedures and time limit for making the election.

FED. R. BANK. P. 2002

The advisory committee would amend Rule 2002(a)(1) to add a reference to § 1104(b) of the Code. The effect would be to require that 20 days' notice be given of the meeting of creditors to elect a trustee in a Chapter 11 case.

The Bankruptcy Reform Act of 1994 amended § 342(c) of the Code to provide that certain additional information be included in the caption of every notice required to be given by a debtor to a creditor. The proposed amendment to Rule 2002(n) would incorporate the new statutory requirements into the rule.

FED. R. BANK. P. 2007.1

The amendments to the rule would provide procedures for electing a trustee in a Chapter 11 case in accordance with § 1104(b) of the Code, as amended by the Bankruptcy Reform Act of 1994.

FED. R. BANK. P. 3014

The current rule provides that a secured creditor who elects application of § 1111(b)(2) of the Code must do so by the time of the hearing on the disclosure statement, or such later time as the court may fix. Professor Resnick stated that Rule 3014 had to be amended to take account of the provisions of the Bankruptcy Reform Act of 1994 governing small businesses under Chapter 11. In a small business case there may never be a hearing on the disclosure statement. Therefore, the advisory committee would amend the rule to provide a time limit for electing application of § 1111(b)(2) in a small

business case in which a conditionally approved disclosure statement is finally approved without a hearing.

FED. R. BANK. P. 3017

The rule governs the procedure by which a disclosure statement is approved before it is distributed to creditors. The advisory committee would amend subdivision (a) to carve out an exception for new Rule 3017.1, which covers small business cases.

The rule also currently specifies that record holders of securities, as of the date that the order approving the disclosure statement is entered, are the ones who will receive the solicitation documents. The advisory committee would amend the rule to give the court flexibility to fix the record date for determining the holders of securities who are entitled to receive the disclosure statement and other solicitation materials.

FED. R. BANK. P. 3017.1

The new rule would implement the concept, introduced in the Bankruptcy Reform Act of 1994, of conditional approval of a disclosure statement in a small business case. The amendment would provide that the disclosure statement may be distributed following conditional approval by the court. The court could then combine the disclosure statement hearing with the hearing on confirmation. If no timely objection were made to the disclosure statement, it would not be necessary for the court to hold a hearing on final approval of the statement.

FED. R. BANK. P. 3018

The rule would be amended to give the court flexibility to fix the record date for the purpose of determining which holders of securities may vote on a plan.

Judge Pratt pointed out an inconsistency in terminology between the proposed amendments to Rule 3018 and Rule 3017, even though the advisory committee apparently had intended the same substance in the two rules. The amendment to Rule 3017 reads: "or another date as the court may, after notice and a hearing, for cause fix." The amendment to Rule 3018 specifies: "or on another date fixed by the court, for cause, after notice and a hearing." He recommended using the language of Rule 3018 in both instances. Professor Resnick agreed to conform the language of the two provisions to whichever version the style committee and the advisory committee found superior.

FED. R. BANK. P. 3021

The proposed amendments to Rule 3021 would provide the court with flexibility to fix the record date for the purpose of determining which security holders are entitled to distribution under a confirmed plan.

Professor Resnick stated that in drafting the amendment, the advisory committee had also noticed an inconsistency in the current rule. Accordingly, it would amend the rule to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by specifying that they will receive a distribution only if their claims have been allowed.

FED. R. BANK. P. 8001

The rule would be changed in two ways to conform to the Bankruptcy Reform Act of 1994. The 1994 Act changed the law to provide a right to an immediate appeal from an order extending or reducing the debtor's exclusive period for filing a Chapter 11 plan. The advisory committee would amend subdivision (a) to implement the statutory change.

The 1994 Act provided that when a bankruptcy appellate panel service is available, an appeal will lie automatically to the panel, unless the parties elect to have it heard by the district court. The advisory committee would amend subdivision (e) to provide the procedure for electing a district court appeal. The proposed amendment makes reference to § 158(c)(1) of the Code, which specifies the pertinent time limits.

