Meeting of the Advisory Committee
on the Federal Rules of Appellate Procedure

December 3, 1986

Present: Chairman, Chief Judge Pierce Lively
Judge Robert Bork
Judge Joseph Hatchett
Professor Rex Lee
Chief Justice Vincent McKusick
Judge Kenneth Ripple
Also present were the the reporter, Professor Carol Mooney and the secretary, Mr. James Macklin, Jr.

Meeting began at 9:30 a.m.

The first item of business considered was item 86-9, the proposed standard rule on disclosure of affiliates. Following the committee's last meeting, a discussion draft was circulated to the chief judges of the circuits. There is great variation in the breadth of the local rules in the different circuits and the responses from the circuits were widely divergent. Judge Ripple noted that the circulated draft was modeled on the existing circuit rules but the draft represented the simplest and also the most comprehensive of the existing forms. In light of the responses from the circuits, the reporter prepared two alternative draft rules prior to this meeting; both of the drafts are narrower in scope than the circulated draft. Alternative A is the broader of the two and similar to the rule in effect in the eleventh circuit. Alternative B is similar to the Supreme Court's rule 28.1 and to the rule in the D.C. Circuit. After some discussion, Professor Lee moved for adoption of Alternative B, with the assumption that if the circuits want to require additional information they can do so, but that Alternative B

represents a minimum requirement which all circuits should meet. The motion was seconded by Judge Hatchett and approved by the committee. Judge Ripple requested that the reporter's notes reflect the committee's concern with national uniformity; although the circuits may supplement the rule and require the disclosure of additional information, the circuits ought to take into consideration the desirability of uniformity and the burden on attorneys whose practice is national in scope and who therefore practice in many different circuits.

Reporter's note: Alternative B as approved by the committee reads as follows:

> All corporate parties to a civil or bankruptcy case or agency review proceeding and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. The statement shall certify a complete list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each such corporation.

As you recall, Chief Justice McKusick's arrival was delayed due to transportation problems and he joined the commitee later in its discussions. Chief Justice McKusick has offered the following language suggestions:

> Any corporate party to a civil or bankruptcy case or agency review proceeding and any corporate defendant~~s~~ in a criminal case shall file a ~~corporate affiliate/financial disclosure statement. The~~ statement ~~shall certify a complete list of~~ identifying all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of ~~each~~ such corporation.

Following his suggestions, the rule would read:

> Any corporate party to a civil or bankruptcy case or agency review proceeding and any corporate defendant in a criminal case shall

> file a statement identifying all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of such corporation.

Chief Justice McKusick also asks the committee to consider adding a sentence which provides: "A negative report is also due." In addition, he wonders if the rule should set the time at which the statement should be filed.

The next items taken up were items 86-10 and 86-18, proposed amendments to Rule 4(a)(4). The committee had previously taken note of the problems caused, especially for pro se litigants, by the requirement that when a notice of appeal is filed prior to the disposition of the post trial motions enumerated in the rule, a new notice must be filed after the disposition of the motion. At the committee's last meeting, the committee approved in substance a change to the rule which would cause a notice filed prior to the disposition of the motions to become effective upon denial of the motion. The reporter's memorandum prepared for the present meeting points out that there can be many instances in which the relief sought in the motion can be granted and yet the reason for the appeal will not be abrogated. The committee considered several different approaches to the problem. The most complex approach hinged upon whether the post trial motion and the notice of appeal were filed by the same party. If the motion is filed by a party other than the appellant, it generally does not matter to the appellant whether the motion is granted or denied, the appellant wants to go forward with the appeal. Conversely, if the appellant files the motion, the granting of the motion often,

although not always, makes the appeal meaningless. Although a bifurcated appproach would solve some problems, the committee found its complexity unattractive. Judge Ripple also noted that the phrase "granted in its entirety," used in line 24 of the discussion draft could spawn considerable litigation. Another alternative considered was the possibility of simply beginning the time for filing a notice of appeal 10 days after the entry of judgment or upon disposition of any post trial motions filed within that 10 days, whichever later occurred. Even with this alternative, however, the current problem would not be resolved; the rule would have to address the effect of a notice of appeal erroneously filed during the pendency of a motion. This alternative was rejected because, as Judge Hatchett pointed out, it results in delay in all cases for the sake of the minority of cases in which there are post-trial motions. Upon motion of Judge Hatchett, which was seconded by Judge Ripple, the committee decided to simply amend the proposal from the last meeting to read as follows:

> A notice of appeal filed before disposition of any of the above motions shall become effective upon the date of entry of an order finally disposing of all such motions.

Judge Bork noted that there could be litigation concerning whether or not all motions have been finally decided. The committee noted, however, that a litigant's right to appeal would be protected so long as he filed a notice of appeal prior to the disposition of the motion and that the rule uses the date of

entry of the order, rather than the date of decision. The committee also considered whether it is necessary to provide that the previously filed notice of appeal is deemed to include an appeal from the disposition of the motion. The committee did not think that any such language is necessary since the motions listed in 4(a)(4) are tolling motions. The reporter was requested to circulate the language to all of the circuits for comment before the next meeting.