FED. R. BANK. P. 8002

Professor Resnick explained that in the bankruptcy rules the time for filing an appeal is only 10 days, rather than the 30 days specified in FED. R. APP. P. 4. The time period for filing a bankruptcy appeal may be extended in two ways: (1) If a motion to extend the time is filed within the 10-day period, it may be granted by the court, but only for an additional 20 days; (2) If the 10-day period for filing a motion to extend is missed, a party may still file a motion to extend the time for "excusable neglect," except with regard to certain specified categories of time-sensitive matters.

Professor Resnick pointed out that in a recent case a judge granted a motion for leave to file a notice of appeal after the 20-day time period had expired, even though the party had filed the motion within the time limit. The court of appeals held that the time for filing the notice of appeal could not be extended beyond 20 days, even though the delay resulted from the judge not having ruled on the motion. Professor Resnick stated that this result was inconsistent with the pertinent provisions of the Federal Rules of Appellate Procedure, which protect an appellant as long as the motion is filed on time.

The advisory committee would amend Rule 8002 to: (1) provide that a party must file a request for an extension of time within the applicable time limit, (2) provide that the court will have discretion, more than 20 days after the expiration of the time to file a notice of appeal, to allow a party to file a notice of appeal if the party's motion for an extension was timely and if the notice of appeal is filed not later than 10 days after entry of the order extending the time, and (3) prohibit any extension of time to file a notice of appeal if the appeal is from certain specified types of orders. The list of specific orders would be moved up to the front of the rule.

Judge Easterbrook pointed out that lines 40-41 of the proposed amendments to Rule 8002 had been modeled on FED. R. APP. P. 4(a)(5). He questioned why the advisory committee would choose subdivision 4(a)(5) as the model, rather than subdivision 4(b), since the latter provides a definite cut-off date and prevents delay. Professor Resnick responded that it had been the strong view of the members that the parties should not be penalized when delay is caused by a judge or clerk.

Professor Resnick agreed to bring to the attention of the advisory committee a suggestion by Professor Hazard that a statement be added to the committee note specifying that a party who files a motion to extend the time, which is later denied, would have no recourse unless the notice itself were filed within the 10-day period.

FED. R. BANK. P. 8020

Proposed new Rule 8020, which is related to FED. R. APP. P. 38, would give the district court or bankruptcy appellate panel hearing an appeal express authority to impose damages and costs for frivolous appeals.

FED. R. BANK. P. 9011

Rule 9011 is analogous to FED. R. CIV. P. 11. The advisory committee would amend Rule 9011 to conform to the 1993 amendments to Rule 11. The "safe harbor" provision in the proposed bankruptcy rule, however, would not apply to the filing of a petition.

FED. R. BANK. P. 9015

Rule 9015, dealing with jury trials, had been abrogated following enactment of the Bankruptcy Reform Act of 1984. The Bankruptcy Reform Act of 1994 provides that bankruptcy judges may conduct jury trials if: (1) they are specially designated by the district court to do so, and (2) the parties expressly consent. The proposed new Rule 9015 would provide procedures relating to the conduct of jury trials in bankruptcy cases and proceedings, including procedures for the parties to consent to have a jury trial

conducted by a bankruptcy judge. The proposed new national rule is based on the provisions of the interim bankruptcy rule which had been approved by the Standing Committee in January 1995.

FED. R. BANK. P. 9035

The rule contains a minor change necessary to deal with the six districts in Alabama and North Carolina that do not have a United States trustee. The present rule provides that the Bankruptcy Rules apply in these districts to the extent they are not inconsistent with the provisions of titles 11 and 28. Some statutes relating to bankruptcy administrators, however, are not codified in title 11 or title 28. Therefore, the rule would be amended to apply to all federal statutes.

The committee unanimously approved the proposed amendments in the bankruptcy rules for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Vinson presented the report of the advisory committee, as set forth in Judge Higginbotham's memorandum of June 2, 1995. (Agenda Item 8)

1. Amendments for Judicial Conference Approval

The amendments to Rule 5(e), authorizing electronic filing of documents with the court, were approved by the committee in connection with the approval of FED. R. APP. P. 25, *supra*.

2. Amendments for Publication

FED. R. CIV. P. 9

Judge Vinson reported that the proposed amendment to Rule 9(h) would treat a case that includes an admiralty or maritime claim as an admiralty case under 28 U.S.C. § 1291(a)(3) for the purpose of taking an interlocutory appeal.

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

FED. R. CIV. P. 26

Judge Vinson reported that the proposed amendments to Rule 26(c), dealing with protective orders, had been submitted to the Judicial Conference for approval at its March 1995 session. Members of the Conference, however, had expressed concern about the

amendments. As a result, the Conference voted to eliminate the proposal that would authorize a court expressly to issue a protective order on stipulation of the parties, and it returned the amendments to the committee for further consideration.

Judge Vinson stated that the advisory committee at its April 1995 meeting had considered four alternative courses of action with regard to Rule 26(c): (1) to eliminate any reference in the proposed amendments to stipulations made by the parties, (2) to retain the reference to stipulations, but redraft the amendments to make it explicit that, even with a stipulation, there is still a requirement of "good cause" for issuance of a protective order, (3) to do nothing further with regard to Rule 26(c), and (4) to adhere to the committee's prior draft, as submitted to the Judicial Conference, and to republish it for public comment. The committee chose the fourth alternative.

Judge Vinson emphasized that protective orders are an essential part of civil litigation and are used in a wide variety of categories of civil cases. He stated that the current federal practice of dealing with protective orders was appropriate and effective. The advisory committee, therefore, considered the third alternative—of doing nothing—to be very attractive. The fourth alternative, though, was more attractive because it would facilitate further public input regarding protective orders.

Judge Vinson stated that the fears of "secrecy" voiced by those opposed to the amendments were unfounded. He asserted that the amendments would not increase secrecy in any way. One member added that the proposed rule, in fact, would provide explicitly for greater public access to records.

Judge Vinson emphasized that there were major differences between protective orders and sealing orders. The proposed amendment was carefully crafted and did not deal at all with sealing orders or access to records.

Judge Vinson stated that the advisory committee believed that there was no need to specify a requirement for good cause when there is a stipulation by the parties. The rule deals only with discovery conducted between the parties. Stipulation practice, as it now exists, gives a trial judge full discretion to accept or reject a stipulation. On the other hand, if the reference to stipulations were not included in the amendment, there might be a need for an evidentiary hearing and a good cause determination in every case.

Justice Veasey moved to authorize publication of the proposed amendments with the addition of a clarifying statement in the committee note to the effect that Rule 26 deals with discovery protective orders, and not with sealing orders. **The committee approved the motion without objection.**

FED. R. CIV. P. 47

The committee approved for publication proposed amendments to Rule 47, dealing with attorney participation in voir dire, in connection with the proposed amendments to FED. R. CRIM. P. 24, *supra*.

FED. R. CIV. P. 48

Proposed amendments to Rule 48 that would require the seating of 12 jurors were approved for publication by the Standing Committee at its January 1995 meeting. (See January 1995 Committee Minutes, pages 8-9.)

REPORT OF THE ADVISORY COMMITTEE ON THE EVIDENCE RULES

Judge Winter presented the report of the advisory committee, as set forth in his memorandum of June 7, 1995. (Agenda Item 9)

1. Amendments for Judicial Conference Approval

The advisory committee had no proposed amendments before the committee for Judicial Conference approval.

2. Amendments for Publication

Judge Winter reported that the advisory committee was seeking authority to publish: (1) proposed amendments to FED. R. EVID. 801, 803, 804, and 806, and a new rule 807; and (2) the committee's tentative decision *not* to amend 24 rules of evidence.

FED. R. EVID. 801

Judge Winter reported that the advisory committee proposed amending Rule 801(d)(2) in light of the Supreme Court's decision in *Bourjaily v. United States*, 483 U.S. 171 (1987). A majority of the committee voted to codify *Bourjaily* and provide expressly that the contents of a conspirator's statement may be considered by the court in determining the existence of a conspiracy and the participation of the declarant and the party against whom the statement is offered.

Judge Winter stated that the proposed amendment applied: (1) to subparagraph (C), dealing with the declarant's authority, (2) to subparagraph (D), dealing with the agency or employment relationship and its scope, and (3) to proving the existence of the conspiracy and the declarant's participation in it. He added, however, that the amendment

to the rule provided that the declarant's statement could not be used by itself to establish these facts.

The committee voted without objection to authorize publication of the proposed amendments.