The committee also considered item 86-18 involving a suggestion that the motions listed in Rule 4(a)(4) should include reference to Fed. R. Civ. P. 50(c)(2). It was agreed that Rule 50(c)(2) does not create a new motion, but simply sets a time limit for filing a Rule 59 motion for a new trial after entry of judgment n.o.v. Since Rule 59 is listed in 4(a)(4), a reference to 50(c)(2) is unnecessary. Judge Lively requested that the reporter write to Mr. Panzer, who had suggested the amendment, and explain the committee's reasons for not proceeding.

The committee then took up item 86-12, amendment to FRAP 6 to accommodate the 1984 Bankruptcy Amendment and Federal Judgeship Act. The committee first decided that a separate title within FRAP is not necessary for bankruptcy appeals. Under the recent amendments, the bankruptcy courts are arms of the district court and appeals need not be handled by a separate title. The discussion then turned to whether the rule should include

reference to bankruptcy appellate panels. Bankruptcy appellate panels can be created to hear first appeals in place of the district courts, which generally hear a first appeal. Only the Ninth Circuit currently uses bankruptcy appellate panels and no other circuits contemplate establishing them. However, the committee decided that there should be a rule governing such appeals and agreed that it is easier to include it in the rule now rather than to add it at a later time. The reporter also noted that Professor Taggart, the reporter for the bankruptcy committee, strongly favors coverage of the bankruptcy appellate panels in FRAP 6 and that if the references to the panels were to be omitted, it is quite likely that the bankruptcy committee would request reinsertion of such references. The consensus was that the references to the bankruptcy appellate panels should remain in the draft rule. The committee adopted the reporter's suggested language dealing with redesignation of the record prior to the appeal to the court of appeals (the second appeal). It was thought desirable to ask the parties to narrow the focus of their case to the extent possible. The language on pages 10 and 11 of the memorandum will be substituted for the same subsection on page two. Professor Taggart, the reporter for the bankruptcy committee asked the committee to consider a proposal for expedited appeals. The committee did not favor such a procedure. It was felt that in appropriate cases the parties could move for an expedited schedule, but that in the ordinary course of events, no such procedure is needed.

The committee approved the following:

I. Rule 1 - insert after "United States Tax Court" the following: "; in appeals from bankruptcy appellate panels;"

II. Rule 3(a) - delete "by allowance" from the last sentence of subsection a.

III. Replace the current Rule 6 with the following:

6. APPEALS IN BANKRUPTCY CASES FROM FINAL JUDGMENTS AND ORDERS OF A DISTRICT COURT OR OF A BANKRUPTCY APPELLATE PANEL

(a) Appeal from a Judgment, Order or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case.

Appeals to the court of appeals from a final judgment, order or decree of a district court exercising jurisdiction pursuant to 28 U.S.C. §1334 should be taken in identical fashion as appeals from other judgments of the district court in civil actions.

(b) Appeal from a Judgment, Order or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. All provisions of these rules are applicable to an appeal to a court of appeals pursuant to 28 U.S.C. §158(d) from a final judgment, order or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. §158(a) or (b), except that:

(i) Rules 3.1, 4(a)(4), 4(b), 5.1, 9, 10, 11, 12(b), 13-20 and 22-23 are not applicable;

(ii) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" shall be read as a reference to Form 5; and

(iii) when the appeal is from a bankruptcy appellate panel, the term "district court" as used in any applicable rule, means "appellate panel."

(2) Additional Rules. In addition to the rules made applicable by subsection (b)(1) of this rule, the following rules shall apply to an appeal to a court of appeals pursuant to 28 U.S.C. §158(d) from a final judgment, order or decree of a district court or of a bankruptcy appellate panel exercising appellate jurisdiction pursuant to 28 U.S.C. §158(a) or (b):

(i) Effect of Motion for Rehearing on Time for Appeal. If a timely motion for rehearing under Bankruptcy Rule 8015 is filed in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying the rehearing or the entry of the subsequent judgment. A notice of appeal filed before disposition of a motion for rehearing shall become effective upon the date of entry of an order denying the rehearing.

(ii) The Record on Appeal. Within 10 days after filing the notice of appeal, the appellant shall file with the clerk possessed of the record assembled pursuant to Bankruptcy Rule 8006, and serve on the appellee, a statement of the issues to be presented on appeal and a designation of the record to be certified and transmitted to the clerk of the court of appeals. If the appellee deems other parts of the record necessary, he shall, within 10 days after service of the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included. The record, redesignated as provided above, plus the proceedings in the district court

or bankruptcy appellate panel and a certified copy of the docket entries prepared by the clerk pursuant to Rule 3(d) shall constitute the record on appeal.

(iii) Transmission of the Record. When the record is complete for purpose of the appeal, the clerk of the district court or the appellate panel, shall transmit it forthwith to the clerk of the court of appeals. The clerk of the district court or of the appellate panel shall number the documents comprising the record and shall transmit with the record a list of documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight, physical exhibits other than documents, and such other parts of the record as the court of appeals may designate by local rule, shall not be transmitted by the clerk unless the clerk is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerk for the transportation and receipt of exhibits of unusual bulk or weight. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

(iv) Filing of the Record. Upon receipt of the record, the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

Form 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF .....

In re)
)
.....,)
BANKRUPT)
)
.....,) File No. .....
PLAINTIFF)
)
v.)
)
.....,)
DEFENDANT)

NOTICE OF APPEAL TO
UNITED STATES COURT OF APPEALS
FOR THE _____ CIRCUIT

....., the plaintiff [or defendant or other party] appeals to the United States Court of Appeals for the _____ Circuit from the final judgment [or order or decree] of the district court [or bankruptcy appellate panel] for the district of .....
....., entered in this case on ....., 19..... [here describe the judgment, order, or decree]
.....
.....
.....

The parties to the judgment [or order or decree] appealed from and the names and addresses of their respective attorneys are as follows:

.....
.....

DATED .....

SIGNED .....
Attorney for Appellant

Address: .....

.....

The committee then took up item 86-13, the development of a standard rule to govern review of fee awards under the Equal Access to Justice Act. Again the committee considered whether these rules should be contained in a separate title and decided that a separate tile would be unnecessary. Instead, Judge Ripple suggested, and the committee agreed, that the rule governing initial applications to courts of appeals for awards of fees and expenses should be placed with FRAP 39 and numbered 39.1 and that the rule dealing with appeals from agency determinations of fees and expenses should be placed in Title IV with the other rules governing review of agency decisions. Justice McKusick suggested that at line 20 of the draft the word "expired" be substituted for the word "lapsed" and at line 75 the words "do not apply" should be deleted and the words "are not applicable" should be substituted to remain consistent with Rules 14 and 20. In light of the committee's decision not to create a separate EAJA title, draft rule 3, governing appeals from district court EAJA decisions was thought unnecessary. The committee approved in substance rules one and two drafted by the reporter but asked that she redraft them in light of their placement with the other rules, and then circulate the new drafts to the committee.

The committee then addressed item 86-11 involving a proposal from Mr. Strubbe, the clerk of the Seventh Circuit, to delete the word "reply" from the caption of Rule 29(a). Since FRAP 27(a) generally gives a party an opportunity to file a response in

opposition to a motion, but does not provide for any further "reply", the committee agreed that the word reply is superfluous and perhaps misleading and should be struck.

Judge Lively then asked the committee to consider a number of matters that did not appear on the agenda because they had been brought to his attention too recently to be included.

1. Between the committee's last meeting and this one, a memorial resolution was adopted for Judge Tamm and a response from Mrs. Tamm has been received and is attached to these minutes.

2. The standing committee has referred to our committee the question of whether the time limit for appeals in coram nobis cases should be governed by the criminal rules or the appellate rules. The reporter was requested to study this question further.

3. Judge Arnold from the Eighth Circuit forwarded an Arkansas lawyer's request that there be a rule providing that the appellant furnish a copy of the record to the appellee cost free, as is done in Arkansas. While the committee thought that was an admirable practice, the committee was unaware of it being done elsewhere and did not believe that it should impose such a burden on appellants. Judge Lively volunteered to write a letter to Judge Arnold communicating the committee's sentiment.

4. The committee adopted in principle a suggestion of Judge Easterbrook of the Seventh Circuit that Rule 28 be amended to

require a jurisdictional statement in the brief of the appellant. Judge Lively suggested, and the committee also agreed, that if Rule 28 is amended, there should also be a requirement that the briefs state the standard of review on appeal. The reporter was requested to prepare a proposed amendment to incorporate these two changes.

5. Judge Lively received correspondence from District Judge Stotler from the central district of California suggesting that parties be required to serve copies of their appeal briefs upon the federal district judge who decided the case. The committee decided that a national rule to that effect is not required. The committee members felt that most district judges are so burdened with paper that few would welcome receiving copies of the briefs in all appealed cases. Judge Lively undertook to notify Judge Stotler of the committee's decision.

6. Judge Sloviter of the Third Circuit wrote concerning the problem that prisoners have in receiving notice of a filing of a magistrate's report and recommendations in time to file their objections within the 10 days required by statute. The Third Circuit has remanded such cases to the district court to find excusable neglect and allow the late filing. Judge Sloviter wonders if some accommodation to such situations could be made by rule. The committee agreed that the problem requires further study and it was referred to the reporter.

7. Chief Justice McKusick suggested that a rule similar to Civil Rule 11 should be included in the appellate rules to permit sanctioning attorneys for bringing frivolous appeals. Judge Lively noted that the Fifth Circuit has recently incorporated Rule 11 in their appellate rules. This matter was also referred to the reporter for further study.

The meeting was adjourned at 12:00 noon.