FED. R. EVID. 803, 804, AND 807

Judge Winter reported that the advisory committee proposed combining Rules 803(24) and 804(b)(5) and moving them into a new Rule 807. Both subdivisions refer to the "foregoing" exceptions. Accordingly, if any new exception were to be added, the subdivisions would have to be renumbered, thereby causing confusion in computer-aided research. When reprinted, Rules 804(b)(5) and 803(24) would simply say "Abrogated."

The committee voted without objection to authorize publication of the proposed amendments to Rules 803 and 804 and the proposed new Rule 807.

The advisory committee recommended adding as Rule 804(b)(6) a new hearsay exception dealing with waiver by misconduct. It would provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party engaged or acquiesced in wrongdoing that procured the unavailability of the declarant as a witness.

The committee voted without objection to authorize publication of the proposed new Rule 804(b)(6).

Judge Winter stated that the advisory committee proposed a purely technical amendment to Rule 806 that would remove an improper comma. He also agreed to accept two additional style changes in the rule proposed by the members.

The committee voted without objection to authorize publication of the proposed amendments to Rule 806.

RULES OF EVIDENCE THAT SHOULD NOT BE AMENDED

The committee voted without objection to authorize for publication the proposal of the advisory committee *not* to amend the following rules of evidence: Rules 103(a-d), 104, 408, 411, 801(a),(b),(c),(d)(1), 802, 803(1-23), 804(a),(b)(1-4), 805, 806, 901, 902, 903, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1101, 1102, and 1103.

UNIFORM LOCAL RULES NUMBERING SYSTEM

Amendments to the rules due to take effect on December 1, 1995, would require courts to make their local rules "conform to any uniform numbering system prescribed by the Judicial Conference." (FED. R. APP. P. 47, FED. R. BANK. P. 9029, FED. R. CIV. P. 83, AND FED. R. CRIM. P. 57).

Professor Coquillette pointed out that the committee had distributed a model numbering system for local civil rules to the district courts in 1989 and that many courts had followed the model in revising their rules. He added that the district courts would have to revisit their local rules again as a result of the conclusion of the Civil Justice Reform Act experiments. He suggested that they might be asked to renumber their rules at the same time. The committee might be able to distribute a package of materials to assist the courts in this matter following the January 1996 committee meeting.

Ms. Squiers gave a brief presentation on her study and proposed uniform numbering system for local district court criminal rules. **The committee voted unanimously to authorize Ms. Squiers to distribute her study and proposed uniform numbering system to the district courts.**

SELF-STUDY OF THE RULES PROCESS

Professor Baker and Judge Easterbrook recommended that the report of the committee's self-study of the rules process be sent to all the individuals and institutions that had contributed comments on the draft. Members suggested that some of the recipients were likely to provide further comments that could be helpful in preparing the report for final action by the committee in January 1996.

On a straw vote, the committee voted without objection to eliminate the long range planning subcommittee after its final report has been accepted.

Judge Pratt noted that the subcommittee on integration of the rules had decided that the substantial effort required to integrate all the federal rules into one body would not be justified.

RECOGNITION OF MEMBERS WHOSE TERMS HAVE EXPIRED

Judge Stotler reported that the terms of Judge Bertelsman, Judge Pratt, and Professor Baker were due to expire on October 1, 1995. She thanked them for outstanding service to the committee, pointing, among other things, to Judge Bertelsman's

strong defense of judicial independence, Judge Pratt's assistance on the style subcommittee and as a parliamentarian, and Professor Baker's lead role in the committee's recent self-study.

RECOGNITION OF JOHN K. RABIEJ

The chairs of the advisory committees and the Standing Committee presented a plaque to John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office, to recognize his outstanding service to the committees. The chairs expressed their gratitude for his "continuous and tireless contributions to the success of the rulemaking process."

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the next meeting of the committee would be held on January 10-11, 1996. The conference to consider attorney conduct issues would be held on January 9, 1996, immediately before the committee meeting. The site of the meeting would be determined later, with Tucson as the favored location if reasonably-priced accommodations could be found.

[After the meeting it was decided to hold the meeting in Los Angeles.]

The committee determined to hold its Summer 1996 meeting on June 19-22, 1996, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary