ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.
April 22-23, 2002

Agenda for Spring 2002 Meeting of
Advisory Committee on Appellate Rules
April 22-23, 2002
Washington, D.C.

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III. Report on June 2001 and January 2002 Meetings of Standing Committee

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B. Item No. 00-08 (FRAP 4(a)(6)(A) — clarify whether verbal communication provides "notice")

C. Item No. 00-12 (FRAP 28, 31 & 32 — cover colors in cross-appeals) (Mr. Letter)

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E. Item No. 01-05 (change references to "19__" in forms)

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B. Item No. 97-31 (FRAP 47(a)(1) — uniform effective date for local rule changes) and Item No. 98-01 (FRAP 47(a) — conditioning effectiveness of local rules on filing with Administrative Office)

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D. Item No. 99-09 (FRAP 22(b) — COA procedures) (Mr. Letter)

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney) (Judge Motz)

F. Item No. 00-07 (FRAP 4 — specify time for appeal of Hyde Amendment order) (Mr. Letter)

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H. Item No. 01-01 (citation of unpublished decisions) (Mr. Letter)

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K. Item No. 01-04 (FRAP 4(b)(1)(A) — give criminal defendants 30 days to appeal) (Mr. Letter)

L. Items Awaiting Initial Discussion

1. Item No. 02-01 (FRAP 27(d) — apply typeface and type-style limitations of FRAP 32(a)(6)&(7) to motions)

VI. Additional Old Business and New Business (If Any)

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VIII. Adjournment

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Advisory Committee on Appellate Rules
Table of Agenda Items — Revised March 2002

FRAP Item	Proposal	Source	Current Status
95-03	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Held in abeyance pending consultation with D.C. Circuit 04/01
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01

FRAP Item	Proposal	Source	Current Status
97-05	Amend FRAP 24(a)(2) in light of Prison Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 09/97 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1. (Related to No. 98-01.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals

FRAP Item	Proposal	Source	Current Status
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office. (Related to No. 97-31.)	Standing Committee	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Further minor revisions approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01

FRAP Item	Proposal	Source	Current Status
98-06	Amend FRAP 4(b)(5) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-01	Amend FRAP 24(a)(3) to address potential conflicts with Prison Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

FRAP Item	Proposal	Source	Current Status
			Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01

FRAP Item	Proposal	Source	Current Status
			Alternative draft approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice Discussed and retained on agenda 04/01
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
00-05	Amend FRAP 3 to address notice of appeal filed on behalf of corporation but not signed by attorney.	Hon. Diana Gribbon Motz (CA4)	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting proposal from Department of Justice
00-08	Amend FRAP 4(a)(6)(A) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice
00-13	Amend FRAP 29 to empower court to preclude the filing of a particular private amicus brief, even if all parties have consented.	Hon. Michael Boudin (CA1)	Awaiting initial discussion Discussed and retained on agenda 04/01
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/01

FRAP Item	Proposal	Source	Current Status
01-02	Amend FRAP 5(c), 21(d), 27(d)(2), 35(b)(2), & 40(b) to replace page limits with word limits.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/01
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01
01-04	Amend Rule 4(b)(1)(A) to give criminal defendant 30 days to appeal.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/01
01-05	Amend Forms 1, 2, 3, and 5 to change references to "19__."	Advisory Committee	Awaiting initial discussion
02-01	Amend Rule 27(d) to apply typeface and type-style limitations of FRAP 32(a)(6)&(7) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion

DRAFT

Minutes of Spring 2001 Meeting of
Advisory Committee on Appellate Rules
April 11, 2001
New Orleans, Louisiana

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 11, 2001, at 8:35 a.m. at the Hotel Inter-Continental in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Samuel A. Alito, Jr., Chief Justice Richard C. Howe, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Also present were Judge Anthony J. Scirica, Chair of the Standing Committee; Judge J. Garvan Murtha, the liaison from the Standing Committee; Prof. Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and former Advisory Committee members Chief Justice Pascal F. Calogero, Jr., and Mr. John Charles Thomas.

Judge Garwood introduced Chief Justice Howe and Mr. Roberts, who replaced Chief Justice Calogero and Mr. Thomas, respectively, as members of this Committee. Judge Garwood thanked Chief Justice Calogero and Mr. Thomas for their devoted service to this Committee and presented both with certificates of appreciation. Judge Garwood also introduced Judge Murtha, who replaced Judge Phyllis A. Kravitch as the liaison from the Standing Committee. Finally, Judge Garwood welcomed Judge Scirica from the Standing Committee and Prof. Cooper from the Civil Rules Committee.

II. Approval of Minutes of April 2000 Meeting

The minutes of the April 2000 meeting were approved.

III. Report on June 2000 and January 2001 Meetings of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2000 meeting, the Standing Committee approved for publication all of the rules forwarded by this Committee — including the proposed amendments to Rules 4(a)(7), 5(c), 21(d), and 26.1, as well as the electronic service package — with one exception. In the electronic service package, this Committee had proposed amending Rule 25(c) to provide that electronic service is complete on transmission unless the party making service is notified "within 3 calendars days after transmission" that the service failed. The Standing Committee removed this 3-day qualifier, so as to maintain consistency between the electronic service provisions of the civil rules (which contained no such qualifier) and the electronic service provisions of the appellate rules.

The Reporter said that this Committee had little to report at the January 2001 meeting of the Standing Committee, as this Committee did not meet in fall 2000 and was still awaiting comments on the package of rules published in August 2000.

IV. Action Items

Proposed Amendments Published for Comment in August 2000

Judge Garwood said that all of the comments on the proposed amendments published for comment in August 2000 were submitted in writing; no commentator requested an opportunity to testify in person. Judge Garwood also announced that he would take up the amendments in a slightly different order than they were listed in the agenda, as he wanted first to consider those amendments in which the Civil Rules Committee had an interest, so that Prof. Cooper could participate in the discussion.

4. Rule 4(a)(7) (separate document requirement) [Item No. 98-02]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a) when it is entered ~~in compliance with~~ for purposes of Rules 58(b) ~~and 79(a)~~ of the Federal Rules of Civil Procedure.

(B) A failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not affect the validity of an appeal from that judgment or order.

Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be entered on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. Under amended Rule 4(a)(7), a judgment or order is entered for purposes of Rule 4(a) when that judgment or order is entered for purposes of Fed. R. Civ. P. 58(b). Thus, if a judgment or order is not entered for purposes of Fed. R. Civ. P. 58(b) until it is set forth on a separate document, that judgment or order is also not entered for purposes of Rule 4(a) until it is so set forth. Similarly, if a judgment or order is entered for purposes of Fed. R. Civ. P. 58(b) even though not set forth on a separate document, that judgment or order is also entered for purposes of Rule 4(a).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be entered on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Rather, such orders are entered for purposes of Fed. R. Civ. P. 58 — and therefore for purposes of Rule 4(a) — when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Fed. R. Civ. P. 58(b).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be entered on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Fed. R. Civ. P. 58 has been amended to impose such a cap. Under amended Fed. R. Civ. P. 58(b) — and therefore under amended Rule 4(a)(7) — a judgment or order is treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 60 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even

if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g., Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g., Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been entered on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

> Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been entered on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).
>
> The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

The Reporter reviewed the lengthy history of this Committee's consideration of Rule 4(a)(7) and the Civil Rules Committee's related consideration of FRCP 58. The Reporter then summarized the public comments. Little opposition was expressed to the proposed amendment to Rule 4(a)(7); no one disagreed with the manner in which amended Rule 4(a)(7) would resolve the waiver issue or the *Townsend* issue. There was also little opposition to proposed FRCP 58(a)'s exclusion of orders disposing of certain post-judgment motions from the separate document requirement. There was, however, strong opposition to proposed FRCP 58(b) — in particular, to the 60-day cap. In addition, some commentators seemed to have difficulty understanding the separate document requirement — either as it exists under current FRCP 58 or as it would exist under amended FRCP 58.

The Reporter said that, to a point, he sympathized with the objections to the 60-day cap. He recommended that the cap be lengthened to the 150 days that this Committee had originally proposed to the Civil Rules Committee. But, the Reporter said, *some* kind of cap was necessary to address the time bomb problem. To argue that there should be *no* cap — as several commentators did — is to argue that, even though a party has only 180 days to move to reopen the time to appeal from a judgment about which the party received *no* notice (*see* Rule 4(a)(6)(A)), a party should have *forever* to appeal from a judgment about which the party *had* notice, if that judgment was not set forth on a separate piece of paper. That makes no sense.

A member said that the only objections to the Rule 4(a)(7)/FRCP 58 package that he thought deserved consideration were the objections to the 60-day cap. He argued that those objections would largely be obviated if the Civil Rules Committee substituted a 150-day cap in place of the 60-day cap. He thought that a 150-day cap would give litigants ample opportunity to protect their appellate rights. The 150 days would generally not begin to run until the judgment was "final" under 28 U.S.C. § 1291. After a final judgment was entered in the civil docket (but not set forth on a separate document), a litigant would have 180 days to appeal — 150 days

before the time to appeal began to run and then 30 days to file the appeal. (The litigant would have another 30 days if the government was a party.) The lack of activity in the case for such a long period of time would put the litigant on notice that it should do *something* to preserve its right to appeal. Under amended Rule 4(a)(7), the litigant can always waive the separate document requirement and appeal, and, under amended FRCP 58(d), the litigant can move the court to set forth the judgment on a separate document.

Prof. Cooper said that, although he was the author of the 60-day provision, he had been persuaded that extending the cap to 150 days was wise. Courts often issue orders whose finality is in doubt. When such an order is not set forth on a separate document, what signals the litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order; by contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with the case.

A member asked whether the widespread non-compliance with the separate document requirement — the non-compliance that creates the "time bombs" that the 60-day cap is meant to "defuse" — is attributable more to district court clerks or district court judges. If the former, he said, it may be that better education could solve the time bomb problem. Several members said that the problem is attributable more to judges than to clerks; a member described how different judges take different positions on whether an order granting a FRCP 12(b)(6) motion is appealable and therefore required to be set forth on a separate document. Judge Murtha said that his impression is that many district court judges simply aren't aware of the separate document requirement; he pointed out that, in all of the training that new district court judges receive, no one mentions the separate document requirement. A member reminded the Committee that, for over 30 years now, the appellate courts had been warning district courts to comply with the separate document requirement, and yet non-compliance remains widespread.

Several members expressed support for extending the cap from 60 days to 150 days. Another member objected. He said that 180 days is a long time to make potential appellees wait in cases in which judgment is not set forth on a separate document. Another member responded that no potential appellee is forced to wait 180 days, as any potential appellee can move the court to set forth the judgment on a separate document and start the time to appeal running. The first member responded that such a motion won't do the potential appellee any good if the judge refuses to grant it because the judge wrongly believes that a separate document is not necessary.

A member moved that this Committee recommend to the Civil Rules Committee that the 60-day cap in proposed FRCP 58(b)(2)(B) be extended to 150 days. The motion was seconded. The motion carried (unanimously).

Judge Garwood recommended the following change to the Committee Note:

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents.

Judge Garwood explained that this amendment would make the Committee Note to Rule 4(a)(7) more precise. As the Committee Note to FRCP 58 indicates, new FRCP 58(a)(1) exempts from the separate document requirement not only orders that dispose of motions that toll the time to appeal under Rule 4(a)(4)(A) (e.g., a FRCP 60 motion filed within 10 days), but also some orders that dispose of motions that do not toll the time to appeal (e.g., a FRCP 60 motion that is not filed within 10 days). Prof. Cooper spoke in support of the recommendation. Prof. Cooper also mentioned that he would be recommending to the Civil Rules Committee that the Committee Note to proposed FRCP 58(a) be amended to clarify that both judgments and *amended* judgments need to be set forth on separate documents, and Prof. Cooper recommended that the Committee Note to Rule 4(a)(7) be similarly amended.

The Committee then discussed some of the confusion that the commentators had in understanding how new FRCP 58 and new Rule 4(a)(7) would work. A member said that he shared a commentator's confusion over whether entry in the civil docket was necessary in cases in which the judgment or order had to be set forth on a separate document. In response, Prof. Cooper said that he would recommend to the Civil Rules Committee that it reword proposed FRCP 58(b) to make it clear that, when a judgment is required to be set forth on a separate document, the judgment is not considered entered until it is *both* entered in the civil docket *and* set forth on a separate document (or, if not so set forth, when 150 days have run after the entry in the civil docket).

Several members expressed confusion about a different matter. Amended Rule 4(a)(7)(A) provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, amended Rule 4(a)(7)(A) tells the reader to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of the running of the time to appeal. When the reader turns to FRCP 58(b), though, he finds this:

> **(b) Time of Entry.** Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:
>
> (1) when it is entered in the civil docket under Rule 79(a), and
>
> (2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:

(A) when it is set forth on a separate document, or

(B) when 60 days have run from entry in the civil docket under Rule 79(a).

The problem is with the clause "[j]udgment is entered for purposes of . . . ." Rule 4(a)(7) informs the reader that FRCP 58(b) will tell him when the time begins to run for purposes of the appellate rules, but when the reader gets to FRCP 58(b), he finds a rule that, by its terms, dictates only when the time begins to run for purposes of a long series of civil rules, each of which the reader would have to look up, and none of which relates to appellate time. This will put the reader through a lot of work and likely leave him scratching his head.

After a lengthy discussion, a member pointed out that this confusion might be avoided if the Civil Rules Committee would amend the introductory sentence in FRCP 58(b) as follows:

(b) Time of Entry. Judgment is entered for purposes of <u>these</u> Rules ~~50, 52, 54(d)(2)(B), 59, 60, and 62~~:

The Reporter described a second way that the confusion could be avoided: amending Rule 4(a)(7)(A) so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This would eliminate the need for practitioners to examine FRCP 58(b) and the rules cited therein, and thus it would eliminate any chance that FRCP 58(b)'s introductory clause could cause confusion. Members seemed to favor the first suggestion. Although amending Rule 4(a)(7) as the Reporter suggested would eliminate confusion for appellate practitioners, FRCP 58(b), as drafted, would still create both work and confusion for trial practitioners, as it would describe when judgment is entered for *some* purposes, but then be completely silent about when judgment is entered for *other* purposes.

A member moved that this Committee recommend to the Civil Rules Committee that proposed FRCP 58(b) be amended by deleting "for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62" and substituting in its place "for purposes of these Rules." The motion was seconded. The motion carried (unanimously). Prof. Cooper said that, while he would communicate the recommendation to his Committee, he did not know if he could support it. He needed to give further thought to the impact that defining time of entry for *all* judgments would have outside the area of the running of the time for bringing post-judgment motions.

A member asked whether Rule 4(a)(7)(B) should refer to "[a] failure to *set forth* a judgment or order on a separate document" instead of to "[a] failure to *enter* a judgment or order on a separate document." Both proposed Rule 4(a)(7) and proposed FRCP 58 consistently refer to judgments being "set forth" on separate documents and "entered" in the civil docket. The Reporter said that the suggestion was a good one.

A member moved that proposed Rule 4(a)(7)(B) be amended by substituting "set forth" for "enter." The motion was seconded. The motion carried (unanimously).

After further discussion, a member moved that proposed Rule 4(a)(7) be approved as published, with the exception of the change to the text already approved and the change to the Committee Note recommended by Judge Garwood. The motion was seconded. The motion carried (unanimously).

By consensus, the Committee authorized Judge Garwood and the Reporter to make conforming changes to the Committee Note to reflect any changes to FRCP 58 made by the Civil Rules Committee at its upcoming meeting.

20. Rule 26.1 (financial disclosure) [Item No. 99-07]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate party.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

(A) identif~~yingies all its~~ any parent corporations and ~~listing~~ any publicly held ~~company~~ corporation that owns 10% or more of ~~the party's~~ its stock or states that there is no such corporation, and

(B) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) **Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be required by the Judicial Conference of the United States.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is

not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

Rule 26.1(a) does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

The Reporter summarized the comments, pointing out that only the Judicial Conference provision was the subject of serious contoversy. Some commentators objected that it would be difficult for attorneys to ascertain what the Judicial Conference was requiring at any point in time. Other commentators questioned the legality under the Rules Enabling Act ("REA") of delegating what is essentially rulemaking authority to the Judicial Conference, questioned the wisdom of short-circuiting the REA process in this manner (particularly when the judiciary often warns Congress not to short-circuit the process), and/or questioned the assertion in the Committee Note that the Judicial Conference had the authority to promulgate requirements that would pre-empt local rules on the issue of financial disclosure.

Mr. Rabiej reported that the Bankruptcy Rules Committee, at its spring meeting, had decided to omit the Judicial Conference provision in its version of the financial disclosure rule. He also said that, in describing the core reporting obligation, the Bankruptcy Rules Committee used substantially different language than the Appellate, Civil, and Criminal Rules Committees used in their financial disclosure proposals.

A member said that Rule 26.1 represents a compromise between very different points of view on financial disclosure. Some believe that Rule 26.1 already goes too far, resulting in judges being overwhelmed by useless information. Others believe that Rule 26.1 does not go far enough. The Codes of Conduct Committee believes that Rule 26.1 should not be broadened or narrowed, but simply extended to the civil and criminal rules. The Judicial Conference provision is basically a "punt" — a recognition that the lengthy and cumbersome REA process is poorly suited to resolve the ongoing dispute over financial disclosure, particularly given the lack of expertise of the rules committees.

A member expressed agreement with the objections made by the commentators to the Judicial Conference provision. He was particularly concerned about how practicing lawyers would find out what the Judicial Conference was requiring at any point in time, as there is no convenient way for lawyers to learn about Judicial Conference activities. Also, although the member was not certain if he agreed with the argument that the Judicial Conference provision was unlawful under the REA, he said that the argument at least gives him pause.

A member pointed out that the appellate rules already delegate some matters to the Judicial Conference. Rule 25(a)(2)(D) authorizes local rules on electronic filing, as long as the rules "are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." And Rule 47(a)(1) requires local rules to "conform to any uniform numbering system prescribed by the Judicial Conference of the United States."

Judge Scirica filled in some of the background to the financial disclosure proposals. To begin with, he said, many think that financial disclosure is not a procedural matter at all — but instead a matter of court management — and thus not appropriately addressed by the rules of practice and procedure. However, Rule 26.1 has existed for some time, and apparently has proven useful. After publication of articles in the *Kansas City Star* and *Washington Post* about the improper failure of judges to recuse themselves, members of Congress and others asked the Committee on Codes of Conduct and the rules committees to try to improve financial disclosure practices. The Codes of Conduct Committee, in turn, asked that the rules of civil and criminal procedure be amended to add a provision similar to Rule 26.1.

Judge Scirica point out that one problem that has not yet been mentioned is the tremendous variation among the courts of appeals and the district courts in their local rules on financial disclosure. Many courts have adopted local rules requiring disclosure far in excess of that required by Rule 26.1. These rules are controversial; not only do they create a hardship for attorneys with national practices, but many argue that they result in judges being so overwhelmed

with information that they make it *more* likely that a judge will fail to recuse herself when appropriate. That said, the courts of appeals have made it very clear that they would resist any attempt to limit their ability to use local rules to govern financial disclosure.

Judge Scirica said that he sympathizes with the impulse behind the Judicial Conference provision. The rules committees are not well suited to tinker with financial disclosure rules — to decide, for example, whether parties should disclose all subsidiaries or all partnerships in which they are involved. These decisions should be made by the Codes of Conduct Committee.

That said, Judge Scirica also recognizes the seriousness of the objections made to the Judicial Conference provision. Such a provision will not be approved unless the Standing Committee has very specific assurances that attorneys will have ready access to any Judicial Conference standards on financial disclosure. In addition, the legal objections to the Judicial Conference provision will need to be considered by the Standing Committee.

Prof. Cooper elaborated on the local rules concern. He said that this Committee had once proposed a much broader version of Rule 26.1, but, in the face of strong opposition from the chief judges of the courts of appeals, had adopted a very narrow rule and used the Committee Note to invite local rulemaking. The circuits have taken up that invitation with a vengeance. This creates a considerable hardship for practicing attorneys. Not only do attorneys have to learn and comply with various sets of local rules, but some of those local rules impose financial disclosure obligations that are extremely onerous.

Prof. Cooper said that, speaking only for himself, he does not think the Judicial Conference provision is illegal. He believes that the Judicial Conference has the power to impose financial disclosure obligations, even in the absence of a rule of practice or procedure, as such obligations pertain to court administration, and the Judicial Conference is charged with ensuring uniformity in the administration of the federal courts. That said, Prof. Cooper is not certain whether, from a policy perspective, the Judicial Conference provision is wise.

A member moved that all of proposed Rule 26.1, with the exception of the Judicial Conference provision, be approved as published. The motion was seconded. The motion carried (unanimously).

The Committee returned to its discussion of the Judicial Conference provision. A member said that, before the provision could become law, it would have to be approved not only by this Committee and the Standing Committee, but by the Judicial Conference and the Supreme Court. He said that if the Judicial Conference and the Supreme Court concluded that they had authority to enact the Judicial Conference provision, that was good enough for him.

A member said that she, too, was happy to leave it to the Standing Committee to address the question whether the Judicial Conference requirement is lawful under the REA. As to the wisdom of the provision, she thought that, on balance, it was a good way to deal with a tricky

problem, but she did not feel strongly. However, she is concerned about making certain that lawyers have access to any requirements promulgated by the Judicial Conference.

A member said that the problem for attorneys goes beyond learning about new requirements imposed by the Judicial Conference. Attorneys also need a place to go to confirm that, as of a particular date, the Judicial Conference has *not* imposed any requirements — or any new requirements.

A member suggested amending the Judicial Conference provision to refer to the disclosure of "any information that may be *publicly designated* by the Judicial Conference," rather than to the disclosure of "any information that may be *required* by the Judicial Conference." This would underscore the importance of making certain that attorneys are informed of any action taken by the Judicial Conference with respect to financial disclosure. Also, using "designated" in place of "required" might soften somewhat the objection to the delegation of "rulemaking" power to the Judicial Conference.

A member said that he did not think it made any difference whether the Judicial Conference provision referred to information that is "required" or "designated." The rule states that the financial disclosure statement "must" include the information, and thus the obligation is mandatory, whether the contents of the statement are "required" or "designated." Another member responded that, although the end result is the same, "designated" may be a more politically palatable term.

A member moved that proposed Rule 26.1(a)(1)(B) and (a)(2) be changed by deleting "required" and substituting in its place "publicly designated." The motion was seconded. The motion carried (unanimously).

A member moved that the Judicial Conference provisions of proposed Rule 26.1 be approved as modified, contingent on the Standing Committee assuring itself that lawyers would have ready access to any standards promulgated by the Judicial Conference and that the Judicial Conference provisions were consistent with the REA. The motion was seconded. The motion carried (unanimously).

Judge Scirica concluded by stating that the ultimate goal was to have uniform financial disclosure rules that apply in every federal court. This is not an area in which there should be variation from one federal court to another; after all, the same recusal standards apply to every federal judge. But the Judicial Conference is comprised of judges, and judges can be very protective of their local rules, so there is no guarantee that the Judicial Conference provision will result in uniformity. That said, the Judicial Conference provision has a better chance of bringing about uniformity than trying to get five rules committees, the Standing Committee, the Judicial Conference, and the Supreme Court all to agree on every modification to the financial disclosure rules.

Judge Garwood thanked Prof. Cooper for participating in the discussions of Rule 4(a)(7)/FRCP 58 and the financial disclosure provisions.

Following the lunch break, the Committee discussed the financial disclosure provision approved by the Bankruptcy Rules Committee. That provision defines the scope of the financial disclosure obligation much differently than the provisions approved by the Appellate, Civil, and Criminal Rules Committees. For example, the bankruptcy provision requires disclosure when a party "directly or indirectly" owns 10 percent or more of "any class" of a publicly *or* privately held corporation's "equity interests."

Members of the Committee expressed several concerns about the provision approved by the Bankruptcy Rules Committee, objecting both to its substance and to its ambiguity. A couple members stressed, though, that while they prefer the provision approved by the Appellate, Civil, and Criminal Rules Committees, they thought it important that there be uniformity across the four sets of rules, even if that meant adopting the Bankruptcy Rules Committee's provision.

1. Rule 1(b) (abrogating statement regarding jurisdiction) [Item No. 97-18]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 1. Scope of Rules; Title

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend

or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

The Reporter summarized the comments, focusing in particular on the argument of the National Association of Criminal Defense Lawyers ("NACDL"). The NACDL argues that there is a conflict between Rule 4(b)(1)(B) — which requires the government to file an appeal in a criminal case within 30 days after entry of the order being appealed — and 18 U.S.C. § 3731 — which requires the government to file an appeal in a criminal case within 30 days after the challenged order "has been rendered." The NACDL argues that, because "rendered" means "announced" rather than "entered," and because § 3731 is jurisdictional, Rule 4(b)(1)(B) is "presently invalid" as it extends the jurisdiction of the courts of appeals. The NACDL objects to abrogating Rule 1(b) because it would remove this trap for the government.

Mr. Letter said that he had consulted his colleagues in the Criminal Division of the Department of Justice, and they said that they had never heard this argument and strongly disagreed with it on the merits. The Reporter said that, even if the NACDL was correct, preserving a trap for the government is a poor reason for refusing to abrogate Rule 1(b).

A member moved that the abrogation of Rule 1(b) be approved as published. The motion was seconded. The motion carried (unanimously).

2. **Rule 4(a)(1)(C) (coram nobis) [Item No. 97-41]**

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Committee Note

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

The Reporter summarized the comments.

A couple of members agreed with the comment of Judge Frank Easterbrook that there are motions that arise much more frequently than coram nobis motions and that create similar problems. However, these members disagreed with Judge Easterbrook that coram nobis applications should be addressed in Rule 4 only as part of a sweeping rule that categorizes all of these difficult motions. These members argued that the coram nobis problem should be fixed now, and that other problems can be addressed in the future.

A member moved that proposed Rule 4(a)(1)(C) be approved as published. The motion was seconded. The motion carried (unanimously).

3. Rule 4(a)(5)(A)(ii) (excusable neglect/good cause) [Item No. 95-07]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The Reporter summarized the comments. The Reporter said that, while all commentators agreed that Rule 4(a)(5)(A) should be amended to resolve the circuit split, several commentators urged that the rule be amended to adopt the majority position that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. The Reporter disagreed with this position, for several reasons.

First, it is not true that, because showing good cause is said to be easier than showing excusable neglect, the proposed amendment to Rule 4(a)(5)(A) would make the excusable neglect standard superfluous. The good cause and excusable neglect standards are not interchangeable; one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault — that is, in which the need for an extension is occasioned by something within the control of the attorney or party. The good cause standard applies in situations in which there is no "neglect" — excusable or otherwise — because the need for an extension is occasioned by something that is not within the control of the attorney or party.

Second, it is not true, as the commentators argue, that the good cause standard cannot apply to "post-expiration" motions. If, for example, the Postal Service failed to deliver a notice of appeal, the party might have good cause to seek a "post-expiration" extension. It would be unfair to make such a party prove that his "neglect" was "excusable," since he wasn't neglectful. Similarly, contrary to what the commentators argue, the "excusable neglect" standard could apply to "pre-expiration" motions. For example, a movant may bring a "pre-expiration" motion for an extension of time when a mistake made by the movant makes it unlikely that she can meet the original deadline.

Finally, amending Rule 4(a)(5)(A) to adopt the majority position would leave Rule 4(a)(5)(A) in tension with Rule 4(b)(4). If this Committee agrees with the commentators that the majority position should be embraced, then this Committee should go further and amend Rule 4(b)(4). All of the criticisms made of proposed Rule 4(a)(5)(A) apply with equal force to current Rule 4(b)(4).

The Reporter went on to state that he thought that the stylistic suggestions made by Judge Jon Newman would be helpful. Specifically, Judge Newman suggested making the following changes to the Committee Note:

> Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought ~~after the expiration of the original deadline~~ during the 30 days following the expiration of the original deadline. . . .
>
> Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or ~~after the time prescribed by Rule 4(b) expires~~ during the 30 days following the expiration of the original deadline.

Several members of the Committee expressed agreement with the Reporter. A member moved that proposed Rule 4(a)(5)(A) be approved as published, except that the Committee Note be changed as Judge Newman suggested, and except that the Reporter be instructed to add language to the Committee Note clarifying the difference between the good cause and excusable neglect standards. The motion was seconded. The motion carried (unanimously).

5. Rule 4(b)(5) (tolling effect of FRCrP 35(c) motion) [Item No. 98-06]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing

of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(c) does not suspend the time for filing a notice of appeal from a judgment of conviction.

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(c) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(c) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(c) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(c), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

The Reporter summarized the comments.

A member said that he understood the motivation behind the NACDL's comments; obviously, criminal defense attorneys want as much time as possible to file notices of appeals. However, if this Committee believes that the 10-day appeal period provided in Rule 4(b)(1)(A) is too short, it should address the problem directly by amending Rule 4(b)(1)(A) rather than indirectly by permitting FRCrP 35(c) motions to toll the time to appeal.

A member asked about the mechanics of amended Rule 4(b)(5). If a Rule 35(c) motion is granted, is a new judgment entered? And, if so, does a criminal defendant have to file a notice of appeal from the amended judgment? The member said that, if a notice of appeal from the amended judgment is needed, he would be concerned. In real life, what typically happens is that judgment is entered, the defense attorney files a notice of appeal, and the defense attorney withdraws. If the court then grants the government's FRCrP 35(c) motion and enters an amended judgment, there won't be a criminal defense attorney around to file a new notice of appeal. A member responded that, while this was a problem, it is a problem that exists now and that won't be affected by the proposed amendment.

A member moved that proposed Rule 4(b)(5) be approved as published. The motion was seconded. The motion carried (unanimously).

6. Rule 5(c) (typo/page limits — petitions for permission to appeal) [Item No. 98-11]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 5. Appeal by Permission

(c) **Form of Papers; Number of Copies.** All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an answer to a petition or cross-petition for permission to appeal are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 5(c) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 5(c) has been amended to correct that error.

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

The Reporter summarized the comments.

A member said that she was inclined to agree with those commentators who argued that the limit on the size of Rule 5 papers should be expressed in words rather than in pages. Other members expressed reservations about using word limits. A member said that abuses such as manipulating font size or margins were a real problem with briefs, but have never been much of a problem with such things as Rule 5 papers. That is why, when the D.C. Circuit adopted word limits on briefs, it did not adopt word limits on motions or other papers.

The Reporter asked about enforcement. Unless this Committee requires a certificate of compliance to be filed with every Rule 5 paper, a word limit could be enforced only if the clerks counted every word of every paper. Mr. Fulbruge said that, in the Fifth Circuit, about half of all petitions and motions are handwritten and filed by pro se litigants (usually prisoners). Word limits cannot effectively be enforced against such papers; page limits provide at least some restraint.

A member moved that proposed Rule 5(c) be approved as published. The motion was seconded. The motion carried (unanimously).

7. Rule 21(d) (typo/page limits — petitions for extraordinary writs) [Item No. 98-11]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

The Reporter summarized the comments. The Reporter said that he sympathized with those commentators who argued that the limit on Rule 21 papers should be extended to 30 pages. The Reporter said that, as a practitioner, he had occasion to file petitions for mandamus, and those petitions were, for all practical purposes, the same as principal briefs on the merits. Just as principal briefs are limited to 30 pages by Rule 32(a)(7)(A), so should Rule 21 papers be limited to 30 pages by Rule 21(d). A couple of members agreed.

Other members disagreed. They argued that 20 pages is adequate for most Rule 21 papers, and that parties can seek the court's permission to exceed the limit in appropriate cases. Mr. Fulbruge endorsed the 20-page limit. He said that, in the Fifth Circuit, most Rule 21 papers are filed pro se by prisoners, and most are frivolous. A 30-page limit would result in wasting the time of judges and clerks.

A member moved that proposed Rule 21(d) be approved as published, except that the page limit be increased from 20 to 30. The motion was seconded. The motion carried (4-3).

8. Rule 15(f) (premature petitions to review agency action) [Item No. 95-03]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(f) Petition or Application Filed Before Agency Action Becomes Final. If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f)

provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

The Reporter summarized the comments. The Reporter said that, with one exception, the comments on proposed Rule 15(f) were positive, although Judge Easterbrook made a number of good drafting suggestions that were reflected in a revised draft of proposed Rule 15(f) that the Reporter had prepared for the Committee.

The one commentator who expressed opposition to proposed Rule 15(f) was an extremely important one: the United States Court of Appeals for the District of Columbia Circuit and its Advisory Committee on Procedure. Chief Judge Raymond Randolph informed this Committee that the judges on the D.C. Circuit unanimously and strongly opposed Rule 15(f).

The Reporter said that he was not entirely persuaded by the reasons given by the D.C. Circuit for its opposition to proposed Rule 15(f) (which, the Reporter reminded the Committee, was initially proposed by a highly respected member of the D.C. Circuit). At bottom, the D.C. Circuit's opposition seems to reflect concern about the administrative burden on its clerk and the impact on its statistics. That said, the Reporter remarked that he thought it would be futile to attempt to advance proposed Rule 15(f) over the determined opposition of the D.C. Circuit, given the large percentage of administrative law cases that are handled by that court.

A member agreed. He said that he, too, was skeptical of the reasons given by the D.C. Circuit for opposing proposed Rule 15(f). He also noted that, at least in part, the D.C. Circuit

seemed to misunderstand proposed Rule 15(f); contrary to the comments of the D.C. Circuit, nothing in proposed Rule 15(f) would provide that the filing of a petition for rehearing *does* render an agency action non-final and thus non-reviewable. However, the member said, his impression is that, outside of the D.C. Circuit, the problem addressed by proposed Rule 15(f) is more theoretical than real, and he is reluctant to push an amendment designed to solve a D.C. Circuit problem over the opposition of the D.C. Circuit.

A member said that he continues to support proposed Rule 15(f). He disagrees with the D.C. Circuit about the seriousness of the problem that Rule 15(f) would solve; he has seen many instances of litigants falling into the "trap" that Rule 15(f) would eliminate. He also believes that a good part of the D.C. Circuit's opposition is motivated by a concern that, under Rule 15(f), the circuit's statistics would look worse. That is not a good reason for maintaining in place a trap that results in litigants inadvertently losing their right to seek appellate review of adverse agency actions. Although the member understands the concern about trying to push proposed Rule 15(f) over the opposition of the D.C. Circuit, he would at least like to invite Chief Judge Randolph and the clerk of the D.C. Circuit to talk with this Committee about proposed Rule 15(f) when this Committee next meets in Washington.

Another member said that he opposes Rule 15(f) on the merits. He said that the analogy between agency actions and court cases — and thus between proposed Rule 15(f) and current Rule 4(a)(4)(B)(i) — is inapt. In multiple party court cases, the filing of a post-trial motion by Party One effectively stays the appeal for Party Two and Party Three; the case will not go forward with respect to any of the parties until the district court disposes of Party One's motion. In agency actions, the filing of a petition for rehearing with the agency by Party One often does *not* stay the "appeal" for Party Two and Party Three; Party Two and Party Three can seek review of the agency order prior to the disposition of Party One's petition for rehearing.

A member said that he thought that the multiple party problem could be addressed by fine tuning Rule 15(f). Another member said that the problem was more theoretical than real, as the D.C. Circuit (and the other circuits) will almost always stay the "appeals" of Party Two and Party Three while Party One's petition for rehearing is pending with the agency.

A member moved that the Committee not proceed with proposed Rule 15(f) at this time, but instead revisit the matter after further conversation with the D.C. Circuit. The motion was seconded. The motion carried (unanimously).

9. Rule 24(a) (IFP status/PLRA) [Item Nos. 97-05 & 99-01]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. ~~In that event, the district court must~~ and states in writing its reasons for the certification or finding; or

(B) the law requires otherwise.

Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g.*, *Morgan v. Haro*, 112 F.3d

788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

The Reporter summarized the comments.

Several members expressed agreement with the commentators who recommended that the phrase "unless *the law* requires otherwise" be replaced by the phrase "unless *a statute* requires otherwise." Mr. Letter said that the Justice Department's representative on the Criminal Rules Committee had further suggested that the word "requires" should be replaced with "provides."

A member moved that the proposed changes to Rule 24(a) be approved as published, except that "unless the law requires otherwise" should be replaced by "unless a statute provides otherwise." The motion was seconded. The motion carried (unanimously).

A member said that she had difficulty following the Committee Note at a couple of points because it spoke in the present tense about the current — rather than the amended — version of Rule 24(a). She asked the Reporter to try to make clarifying changes in the Committee Note. For example, in the last sentence of the first paragraph of the Committee Note to subdivision (a)(2), it would be better to say "Rule 24(a)(2) *has provided* that" rather than "Rule 24(a)(2) *provides* that."

The Committee adjourned for lunch at 12:00 noon.

The Committee reconvened at 1:35 p.m.

10. Rule 25(c) (electronic service — authorized, consent, when complete) [Item No. 99-03]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; ~~or~~ ;

(C) by third-party commercial carrier for delivery within 3 calendar days; ; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) ~~Personal service includes delivery of the copy to a responsible person at the office of counsel.~~ Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be

served electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

Subdivision (c)(1)(D). New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have given written consent to electronic service.

Subdivision (c)(2). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. New subdivision (c)(2) has been added so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

The Reporter summarized the comments. He said that many of the practical questions raised by the commentators were good ones, but they are precisely the types of questions that the parties can address when they consent to electronic service or courts can address in their local rules. The strong sentiment of the Standing Committee is that parties and courts should

experiment with electronic service for a few years before the rules of practice and procedure are amended to impose more specific requirements on electronic service.

Some commentators complained that it was unclear how the electronic service provisions are to be reconciled with Rule 31(b), which requires that "2 copies" of every brief must be served on counsel for each separately represented party. The Reporter said that similar problems already exist in the rules: Rule 25(a)(2)(D) authorizes the electronic *filing* of briefs, even though Rule 31(b) requires that 25 copies of each brief must be filed with the clerk. And Rule 25(a)(2)(D) authorizes the electronic filing of motions, even though Rule 27(d)(3) requires the filing of "[a]n original and 3 copies." The rules don't address any of these discrepancies, perhaps because none of them causes any harm. Electronic filing is permitted only "by local rule," and any such rules presumably will address the question of how many hard copies must be filed in addition to the electronic copy. And electronic service will be permitted only upon consent, so parties can decide for themselves whether service of hard copies is necessary. Some parties will not think to address this issue in their consent agreements, but, even if they don't, all parties will still receive at least an electronic copy of everything.

The Reporter said that he agreed with the suggestion of the D.C. Circuit that a line be added to the Committee Note clarifying that consent to electronic service is not an "all-or-nothing" affair. Parties can define the terms of their consent; for example, they can consent to service by fax but not by e-mail, or they can consent to electronic service only if follow-up hard copies are always sent.

A member moved that proposed Rule 25(c) be approved as published, except that the Committee Note be revised as the D.C. Circuit suggested. The motion was seconded. The motion carried (unanimously).

11. Rule 25(d) (electronic service — proof of service) [Item No. 99-03]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail~~ing~~ or e-mail addresses, or the addresses of the places of delivery.

Committee Note

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served by e-mail, the proof of service of that paper must include the e-mail address to which the paper was transmitted.

The Reporter summarized the comments. Members expressed agreement with Judge Easterbrook's suggestion that the word "electronic" be used in place of "e-mail" and the D.C. Circuit's suggestion that "facsimile number" be added to Rule 25(d)(1)(B)(iii).

A member moved that Rule 25(d)(1)(B)(iii) be amended as follows and approved:

(iii) their mail~~ing~~ or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

The motion was seconded. The motion carried (unanimously).

By consensus, the Committee gave Judge Garwood and the Reporter permission to make conforming changes to the Committee Note.

12. Rule 26(c) (electronic service — 3-day rule) [Item No. 99-03]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26. Computing and Extending Time

(c) **Additional Time after Service.** When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later. Finally, extending the "three-day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

The Reporter summarized the comments. He said that, while a couple of commentators objected to extending the 3-day rule to electronic service, that matter has already been debated at length by the Standing Committee, the Civil Rules Committee, and this Committee, and the Standing Committee has decided that the 3-day rule should apply to electronic service.

A member moved that proposed Rule 26(c) be approved as published. The motion was seconded. The motion carried (unanimously).

13. Rule 36(b) (electronic service — notification of judgment) [Item No. 99-03]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 36. Entry of Judgment; Notice

(b) Notice. On the date when judgment is entered, the clerk must ~~mail to~~ serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 36(b) be approved as published. The motion was seconded. The motion carried (unanimously).

14. Rule 45(c) (electronic service — notification of entry of judgment/order) [Item No. 99-03]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 45. Clerk's Duties

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party ~~to the proceeding~~, with a copy of any opinion, and must note the ~~mailing~~ date of service on the docket. Service on a party represented by counsel must be made on counsel.

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 45(c) be approved as published. The motion was seconded. The motion carried (unanimously).

15. Rule 26(a)(2) (time calculation) [Item Nos. 95-04 & 97-01]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than ~~7~~ 11 days, unless stated in calendar days.

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated

differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

The Reporter summarized the comments.

A member said that he had encountered the problem described by commentator Roy Wepner regarding the interaction between the "3 day rule" of Rule 26(c) and the "time calculation rule" of Rule 26(a)(2). In deciding whether a deadline is less than 11 days for purposes of Rule 26(a)(2), should the court first count the 3 days that are added to the deadline under the 3-day rule of Rule 26(c)? Or should the court add those 3 days only after it first calculates the deadline under Rule 26(a)(2)? Courts have split over this question when applying the Civil Rules counterparts to Rules 26(a)(2) and 26(c), and there is every reason to believe that the split will now carry over into the appellate rules. The member urged that Mr. Wepner's suggestion be placed on the study agenda.

A member said that he was bothered by the fact that the change in the way time was calculated would mean that the 10-day period for criminal defendants to appeal under Rule 4(b)(1)(A) would be lengthened as a practical matter. Under the new computation method, criminal defendants would never have less than 14 days to file an appeal, and legal holidays could extend that period to as much as 18 days. The member asked whether Rule 4(b)(1)(A) might be amended so that the 10-day appeal period was stated in *calendar* days.

A member opposed the suggestion. He said that he was not bothered by the extra time, and that he did not want to unnecessarily complicated the rules. The Reporter also raised concerns about the suggestion. He pointed out that many criminal defense attorneys would miss the significance of the use of the word "calendar" (especially since the concept of "calendar days" is not used in the rules of criminal procedure) and blow the deadline, resulting in many motions for extensions of time and many ineffective assistance of counsel claims.

Some members questioned the 10-day deadline of Rule 4(b)(1)(A) and asked why defendants were not given 30 days to appeal in criminal cases, as the government is. By consensus, the Committee agreed to add this issue to its study agenda, along with the concern raised by Mr. Wepner.

A member moved that Rule 26(a)(2) be approved as published. The motion was seconded. The motion carried (unanimously).

16. **Rule 4(a)(4)(A)(vi) (obsolete parenthetical) [Item No. 98-12]**

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

The Reporter summarized the comments.

A member moved that proposed Rule 4(a)(4)(A)(vi) be approved as published. The motion was seconded. The motion carried (unanimously).

17. Rule 27(a)(3)(A) (reduce time to respond to motion) [Item No. 98-12]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

(a) In General.

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 7 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~7-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10-day deadline, which means that, except when the 10-day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10-day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10-day deadline in subdivision (a)(3)(A) has been reduced to 7 days. This change will, as a practical matter, ensure that every party will have at least 9 actual days — but, in the absence of a legal holiday, no more than 11 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

The Reporter summarized the comments.

Several members agreed with those commentators who urged that the deadline for responding to motions be reduced to 8 days, rather than to 7 days. Under the current 10-day rule, litigants always have at least 10 actual days to respond to motions, whereas under the proposed 7-day rule, litigants would sometimes have only 9 actual days. This shortening of the already tight deadline for responding to motions could create a hardship.

A member pointed out that the hardship could be avoided simply by *increasing* the deadline from 10 days to 11 days. Under amended Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays are not excluded when a deadline is 11 days or more. Thus, increasing the deadline to 11 days would bring about roughly the same practical result as decreasing it to 8 days, and practitioners could calculate the deadline using the "old" counting method with which they are familiar. Other members expressed a preference for stating the deadline as 8 days.

A member moved that Rule 27(a)(3)(A) be approved as published, except that "8 days" be substituted for "7 days." The motion was seconded. The motion carried (unanimously).

18. Rule 27(a)(4) (reduce time to reply to response to motion) [Item No. 98-12]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

(a) In General.

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, parties generally must reply to responses to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to reply to responses to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7-day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every party will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 27(a)(4) be approved as published. The motion was seconded. The motion carried (unanimously).

19. Rule 41(b) (time to issue mandate stated in calendar days) [Item No. 98-12]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(b) When Issued. The court's mandate must issue 7 <u>calendar</u> days after the time to file a petition for rehearing expires, or 7 <u>calendar</u> days after entry

of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Committee Note

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

The Reporter summarized the comments.

A member moved that proposed Rule 41(b) be approved as published. The motion was seconded. The motion carried (unanimously).

21. Rule 27(d)(1)(B) (cover colors — motions) [Item No. 97-09]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

The Reporter summarized the comments.

A member moved that proposed Rule 27(d)(1)(B) be approved as published. The motion was seconded. The motion carried (unanimously).

22. Rule 32(a)(2) (cover colors — supplemental briefs) [Item No. 97-09]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) **Form of a Brief.**

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow

covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

The Reporter summarized the comments.

A member moved that proposed Rule 32(a)(2) be approved as published. The motion was seconded. The motion carried (unanimously).

23. Rule 32(c)(2)(A) (cover colors — "other papers") [Item No. 97-09]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 32. Form of Briefs, Appendices, and Other Papers

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~, and~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a

cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

The Reporter summarized the comments.

A member moved that proposed Rule 32(c)(2)(A) be approved as published. The motion was seconded. The motion carried (unanimously).

24. Rule 28(j) (limit length and permit argument in Rule 28(j) letters) [Item No. 97-07]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 28. Briefs

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly

advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250-word limit.

The Reporter summarized the comments. He said that, although the comments were generally supportive, several commentators were concerned that the 250-word limit was insufficient when a party wishes to bring multiple citations to the attention of the court. Commentators suggested that the overall word limit be increased, or that the word limit be stated on a "per citation" basis, or that Rule 28(j) provide that the numbers and words contained within citations not count toward the 250-word limit. The Reporter said that, if this Committee shared the commentators' concerns about multiple citation letters, he would recommend simply increasing the overall word limit — say, to 350 words — rather than putting the clerks' offices through the hassle of calculating words per citation or resolving disputes over whether certain words were or were not part of the "citation."

The Committee discussed and rejected various suggestions, including requiring parties to certify the number of words in each Rule 28(j) letter, having *no* limit on the size of Rule 28(j)

letters, stating the limit on the size of Rule 28(j) letters in pages rather than in words, and restoring the prohibition on "argument."

A member moved that proposed Rule 28(j) be approved as published, except that the limitation on the length of letters be increased from 250 words to 350 words. The motion was seconded. The motion carried (unanimously).

25. Rule 31(b) (service of briefs on unrepresented parties) [Item No. 97-21]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 31. Serving and Filing Briefs

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to clarify that briefs must be served on all parties, including those who are not represented by counsel.

The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 31(b) be approved as published. The motion was seconded. The motion carried (unanimously).

26. Rule 32(a)(7)(C) and Form 6 (compliance with type-volume limitation) [Item No. 97-30]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of Brief.

(7) **Length.**

(C) **Certificate of compliance.**

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- ☐ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

- ☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- ☐ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

- ☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

The Reporter summarized the comments. The Reporter stated that the D.C. Circuit was the only commentator on proposed Rule 32(a)(7)(C) and proposed Form 6. The D.C. Circuit suggested that Form 6 be amended to refer to "the *applicable* type-volume limitation" rather than to "the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)," to account for the fact that, in some cases, the length of briefs will be controlled by court order rather than by Rule 32(a)(7)(B).

A member expressed support for the D.C. Circuit's suggestion, and pointed out that altering Form 6 as the D.C. Circuit recommended would make it easier to use the form to certify compliance with other word limitations in the appellate rules, if this Committee were to decide to replace all of the page limitations with word limitations. Other members disagreed, arguing that the D.C. Circuit's recommendation would sacrifice a great deal of clarity and accomplish little. No party is *required* to use Form 6, and, in cases in which the length of briefs is governed by court order, the parties either will not have to file a certificate of compliance or Form 6 can easily be adapted to refer to the terms of the court's order.

A member moved that proposed Rule 32(a)(7)(C) and proposed Form 6 be approved as published. The motion was seconded. The motion carried (unanimously).

27. Rule 32(d) (signature requirement) [Item No. 99-02]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 32. Form of Briefs, Appendices, and Other Papers

(d) **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(de) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. (An appendix filed with the court does not have to be signed.) By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

The Reporter summarized the comments. He said that he was not persuaded by the objections to proposed Rule 32(d), in large part because the signature requirement in Rule 32(d) is substantively identical to the signature requirement in FRCP 11(a). The latter has existed for decades — and applied to appellate proceedings prior to 1968 — yet none of the concerns feared by the commentators has materialized. The Reporter said that he did think it would be helpful to add a line to the Committee Note making it clear that only the original of a paper need be signed.

A member moved that proposed Rule 32(d) be approved as published, except that the Committee Note be amended to clarify that only one copy of each paper need be signed. The motion was seconded. The motion carried.

28. Rule 44(b) (constitutional challenges to state statutes) [Item No. 97-12]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) **Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) **Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or

> employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.
>
> The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.
>
> Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

The Reporter summarized the comments.

A member moved that proposed Rule 44(b) be approved as published. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 97-14 (FRAP 46(b)(1)(B) — attorney conduct)

Judge Scirica reported briefly on the ongoing efforts to draft Federal Rules of Attorney Conduct ("FRAC"). As this Committee has discussed several times, the primary motivation behind those efforts is the enforcement by some states of a broad interpretation of Model Rule 4.2 against federal prosecutors. At this point, the Bush Administration has not taken a position on enforcement of Rule 4.2 against federal prosecutors or decided whether it will continue the negotiations conducted by the Clinton Administration with the Conference of Chief Justices. Likewise, it is not clear what the new Congress thinks about Rule 4.2 or the McDade Amendment. Given this uncertainty, the FRAC project will likely be dormant for some time. However, a great deal of work has been done, so the Standing Committee will be prepared to act if called upon by Congress.

B. Item No. 99-09 (FRAP 22(b) — COA procedures)

Before a party who has applied for a writ of habeas corpus in the district court can appeal the denial of his application, he must obtain a certificate of appealability ("COA") from "a circuit

justice or a circuit or district judge." Rule 22(b)(1). Judge Scirica has pointed out that the circuits have different procedures for considering requests for a COA. In particular, circuits answer the following questions differently: (1) Should the court decide whether to grant a COA before or after it receives briefing on the merits of the appeal? (2) How many judges should be involved in deciding whether a COA should be granted? (3) When, if ever, should counsel be appointed for a party who seeks a COA? Judge Scirica has asked whether FRAP, the FRCrP, or both might be amended to bring about more uniformity. At the April 2000 meeting of this Committee, the Department of Justice agreed to study this matter.

Mr. Letter said that he raised this subject at a meeting of the appellate chiefs from every United States Attorney's Office. The overwhelming majority of the appellate chiefs felt that the variation in circuit procedure was not creating a problem for litigants and that the advisory committees should allow more time for circuit-by-circuit experimentation before trying to impose detailed rules. The one exception cited by the appellate chiefs was the practice in some circuits of making the government file a brief on the merits before the court decides whether to grant a COA and, if so, on what issues. The government believes that this practice defeats the purpose of the COA procedure, which is to spare the government from having to participate in meritless habeas proceedings. The Department of Justice proposes that this Committee approve a new Rule 22(b)(4), which would provide that the government cannot be required to submit a brief until the court first decides whether and to what extent to grant a COA.

Judge Garwood asked Judge Scirica for his reaction to the Justice Department's position. Judge Scirica said that he asked only that this Committee take a look at this area and use its best judgment regarding whether rulemaking was appropriate. He is happy to defer to the considered judgment of this Committee.

Members of the Committee discussed the various procedures used in the circuits. In some circuits, the government is never required to file a brief until a decision is made on the application for a COA. In other circuits, the government is often required to file a brief — and sometimes to engage in oral argument — before a decision is made regarding a COA. In still other circuits, the procedure used in capital cases differs from the procedure used in non-capital cases.

A member expressed opposition to the proposed Rule 22(b)(4); as a judge, he has found that it can be difficult to make a decision regarding a COA until the government files a brief. Another member also expressed opposition to proposed Rule 22(b)(4); he argued that circuits should be given the freedom to decide whether and to what extent they wish to receive briefing from the government before deciding on COAs.

Mr. Rabiej pointed out that current Rule 22 was enacted by Congress, not this Committee, and that the rule represented a carefully balanced political compromise. He said that, if this Committee is intent on altering Rule 22, it ought to first consult with Congress.

A member asked whether proposed Rule 22(b)(4) would be more acceptable if the phrase "except by local rule" or "except by order in a particular case" was added. Members said that the "local rule" exception would render the rule useless; the rule would simply describe the status quo. The "order in particular case" exception would not eviscerate the rule. Again, though, some members oppose any rulemaking on this issue.

By consensus, the Committee agreed to postpone further consideration of this matter until its fall 2001 meeting. In the meantime, the Justice Department will consider whether it wishes to pursue proposed Rule 22(b)(4), given the opposition of some members of this Committee.

C. Item No. 00-03 (FRAP 26(a)(4) & 45(a)(2) — names of legal holidays)

Mr. Jason Bezis has called this Committee's attention to the fact that Rules 26(a)(4) and 45(a)(2) refer to three legal holidays in a different manner than 5 U.S.C. § 6103(a). The rules refer to "Presidents' Day," whereas the statute refers to "Washington's Birthday"; the rules refer to "Martin Luther King, Jr.'s Birthday," whereas the statute refers to the "Birthday of Martin Luther King, Jr."; and the rules refer to "Veterans' Day," whereas the statute refers to "Veterans Day."

At its April 2000 meeting, this Committee agreed that the differences regarding the King holiday and Veterans' Day did not warrant Committee action. However, some members thought that the difference between "Presidents' Day" and "Washington's Birthday" might be substantial enough to justify amending Rules 26(a)(4) and 45(a)(2). Mr. McGough offered to look into this matter.

Mr. McGough reported that, during the 1998 restyling of the rules, this Committee changed "Washington's Birthday" to "Presidents' Day" based upon the advice of a consultant, who appears to have consulted only a dictionary. This Committee did not seem to realize that a statute designates the day as "Washington's Birthday" or that many in Congress and elsewhere feel strongly that the day should be referred to in the traditional way.

Mr. Rabiej said that the Criminal Rules Committee, which is in the midst of restyling its rules, has decided to refer to "the day set aside by federal statute for observance of . . . Washington's Birthday" rather than to "Presidents' Day."

The Reporter said that he would prepare amendments to Rules 26(a)(4) and 45(a)(2) in time for the fall 2001 meeting of this Committee, so that a final decision can be made on this matter. The Committee agreed to postpone further discussion until then.

D. Item No. 00-04 (FRAP 4.1 — indicative rulings)

The Department of Justice has proposed that FRAP be amended to authorize a procedure — commonly referred to as an "indicative ruling" — that is permitted under the common law of most of the courts of appeals. The need for an indicative ruling most often arises in the following situation: A district court enters judgment. A party files a notice of appeal. Sometime later, that party — or another party — files a motion under FRCP 60(b) for relief from the judgment. At that point, the district court cannot grant the FRCP 60(b) motion, as it no longer has jurisdiction over the case. The party can ask the court of appeals to remand the case to the district court, but that would be a waste of everyone's time if the district court will not grant the FRCP 60(b) motion.

Under the indicative ruling procedure, the party files its FRCP 60(b) motion in the district court. The district court then issues an "indicative ruling" — that is, a memorandum in which the district court indicates how it would rule on the FRCP 60(b) motion if it had jurisdiction. If the district court indicates that it would grant the motion, the court of appeals remands the case.

The Justice Department's proposal was discussed at some length at this Committee's April 2000 meeting. At that time, members raised several concerns. Some members objected to the exclusion of proceedings under 28 U.S.C. §§ 2241, 2254, and 2255 from the rule. Other members expressed confusion over how the rule would operate in the case of interlocutory appeals. Still other members questioned the need for rulemaking on this subject or expressed concern about particular language in the Committee Note. The Justice Department agreed to give the matter further study.

Mr. Letter reported that the Justice Department continued to believe that habeas proceedings should be excluded from the rule, but did not feel strongly about it. Likewise, the Department was willing to drop any reference to interlocutory proceedings from the rule or Committee Note.

After further Committee discussion, the Reporter suggested that any rule on indicative rulings should be placed in the FRCP, not in FRAP. Placement in the FRCP would be more logical; after all, the rule authorizes parties to file the post-judgment motions authorized by *the FRCP* in the *district* court and authorizes the *district* court to issue a particular type of ruling. The appellate court has no real involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. The rule on indicative rulings is a rule governing a district court's consideration of post-judgment motions listed in the FRCP; as such, it belongs in the FRCP. This point is reinforced by the fact that FRCrP 33, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

Several members agreed with the Reporter. A member moved that the proposal of the Justice Department on indicative rulings be referred to the Civil Rules Committee and removed from the study agenda of this Committee. The motion was seconded. The motion carried (unanimously).

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which a notice of appeal is filed on behalf of a corporation, but, rather than being signed by an attorney, the notice is signed by one of the corporation's officers. To date, there is only one decision on this issue. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999). However, the issue is pending before the Fourth Circuit, so the possibility of a future conflict exists.

Judge Motz asked that further discussion of this matter be postponed. She stated that the Fourth Circuit had not yet issued its decision on this issue. The Reporter said that it is likely that the panel is holding the case in anticipation of the Supreme Court's decision in *Becker v. Montgomery*, which is scheduled for argument on April 16. In *Becker*, the Sixth Circuit held that it was required to dismiss an appeal because the pro se appellant failed to sign the notice of appeal.

By consensus, the Committee agreed to postpone further discussion of this matter until its fall 2001 meeting.

F. Items Awaiting Initial Discussion

1. Item No. 00-06 (FRAP 4(b)(4) — failure of clerk to file notice of appeal)

Judge Easterbrook forwarded to this Committee a copy of his opinion for the Seventh Circuit in *United States v. Hirsch*, 207 F.3d 928 (7th Cir. 2000), and asked this Committee to consider amending Rule 4(b)(4) to address the failure of a district clerk to file a notice of appeal in a criminal case when requested by a defendant under FRCrP 32(c)(5).

The Reporter suggested that this matter be removed from this Committee's study agenda. Judge Easterbrook himself said in *Hirsch* that the situation that he wishes Rule 4(b)(4) to address "is rare and may be unique," given that he was "unable to find any other case in which judges have had to ponder how to proceed when the clerk does not carry out that mechanical step." Moreover, *Hirsch* itself was not such a case. The transcript made clear that the defendant in

Hirsch had not, in fact, asked the clerk to file a notice of appeal on his behalf. Until this situation actually arises, this would not be a fruitful subject of rulemaking.

A member moved that Item No. 00-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

2. Item No. 00-07 (FRAP 4 — specify time for appeal of Hyde Amendment order)

The Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) authorizes criminal defendants who are acquitted to recover attorney's fees from the government if the court finds that the position of the government was "vexatious, frivolous, or in bad faith." The courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for attorney's fees under the Hyde Amendment is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Truesdale*, 211 F.3d 898, 904 (5th Cir. 2000) (applying the time limitations of Rule 4(a)); *with United States v. Robbins*, 179 F.3d 1268, 1270 (10th Cir. 1999) (applying the time limitations of Rule 4(b)). Judge Duval has asked whether Rule 4 should be amended to resolve this conflict.

Several members pointed out that this circuit split closely resembles the circuit split over the *coram nobis* issue and suggests the need for a general rule defining the time to appeal from orders granting or denying "civil type" motions that are brought in connection with criminal proceedings. For example, Rule 4 might be amended to provide that the 10-day deadline of Rule 4(b)(1)(A) applies only to the appeal of the judgment of conviction or sentence, and that a 30-day deadline applies to all other appeals.

Mr. Letter said that Assistant United States Attorneys had argued both sides of the Hyde Amendment issue, and he said that the Justice Department would be happy to study this issue further. Judge Garwood asked that the Department try to identify other instances in which there is disagreement over the appellate deadline that is applied to an order disposing of a motion brought in connection with criminal proceedings. He also asked that, if appropriate, the Department propose a general rule of the type that has been suggested.

By consensus, the Committee agreed to leave this matter on its study agenda.

3. Item No. 00-08 (FRAP 4(a)(6)(A) — clarify whether verbal communication provides "notice")

Rule 4(a)(6)(A) provides that a party who does not receive "notice" of the entry of a judgment within 21 days can file a motion to reopen the time to file an appeal, as long as the party does so within 180 days after the entry of the judgment or within 7 days after the party receives "notice" of that entry, whichever occurs earlier. There is some tension in the case law over whether a party who learns about the entry of a judgment in a conversation — but not in writing — has received "notice" for purposes of Rule 4(a)(6)(A). At least four circuits have expressly held that only *written* notice will suffice, but two circuits have implied that oral notice is sufficient.

This matter was brought to the attention of this Committee by Judge Duval, who was unable to attend the meeting. By consensus, the Committee agreed to postpone discussion of this matter until its fall 2001 meeting, when Judge Duval could be present. Judge Garwood said that he would ask Judge Duval to be prepared to make a recommendation at the fall meeting.

4. Item No. 00-09 (FRAP 22 — clarify post-AEDPA treatment of CPCs)

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner seeking to appeal the denial of habeas relief had to seek a certificate of probably cause ("CPC"). Under the AEDPA, such a prisoner must seek a COA; in theory, CPCs no longer exist. However, some district court judges have mistakenly continued to issue CPCs instead of COAs, and the circuits have disagreed about how such cases should be handled. Mr. Stuart Buck, a law clerk to Judge David Nelson, has suggested that Rule 22 be amended to address this disagreement.

The Committee discussed Mr. Buck's suggestion and concluded that, before such an amendment could become effective under the REA process, the problem of district courts issuing CPCs will likely have disappeared. A member moved that Item No. 00-09 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

5. Item No. 00-10 (neutral assignment of judges to panels)

Judge William R. Wilson, a former member of the Standing Committee, has suggested that a provision be added to FRAP to require the "neutral" assignment of appellate judges to panels.

The Committee discussed Judge Wilson's suggestion at length and identified a number of potential problems with trying to enact such a rule:

- It would be extremely difficult to come up with a workable concept of "neutrality." Many common circuit practices could be considered "non-neutral," such as taking judges who are behind in their work off of panels or not assigning three inexperienced judges to the same panel.

- Any rule requiring neutrality would have to be accompanied by several exceptions — such as an exception that would allow the same judges that heard an appeal of a case to hear a later related appeal. Drafting these exceptions would be difficult.

- To the Committee's knowledge, the "non-neutral" assignment of judges to panels has not been a problem. An article cited by Judge Wilson focused mainly on the non-neutral assignment of judges to panels of the Fifth Circuit in the early 1960s. Over the past 40 years, there is almost a complete dearth of even anecdotal evidence of panels being unfairly "stacked." Judges can be trusted to ensure that panel assignments are fairly made.

- This is more an issue of internal court administration than procedure, and thus not appropriate for inclusion in FRAP.

- Any proposed rule would likely be resisted by the chief judges of the circuit courts, who make up half the membership of the Judicial Conference.

A member moved that Item No. 00-10 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

6. Item No. 00-11 (FRAP 35(a) — disqualified judges/en banc rehearing)

Both 28 U.S.C. § 46(c) and Rule 35 require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc. The circuits have split on the question of whether judges who are recused are counted in calculating what constitutes a "majority." In some circuits, judges who are recused are counted in the "base" but, of course, cannot vote to hear the case en banc. This leads to some troubling results.

Suppose, for example, that a circuit has 12 active judges and that, in a particular case, 5 of those 12 judges are recused. Even if 6 of the 7 non-recused judges wish to take a case en banc, the case cannot be heard en banc, because 6 is not a majority of 12. This permits just one judge — perhaps sitting on a panel with a visiting judge and a senior judge — effectively to control circuit precedent, even over the objection of all 6 of his non-recused colleagues. In a recent opinion, Judge Edward Carnes asked this Committee to consider amending Rule 35 to provide that a case can be heard en banc upon a majority vote of those active judges who are not recused.

Several members of the Committee said that this issue is worth studying. Judge Scirica warned that this Committee should tread carefully, given that a statute is involved. Judge Scirica said that although a newly enacted rule of appellate procedure would supercede the statute in this case, asking Congress to change the statute remains an option.

By consensus, the Committee agreed to request the Federal Judicial Center to prepare a report on the en banc practices of the circuit courts, encompassing not just the precise issue raised by Judge Carnes but also the extent to which senior judges are permitted to participate in en banc proceedings.

7. Item No. 00-12 (FRAP 28, 31 & 32 — cover colors in cross-appeals)

The Department of Justice has proposed a series of amendments that would address the number of briefs, the length of briefs, the timing of the filing of briefs, and the colors of the covers of briefs filed in cross-appeals. FRAP simply does not address these issues clearly, resulting in a wide variety of circuit practices.

The Committee discussion focused mainly on the length of briefs. The majority of circuits limit the brief of the appellant (the "first" brief) to 14,000 words, the brief of the appellee/cross-appellant (the "second" brief) to 14,000 words, the reply brief and brief of the cross-appellee (the "third" brief) to 14,000 words, and the cross-reply brief (the "fourth" brief) to 7,000 words. The Justice Department proposal is consistent with the majority rule, except that the Department proposes that the second brief be limited to 16,500 words instead of 14,000 words.

Several members expressed disagreement with the 16,500 word limit on the second brief; they said that the second brief should be limited to 14,000, as under the majority rule. Mr. Letter objected that this gives the party who is designated as the appellant/cross-appellee 7,000 more words of total briefing. A member responded that, while that is true, the appellee/cross-appellant also gets the last word, which is often more valuable than 7,000 extra words.

By consensus, the Committee asked the Department of Justice to prepare three alternative proposals:

- the Department's current proposal, except that the proposal should be changed to limit the second brief to 14,000 words instead of 16,500 words;

- a proposal that would combine all provisions applicable to briefs filed in cross-appeals into one rule, rather than scattering those provisions through several rules, as does the Department's current proposal; and

- a proposal that would require parties in cross-appeals to file separate briefs. For example, instead of the appellee/cross-appellant filing a single brief that acts as a principal brief on the merits of its appeal and as a response to the principal brief filed by the appellant/cross-appellee, the appellee/cross-appellant could file two separate briefs.

Mr. Letter said that he hoped to have these three alternatives available for the Committee's consideration at its fall 2001 meeting.

8. Item No. 00-13 (FRAP 29 — preclusion of amicus briefs)

Judge Michael Boudin, a member of the Standing Committee, has asked that this Committee consider amending Rule 29 to expressly authorize courts to bar the filing of a brief by a private amicus, even if the parties consent. At present, the scope of a court's authority is not clear. Judge Boudin's concern is with the use of private amicus briefs to force the recusal of members of a panel assigned to a case.

Committee members expressed some skepticism about the seriousness of this problem especially given that the Committee on Codes of Conduct has issued an opinion that an amicus is *not* a party for purposes of recusal obligations. It is true that a general "appearance of impropriety" standard still applies, and it is true that an amicus could still try to force the recusal of a judge by hiring, say, the judge's daughter to prepare its brief. But these tactics seem rare, and nothing in Rule 29 would preclude a court from barring the filing of a particular amicus brief under these circumstances.

The Reporter offered to draft an amendment implementing Judge Boudin's suggestion for consideration by the Committee at a future meeting. By consensus, the Committee agreed to maintain this matter on its study agenda.

9. Item No. 00-14 (citation of unpublished decisions)

The Department of Justice has proposed that a new Rule 32.1 be added to FRAP to govern the citation of unpublished or non-precedential opinions. Mr. Letter explained that the wide variations in local practice has imposed a hardship on attorneys who have national practices. He stressed that the proposed rule would not address *whether* unpublished decisions have precedential value, but only whether such decisions can be *cited*. Every court will still have the freedom to give as much weight as it wishes to such decisions.

The Reporter reminded the Committee that it had recently considered the substance of this proposal. In fact, Item No. 91-17 — which included, inter alia, the question whether FRAP should regulate the citation of unpublished opinions — stayed on this Committee's study agenda

for seven years. On January 28, 1998, Judge Garwood wrote to the chief judges of the courts of appeals, asking for their views on several questions, including the question: "Should FRAP be amended to specify the circumstances, if any, under which 'unpublished' opinions may be cited by counsel in their briefs and other submissions . . . ?" All of the chief judges, save two, responded to Judge Garwood's letter. With virtual unanimity and much passion, those judges answered "absolutely not." Indeed, the chief judges were adamant that they did not want this advisory committee to regulate unpublished decisions in any way. In light of the reaction of the chief judges — who, after all, make up half of the Judicial Conference — this Committee voted unanimously at its April 1998 meeting not to proceed with proposals to regulate the citation of unpublished decisions. The Reporter said that he thought it would be a waste of this Committee's time — and perhaps risk the appearance of a lack of respect for the chief judges who responded to Judge Garwood's 1998 letter — to take up this precise proposal again just three years later.

Judge Garwood agreed. He mentioned that he had met with the chief judges of the 13 courts of appeals in March 1998. The chief judges used the occasion of that meeting to tell Judge Garwood in person what they had told him in writing: They do not want this Committee to become involved in any way in attempting to regulate unpublished opinions. Judge Garwood said that in light of the recent and vehemently negative reaction of the chief judges, he did not think this Committee should even "stick its toe" in this area.

The Committee briefly discussed the Justice Department's proposal, the use of unpublished decisions, and the likelihood that the attitude of the chief judges might be different today than it was 3 years ago, given the turnover of chief judges and given the controversy surrounding the Eighth Circuit's *Anastaoff* decision. By consensus, the Committee agreed to postpone further discussion of this matter to a later meeting.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Scheduling of Dates and Location of Fall 2001 Meeting

The Committee will next meet on November 8 and 9 in San Francisco.

VIII. Adjournment

By unanimous consent, the Committee adjourned at 5:25 p.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 7-8, 2001
Philadelphia, Pennsylvania

Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Philadelphia, Pennsylvania, on Thursday and Friday, June 7-8, 2001. The following members were present:

Judge Anthony J. Scirica, Chair
David M. Bernick
Honorable Michael Boudin
Honorable Frank W. Bullock, Jr.
Charles J. Cooper
Honorable Sidney A. Fitzwater
Dean Mary Kay Kane
Gene W. Lafitte
Patrick F. McCartan
Honorable J. Garvan Murtha
Honorable A. Wallace Tashima
Honorable Thomas W. Thrash, Jr.

The Department of Justice was represented at the meeting by Roger Pauley, Director (Legislation) of the Office of Legislation and Policy in the Criminal Division. Also in attendance was Chief Justice E. Norman Veasey, a former member of the committee.

Chief Justice Charles Talley Wells and Deputy Attorney General Larry D. Thompson were unable to attend the meeting.

Providing support to 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 U.S. Courts; Nancy Miller, special counsel in the Office of Judges Programs of the Administrative Office; and Christopher F. Jennings, assistant to Judge Scirica.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Honorable David F. Levi, Chair
Honorable Lee H. Rosenthal, Member
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Special Consultant
Advisory Committee on Criminal Rules —
Honorable W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Honorable Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Joe Cecil of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica introduced Dean Michael A. Fitts and Professor Stephen B. Burbank of the University of Pennsylvania Law School and thanked them for making the school's facilities available to the committee for the meeting. Dean Fitts and Professor Burbank welcomed the members and conveyed best wishes from Professor Geoffrey Hazard, a former member of the committee, who was unable to attend the meeting.

Judge Scirica welcomed Dean Mary Kay Kane to the committee and pointed out that she is the dean of the Hastings College of the Law, University of California, president of the American Association of Law Schools, and reporter for the American Law Institute's complex litigation project.

Judge Scirica thanked Chief Justice Veasey for seven years of distinguished service as a member of the Standing Committee, citing, among other things, his leading role in attorney conduct and mass torts issues. He also thanked Judges Garwood and Davis, whose terms as advisory chairs are due to end on October 1, 2001. He praised them especially for their enormous contributions in achieving a complete restyling of the appellate and criminal rules.

Judge Scirica said that there was little to report on the action of the Judicial Conference at its March 2001 meeting. He added, however, that several proposed amendments to the rules will be presented to the Conference at its September 2001 meeting, some of which might prove to be controversial.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 2001.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Judicial Conference at its September 2000 meeting had passed a resolution encouraging courts to post their local rules on the Internet. At that time, 54 district courts already had posted local rules on their respective web sites. The courts, he said, have been complying with the resolution, and now 83 out of the 92 district courts have placed their rules on the Internet. He added that Senator Lieberman had introduced legislation that would require all courts to establish web sites and post on them their local rules and orders.

Mr. Rabiej reported that Senator Thurmond had introduced legislation that would allow a district judge to conduct an arraignment by video conferencing, even without the consent of the defendant, and to conduct a sentencing hearing by video conferencing under certain circumstances.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil noted that the agenda book for the meeting contains a status report on the various educational and research projects of the Federal Judicial Center. He pointed out that the Research Division of the Center is updating an earlier study of summary judgments and should have some additional insights to present at the next committee meeting on the impact of summary judgments on civil litigation in the district courts.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 2001. (Agenda Item 8)

Amendments for Final Approval

Judge Garwood reported that the advisory committee had been working since April 1998 on a variety of amendments to the appellate rules. The proposed amendments had been brought to the Standing Committee's initial attention at its January 2000 and June 2000 meetings. They deal with five general subjects: (1) entry of judgment and time for filing an appeal; (2) electronic service; (3) calculating time limits; (4) corporate disclosure statements; and (5) various "housekeeping" changes in the rules. Judge Garwood pointed out that public comments had been received on the proposed amendments, but no commentator had asked to testify on them in person.

FED. R. APP. P. 1(b)

Professor Schiltz said that the advisory committee recommends abrogating Rule 1(b), which declares that the Federal Rules of Appellate Procedure "do not extend or limit the jurisdiction of the courts of appeals." He noted that the provision is obsolete because Congress enacted legislation in 1990 and 1992 authorizing the Supreme Court through the rules process to affect the jurisdiction of the courts of appeals by: (1) defining when a district court ruling is final for purposes of 28 U.S.C. § 1291; and (2) providing for appeals of interlocutory decisions not already authorized by 28 U.S.C. § 1292.

One of the members expressed concern that extending or limiting the jurisdiction of the courts of appeals through the rules process may not be constitutional. Defining the jurisdiction of the courts, he said, is "ordaining and establishing" courts within the meaning of Article III of the Constitution — a power reserved exclusively to Congress.

Judge Garwood responded that the advisory committee is not taking a position on the constitutional issue. Rather, it is merely seeking to abrogate a rule that is no longer correct in light of the legislation described above.

Mr. Cooper moved to add language to the committee note specifying that the committee takes no position with regard to the constitutional issue. The motion died for lack of a second.

The committee with one objection approved the proposed abrogation of Rule 1(b).

FED. R. APP. P. 4(a)(1)(C)

Professor Schiltz explained that the proposed addition to Rule 4, governing the time for filing a notice of appeal, would resolve a split among the courts of appeals as to whether an appeal from an order denying an application for a writ of error *coram nobis* is governed by the time limitations applicable to civil cases (Rule 4(a)) or by those applicable to criminal cases (Rule 4(b)). He said that the proposed amendment adopts the civil case time limitations. He added that no changes had been made in the text or note following publication.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 4(a)(5)(A)(ii)

Professor Schiltz said that the proposed amendment to the rule, governing motions for extension of time, would allow a district court to extend the time to file a notice of appeal if the moving party shows either "excusable neglect" or "good cause" — regardless of whether the extension motion is filed within the original 30-day time for appeal or the next 30 days. He added that some courts have held — based on obsolete language in a committee note — that the "good cause" standard applies to motions brought within the 30-day period, and the "excusable neglect" applies after that time.

Professor Schiltz explained that the proposed amendment brings the civil appellate provision into harmony with the criminal appellate provision. He also said that the only change, other than style, made after publication was to add language to the note explaining "good cause" and "excusable neglect."

The committee without objection approved the proposed amendment.

FED. R. APP. P. 4(a)(7)

Professor Schiltz said that the proposed changes would address problems caused by the interaction of: (1) Rule 4(a)(7)'s definition of when a judgment is entered for purposes of appeal; and (2) FED. R. CIV. P. 58's requirement that a judgment be set forth on a separate document. The core problem, he said, is that many district court judgments — despite the requirement of Rule 58 — are not in fact set forth on separate documents. Under the case law of every circuit but one, the time to file an appeal never begins to run if the trial court fails to comply with the separate document requirement.

In addition, he said, the filing of a post-judgment motion tolls the time for appeal until an order denying the motion is entered. In many circuits, most orders denying post-judgment motions are themselves appealable, and thus are defined under the civil rules as "judgments" that must be entered on separate documents before the time to appeal begins to run. As a result of all this, there are many cases in which the parties assume that the time to appeal has expired, when in fact it remains open. Professor Schiltz pointed out that there are more than 500 court of appeals decisions addressing the subject.

Professor Schiltz reported that the Advisory Committee on Appellate Rules and the Advisory Committee on Civil Rules had worked together on proposing solutions to the problems caused by the interaction of the two sets of rules. He said that the proposed companion amendments to FED. R. CIV. P. 58 would maintain the separate document requirement generally, but specify that when a separate document is required a judgment is entered for purposes of the civil rules when it is entered in the civil docket and when the earlier of these events occurs: (1) the judgment is set forth on a separate document; or (2) 150 days have run from entry in the civil docket. The proposed amendments to the civil rule would also specify that a separate document is not required for an order disposing of specified post-trial motions.

Professor Schiltz explained that the proposed amendments to FED. R. APP. P. 4(a)(7) tie directly into FED. R. CIV. P. 58. There will be no separate document requirement in the appellate rules. Rather, a judgment will be considered entered for purposes of FED. R. APP. P. 4(a) if it is entered in accordance with FED. R. CIV. P. 58.

Professor Schiltz pointed out that the committee had received some negative comments from the public on the proposal to "cap" the time for filing an appeal. Commentators declared that the separate document requirement protects parties against unknowingly forfeiting their rights by giving them clear, actual notice that the time for appeal has begun to run. They argue that the appeal period should never run until a separate document is entered. Professor Schiltz reported, however, that the two advisory

committees had rejected that argument, believing that the time to appeal should not be allowed to run forever.

As published, the proposed amendments had specified that a judgment is deemed entered 60 days after entry in the civil docket by the clerk. But commentators suggested that 60 days of inactivity in a case is simply too common to provide the parties with adequate notice that the case is over. Accordingly, in light of the public comments, the advisory committees decided after publication to increase the "cap" from 60 days to 150 days. A period of 150 days of inactivity should clearly signal to the parties that the court is done with their case. Professor Schiltz noted, moreover, that if a a judgment is properly entered on a separate document, a party who receives *no notice at all* has only 180 days to file an appeal under the current rule. It would be inconsistent, he said, to argue that a party who does in fact receive notice of the court's judgment, but not through a separate document, should have an unlimited amount of time to appeal.

Professor Cooper reported that a few changes had been made in FED. R. CIV. P. 58 following publication. He noted that the definition of the time of entering judgment in Rule 58(b) had been extended to apply to all the civil rules, not just the list of specific rules set forth in the published version.

He also noted that the advisory committee had decided to carry forward the separate document requirement in Rule 58(a), even though some commentators had suggested abandoning it. The requirement applies explicitly not only to every judgment, but also to every amended judgment. This provision, he said, is important with respect to orders disposing of post-trial motions. Rule 58(a), as amended, states that a separate document is not required to dispose of certain post-trial motions. But if the order disposing of the motion amends the judgment, a separate document is in fact required.

Professor Cooper pointed out that Rule 58(a)(2) specifies the duty of the clerk to prepare, sign, and enter the judgment. The advisory committee decided after publication to add the words: "unless the court otherwise orders." He noted that subdivision (c) restates the current rule on cost or fee awards. But subdivision (d), he said, is new. It allows a party to request the court to set forth a judgment on a separate document to support an immediate appeal. A complementary amendment to FED. R. CIV. P. 54(d) would delete the requirement that a judgment on a motion for attorney fees be set forth in a separate document.

Several of the participants stated that the proposed amendments represented a major accomplishment, achieved as a result of extensive, careful research and close cooperation between the appellate and civil advisory committees.

One of the members pointed out that Supreme Court orders normally specify that amendments to the rules govern all proceedings then pending "insofar as just and practicable." He asked whether the proposed amendments to the FED. R. APP. P. 4(a)(7) and FED. R. CIV. P. 58 will have the effect of ending all pending "time bomb" cases 150 days after the proposed amendments are scheduled to take effect on December 1, 2002. Professors Schiltz and Cooper responded that the Court's orders prescribing the amendments to FED. R. APP. P. 4 and FED. R. CIV. P. 58 should specify that they do in fact apply to all pending cases. Judge Scirica noted that there was a consensus in the committee in support of the recommendation, and he suggested that the matter be brought specifically to the attention of the Court.

The committee without objection approved the proposed amendments to Fed. R. App. P. 4(a)(7) and Fed. R. Civ. P. 54(d)(2) and 58.

FED. R. APP. P. 4(b)(5)

Professor Schiltz reported that the proposed amendment would resolve a split among the circuits by specifying that the filing of a motion to correct a sentence under FED. R. CRIM. P. 35 does not toll the time to appeal a judgment of conviction.

Judge Garwood added that the rule's reference to FED. R. CRIM. P. 35(c) must be changed to FED. R. CRIM. P. 35(a) because of the recent restyling of the criminal rules.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 5(c)

Professor Schiltz said that the proposed amendment would correct an erroneous cross-reference in the rule and impose a 20-page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal. He noted that there had been no public comments on the proposal.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 15(f)

Professor Schiltz reported that the advisory committee had proposed adding a new subdivision (f) to Rule 15 (review or enforcement of an agency order) to provide that when an agency order is rendered non-reviewable by the filing of a petition for rehearing or a similar petition with the agency, any petition for review or application filed with the court to enforce that non-reviewable order will be held in abeyance and become effective

when the agency disposes of the last review-blocking petition. The proposed amendment is modeled on Rule 4(a)(4)(B)(i) and treats premature petitions for review of agency orders in the same manner as premature notices of appeal of judicial decisions.

Professor Schiltz noted that the proposed amendment is being deferred in light of opposition from the Advisory Committee on Procedures for the District of Columbia Circuit. He said that the committee would confer with the chief judge and clerk of the court of appeals about the objections.

FED. R. APP. P. 21(d)

Professor Schiltz reported that the proposed amendment would correct an erroneous cross-reference in Rule 21(d) (writs of mandamus and prohibition and other extraordinary writs). It would also impose a 30-page limit on petitions for extraordinary relief and answers to those petitions.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 24(a)

Professor Schiltz said that the proposed amendments to Rule 24(a) (proceeding *in forma pauperis*) would eliminate apparent conflicts with the Prison Litigation Reform Act of 1995 regarding payment of filing fees and continuance of district court *in forma pauperis* status to the court of appeals.

The committee without objection approved the proposed amendments.

ELECTRONIC SERVICE
FED. R. APP. P. 25(c), 25(d), 26(c), 36(b) AND 45(c)

Professor Schiltz pointed out that the proposed amendments to the appellate rules authorizing the use of electronic service are identical to the companion amendments to the civil rules, except for an additional paragraph in the committee note making it clear that parties have the flexibility to define the terms of their consent.

The committee without objection approved the proposed amendments.

TIME CALCULATION
FED. R. APP. P. 26(a)(2), 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4), AND 41(b)

Professor Schiltz reported that the proposed amendments are designed to conform computation of deadlines under the Federal Rules of Appellate Procedure with usage

under the civil and criminal rules. Thus, under the proposed amendment to Rule 26(a)(2), intermediate weekends and holidays will be excluded in computing any prescribed period less than 11 days, rather than periods less than 7 days.

The proposed amendment to Rule 4(a)(4)(A)(vi) (appeal in a civil case) would delete a parenthetical that will become superfluous in light of the proposed amendment to Rule 26(a)(2).

Professor Schiltz explained that the proposed amendment to Rule 27(a)(3)(A) would change from 10 days to 8 days the time within which a party must file a response to a motion. As a practical matter, he said, the time limit would remain about the same as under the current rule since the proposed amendment to Rule 26(a)(2) specifies that intermediate weekends and holidays are excluded in computing deadlines of less than 11 days.

Professor Schiltz said that the proposed amendment to Rule 27(a)(4) would change from 7 days to 5 days the time within which a party must file a reply to a response to a motion. Because of the parallel amendment to Rule 26(a)(2), intermediate weekends and holidays will be excluded from computation.

Professor Schiltz said that Rule 41 (mandate) would be amended to specify that the court's mandate must issue in seven *calendar* days.

The committee without objection approved the proposed amendments.

FED. R. APP. P. 26.1

The committee considered the proposed amendments to Rule 26.1 (corporate disclosure statement) later in the meeting together with proposed parallel amendments to the civil, criminal, and bankruptcy rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

COVER COLORS
FED. R. APP. P. 27(d)(1)(B), 32(a)(2), AND 32(c)(2)(A)

Professor Schiltz pointed out that the proposed amendments would specify the color of a cover, if one is used, for a motion (white), a supplemental brief (tan), and a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, or response to a petition for hearing or rehearing en banc (white). He said that all the public comments save one had been favorable.

The committee without objection approved the proposed amendments.

FED. R. APP. P. 28(j)

Professor Schiltz explained Rule 28(j) (citation of supplemental authorities) authorizes a party to notify the clerk by letter if pertinent and significant authorities come to its attention after its brief has been filed. The current rule, he said, specifies that the letter must describe the supplemental authorities "without argument," but there is no size limit on the letter. The proposed amendment would eliminate the prohibition on "argument" because it is just too difficult to enforce. But it would impose a limit on the size of the letter. As published, the proposed limit had been 250 words, but commentators expressed concern about letters addressing multiple citations. In response, the advisory committee decided to increase the proposed limit of the letter to 350 words, without specifying how citations will be counted.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 31(b)

Professor Schiltz said that the proposed amendment to Rule 31 (serving and filing briefs) would clarify that briefs must be served on all parties, including those not represented by counsel.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 32(a)(7)(C) AND FORM 6

Professor Schiltz explained that the proposed new Form 6 is a suggested certificate of compliance stating that a brief meets the requirements of Rule 32(a) regarding type-volume limitation, typeface, and type style. The proposed amendment to Rule 32(a)(7)(C) specifies that use of Form 6 is sufficient to meet the certification obligation of the rule.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 32(d)

Professor Schiltz reported that the proposed amendment to Rule 32(d) specifies that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it. He said that one commentator strongly opposed the amendment, and other commentators expressed concern as to whether each copy of a document must be signed. He explained that the advisory committee added a sentence to the committee note following publication specifying that only the original of every paper must be signed.

The committee without objection approved the proposed amendment.

FED. R. APP. P. 44(b)

Professor Schiltz explained that the current Rule 44 implements 28 U.S.C. § 2403(a) by requiring the clerk of court to notify the Attorney General of the United States whenever a party challenges the constitutionality of a federal statute and the United States is not a party to the case. Proposed new Rule 44(b) would implement a companion statutory provision, 28 U.S.C. § 2403(b), and require the clerk to notify the attorney general of a state whenever a party challenges the constitutionality of a state statute and the state is not a party to the case.

The committee without objection approved the proposed amendment.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 15, 2001. (Agenda Item 7)

Judge Small noted that the Supreme Court on April 23, 2001, had approved amendments to eight bankruptcy rules and submitted them to Congress. (Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022)

He also reported that major bankruptcy reform legislation had passed both houses of the 107th Congress and will likely be enacted into law sometime later in the year. Because the legislation generally will take effect 180 days after enactment, the advisory committee will have a very short period in which to draft appropriate rules and forms to implement the new law. He said that the advisory committee had appointed subcommittees and hired consultants to examine the legislation thoroughly and determine what changes will be needed in the rules and forms.

Amendments for Final Approval

Judge Small reported that the advisory committee in August 2000 had published proposed amendments to seven rules, one proposed new rule, and amendments to one official form. He said that the committee had received many comments on the proposals and had conducted a public hearing on January 26, 2001. The most controversial of the changes, he said, involves the rewriting of Rule 2014, which requires a professional seeking employment in a bankruptcy case to disclose connections with the debtor and others.

FED. R. BANKR. P. 1004

Professor Morris explained that Rule 1004(a), dealing with voluntary petitions filed by partnerships, would be deleted because it addresses a matter of substantive law beyond the scope of the rules. As amended, the rule will apply only to involuntary petitions.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 1004.1

Professor Morris reported that proposed new Rule 1004.1 will fill a gap in the rules and allow an infant or incompetent person to file a petition through a representative, next friend, or guardian ad litem. It also will allow the court to appoint a guardian ad litem or issue any other orders necessary to protect an infant or incompetent debtor. Judge Small pointed out that the proposed rule is modeled on FED. R. CIV. P. 17(c).

The committee without objection approved the proposed new rule.

FED. R. BANKR. P. 2004

Professor Morris said that Rule 2004 (examination) would be amended to clarify that an examination may be conducted outside the district in which a case is pending. The amended rule specifies that the subpoena for the examination may be issued and signed by an attorney authorized to practice either in the court where the case is pending or the court where the examination is to be held.

One of the judges questioned whether it is technically correct to state that an attorney, rather than the court, "issues" a subpoena. It was pointed out, though, that the language of the proposed amendment to the bankruptcy rules is consistent with the usage of the civil rules. Specifically, FED. R. CIV. P. 45(a)(2) declares that a subpoena issues from the court, but FED. R. CIV. P. 45(a)(3) provides that an attorney, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 2014

Judge Small explained that Rule 2014 (employment of a professional) has been rewritten to conform more closely to the provisions of the Bankruptcy Code regarding the disclosures that a professional must make when seeking employment in a bankruptcy case. The amended rule will require the professional to disclose, among other things:

(1) any interest in, relationship to, or connection with the debtor; and

(2) any other interest, relationship, or connection that might cause the court or a party in interest reasonably to question whether the professional is "disinterested" within the meaning of section 101 of the Code.

Judge Small said that the committee had received both favorable and unfavorable comments on the proposed revisions. He explained that the opponents claim that the revised rule will give professionals too much discretion to decide what they must disclose. They express a preference for retaining the current rule, which requires disclosure of "all connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Proponents of the revision, on the other hand, declare strongly that the current rule simply does not work and that it is impossible as a practical matter for professionals to comply with it fully.

Judge Small reported that the advisory committee had spent a great deal of time in addressing the rule, and he noted that members had engaged in a personal dialog with some of the opponents of the revisions. As a result of these discussions, he said, the advisory committee had refined the language of paragraphs (b)(3) and (b)(4) following publication. He and Professor Morris explained that the revisions will continue to require full disclosure of any connection with the debtor, will specify a reasonableness standard with respect to disclosure of connections with creditors and other parties in interest, and will give clear notice to professionals that their disinterestedness is to be judged by others, *i.e.,* the court and parties in interest. Judge Small said that the post-publication refinements had satisfied most, though not all, opponents of the change.

The committee with two negative votes approved the proposed amendment.

FED. R. BANKR. P. 2015

Professor Morris said that Rule 2015 (duty to keep records, make reports and give notice) would be amended to specify that the duty to file quarterly reports in a chapter 11 case continues only as long as there is an obligation to make quarterly payments to the United States trustee.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 4004

Professor Morris stated that the proposed amendment to Rule 4004(c) (grant or denial of discharge) would expand the types of motions that prevent or postpone the entry of a discharge.

The committee without objection approved the proposed amendment.

FED. R. BANKR. P. 9014

Judge Small noted that the advisory committee had considered the proposed amendments to Rule 9014 (contested matters) originally as part of its proposed "litigation package."

He said that some negative comments had been received regarding new subdivision (d). The proposed amendment makes it clear that testimony as to material, disputed facts in contested matters must be taken in the same manner as in an adversary proceeding. He said that some commentators had expressed concern that the amendment might eliminate the widespread practice of allowing some direct testimony to be presented by way of affidavit. Judge Small explained that the proposed amendment does not eliminate the practice. But if a factual dispute arises in a contested matter, the court must resolve it through live testimony, just as it would in an adversary proceeding.

Professor Morris reported that new subdivision (e) would require a court to provide a mechanism for notifying attorneys as to whether the presence of witnesses is necessary at a particular hearing. He emphasized that the rule does not specify any particular procedures. Nor does it specify whether the court should notify attorneys by local rule, order, or otherwise. He emphasized that local procedures for hearings and other court appearances in contested matters vary from district to district. The amended rule will simply require a court to provide some sort of mechanism enabling attorneys to know at a reasonable time before a scheduled hearing on a contested matter whether they need to bring their witnesses.

The committee without objection approved the proposed amendments.

FED. R. BANKR. P. 9027

Professor Morris said that the proposed amendment to Rule 9027 (removal) makes it clear that if a claim or cause of action is initiated after a bankruptcy case has been commenced, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed by the court.

The committee without objection approved the proposed amendment.

FORMS 1 AND 15

Professor Morris pointed out that only relatively minor changes are proposed in the forms. He said that Form 1 (voluntary petition) would be amended to require a debtor to disclose ownership or possession of any property that poses, or is alleged to pose, a

threat of imminent and identifiable harm to public health or safety. He said that there had been very little public comment on the proposed addition.

Professor Morris reported that Form 15 (order confirming a plan) would be amended to conform to a change in Rule 3020 currently pending in Congress that should take effect on December 1, 2001. The amended rule states that if a chapter 11 plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation must describe in reasonable detail all acts enjoined, be specific in its terms regarding the injunction, and identify the entities subject to the injunction.

Professor Morris recommended that the amendments to the forms be made effective by the Judicial Conference on December 1, 2001, to coincide with the effective date of amendments to the rules.

The committee without objection approved the proposed amendments to the forms and recommended that they become effective on December 1, 2001.

Amendments for Publication

FED. R. BANKR. P. 1007 AND 7007.1

The committee considered the proposed amendment to Rule 1007 and proposed new Rule 7007.1 (corporate ownership statement) later in the meeting together with proposed parallel amendments to the appellate, civil, and criminal rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. BANKR. P. 2003 AND 2009

Judge Small said that the proposed amendments to Rule 2003 (meeting of creditors or equity security holders) and Rule 2009 (trustees for estates when joint administration is ordered) reflect the enactment of a new subchapter V of chapter 7 of the Bankruptcy Code governing the liquidation of multilateral clearing organizations.

The committee without objection approved the proposed amendments for publication.

FED. R. BANKR. P. 2016

Professor Morris said that new subdivision (c) would be added to Rule 2016 (compensation for services rendered and reimbursement of expenses) to implement § 110(h)(1) of the Bankruptcy Code. It would require bankruptcy petition preparers to disclose fees they receive from the debtor.

The committee without objection approved the proposed amendment for publication.

FORMS 1, 5, AND 17

Professor Morris said that Form 1 (voluntary petition) would be amended by adding a check box to designate a clearing bank case filed under subchapter V of chapter 7 of the Bankruptcy Code. The proposed changes to Form 5 (involuntary petition) and Form 17 (notice of appeal) are required by an uncodified 1994 amendment to the Bankruptcy Code providing that child support creditors do not have to pay filing fees.

The committee without objection approved the proposed amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Levi and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachments of May 14, 2001. (Agenda Item 6)

Amendments for Final Approval

FED. R. CIV. P. 7.1

The committee considered proposed new Rule 7.1 (corporate disclosure statement) later in the meeting together with proposed parallel amendments to the appellate, bankruptcy, and criminal rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. CIV. P. 54 AND 58

The committee approved proposed amendments to Rule 54 (judgment and costs) and Rule 58 (entry of judgment) as part of its consideration of proposed amendments to FED. R. APP. P. 4(a)(7). (See pages 6-8 of these minutes.)

FED. R. CIV. P. 81

Professor Cooper said that the proposed amendment to Rule 81 (applicability of the rules) would eliminate an inconsistency regarding time provisions between Rule 81(a)(2) and the rules governing § 2254 cases and § 2255 proceedings.

The committee without objection approved the proposed amendment.

ADMIRALTY RULE C

Professor Cooper pointed out that the proposed amendments to the admiralty rules had been described in detail at the January 2001 meeting of the committee. He explained that the proposed changes are minor in nature and designed to eliminate unintentional inconsistencies between the rules and the Civil Asset Forfeiture Reform Act of 2000. He noted that the amendments had been published under an expedited schedule and had attracted no public comments.

The committee without objection approved the proposed amendments.

Amendments for Publication

Judge Levi reported that the advisory committee was seeking authority to publish proposed amendments to Rule 23 (class actions), Rule 51 (jury instructions), and Rule 53 (masters).

FED. R. CIV. P. 23

Background

Judge Levi noted that the advisory committee had been studying the operation of Rule 23 for a number of years. In the 1990s, he said, its efforts had focused largely on the merits of the decision to certify a class. Although several proposed amendments to Rule 23 had been published for comment, the only change actually made in the rule was the addition in 1998 of subdivision (f), authorizing interlocutory appeals of decisions granting or denying class certification. That amendment, he said, appears to be working very well. It has facilitated a healthy development of the law without either overburdening the courts of appeals or delaying cases in the district courts.

Judge Levi said that the focus of the advisory committee's current efforts is on judicial oversight of class actions, including oversight of settlements, appointment and payment of attorneys, and overlapping or competing class actions. He reported that the advisory committee's class-action work has been directed by Judge Rosenthal, chair of the committee's class action subcommittee, assisted by Professor Cooper and Professor Marcus, its special consultant.

Judge Levi pointed out that the standing committee in January 2001 had advised the advisory committee to be bold in devising solutions to class action problems and not to be intimidated by the restrictions of the Rules Enabling Act. To that end, he said, some members invited the advisory committee to recommend possible statutory amendments as part of the proposed solutions.

Judge Levi noted that the advisory committee's package of proposed amendments to Rule 23 had been carefully drafted with an eye on the Rules Enabling Act. Nevertheless, he said, some members have questioned whether the committee has authority to proceed under the rules process with three of the amendments in the package. As included in the committee's agenda book, the three deal with competing class actions and may be summarized as follows:

(1) Proposed Rule 23(c)(1)(D) specifies that if a court refuses to certify a class, it may direct that no other court certify a substantially similar class.

(2) Proposed Rule 23(e)(5) specifies that if a court refuses to approve a settlement, other courts are precluded from approving substantially the same settlement.

(3) Proposed Rule 23(g) specifies that a court may enjoin a class member from filing or pursuing a similar class action in any other court.

Judge Levi said that the advisory committee had decided to table further action on these three particular provisions in order to avoid controversy over the Rules Enabling Act that could derail the whole package of proposed class action amendments. He said that the advisory committee will not publish the three provisions, but will distribute them in a less formal way to members of the bench, bar, and academia, and invite comments. Accordingly, the attorney appointment and attorney fee subdivisions, originally designated as proposed Rules 23(h) and (i), will be redesignated as proposed Rules 23(g) and (h). In addition, the committee will host a class-action conference at its October 2001 meeting that will consider, among other things, competing and conflicting class actions.

Judge Scirica reported that the decision to defer publication of the three proposed amendments had been reached following considerable discussion among the committee chairs and reporters. He said that it is very important to solicit input on the three "preclusion" amendments and to discuss them with bar groups, judges, and law schools, and also with the Federal-State Jurisdiction Committee of the Judicial Conference.

Several members of the committee extolled the work of the advisory committee, stating that the proposed preclusion provisions are badly needed, whether by way of statute or rule.

Rule 23(c)

Judge Levi pointed out that proposed Rule 23(c)(1)(A) requires a court to make a decision on whether to certify a class "when practicable." The current rule, on the other hand, requires a decision "as soon as practicable." He said that the proposed change is significant because it would give a judge adequate time to decide whether certification of

a class is appropriate. The amendment, he said, is not designed to have the judge delve into the merits of the case, but to learn more about the nature of the issues.

Professor Cooper added that the proposal had been recommended by the advisory committee in the past, but had been deferred in part because of concern by some that it might cause delay in some cases. The advisory committee, he said, had looked at the proposal afresh, had considered a Federal Judicial Center study of class actions, and had determined that the proposal strikes a good balance between the need for dispatch and the need to gather sufficient information to support a well-informed determination by the court on whether to certify a class.

One member stated that there is no compelling reason to change the current rule. He said that the bench and bar are comfortable with the present language, which emphasizes prompt court action. Any change in the rule, he said, could lead to mischief and unintended consequences. Another member complained that some judges now defer certification decisions in order to encourage settlement. He said that the amendment may broaden that practice and open the way to additional discovery and delay.

Judge Levi responded that most courts read the current "as soon as practicable" language to mean "when practicable." Thus, the amendment may make no difference in these courts. On the other hand, other courts read the current language to mean "as quickly as is humanly possible," and some even have local rules setting overly strict time limits for making certification decisions. The advisory committee, he said, wants to emphasize the need for the court to make an informed decision, even if it takes a little time for the judge to explore the key issues, and even to allow some limited discovery.

Judge Rosenthal pointed out that an unintended consequence of the current rule is that many judges and lawyers believe that there is an absolute barrier against inquiring into the nature of the issues on the merits. The amendment, she said, would remove that impediment. At the same time, she said, the advisory committee is very careful in the note to explain the purposes of the pre-certification activities and to emphasize that the amendment does not allow further delay.

One of the participants suggested that the key issue is whether a court may grant a dispositive motion before it makes a certification decision. He suggested that the rule or note focus on the power of a judge to rule on a dispositive motion before ruling on a class certification motion.

Several participants offered language changes in the proposed amendment and committee note. Judge Scirica noted that there appeared to be a consensus as to the desirability of publishing the proposed rule. But, he said, there were a number of disagreements as to language. Accordingly, he suggested that Professor Cooper work with several of the members to incorporate their suggestions and improve the language of

the rule and note before publication. Ultimately, it was decided to require that the court's certification decision be made "at an early practicable time."

Judge Levi noted that the remaining parts of proposed Rule 23(c) are non-controversial. He pointed out that Rule 23(c)(2)(a)(ii) would require that reasonable notice be provided to class members in (b)(1) and (b)(2) class actions.

The committee without objection approved proposed Rule 23(c) for publication — after tabling subparagraph (c)(1)(D), as noted above. It also authorized the advisory committee to entertain additional changes in the note.

Rule 23(e)

Judge Levi noted that the proposed amendment to Rule 23(e)(1) would for the first time specify standards in the rules for approving a settlement. It would require a settlement to be "fair, reasonable, and adequate."

Professor Cooper stated that the current rule provides that an action may not be dismissed or settled without notice. He explained that the rule, as revised, would distinguish between: (1) voluntary dismissals and settlements occurring before the court certifies a class; and (2) dismissals and settlements that bind a class. In the first case — covered by proposed Rule 23(e)(1)(A) — notice is not required, although the court retains discretion to order notice. But court approval is required because people may have relied on the action being pending. In the second case — covered by proposed Rule 23(e)(1)(B) and (C) — reasonable notice must be provided to all class members, and the court must determine that the dismissal or settlement is "fair, reasonable, and adequate." Professor Cooper added that the term "compromise" has been retained in the rule, as well as "settlement," out of an abundance of caution.

Some participants offered suggested improvements in the language of the rule that Judge Levi agreed to consider.

The committee with one objection approved proposed Rule 23(e)(1) for publication.

Judge Levi stated that proposed Rule 23(e)(2) would authorize the court to direct that settlement proponents file copies of any side agreements made in connection with the settlement.

The committee with one objection approved proposed Rule 23(e)(2) for publication.

Judge Levi said that in many cases a proposed settlement and a class certification are presented to the court at the same time. Class members have the opportunity to opt out with full knowledge of the terms of the settlement.

On the other hand there are many cases where class members are provided a single opportunity to opt out of a class before settlement terms are disclosed. He said that the court should have discretion to give them another chance to opt out when they learn the terms of the settlement. Judge Levi said that most class members will likely not opt out, but fairness dictates that they be allowed to elect exclusion after the settlement terms are announced. He noted that the advisory committee had drafted two alternate versions of the opt-out provision for publication. Judge Rosenthal explained that the first alternate is stronger, containing a presumption in favor of an opt out. The second, she said, is more neutral.

One of the members strongly opposed the proposed amendment, saying that although it appears on its face to be fair to class members, it is normally lawyers, not class members, who make the decisions. The amendment, he said, would allow attorneys to sabotage a class action by threatening to pull out large numbers of clients. It would also make the negotiation process considerably more difficult.

Judge Levi responded that there were points to be made on both sides of the argument, but the arguments in favor of allowing an opt-out are stronger on balance. He added that the advisory committee had considered the alternative of strengthening the procedural support for objections, but had come to the conclusion that it was not workable. He emphasized, moreover, that support had been voiced for the opt-out proposal by attorneys from all segments of the bar. Thus, he said, the advisory committee had concluded that giving bound class members a chance to opt out — at the discretion of the court — is simply the right thing to do.

Some participants made suggestions for improvements in the language of the rule that Judge Levi said he would try to incorporate.

The committee without objection approved proposed Rule 23(e)(3) for publication.

Judge Levi said that proposed Rule 23(e)(4) is self-explanatory. It confirms the right of class members to object to a proposed settlement or dismissal.

The committee without objection approved proposed Rule 23(e)(4) for publication.

Rule 23(h)

Professor Marcus noted that proposed subdivisions (h) and (i), dealing with appointment of counsel and attorney fees, will be relettered to account for the decision to table proposed subdivision (g) on overlapping classes.

Professor Marcus stated that proposed paragraph (h)(1) sets forth both the requirement that the court appoint class counsel and the obligation of class counsel to fairly and adequately represent the interests of the class. He noted that the introductory phrase to subparagraph (1)(A), *i.e.*, "unless a statute provides otherwise," is designed to exclude securities litigation. This recognizes explicitly that the rule will not supersede the Private Securities Litigation Act of 1995, which contains specific directives about selecting a lead plaintiff and retaining counsel.

Professor Marcus noted that paragraph (h)(2) sets forth procedures for appointing class counsel. In subparagraph (2)(A), he said, the advisory committee contemplates possible competition for appointment as class counsel. It specifies that the court may allow a reasonable time for attorneys seeking appointment to apply. He added that a Federal Judicial Center study of class actions in the district courts shows that it may take several months before certification and appointment of class counsel in many cases.

He explained that subparagraph (2)(B) elaborates on what the court must look for in class counsel, including experience, work undertaken on the case to date, and resources that counsel will devote to representing the class. The court may consider any other factors and require counsel to provide additional information and propose terms for attorney fees and costs. Subparagraph (2)(C) suggests that the court order appointing class counsel may include provisions for attorney fees and costs.

Concern was expressed regarding use of the word "appoint" in Rule 23(h)(1)(A) because counsel is not "appointed" in securities litigation. The court merely approves the parties' designation of counsel. Professor Marcus responded that the narrow purpose of the lead-in language is only to document that the rule does not supersede the securities legislation. Judge Rosenthal suggested that the advisory committee could draft appropriate language to address the concern.

Several language improvements were suggested in the rule and committee note. Judge Levi agreed to work on incorporating the suggestions.

The committee without objection approved proposed Rule 23(h) for publication.

Professor Marcus explained that proposed Rule 23(i), dealing with attorney fees, is new. Under paragraph (i)(1), notice of a motion for award of attorney fees must be served on all parties, and notice of motions by class counsel must also be given to all

class members in a reasonable manner. Under paragraph (i)(2), class members or parties from whom payment is sought may object to the motion. Under paragraph (i)(3), the court must give a careful explanation of its decision by holding a hearing and making findings of fact and conclusions of law. Under paragraph (i)(4), the court is authorized to refer fee award issues to a special master or magistrate judge, as provided in FED. R. CIV. P. 54(d)(2)(D).

Several members suggested that the language of paragraph (i)(3) should not specify that the court must hold a hearing. Judge Rosenthal responded that the rule is intended to simply provide an opportunity for a hearing, not a right to a hearing. She suggested, and the members agreed, that the paragraph should be rephrased to specify that "the court may hold a hearing, and must find the facts and state its conclusions."

The committee without objection approved proposed Rule 23(i) for publication.

Judge Thrash moved to delete lines 69 to 145 of the committee note.

He pointed out that the proposed rule itself specifies no criteria for setting attorney fees. Nevertheless, extensive discussion is set forth in the committee note explaining the criteria that courts follow in setting fees. He said that this amounted to placing substantive law in the committee note and questioned the appropriateness of the practice.

Judge Rosenthal responded that the advisory committee had debated the matter at considerable length and had decided in the end not to include a "laundry list" of attorney fee factors in the rule itself. She explained that the committee's goal has been to blend flexibility with standards. To that end, it concluded that it would not be possible to specify all the potentially relevant factors in the rule. Rather, it chose to set forth some examples in the committee note to guide bench and bar and make it clear that the list is not exhaustive or complete. Thus, case law will not be restrained from developing additional factors.

Judge Thrash said that the committee note contains an excellent summary of the current law, but it will be out of date in a few years. He objected on principle to placing substantive law in committee notes. He said that if standards are desired, they belong in the rule, not the note.

He also pointed to the proposed committee note to FED. R. EVID. 804(b)(3), which contains a detailed discussion of the law on corroborating circumstances in support of declarations against penal interest. He recommended elimination of the extensive case law discussion from that note.

Two of the advisory committee chairs responded that committee notes in general serve an important educational purpose for bench and bar. They recognized that the case

law is expected to develop and change. Nevertheless, an explanation of the current law and a careful citing of key cases and factors can provide clear guidance and serve as a useful resource for counsel.

The motion died for lack of a second.

FED. R. CIV. P. 51

Judge Levi noted that the current Rule 51 allows a party to file proposed jury instructions at the close of evidence or at "such earlier time during the trial" that the court directs. Many judges, however, request or allow proposed instructions before trial. The rule, he said, does not reflect current practice, and it fails to distinguish clearly among requests, instructions, and objections.

Judge Levi explained that the common model today is for a court to ask the parties to submit proposed instructions before trial. At some point, usually well before argument, the court prepares its own instructions, often including portions of the parties' proposed instructions. At that point, the parties are given a chance to object and be heard on the court's instructions.

He said that the amended rule follows this approach. Subdivision (a) deals with requests of the parties. Paragraph (a)(1) gives the court authority to direct that requests be submitted before trial. Paragraph (a)(2) allows a party to file requests for additional instructions at the close of the evidence in appropriate circumstances, recognizing that evidence emerging during the trial may turn out to be different from that anticipated by the parties before trial.

In subdivision (b), the court must inform the parties of its proposed instructions and its actions on their requests. The court must give the parties a chance to object on the record before instructions and arguments are delivered to the jury.

Subdivision (c) deals with objections. It specifies that a party may object to an instruction by stating the matter objected to and the grounds of the objection. A party must also object to the court's failure to give an instruction. Judge Levi noted that subdivision (d) requires both a timely request and a timely objection, although a request alone suffices if the court made a definitive ruling on the record rejecting the request. It also incorporates the plain error rule.

Several participants suggested some modifications in the language of the rule, and Judge Levi agreed to incorporate them in a revised draft for publication.

The committee without objection approved the amended rule for publication.

FED. R. CIV. P. 53

Professor Cooper explained that Rule 53 would be revised to reflect the actual use of masters in the district courts. The current rule, he said, focuses on special masters who perform trial functions. But a study conducted for the advisory committee by the Federal Judicial Center has confirmed the general experience that masters are also used extensively to perform pre-trial and post-trial functions.

He emphasized that the revised rule is not designed either to encourage or discourage the use of special masters. Rather, it reflects current reality and addresses the key issues that district courts need to consider in using masters.

Professor Cooper pointed out that subdivision (a) of the revised rule, dealing with appointment of a master, is a central part of the revisions. Under paragraph (a)(1), a court may appoint a master to perform duties consented to by the parties. He said that the rule provides broad discretion for the court to agree to the parties' wishes on the use of a master, as long as their consent is genuine.

If the parties do not consent, the court may appoint a master to hold trial proceedings and make recommended findings of fact, but only if warranted by an "exceptional condition" or if there is a need to perform an accounting or resolve a difficult computation of damages. In this respect, he said, the revised rule retains the current limits on the use of masters in exercising trial functions, as directed by case law such as *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). The rule also eliminates the use of trial masters in a case tried before a jury, unless the parties consent.

Finally, Professor Cooper noted that subparagraph (a)(1)(C) would allow a court to appoint a master to perform pretrial and post-trial duties. The duties, however, would be limited to those that cannot be performed by an available district judge or magistrate judge of the district. He added that an earlier draft of the revised rule had contained a lengthy list of duties that might be assigned, but the advisory committee decided against detail in the rule in favor of just setting forth examples in the committee note.

Professor Cooper pointed out that it is essential that there be no actual or apparent conflicts of interest involving a master. To that end, paragraph (a)(2) would extend to masters the standard of disqualification for a judge found in 28 U.S.C. § 455. But it would allow the parties to consent to appointment of a particular person as master after disclosure of a potential ground for disqualification.

He added that paragraph (a)(3) would prohibit a master, during the period of appointment, from appearing as an attorney before the judge who made the appointment. Under paragraph (a)(4), the court must consider the fairness of imposing the expenses of a master on the parties and protect against unreasonable expense and delay.

Professor Cooper emphasized the key role played by the order appointing a master under the revised rule. He said that the order must specify the master's duties and compensation and address certain procedural matters. He pointed out that the Federal Judicial Center's study of masters in the district courts had revealed that *ex parte* communications between a master and either the court or the parties are the focus of continuing concern, but may be very beneficial in certain circumstances. Accordingly, the rule requires the order appointing the master to specify the circumstances in which the master may communicate *ex parte* with the court or a party.

One member questioned the advisability of authorizing *ex parte* contact between a master and a party. He said that *ex parte* communications can bring the institution of master into great disrepute and are inherently inconsistent with the concept of an impartial decider. He said that the rule will result in parties questioning the neutrality of the master.

Professor Cooper responded that the rule simply allows the district judge to determine the matter. He pointed out that the Federal Judicial Center study on the use of masters in the district courts had pointed out that this issue is the single most difficult problem cited by interviewees. He noted that *ex parte* contacts normally will not be allowed, but that confidential contacts with the parties may be essential for a settlement master. He said that lines 266-281 of the committee note provide guidance to the courts on the matter.

Professor Cooper stated that subdivision (g) addresses a master's order, report, or recommendations. He pointed out that a party may file objections to a master's findings or recommendations within 20 days, unless the court sets a different time. Professor Cooper noted that the presumptive standard of review for a master's findings of fact will be "clearly erroneous," carried over from the current Rule 53(e)(2). But the court's order of appointment may specify *de novo* review by the court, or the parties may stipulate with the court's consent that the master's findings will be final.

After discussion, it was decided to publish alternate versions of subdivision (g). The first version establishes *de novo* review of all fact issues unless the order of appointment provides for clear error review or the parties stipulate with the court's consent that the master's findings will be final. The second version uses the approach of the first version for "substantive fact issues," but establishes clear error review for "non-substantive fact issues" unless the order of appointment provides for *de novo* review, the court receives evidence, or the parties stipulate with the court's consent that the master's findings will be final.

Professor Cooper pointed out that subdivision (h) deals with compensation of a master. Among other things, it requires the court to take into account the means of the parties. In subdivision (i), a magistrate judge may be appointed as a master only for

duties that cannot be performed in the capacity of a magistrate judge and only in exceptional circumstances.

Several suggestions were made for language improvements, which Professor Cooper and Judge Levi agreed to incorporate in the rule before publication.

One member expressed reservations concerning the proposed revisions in general. He said that masters are not a beneficial institution, and individual masters have engaged in egregious violations of the judicial process. He feared that the revised rule would encourage the use of masters or increase their authority. He voiced particular concern over subdivision (g), which he said gives a master the powers of an Article III judge to make findings of fact. He questioned the constitutional propriety of allowing masters to perform judicial functions.

Judge Levi responded that the advisory committee was very much aware of this issue, and the rule does not attempt to change the current law or expand its exceptional circumstance limitations. Masters, he said, make findings of fact under the current rule, and review of the findings by a district judge is limited to the clear error test. He emphasized that the revised rule will place firm control in the Article III judge's hands. The judge may require *de novo* review in the order appointing the master and may also review any finding on a *de novo* basis, even if the order specifies a less rigid standard. Professor Cooper emphasized that the revised rule gives the judge more power than the current rule in reviewing a master's report. He pointed out that under the revised rule, the master's report is a nullity unless the court acts to adopt it.

The committee without objection approved the revised rule for publication.

Professor Cooper pointed out that conforming amendments are needed in Rule 54(d)(2)(D) (attorneys' fees) and Rule 71A(h) (condemnation of property) to reflect the proposed revisions in Rule 53. The proposed amendments would delete references to specific subdivisions of the current rule.

The committee without objection approved the amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis and Professor Schleuter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of May 10, 2001. (Agenda Item 5)

Style Package

Judge Davis explained that the project to restyle the body of criminal rules, begun in January 1998, had entailed an enormous amount of effort and thought on the part of the advisory committee, its consultants, and the Administrative Office staff. He expressed special appreciation for the contributions of Judge James A. Parker, former chairman of the style committee; John K. Rabiej, chief of the Rules Committee Support Office; Professor Schlueter, the committee's reporter; and the committee's consultants — Bryan A. Garner, Professor Stephen A. Salzburg, Professor R. Joseph Kimble, and Joseph F. Spaniol, Jr.

Judge Davis distributed to the members a chronology of the project. He noted that he had divided the advisory committee into two subcommittees, assigning blocks of rules to each. In addition, each member was given a number of rules for which he or she was primarily responsible. He explained that all the proposed revisions had been reviewed on several occasions by the individual members, the consultants, a subcommittee, and the full committee. The committee's schedule, he said, had been demanding and intense, with 10 subcommittee meetings and 6 full committee meetings taking place between December 1998 and April 2001.

Judge Davis reported that the proposed revisions had been published in two separate packages — one limited to stylistic changes and the other comprising those rules containing substantive changes. He said that the committee had made a number of non-controversial changes in the style package after publication, most of them suggested by the style consultants. He also pointed out that two changes had been added to the style package to take account of recent legislation — in Rule 4 (arrest warrant or summons on a complaint) to reflect the Military Extraterritorial Jurisdiction Act and in Rule 6 (grand jury) to reflect 18 U.S.C. § 3322.

The committee without objection voted to approve the "style" package of proposed amendments.

Substantive Package

Judge Davis reported that the advisory committee had decided after the public comment period to withdraw or defer three matters in the substantive package.

First, revised Rule 32(h)(3), as published, would have required a sentencing judge to resolve all objections to "material" matters in a presentence report, even matters not affecting the actual sentence. Judge Davis explained that presentence reports are used by the Bureau of Prisons to make operational decisions, such as whether a defendant is eligible for drug treatment. He noted that the proposal had attracted negative comments

from a number of judges. Thus, he said, after further consideration of the proposal and consultation with the Bureau of Prisons, the advisory committee had decided to withdraw the amendment.

Second, the advisory committee had published an amendment to Rule 41 prescribing procedures for issuing "covert" warrants, *i.e.,* warrants permitting law enforcement agents to enter premises, not to seize property, but covertly to observe and record information. Judge Davis noted that these warrants, though not mentioned in Rule 41, are authorized by case law and are currently issued by magistrate judges. He said that the advisory committee had decided that the rule itself should give magistrate judges clear, authoritative advice. He said that the advisory committee had received a good deal of opposition to the proposal and had decided to defer the amendment for further study.

Third, the advisory committee had published several amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings. Judge Davis noted that several public comments suggested that more extensive changes were needed in these rules. Therefore, the committee decided to defer the proposed amendments and conduct a broader study of the rules. To that end, it has hired a special consultant to assist with the study.

Judge Davis proceeded to describe the proposed amendments contained in the substantive package.

FED. R. CRIM. P. 5, 10, AND 43 — VIDEO CONFERENCING

Judge Davis noted that the proposed amendments to Rule 5 (initial appearance), Rule 10 (arraignment), and Rule 43 (presence of the defendant) are closely related. They will allow a judge to conduct an initial appearance or arraignment by video conferencing. He reported that originally the advisory committee had decided to propose that video conferencing be allowed only with the consent of the defendant. But after considerable discussion, it voted to seek public comments also on an alternate proposal allowing video conferencing without consent.

Judge Davis said that a number of judges had expressed very strong support for the proposal — especially judges who have conducted criminal proceedings along the Mexican border and judges from districts with large geographical expanses. He added that many of the judges would support a rule authorizing video conferencing without consent.

Judge Davis pointed out that the committee had also received a good deal of opposition to the amended rule, particularly to the alternate proposal dispensing with consent. He focused on a letter just received from the chair of the Defender Services Committee of the Judicial Conference. He said that the advisory committee had assumed

that the defender committee would object to the non-consent provision. But the letter expressed broader opposition to the very concept of video conferencing of initial criminal proceedings as a matter of policy, regardless of whether the defendant consents. It also emphasized that video conferencing, if permitted, would shift significant costs from the Department of Justice to the judiciary's defender services budget.

He added that the National Association of Criminal Defense Lawyers and the public defenders' organizations had also voiced opposition to the proposed rule. They argue, he said, that it is essential for an initial appearance to be conducted before a judge in a courtroom. The proceedings are seen as a critical opportunity for a lawyer to meet personally with his or her client.

Judge Davis pointed out that he and Judge Scirica had met with members of the Judicial Conference in March 2001 to give them a preliminary briefing on the two alternative proposals. He said that several of the members had expressed concern about the amendments and had reacted negatively to the non-consent alternative.

Judge Davis reported that the advisory committee — in light of the public comments and the initial reactions of the members of the Judicial Conference — had decided to seek approval of an amendment authorizing video conferencing of initial appearances and arraignments only with the consent of the defendant. He suggested that giving defense counsel an absolute right to opt out of video conferencing should meet the principal objections and provide sufficient protection for the defendant.

He added that the negative public comments to the rule had been directed generally to the initial appearance, not the arraignment. He noted that a separate amendment to Rule 10, allowing a defendant to waive appearance at the arraignment entirely, had attracted no significant objection. He suggested that if a defendant can waive the proceeding itself, he or she should be able to consent to having it conducted by video conferencing.

Judge Davis said that many district courts already use video conferencing to conduct initial appearances or arraignments with the defendant's consent. One of the members added that he had been doing so for several years, largely to accommodate lawyers and defendants. He said that the lawyers request video conferencing, and it makes a great deal of sense to all participants for geographic reasons. He noted that the video proceedings are conducted with the judge in his own courtroom, the defendant in another courtroom, and lawyers in both courtrooms. Another member added that many state court systems successfully use video conferencing for a number of criminal proceedings.

Mr. Pauley pointed out that the vote in the advisory committee to require consent for video proceedings had been a close one. The Department of Justice, he said, favors a rule giving a court discretion to order video conferencing without the defendant's consent. He pointed out that video proceedings are held already in many courts on consent. Therefore, the proposed amendment would not accomplish anything of substance. He said that the Department is concerned about locking a consent requirement into the rule that will freeze the law for an indeterminate period.

Mr. Pauley added that several potential options exist between the published consent and non-consent alternatives. He suggested a rule allowing a court to order video conferencing without consent for "good cause" or under "exceptional circumstances." He said that the committee could also consider approving the consent proposal, but with the clear understanding that the advisory committee will return shortly with an amendment allowing video conferencing in certain circumstances without consent. Another option, he said, would be to recommit the whole rule to the advisory committee for further consideration.

Judge Scirica said that the proposed consent rule may be just the first step towards greater use of video conferencing. He said that the consent requirement should mitigate the legitimate concerns expressed by the members of the Judicial Conference and the defense bar. Nevertheless, he said, the advisory committee should think about additional alternatives and consider the advisability of a further amendment addressing the concerns of the Department of Justice.

The committee without objection approved the proposed three amended rules.

FED. R. CRIM. P. 5.1

Judge Davis explained that Rule 5.1 (preliminary examination), as amended, would permit a magistrate judge to grant a continuance of a preliminary examination. He noted that the Judicial Conference had approved the amendment at its Spring 1998 meeting. Mr. Rabiej added that Congress needs to be informed that the amendment, though non-controversial, will supersede a statute, 18 U.S.C. § 3060(c).

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 12.2

Professor Schlueter said that several substantive changes are included in amended Rule 12.2, addressing notice requirements for presenting an insanity defense or evidence of a mental condition. He noted that the rule had attracted only two comments from the

public, and the advisory committee had made some minor language changes following publication.

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 12.4

The committee considered proposed new Rule 12.4 (disclosure statement) later in the meeting together with proposed parallel amendments to the civil, bankruptcy, and appellate rules. (See the section of these minutes entitled "Corporate Disclosure Statements" at pages 38-41.)

FED. R. CRIM. P. 26

Professor Schlueter said that amended Rule 26 (taking of testimony) would permit a court to use remote transmission for live testimony. It generally tracks a counterpart provision in the civil rules, FED. R. CIV. P. 43.

He noted that the advisory committee had made some improvements in the rule as a result of the public comments. First, the rule was amended to refer specifically to "two-way" video presentations. Second, a requesting party must establish "exceptional circumstances" for remote transmission, rather than "unusual circumstances." The revised language reflects the FED. R. CRIM. P. 15 standard for taking depositions, as well as the standard courts have applied under the Confrontation Clause of the Constitution. Third, the committee expanded the note to address the Confrontation Clause and provide courts with guidance as to the steps they may take to ensure the accuracy and quality of remote transmissions.

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 30

Judge Davis reported that amended Rule 30 (jury instructions) permits a judge to request the parties to submit requested jury instructions before trial. The current rule allows a party to file a request for instructions only after the trial has started.

Judge Davis said that some commentators had raised concerns about permitting a court in a criminal case to require the defense to disclose its theory of the case before trial. Nevertheless, he said, the proposal simply conforms with actual, current practice in the district courts. He pointed out that the advisory committee had added a comment in the note explaining that the amendment does not preclude a party from seeking to supplement during the trial, particularly when the evidence turns out to be different from that contemplated in its requested instructions. The committee also added a sentence to

Rule 30(d) specifying that failure of a party to object precludes appellate review, except as permitted under FED. R. CRIM. P. 52(b) (stating that plain errors or defects affecting substantial rights may be noticed although not brought to the court's attention).

Judge Davis noted that the proposed criminal rule differs in several respects from a proposed amendment to its civil rule counterpart, FED. R. CIV. P. 51. Professor Coquillette explained that the proposed revision of FED. R. CRIM. P. 30 had been published, subject to public comments, and is now ready for final approval by the Judicial Conference. On the other hand, the proposed revision of FED. R. CIV. P. 51 had not yet been published. He said that the rules committee reporters work together as a group to keep the rules in tandem, but they have concluded that it is not advisable to defer final approval of the criminal rule — which has been under consideration for several years — until the civil rule is published and subject to public comment. He added that there may be legitimate reasons for some differences between the civil and criminal rules. The criminal rule, moreover, could be amended in the future if additional insights are gained during the public comment period for the civil rule.

The members proceeded to comment on and compare the language of the proposed civil and criminal rules. Several offered suggestions for improving the language of the proposed revision of FED. R. CIV. P. 51. Judge Davis and Judge Levi agreed to confer to harmonize the two proposals as much as possible.

The committee without objection approved the proposed amended rule.

FED. R. CRIM. P. 35

Judge Davis reported that the primary substantive change to Rule 35 (correcting or reducing a sentence) is to broaden the exceptions to the one-year deadline that the government has to seek reduction in a sentence to reward the defendant's substantial assistance. He explained that the amended rule will allow exceptions where the substantial assistance involves:

(1) information not known to the defendant until a year or more after sentencing;

(2) information provided to the government within a year of sentencing, but that did not become useful to the government until a year or more after sentencing; and

(3) information the usefulness of which the defendant could not reasonably have anticipated until more than a year after sentencing, and that was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

Judge Davis added that the rule, as published, did not specify what event constitutes "sentencing" for purposes of triggering the one-year period for bringing a motion. Accordingly, the advisory committee, at its April 2001 meeting, added a provision to Rule 35(a) defining "sentencing" as the entry of judgment, rather than the oral announcement of sentence from the bench.

Judge Davis said, however, that several members wrote to him after the meeting suggesting that the additional provision was sufficiently substantive to require further publication of the rule. Thus, the committee decided to seek final approval of the rule without the definitional provision and separately seek authority to publish the proposed definition. Mr. Pauley noted that the Department of Justice was opposed to the recommended definition, preferring to define sentencing for purposes of computation as the oral announcement of the court.

The committee voted without objection: (1) to approve the proposed amended rule without the proposed definition of "sentencing" in Rule 35(a); and (2) to authorize for publication the proposed amendment to Rule 35(a).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in his memorandum and attachments of May 1, 2001. (Agenda Item 9)

Amendments for Publication

FED. R. EVID. 608(b)

Professor Capra reported that the proposed amendment to Rule 608 (evidence of character and conduct of witness) deals with extrinsic evidence. He said that the intent of the drafters of the rule was to preclude the use of extrinsic evidence when an attorney asks a witness about specific instances of past conduct to attack or support the witness's character for veracity.

Professor Capra explained that the problem with the current rule is that it uses the broad term "credibility." Thus, many courts apply the ban on extrinsic evidence more widely than was intended and have prohibited the use of evidence for non-character forms of impeachment, such as bias, contradiction, or prior inconsistent statements. The proposed amendment substitutes the term "character for truthfulness" for "credibility." As a result, it brings the text of the rule into line with the original intent of the drafters.

One of the members hailed the change and suggested that the existing rule may be the most misunderstood provision in the Federal Rules of Evidence.

The committee without objection approved the proposed amendment for publication.

FED. R. EVID. 804(b)(3)

Professor Capra explained that Rule 804(b)(3) is designed to assure that a declaration against penal interest is reliable by requiring that it be supported by corroborating circumstances. He pointed out that the current text of the rule imposes the corroborating circumstances requirement on declarations offered by a criminal defendant, but not on those offered by the government. Nevertheless, he said, most courts applying the rule have extended its corroboration requirement to prosecution-proffered declarations as a matter of fundamental fairness.

Professor Capra said that the proposed amendment would adopt the case law and provide uniform treatment of all declarations against interest, whether offered by the defendant or the government. It would also apply equally in criminal cases and civil cases. Professor Capra added that the amendment does not reach beyond the current case law, including the Supreme Court's decision in *Williamson v. United States,* 512 U.S. 594 (1994).

Mr. Pauley said that the Department of Justice is strongly opposed to the amendment and recommended that it be rejected outright or returned to the advisory committee. He reported that the Department also opposes the rule's application in civil cases, but it is most concerned about its impact on criminal cases.

Judge Shadur responded that the advisory committee had considered all the issues thoroughly and had explicitly rejected the Department's arguments. He emphasized that — despite the literal language of the current rule — many courts interpret Rule 804(b)(3) broadly, applying it as a matter of fundamental fairness equally to the defendant and the government.

Some members pointed out that the matter had been discussed largely in the abstract and suggested that the advisory committee take advantage of the public comment period to document specific factual examples, obtain the views of prosecutors and defense counsel, and examine the operation of the rule in those state court systems that have a two-way corroboration requirement.

The committee with one objection approved the proposed amendment for publication.

Informational Items

Judge Shadur reported that the advisory committee had considered a proposal to amend Rule 1101 (applicability of the rules). He noted that subdivision (d), listing the proceedings to which the evidence rules are not applicable, is not complete. But, he said, it would be difficult, if not impossible, to set forth specifically all the proceedings to which the rules are not, or should not be, applicable. It would be inadvisable to provide a list of excluded proceedings that is not comprehensive. In addition, he pointed out, the courts are having no problem in applying Rule 1101(d).

Judge Shadur noted that the advisory committee is continuing to work on a long-term project to prepare provisions that would state, in rule form, the federal common law of privileges. But, he emphasized, the project may never result in proposed amendments. He also reiterated the advisory committee's policy not to make changes in the evidence rule unless it is obvious that there is an important need for them.

CORPORATE DISCLOSURE STATEMENTS

[FED. R. APP. P. 26.1; FED. R. BANKR. P. 1007(a)(1) and 7007.1; FED. R. CIV. P. 7.1; FED. R. CRIM. P. 12.4]

Judge Scirica commented that the advisory committees had not initiated the proposed amendments. Rather, he said, they are in large part a response to recommendations from members of Congress that the Judicial Conference take additional steps to ensure that judges recuse themselves from cases in which they hold stock in a corporate party.

Judge Scirica said that the proposed amendments have resulted from well-coordinated efforts by the standing committee, the advisory committees, and the reporters. He noted that the proposed amendments to the appellate, civil, and criminal rules had been published in August 2000 and are ready for final approval by the Judicial Conference. On the other hand, the standing committee gave the Advisory Committee on Bankruptcy Rules additional time to consider how corporate disclosure requirements could be implemented in bankruptcy cases and proceedings. Accordingly, the proposed amendments to the bankruptcy rules are only ready for public comment.

As to the merits of the proposals, Judge Scirica reported that the Codes of Conduct Committee of the Judicial Conference recommends that the relatively minimal disclosure requirement of the current FED. R. APP. P. 26.1 be extended to the civil, criminal, and bankruptcy rules. Rule 26.1 requires a non-governmental corporate party to

file a statement with the court identifying only its parent corporations and any publicly held company owning 10% of more of its stock.

Judge Scirica reported that the proposed amendments, as published, would have both: (1) extended FED. R. APP. P. 26.1 to the other sets of rules; and (2) given the Judicial Conference authority to prescribe additional disclosure requirements from time to time. But, he said, significant objections were raised during the comment period to the second part of the proposal. The objectors cited two potential problems: (1) it is difficult for the bar to know the requirements unless they are set forth in the rule itself; and (2) it would be illegal, or at least unwise, to permit the Judicial Conference to supplement a federal rule without proceeding through the full Rules Enabling Act process. He said that the advisory committees had decided to withdraw the Judicial Conference authority to supplement Rule 7.1 in light of the public comments.

Judge Scirica also pointed out that, although FED. R. APP. P. 26.1 imposes only minimum disclosure requirements, the committee note to the rule encourages the courts of appeals by local rule to require additional disclosures. He noted that research conducted for the committee by the Federal Judicial Center shows that virtually every court of appeals, and several district courts, have in fact expanded upon the national rule and require parties to disclose a wide variety of additional financial interests and connections. Thus, he said, it would be very difficult at this juncture to restrict local rulemaking in this area, even though a uniform set of national disclosure requirements should be an ultimate goal.

In addition, he said, the Codes of Conduct Committee, rather than the rules committee, is the body with the pertinent subject matter expertise. It should take the lead for the Judicial Conference in deciding what disclosures are needed. To that end, he added, it would be advisable to have a formal understanding between the two committees that any additional disclosure requirements recommended by the Codes of Conduct Committee will be considered by the rules committee through the Rules Enabling Act process.

Professor Coquillette emphasized that the committee reporters had worked together closely to coordinate the proposed amendments. He reported that the proposed amendments now before the committee for final approval are substantially identical, although there are a few minor differences in language among them.

Professor Schlueter pointed out that three post-publication changes had been made in the criminal version of the amendments: (1) requiring parties to file their disclosure statements at the defendant's first appearance; (2) requiring the government to file a statement identifying a corporate victim, but only to the extent that the information "can

be obtained through due diligence"; and (3) deleting some material from the committee note.

Professor Morris explained that the bankruptcy version had several differences in language from the other versions in order to take account of statutory definitions set forth in section 101 of the Bankruptcy Code. Among other things, he noted, the Code defines "corporation" more broadly than in the normal context. Likewise, while the other versions refer to a "non-governmental corporate party," the bankruptcy version speaks of a corporation "other than the debtor or a governmental unit." In addition, FED. R. BANKR. P. 1007 would be amended to require the debtor to file a statement at the beginning of a case, rather than with every adversary proceeding. He noted, also, that the advisory committee had decided not to apply the rule to contested matters, in part because there is no requirement for a response in those proceedings.

Professor Cooper reported that the only difference between the proposed civil rule and the other versions is the inclusion of subdivision (c) in proposed FED. R. CIV. P. 7.1 , specifying that the clerk of court must deliver a copy of the disclosure statement to each judge acting in the action or proceeding.

Judge Tashima said that subdivision (c) does not belong in a national rule because it deals with a purely internal operating matter pertinent only to court personnel. Several members agreed.

Accordingly, Judge Tashima moved to eliminate proposed FED. R. CIV. P. 7.1(c). The committee without objection approved his motion.

One member suggested that the rule or committee note should make it clear that the corporate disclosure statement requirement does not apply to every member of a class. Professor Cooper responded that the same issue exists with the current FED. R. APP. P. 26.1. He added that it is not the intention of the advisory committees to require class members to file statements.

Another member pointed out that the rule did not specify procedures for removal situations. It was generally agreed, however, that the subject could be addressed by local rule.

The committee without objection approved the proposed amendments to FED. R. APP. P. 26.1 and proposed new FED. R. CIV. P. 7.1, as modified, and FED. R. CRIM. P. 12.4.

It also without objection authorized publication of the proposed amendment to FED. R. BANKR. P. 1007(a)(1) and proposed new FED. R. BANKR. P. 7007.1.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Privacy and Public Access to Court Files

Mr. Lafitte presented the report of the Technology Subcommittee, noting that the primary focus of the subcommittee's attention for the past two years has been the judiciary's Electronic Case File (ECF) systems, now being deployed in the courts.

He reported that implementation of ECF has given rise to a number of important policy questions cutting across jurisdictional lines of Judicial Conference committees. He said that the Court Administration and Case Management Committee has formed two subcommittees to address the issues – one to deal with privacy and public access to court records, and the other to draft model local rules for electronic case filing. He noted that he has served as a representative of the rules committee on the two subcommittees. Both subcommittees, he said, have filed draft reports and are seeking input on the products from the rules committee and other committees of the Conference.

Privacy and Public Access

Mr. Lafitte reported that there is a natural tension between two very important, competing public policies — open access to court records and protection of legitimate privacy interests. He said that the privacy and public access subcommittee had conducted considerable research on these issues, listened to experts from different disciplines, and received initial input from the rules committees. It then published a document soliciting public comments and conducted a public hearing in Washington in March 2001.

The subcommittee, he said, has now prepared a draft report and set of recommendations for approval by the Court Administration and Case Management Committee. That committee, however, has not made the draft report public, and it distributed the draft to the rules committees for comment on a confidential basis.

The members reviewed the report and made suggestions to bring to the subcommittee's attention. There was a consensus that no amendments were needed in the federal rules at this time to address the issues of privacy and public access.

Model Electronic Filing Rules

Mr. Lafitte reported that Professor Capra and Ms. Miller had collected and analyzed the local rules of the ECF pilot courts and that the subcommittee had developed a set of model local court rules. Professor Capra pointed out that no original rule drafting had been involved. Rather, he said, the subcommittee worked from the existing rules of the pilot courts and made a few modifications and language improvements.

Judge Small expressed concern over use of the term "model rules." He pointed out, for example, that they had not been subject to any of the requirements of the rules process. Moreover, he said, the Advisory Committee on Bankruptcy Rules will soon draft model local rules to implement the pending bankruptcy reform legislation. The model rules need to be in place within 180 days of enactment of the legislation. He emphasized that it is important to avoid any confusion between the two sets of model rules.

Professor Capra pointed out that a different title would be advisable. He noted, by way of example, that the term model "procedures" had been used in the past. Judge Scirica agreed with the suggestion and said that Judge Small was free to send any additional comments to the Electronic Filing Rules Subcommittee.

Professor Capra promised to convey orally the committee's suggestions to the chair of the subcommittee. **Judge Scirica noted that it was the consensus of the committee that the proposed model electronic filing rules or procedures will be helpful to the courts and should be distributed to them.**

ATTORNEY CONDUCT

Judge Scirica and Professor Coquillette reported that the committee has deferred further action on proposed attorney conduct rules for a number of reasons. Among other things, they said, a new administration and Congress have just been elected. In addition, negotiations have not yet resumed among the American Bar Association, the Department of Justice, and the Conference of Chief Justices on developing a standard for government attorneys in dealing with represented parties.

LOCAL RULES PROJECT

Professor Squiers stated that she was continuing to work on the comprehensive local court rules report for the committee. She said that the report will follow the same format as her last report, and the bulk of it should be available at the January 2002 committee meeting.

NEXT COMMITTEE MEETING

The next meeting of the committee is scheduled for January 10-11, 2002, in Tucson, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary

IV-A

MEMORANDUM

DATE: March 21, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-03

At its April 2001 meeting, the Committee determined that references to "Presidents' Day" in the Federal Rules of Appellate Procedure should be changed to "Washington's Birthday." The Committee acted in response to a letter from Jason A. Bezis, a student at Boalt Hall School of Law, who pointed out that 5 U.S.C. § 6103(a) officially designates the third Monday in February as "Washington's Birthday." A research memorandum written by Aaron Potter, a summer associate at Thomas McGough's firm, explained that Congress's decision to designate the holiday as "Washington's Birthday" was intentional and reflected a desire specially to honor the first president.

Attached are draft amendments to Rules 26(a)(4) and 45(a)(2) that are intended to implement the Committee's decision.

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

Committee Note

Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Note

Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

MEMORANDUM

DATE: March 24, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-08

Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. Although Rule 4(a)(6) dates only to 1991, it has already created confusion and conflict among the circuits.

Rule 4(a)(6) provides:

> (6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

In sum, Rule 4(a)(6) permits a district court to reopen the time to appeal a judgment if it finds that four conditions have been satisfied. First, the district court must find that the appellant did not receive notice of the entry of the judgment from the district court or any party within 21 days after the judgment was entered. Second, the district court must find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry

of the judgment. Third, the district court must find that the appellant moved to reopen the time to appeal within 180 days after the judgment was entered. Finally, the district court must find that no party would be prejudiced by the reopening of the time to appeal.

The problems that have arisen in interpreting Rule 4(a)(6) center on the meaning of the word "notice." The circuits have been split for some time over the meaning of "notice" in subdivision (A), while subdivision (B) was amended in 1998 to give the word "notice" two different meanings within the same sentence. All of this has created a great deal of confusion about a rule that should be relatively simple to apply. I will address these two subdivisions in reverse order.

"Notice" in Subdivision (B)

The confusion regarding the meaning of "notice" in subdivision (B) arises out of a 1998 amendment to Rule 4(a)(6).

Prior to 1998, Rule 4(a)(6) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." Courts had no difficulty agreeing on what "notice" meant. As the Committee Note to Rule 4(a)(6) made quite clear, the notice to which the party was "entitled" was the notice described in Civil Rule 77(d).[1] That rule requires the clerk to serve notice of the entry of a judgment upon the parties, and to do so in the manner

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[1]Civil Rule 77(d) provides in part:

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry in the manner provided for in Rule 5(b) upon each party . . . . Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers.

prescribed by Civil Rule 5(b). It also permits any party to serve notice of the entry of the judgment upon the other parties, again in the manner prescribed by Civil Rule 5(b). The meaning of Rule 4(a)(6) was thus clear: A district court could reopen the time to appeal upon a finding "that a party entitled to notice of the entry of a judgment or order [under Civil Rule 77(d)] did not receive such notice [that is, Civil Rule 77(d) notice] from the clerk or any party [both of whom are mentioned in Civil Rule 77(d)] within 21 days of its entry."

In 1998, the Advisory Committee amended Rule 4(b)(6), both to restyle it and to make a substantive change. As amended, the rule permits a district court to reopen the time to appeal if it finds "that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry." Two changes are significant: the substitution of "the notice" for "such notice" and the substitution of "district court" for "clerk." The Committee Note said only this about the intent of the change:

> This change broadens the type of notice that can preclude reopening the time for appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

Here's the problem: Nothing in amended Rule 4(a)(6) creates an entitlement to notice of entry of a judgment. That entitlement is still found in Civil Rule 77(d). Thus, when amended subdivision (B) refers to a "moving party" being "entitled to notice of the entry of the judgment or order sought to be appealed," it must continue to be referring to the notice that Civil Rule 77(d) authorizes the "clerk" and "part[ies]" to serve.

But subdivision (B) then goes on to refer not to the failure to receive "*such* notice" — that is, Civil Rule 77(d) notice — but rather to the failure to receive "*the* notice." And subdivision (B) refers not to the failure to receive notice from "the clerk or any party" (i.e., the two people mentioned in Civil Rule 77(d)), but rather to the failure to receive notice from "the *district court* or any party." Subdivision (B) therefore provides that the type of notice that precludes a party from moving to reopen an appeal is no longer limited to Civil Rule 77(d) notice. In other words, amended subdivision (B) must mean that *some* kind of notice, in addition to Civil Rule77(d) notice, precludes a party. But neither the text nor the Committee Note gives any clue as to what type of notice will suffice. A phone call from the clerk? Or from another party? An off-hand remark by the judge? Or by the judge's law clerk? No one knows.

Again, the prior rule was clear: If a party entitled to Civil Rule 77(d) notice did not get that Civil Rule 77(d) notice within 21 days, that party could move to reopen. The new rule is not clear: If a party entitled to Civil Rule 77(d) notice does not get *either* Civil Rule 77(d) notice *or* some other kind of (unspecified) notice from the district court or another party within 21 days, that party can move to reopen.

I do not know what problem the 1998 amendment was intended to solve. The Note does not address the matter, and I can find no evidence in the case law that the prior rule was creating a significant problem. I can understand why the Committee might have wanted to expand the rule, so that if a party received *any* kind of notice of entry of a judgment from *any* source within 21 days, the party would not be permitted later to move to reopen the judgment. But the choice made by the Committee was broadly to expand the *type* of "disqualifying" notice to include any kind of notice (verbal or written), but then to expand the *source* of this "disqualifying" notice only

modestly to include the district court. The bottom line is that this change — which results in the same term ("notice") having very different meanings in the same sentence — seems to create a lot of confusion with little corresponding benefit.

I recommend that the Committee remedy this situation by restoring Rule 4(a)(6)(B) to its pre-1998 simplicity and clarity. Specifically, I recommend that Rule 4(a)(6)(B) be amended to provide, in essence, that a motion to reopen can be brought when a party entitled to notice of the entry of a judgment under Civil Rule 77(d) does not receive *that* notice — i.e., Civil Rule 77(d) notice — within 21 days. Other kinds of notice (e.g., a phone call from a party) would not suffice to preclude a litigant from later moving to reopen the time to appeal.

I do not believe that such an amendment will open the floodgates to tardy appeals. First, any party who wishes to protect against a later motion to reopen need only serve notice of the entry of the judgment upon the other parties, as Civil Rule 77(d) explicitly authorizes. And second, Rule 4(a)(6) will continue to bar all motions to reopen that are filed more than 180 days after entry of the judgment or order, no matter what the circumstances.

"Notice" in Subdivision (A)

As I just described, the problem with the meaning of the word "notice" in subdivision (B) dates only to December 1, 1998 — and thus, not surprisingly, it has not yet been the subject of much litigation. However, the problem with the meaning of the word "notice" in subdivision (A) dates back to the 1991 enactment of Rule 4(a)(6) and has been the subject of considerable litigation.

Subdivision (A) requires a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]."

It has been clear to (almost) all courts that the "notice" that triggers the 7-day period under subdivision (A) is broader than the "notice" that precludes moving to reopen under subdivision (B). As I have explained, it was clear until 1998 that the "notice" referred to in subdivision (B) was Civil Rule 77(d) notice — that is, notice formally served in the manner required by Civil Rule 5(b). Although the 1998 amendment to subdivision (B) broadened the meaning of "notice" beyond Civil Rule 77(d) notice, subdivision (B) nevertheless requires that such notice be received from "the district court or any party."

No such restrictions pertain to subdivision (A) notice — that is, to the notice that triggers the 7-day period to bring a motion to reopen. Subdivision (A) notice has never been limited to Civil Rule 77(d) notice, and the source of such notice has never been limited to the district court, the clerk, or the other parties. Rather, as one court pointed out:

> There's nothing [in subdivision (A)] about the physical attributes of the notice (oral or written; electrostatic, carbon, or certified copy, etc.); nothing about who must furnish the notice (the court, the clerk, the party opposite, an interested or disinterested third party, etc.); nothing whatsoever about delivery of the notice, much less specification of a particular method of delivery (service of process, ordinary mail, registered mail, certified mail, e-mail, hand delivery, facsimile delivery, etc.); and nothing about who other than the moving party is authorized to receive the notice (counsel for moving party, responsible party in home or office, etc.).

Wilkens v. Johnson, 238 F.3d 328, 332 (5th Cir. 2001), *cert. denied*, 121 S. Ct. 2605 (2001). Read literally, then, subdivision (A) suggests that *any* type of notice of the entry of a judgment from *any* source — including, for example, a phone call from a friend of one of the other parties — triggers the 7-day period.

To date, courts have taken four approaches in interpreting the word "notice" in subdivision (A):

1. The D.C. Circuit and the Eighth Circuit have suggested in dicta that "actual notice" — including verbal notice — suffices to trigger the 7-day period. *See Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214-15 (D.C. Cir. 1996); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir.), *cert. denied*, 531 U.S. 929 (2000).

2. The D.C. Circuit and the Second Circuit have mistakenly read into subdivision (A) the limitations on notice presently or formerly contained in subdivision (B). Thus, the D.C. Circuit held that only notice from "the clerk or any party" will suffice to trigger the 7-day period — a requirement that is clearly not part of subdivision (A). *Benavides*, 79 F.3d at 1214. Similarly, the Second Circuit held that only notice that was served in the manner prescribed by Civil Rule 5(b) would suffice. *Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999). Although it was clear before 1998 that subdivision (B) was referring only to notice served pursuant to Civil Rule 5(b), subdivision (A) has never been so limited.

3. The majority of courts that have addressed the issue read into subdivision (A) a requirement that only *written* notice is sufficient to trigger the 7-day period. Some of these courts have reasoned that, because the notice referred to in subdivision (B) must be written (something that was true only before the 1998 amendment), and because subdivision (A) should be read *in pari materia* with subdivision (B), the notice referred to in subdivision (A) must also be written. (Somewhat inconsistently, these courts do *not* then go on to require that subdivision (A) notice be served pursuant to Civil Rule 5(b), as was also required of subdivision (B) notice prior to 1998.) Other courts require that the notice be in writing for policy reasons. As one explained,

> Policy concerns point us in the same direction. Reading Rule 4(a)(6) to require written notice will simplify future proceedings. As the familiar request to "put it in writing" suggests, writings are more readily susceptible to proof than oral

> communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice. Such a scheme not only takes much of the guesswork out of the equation, but also, because Rule 77(d) specifically provides that parties who do not wish to rely upon the clerk to transmit the requisite written notice may do so themselves, the scheme confers certitude without leaving a victorious litigant at the mercy of a slipshod clerk.

Scott-Harris v. City of Fall River, 134 F.3d 427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *see also Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000).

4. The Ninth Circuit holds that while subdivision (A) does not require written notice, "the quality of the communication must rise to the functional equivalent of written notice . . . . This means that the notice must be specific, reliable, and unequivocal." *Nguyen v. Southwest Leasing & Rental, Inc.*, 2002 WL 372927, at *4 (9th Cir. Feb. 5, 2002). It appears that, in the Ninth Circuit, verbal notice could in some circumstances be deemed "the functional equivalent of written notice."

To resolve this circuit split, I recommend that the Committee amend subdivision (A) to require written notice (which is something more than "the functional equivalent of written notice"). I also recommend that, through language in the Note, the Committee make clear that subdivision (A) notice is considerably broader than subdivision (B) notice. That discussion will hopefully prevent courts from following the lead of the D.C. Circuit and Second Circuit in confusing subdivision (B) notice (i.e., notice served under Civil Rule 5(b)) with subdivision (A) notice (i.e., any kind of written notice).

Attached is a draft amendment and Note that would implement my recommendations.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives written notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive ~~the~~ such notice ~~from the district court or any party~~ within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

Committee Note

Rule 4(a)(6) permits a district court to reopen the time to appeal a judgment or order if the district court finds that four conditions have been satisfied. First, the district court must find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court must find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court must find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court must find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period under subdivision (a)(6)(A) and about what kind of "notice" must be found lacking under subdivision (a)(6)(B) before the time to appeal may be reopened.

Subdivision (a)(6)(A). Subdivision (a)(6)(A) requires a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts have had difficulty agreeing upon what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that have addressed the question hold that only *written* notice is sufficient, although nothing in the text of the rule suggests such a

limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit holds that while subdivision (a)(6)(A) does not require written notice, "the quality of the communication must rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 2002 WL 372927, at *4 (9th Cir. Feb. 5, 2002). It appears that verbal communications can be deemed "the functional equivalent of written notice" if they are sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits have suggested in dicta that subdivision (a)(6)(A) requires only "actual notice," which, presumably, could include verbal notice that is not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits have read into subdivision (a)(6)(A) restrictions that have appeared only in subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that currently appear in neither subdivisions (a)(6)(A) nor (a)(6)(B) (such as a requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

Subdivision (a)(6)(A) has been amended to resolve this circuit split. Under amended subdivision (a)(6)(A), only *written* notice of the entry of a judgment or order will trigger the 7-day period. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall River*, 134 F.3d 427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

All that is required to trigger the 7-day period under amended subdivision (a)(6)(A) is written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in subdivision (a)(6)(A) requires that the written notice be received from any particular source, and nothing requires that the written notice have been served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open subpart (A)'s seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 121 S. Ct. 2605 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has received written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received written notice. However, a verbal communication is not written notice for purposes of subdivision (a)(6)(A), no matter how specific, reliable, or unequivocal.

Subdivision (a)(6)(B). Prior to 1998, subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may be served by a party pursuant to that same rule. In other words, subdivision (a)(6)(B) was clear that, if a party did not

receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precludes a party from moving to reopen the appeal was no longer limited to Civil Rule 77(d) notice; under the amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, would preclude a party. But the text of the amended rule did not make clear what kind of notice would qualify. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, subdivision (a)(6)(B) has been amended to restore its pre-1998 simplicity. Under amended subdivision (a)(6)(B), if the court finds that the moving party was entitled under Civil Rule 77(d) to notice of the entry of the judgment or order sought to be appealed and further finds that the party did not receive "such notice"within 21 days — that is, the notice described in Civil Rule 77(d) — then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice be formally served under Civil Rule 5(b), any notice that has not been so served will not operate to preclude the reopening of the time to appeal under subdivision (a)(6)(B).

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March 28, 2002

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
University of St. Thomas School of Law
1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Re: Rules For Cross Appeals

Dear Patrick:

As you know, by letter of October 13, 2000, the Department of Justice proposed amendments to the Federal Rules of Appellate Procedure concerning briefs in cross appeals. We did so because the Circuits vary in their treatment of the briefing procedures for such cases, and the FRAP is quite ambiguous on these matters. Our proposal dealt with the length, timing, and cover color of briefs in cross appeals.

The Justice Department proposal was discussed at the Committee's April 2001 meeting, and the Committee asked me to consider two alternative proposals: whether the FRAP should do away with combined briefs in cross appeals, and instead simply have separate briefs for each appeal; and whether we should draft an entirely separate rule dealing with most aspects of briefs in cross appeals. By this letter, I am reporting on these alternatives.

1. The alternative of having completely separate briefs for each appeal in a cross appeal does not seem like a good idea for judges, clerks, or litigants. It would mean that a court would receive six briefs instead of four, and thus would have more paper and filings with which to contend. These six briefs would contain considerable duplicative material, as both the appellant and the cross-appellant would have to set out the background of the case, including, for example, the basis for jurisdiction, the relevant statutory scheme, and the background facts. The parties could attempt to avoid this duplication by cross references in their briefs in one case to the briefs in the other, but this practice would likely lead to confusion, and make it more difficult for the judges to obtain a coherent presentation of the case. The parties would have more briefs to prepare, print, file, and serve, and the clerks would have more briefs to file, circulate, and store. In addition, if cross appeals were dealt with separately and individually, the parties might sometimes file more than one appendix, which again would increase the overall burden on judges, clerks, and litigants.

Thus, it appears to be in the interests of all groups involved in the appellate process to provide for combining of briefs in cross appeals, rather than to have full briefing in two separate appeals.

2. At the Committee's request, I have attached two alternative proposed rule amendments for dealing with cross appeals. (In both alternatives, the proposed rules changes are underlined.) The first is the version submitted with our original proposal; it proposes modifications only to existing rules. The second creates a new rule to deal solely with briefs in cross appeals. However, even under this proposal, amendments are needed to existing rules dealing with form of briefs and oral argument. Although this second proposal creates a new rule for cross appeal briefs, it did not seem to make sense to place in that rule points dealing with the form of briefs and oral argument for cross appeals. Accordingly, those subjects are dealt with through amendments to Rules 32 and 34.

It is not clear to me that one proposal is preferable to the other. I am therefore simply presenting them both for the Committee's consideration.

Sincerely,

Douglas Letter
Appellate Litigation Counsel

Attachments

OPTION 1: MODIFICATIONS TO EXISTING RULES

Rule 28. Briefs

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief, but if the appellee has cross-appealed the appellant must file a brief in response to the cross-appeal in lieu of filing a separate reply brief. Appellant's responding brief may also reply to appellee's response to the issues presented by the main appeal. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief and appellant's responding/reply brief in a case involving a cross-appeal must contain a table of contents, with page references, and a table of authorities -- cases (alphabetically arranged), statutes, and other authorities -- with references to the pages of the reply brief or responding/reply brief where they are cited.

(h) Briefs in a Case Involving a Cross-Appeal. If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31(a), 32, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order entered on the court's own initiative or pursuant to a party's motion. A party may move to be designated as appellant on the ground that it is the party principally aggrieved by the judgment or for other good cause. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)-(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.

Advisory Committee Note for Rule 28:

Subdivision (c). The amendment clarifies that the appellant and appellee (as defined in subdivision (h)) are each entitled to file two briefs in cases involving a cross-appeal. The consolidated briefing of an appeal and cross-appeal will therefore normally consist of four briefs, reflecting the prior practice of all but one of the court of appeals. See 7th Cir. R. 28(d)(1)(a) (consolidating briefing into three briefs). Subdivision (a) governs the appellant's opening brief in the main appeal while subdivision (b) governs the appellee's brief which serves both as a response in the main appeal and an opening brief in the cross-appeal, see Rule 28(h). The amendment to subdivision (c) clarifies that the appellant is required to file a brief in response to the cross-appeal and that the appellant may also use this brief to reply in the main appeal. The amendment retains the provision permitting the appellee to file a reply brief pertaining to its cross-appeal.

Subdivision (h). The designation of "appellant" under this subdivision determines which party will file the first and third briefs in the consolidated briefing applicable to cases involving cross-appeals. Because Rule 32(a)(7) provides this party with the opportunity to file briefs longer than those of the "appellee," the Committee believes that the party principally aggrieved by the judgment below should normally be designated as the appellant. Cf. 7th Cir. IOP 8. Subdivision (h) will often obtain this result since the party principally aggrieved will often file a notice of appeal first. However, the amendment makes explicit that a party who is initially designated as the appellee

may move to be redesignated as the appellant on the ground it is the party principally aggrieved by the judgment below, or for other good cause.

The amendment also applies the definition of "appellant" to Rule 32 (pertaining to the form of briefs and other papers) but limits its application in Rule 31 to subdivision (a). Consequently, Rule 31(c)'s use of "appellant" refers to both the appellant and cross-appellant while its use of "appellee" refers to both the appellee and cross-appellee.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief

(1)(A) General Rule. The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief, but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

(B) Cross-Appeals. If a cross-appeal is filed, the appellant and appellee must serve and file principal briefs as specified by Rule 31(a)(1)(A). The appellant must serve and file a brief in response to the cross-appeal within 30 days after the appellee's brief is served. The appellee may serve and file a reply brief within 14 days after service of the appellant's responding brief, but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

Advisory Committee Note for Rule 31:

Subdivision (a). The amendment adds Rule 31(a)(1)(B) to clarify the time to file briefs in cases involving a cross-appeal.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; the appellant's responding/reply brief in a case involving a cross-appeal, yellow; an intervenor's or amicus curiae's, green; and any reply brief, gray. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(7) Length.

(A) Page Limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C). In cross-appeals, the appellant's responding/reply brief is considered a principal brief, and the appellees's initial brief may not exceed 35 pages unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) An appellee's initial brief in a case involving a cross-appeal is acceptable if:

- it contains no more than 16,500 words; or
- it uses a monospaced face and contains no more than 1,500 lines of text.

~~(ii)~~ (iii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

~~(iii)~~ (iv) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

Advisory Committee Note for Rule 32:

Subdivision (a). Form of A Brief.

Paragraph (a)(7). Length.

Of the four briefs that may be filed in cases involving a cross-appeal, see Rule 28, the maximum length of the third brief, i.e. the appellant's responding/reply brief, currently varies from circuit to circuit. In recognition of the fact that this brief serves the dual purpose of a responding

brief in the cross-appeal and a reply brief in the main appeal, a majority of the courts of appeals have treated it as a principal brief for the purposes of paragraph (7)'s length limitations. See, e.g., 3d Cir. R. 28.5; 6th Cir. R. 102(a). A few courts, however, have limited its length to that of a reply brief, see, e.g., 7th Cir. R. 28(d)(1)(A); Fed. Cir. R. 32 practice note, and one court has established a length limitation near the halfway point between these two extremes, see 8th Cir. R. 28A(e)(2). The amendment to paragraph (7) erases this variation and lessens the disparity of the brief lengths available to the parties in a cross-appeal. It establishes a maximum length for the appellant's opening brief at 14,000 words, the appellee's initial brief at 16,500 words, the appellant's responding/cross-reply brief at 14,000, and the final reply brief at 7,000 words. The Committee believes that these are workable and equitable lengths.

OPTION 2: NEW RULE 28A

Rule 28. Briefs

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities -- cases (alphabetically arranged), statutes, and other authorities -- with references to the pages of the reply brief where they are cited.

~~**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)-(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.~~

Advisory Committee Note for Rule 28:

Subdivision (c). The amendment removes reference to cross-appeals because new Rule 28A now governs briefs in cases involving cross-appeals.

Subdivision (h). Subdivision (h) was deleted because new Rule 28A now governs briefs in cases involving cross-appeals. Rule 28A(b) and (d) replace the provisions of subdivision (h).

Rule 28A. Briefs In Cases Involving Cross-Appeals.

(a) Applicability. This rule applies only to appeals in which a cross-appeal is filed. Except as otherwise provided in this rule, Rules 28(a)-(c) and 31(a)(1) do not apply to appeals that involve a cross-appeal.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 32, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order entered on the court's own initiative or pursuant to a party's motion. A party may move to be designated as appellant on the ground that it is the party principally aggrieved by the judgment or for other good cause.

(c) Appellant's Brief. The appellant's brief must conform to the requirements of Rule 28(a).

(d) Appellee's Brief. The appellee's brief is both the opening brief in the appellee's cross-appeal and a brief in response to appellant's brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(11), but an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.

(e) Appellant's Brief in Response. The appellant must file a brief in response to appellee's cross-appeal. This brief may also reply to appellee's response to the issues presented by appellant's brief. The appellant's brief in response is a principal brief under Rule 32(a)(7) that must conform to the requirements of Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement as it pertains to the cross-appeal:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

(f) Reply Brief. The appellee may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief must conform to the requirements of Rule 28(a)(2)-(3) and (11).

(g) Time to Serve and File a Brief. Unless the court provides otherwise, the appellant must serve and file an appellant's brief within 40 days after the record is filed. The appellee must serve and file an appellee's brief within 30 days after the appellant's brief is served. The appellant must serve and file a brief in response to the cross-appeal within 30 days after the appellee's brief is

served. The appellee may serve and file a reply brief within 14 days after service of the appellant's brief in response, but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

Advisory Committee Note for Rule 28A:

This rule is enacted to centralize and clarify the various provisions applicable to briefs in cases involving a cross-appeal. It clarifies that the appellant and appellee (as defined in subdivision (b)) are each entitled to file two briefs in cases involving a cross-appeal. The consolidated briefing of an appeal and cross-appeal will therefore normally consist of four briefs, reflecting the prior practice of all but one of the courts of appeals. See 7th Cir. R. 28(d)(1)(a) (consolidating briefing into three briefs). Subdivision (c) governs the appellant's opening brief in the main appeal. Subdivision (d) governs the appellee's brief, which serves both as a response in the main appeal and an opening brief in the appellee's cross-appeal. Subdivision (e) clarifies that the appellant is required to file a second principal brief to respond to the cross-appeal, and that the appellant may also use this brief to reply in the main appeal. Subdivision (f) retains the provision formerly found in Rule 28(c) that permits the appellee to file a reply brief pertaining to its cross-appeal.

The designation of "appellant" in subdivision (b) determines which party will file the first and third briefs in the consolidated briefing of an appeal and cross-appeal. Because Rule 32(a)(7) provides the "appellant" with the opportunity to file briefs longer than those of the "appellee," the Committee believes that the party principally aggrieved by the judgment below should normally be designated as the appellant. Cf. 7th Cir. IOP 8. Subdivision (h) will often obtain this result since the party principally aggrieved will often file a notice of appeal first. However, the amendment makes explicit that a party who is initially designated as the appellee may move to be redesignated as the appellant on the ground that it is the party principally aggrieved by the judgment below, or for other good cause.

The rule applies subdivision (b)'s definition of "appellant" only to this rule and Rules 30, 32, and 34. Unlike former Rule 28(h), the subdivision does not apply this definition to Rule 31. Rule 31(c)'s use of "appellant" therefore refers to both the appellant and cross-appellant while its use of "appellee" refers to both the appellee and cross-appellee. This reflects the usage of these terms in numerous other rules. See, e.g., Rules 3, 5, 6, 7.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; the appellant's brief in response in a case involving a cross-appeal, yellow; an intervenor's or amicus curiae's, green; and any reply brief, gray. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(7) Length.

(A) Page Limitation. A principal brief may not exceed 30 pages, an appellee's brief in a case involving a cross-appeal 35 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) An appellee's brief in a case involving a cross-appeal is acceptable if:

- it contains no more than 16,500 words; or
- it uses a monospaced face and contains no more than 1,500 lines of text.

~~(ii)~~ (iii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

~~(iii)~~ (iv) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

Advisory Committee Note for Rule 32:

Subdivision (a). Form of A Brief.

Paragraph (a)(7). Length. Of the four briefs that may be filed in cases involving a cross-appeal, see Rule 28A, the maximum length of the appellant's brief in response, has previously varied from circuit to circuit. In recognition of the fact that this brief serves the dual purpose of a responding brief in the cross-appeal and a reply brief in the main appeal, a majority of the courts of appeals have treated it as a principal brief for the purposes of paragraph (7)'s length limitations. See, e.g., 3d Cir. R. 28.5; 6th Cir. R. 102(a). A few courts, however, have limited its length to that of a reply brief, see, e.g., 7th Cir. R. 28(d)(1)(A); Fed. Cir. R. 32 practice note, and one court has established a length limitation near the halfway point between these two extremes, see 8th Cir. R. 28A(e)(2). The amendment to paragraph (7) and the addition of Rule 28A(e) erases this variation and lessens the disparity of the brief lengths available to the parties in a cross-appeal. These amendments establish a maximum length for the appellant's opening brief at 14,000 words, the appellee's initial brief at 16,500 words, the appellant's brief in response at 14,000 words, and the final reply brief at 7,000 words. The Committee believes that these are workable and equitable lengths.

Rule 34. Oral Argument

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 28A(b) ~~28(h)~~ determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

Advisory Committee Note for Rule 34:

Subdivision (d). The amendment of subdivision (d) conforms this rule with the deletion of Rule 28(h) and the consequent addition of new Rule 28A(b).

IV-D

MEMORANDUM

DATE: March 25, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 00-13

Rule 29(a) permits "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia" to file an amicus-curiae brief "without the consent of the parties or leave of court." Rule 29(a) permits "[a]ny other amicus curiae" to file a brief "only by leave of court or if the brief states that all parties have consented to its filing." By its terms, then, Rule 29(a) provides that leave of court is not necessary to file a "private" amicus brief if "all parties have consented to its filing." This worries the judges of the First Circuit.

Judge Michael Boudin, on behalf of the First Circuit, has requested that Rule 29(a) be amended to "make clear that a court of appeals is entitled at its discretion to preclude the filing of a particular private amicus brief, even if all parties have consented to the filing." Judge Boudin's concern is with the strategic use of amicus briefs to force the disqualification of particular judges. For example, if someone hired the sibling of a judge to prepare and file an amicus brief, that judge would likely feel obligated to disqualify himself or herself under 28 U.S.C. § 455(a) (requiring disqualification in any proceeding in which the judge's "impartiality might reasonably be questioned") or § 455(b)(5)(ii) (requiring disqualification if a person within the third degree of relationship to the judge "[i]s acting as a lawyer in the proceeding"). *See also* Canon 3(C)(1) of the Code of Conduct for United States Judges.

A couple of things must be said about the First Circuit's concern:

First, it is hard to imagine that the situation feared by the First Circuit occurs often. The situation would arise only if all of the parties affirmatively consented to the filing of an amicus brief (something that usually does not happen) and if that brief resulted in the disqualification of one of the members of the panel assigned to hear the case (or one of the members of the en banc court). It would be a rare brief that would cause such a disqualification, and, hopefully, a rare litigator who would "sucker" the parties into consenting to the filing of such a brief. Not surprisingly, Judge Boudin has not cited a single instance in which anyone tried such a tactic, much less succeeded.

Second, confirming that this problem may be theoretical only, I cannot find any reported instance of an amicus brief causing the disqualification of a judge — or an in instance of an amicus brief being rejected because it would cause the disqualification of a judge. I have researched the case law on Rule 29(a) and read the major secondary sources (such as *Federal Practice & Procedure* and *Moore's Federal Practice*) and found no evidence that the problem described by Judge Boudin has ever arisen. The closest authority that I could find was *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983), in which the motion of a group of law professors to file an amicus brief was denied, even though the appellants consented and the appellees did not object. *Thornburgh* is not on point, though. Because the appellees did not affirmatively consent to the filing of the brief, the potential amici were required to seek the leave of the court. Moreover, there was no suggestion that the filing of the amicus brief would cause the disqualification of any judge.

Finally, I have also reviewed the local rules of all of the courts of appeals. With one possible exception, I have found no local rule that addresses or reflects a concern about amicus briefs resulting in the disqualification of judges. The exception is Local Rule 29.4 of the Fifth Circuit, which provides: "After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court." The dearth of local rulemaking in the circuits suggests that the problem described by Judge Boudin has not arisen with any frequency. And, of course, the scope of the Fifth Circuit rule is quite a bit narrower than the amendment proposed by Judge Boudin.[1]

Rule 29(a) has remained substantively unchanged in relevant part since the adoption of the Federal Rules of Appellate Procedure in 1967.[2] Yet I can find no evidence that the problem feared by the First Circuit has ever arisen. This may give the Committee pause before it acts to amend the rule.

If the Committee chooses to proceed, attached is a draft amendment and Committee Note for the Committee's consideration. Drafting the amendment has proven to be a challenge. I see two options. First, the Committee could simply delete the provision that permits amicus briefs to be filed without leave of court; in other words, every party who seeks to file an amicus brief

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[1]The D.C. Circuit has a local rule (Local Rule 35(f)) barring the filing of any amicus brief "in response to or in support of a petition for rehearing en banc," but that is not the situation addressed by Rule 29(a), and the D.C. Circuit's concern appears to be one of workload rather than strategic disqualification.

[2]Prior to being amended in 1998, Rule 29 provided in relevant part: "A brief of an amicus curiae may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court, except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth."

would have to move for leave of court. That would allow the court to ascertain before ruling on the motion whether permitting the brief to be filed would result in the disqualification of any judge. However, it would also increase the workload of the court, as motion practice would be necessary whenever a private party sought to file an amicus brief. A second option would be to continue to allow a brief to be "filed" without leave of the court if all parties consent, but then to provide explicitly that the court may "reject" such a brief if its consideration would result in the disqualification of a judge. The attached draft amendment takes this approach.

I want to be clear that I am not thrilled with either option. My recommendation to the Committee is that Rule 29(a) not be amended and that this item be removed from the study agenda.

Rule 29. Brief of an Amicus Curiae

(a) When Permitted.

(1) **Government Briefs.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court.

(2) **Other Briefs.** Any other amicus curiae may file a brief only:

(A) by leave of court or

(B) if the brief states that all parties have consented to its filing.

(3) **Rejection of Briefs.** A court may reject a brief filed under Rule 29(a)(2)(B) if consideration of that brief would result in the disqualification of a judge.

Committee Note

Subdivision (a). Rule 29(a) gives the government the right to file an amicus-curiae brief without seeking the leave of the court or the consent of the parties. As to all others, Rule 29(a) permits the filing of an amicus-curiae brief only "by leave of court or if the brief states that all parties have consented to its filing."

Rule 29(a) may be understood to provide that, when all parties consent to the filing of a private amicus-curiae brief, the court has no alternative but to consider the brief. That, in turn, may open the door to the strategic use of amicus-curiae briefs to force the disqualification of particular judges. For example, someone might hire the sibling of a judge to file an amicus-curiae brief, know that such a filing will likely result in the disqualification of the judge under 28 U.S.C. § 455 or the Code of Conduct for United States Judges. Even when an amicus-curiae brief has not been filed for the purpose of disqualifying a judge — but nevertheless has that effect — the benefit to the court of maintaining the original panel or the full en banc court may outweigh the benefit to the court of receiving the amicus-curiae brief.

Rule 29(a) has been amended to make clear that, even when all parties have consented to the filing of a private amicus-curiae brief, the court may act on its own initiative to reject that brief if its consideration would result in the disqualification of a judge. After all, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). If the court does not want to consider a private amicus brief, Rule 29(a) should not force it to do so.

00-13

United States Court of Appeals
For The First Circuit

CHAMBERS OF
MICHAEL BOUDIN
U.S. CIRCUIT JUDGE

UNITED STATES COURTHOUSE
SUITE 7710
1 COURTHOUSE WAY
BOSTON, MA 02210
617-748-4431

November 6, 2000

Honorable Anthony J. Scirica
U.S. Court of Appeals
Third Circuit
22614 U.S. Courthouse
Independence Mall West
Philadelphia, Pennsylvania 19106

Dear Tony:

My court has asked me to request that the Standing Committee consider an amendment to Fed. R. App. P. 29 to make clear that a court of appeals is entitled at its discretion to preclude the filing of a particular private amicus brief, even if all parties have consented to the filing. The requested amendment or clarification would not curtail the existing right of government entities to file amicus briefs without consent of the court. The principal concern is with private amicus briefs that would result in the obligatory recusal of a member of the panel.

There is nothing in the existing Rule 29 that squarely precludes a court, by local rule or by order, from prohibiting private amicus briefs that would have this effect. My own view, subject to more research, is that such a local rule or order would be valid because the critical language in the present rule--the last sentence of Rule 29(a)--was not intended to address the issue of court-initiated prohibitions but simply was intended to spare the court the need (where none of the parties objected) to consider whether an amicus brief was appropriate.

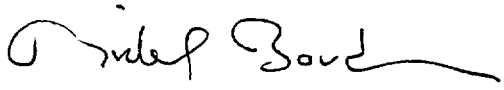
Nevertheless, some have read the literal language of the sentence as implying an unqualified right to file a private amicus brief, so long as it is timely and so long as consent is obtained. And, while there are fairly broad statements here and there about the authority of courts to regulate the filing of amicus briefs (see Dick Posner's N.O.W. v. Scheidler, a copy of which is enclosed), a brief search does not reveal any authority squarely in point that applies this generality to a private amicus brief for which consent is obtained from all parties. The D.C. Circuit does have a local rule that precludes amicus briefs at the rehearing

stage without permission (Local Rule 35(f)) but it is possible to distinguish this situation.

The policy issue seems to me a fairly easy one. Amicus briefs are sometimes useful but almost never necessary and there is a risk that they can be used strategically to cause the recusal of individual judges. Even when they are not so intended, the benefit of maintaining the original panel or, more important, a full en banc court may be far greater than the benefit of an amicus brief. Under present circumstances, all parties usually do not consent to amicus briefs and so the court can take recusal into account in deciding whether to grant leave; it is only in the case of consent that there is some doubt about the court's ability to protect itself. Barring the amicus brief does not always avoid a recusal problem but often it may do so.

If further study identifies clear authority for the view that a court can now adopt a rule requiring the leave of court for all amicus briefs, this would satisfy our concern. There may be some other mechanism for clarifying the court's authority that would also serve. But if neither of these courses is available, the active judges of my court are unanimously of the view that this small, almost certainly accidental, loophole should be closed--not in terms that would require courts to do anything but leaving it entirely to them to decide whether and what to do: e.g. (as a proviso to FRAP 29(a)), "provided that the court may by rule or order require leave of court for the filing of amicus briefs other than those filed by governmental entities or officers."

Sincerely,



IV-E

MEMORANDUM

DATE: March 28, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-05

Four of the five forms attached to the Federal Rules of Appellate Procedure refer to "the ___ day of _____, 19__" (Forms 1 and 2), "entered on _____, 19___" (Form 3), or "entered in this case on _____, 19___." I recommend that the Committee change the forms to refer to "20___" instead of to "19___."

I further recommend that this proposed change be presented to the Standing Committee at its next meeting. It is the policy of this Committee not to present amendments to the Standing Committee in piecemeal fashion, but rather to present packages of amendments every three years or so. This policy reflects the wishes of the Standing Committee, which is sensitive to the complaints of the bar about constant tinkering with the rules. However, this particular change is the type of technical change that will not require notice and comment and will not require practicing attorneys to learn any new rules.

Copies of the forms are attached.

APPENDIX OF FORMS

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____

File Number _____

A.B., Plaintiff
v.
C.D., Defendant
} Notice of Appeal

Notice is hereby given that _____(here name all parties taking the appeal)_____, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the ____ day of _____, 19__.

(s)_____
Attorney for _____
Address: _____

*See Rule 3(c) for permissible ways of identifying appellants.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993.)

Form 2. Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner
v.
Commissioner of Internal Revenue, Respondent
} Docket No. _____

Notice of Appeal

Notice is hereby given that _____(here name all parties taking the appeal)*_____ hereby appeal to the United States Court of Appeals for the _____ Circuit from (that part of) the decision of this court entered in the above captioned proceeding on the _____ day of _____, 19__ (relating to _____).

(s)_____
Counsel for _____
Address: _____

*See Rule 3(c) for permissible ways of identifying appellants.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993.)

Form 3. Petition for Review of Order of an Agency, Board, Commission or Officer

United States Court of Appeals for the _____ Circuit

A.B., Petitioner
v.
XYZ Commission, Respondent
} Petition for Review

_____(here name all parties bringing the petition)*_____ hereby petition the court for review of the Order of the XYZ Commission (describe the order) entered on _____, 19__.

(s)_____,
Attorney for Petitioners
*Address:*_____

*See Rule 15.

(As amended Apr. 22, 1993, eff. Dec. 1, 1993.)

Form 5. Notice of Appeal to a Court of Appeals from a Judgment or Order of a District Court or a Bankruptcy Appellate Panel

United States District Court for the _____
District of _____

In re

_____,
Debtor

_____,
Plaintiff
v.
_____,
Defendant

File No. _____

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 for the district of _____ [or bankruptcy appellate panel of the _____ circuit], 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: _____
_____

(As added Apr. 25, 1989, eff. Dec. 1, 1989.)

○

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(f) Petition or Application Filed Before Agency Action Becomes Final. If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

United States Court of Appeals
District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, DC 20001-2866

00-AP-20

A. Raymond Randolph
United States Circuit Judge

February 12, 2001

Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Enclosed are comments on the Preliminary Draft of the Proposed Amendments to the Federal Rules of Appellate Procedure. The comments were prepared by the D.C. Circuit's Advisory Committee on Procedures after careful consideration and several meetings. Each of the active judges on our court has reviewed the comments and unanimously endorse them.

While the comments speak for themselves, the judges of this court would like to draw the Committee's attention to our strong opposition to the proposed addition of Rule 15 (f) governing the filing of premature petitions for review. As set out more fully at pages six through nine of the comments, this new rule would emasculate the D.C. Circuit's "incurably premature" jurisprudence, introduce new uncertainties in handling petitions for review, cause substantial additional work for the Court, and have an adverse effect on its docket. Because the D.C. Circuit handles the largest percentage of petitions for review from the agencies most likely to be affected by this rule, namely the Federal Energy Regulatory Commission, the Environmental Protection Agency, and the Federal Communications Commission, the adverse impact of this proposed rule would be much greater on the D.C. Circuit than on other circuits.

Thank you for the opportunity to comment on these proposed amendments.

Sincerely,

A. Raymond Randolph

ARR/jac

cc: Maureen E. Mahoney, Esq.
Chair
Advisory Committee on Procedures
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Rule 15(f) (Petition Filed Prior to Final Agency Action)

As set forth more fully below, the Judges of the D.C. Circuit strongly oppose the proposed addition of Rule 15(f), as do we. In the Judges' view, the suggested change would create a host of new problems for the courts of appeals and litigants. Consequently, we urge the Committee to abandon the proposed amendment. Alternatively, we recommend substantial revisions.

1. New Rule 15(f) would address petitions for review or applications to enforce agency action filed after the agency has announced or entered its order but before it has disposed of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable. Under new Rule 15(f) the petition for review or application to enforce would become effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

As the Committee Note explains, "Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal." It would apply when the filing of a petition with the agency for reconsideration would render an agency order "non-final and hence non-appealable" under "the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987)."

The Note states that "Subdivision (f) is designed to eliminate a procedural trap" that arises because "[s]ome circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are 'incurably premature,' meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *See, e.g., TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam)," whereas "if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time."

The Court, however, advises that the Circuit's "incurably premature" doctrine causes few, if any, surprises for litigants. Conversely, the Court anticipates that, if adopted, the proposed rule would cause substantial additional work for the Court and have an adverse effect on its docket. For these reasons, we oppose the proposed amendment.

The D.C. Circuit has exclusive or concurrent jurisdiction over many cases seeking direct review of administrative agency actions. In recent years, administrative agency cases have constituted 35 - 40 % of the D.C. Circuit's docket. Many of those cases involve agencies that frequently conduct extensive reconsideration or rehearing proceedings, such as the Federal Communications Commission and the Federal Energy Regulatory Commission. Consequently, the proposed rule is likely to have the greatest effect on the D.C. Circuit.

Because parties would no longer be constrained by the D.C. Circuit's "incurably premature" doctrine, the number of court cases filed concurrently with petitions for agency reconsideration might increase, resulting in a significant increase in the number of cases that must be held in abeyance and monitored by the Court.

The administrative burdens associated with such increased case filings and monitoring could include: dual case openings; identifying cases that need to be held in abeyance or processing motions to hold such cases in abeyance and preparing appropriate orders; processing periodic status reports filed by the parties in each case; reactivating cases; soliciting and processing motions to govern future proceedings once the administrative proceedings have terminated; determining which parties remain interested in participating in the reactivated cases; directing the parties to file current disclosure statements once a case has been reactivated and processing those statements; identifying and consolidating related appeals from the initial administrative order and the subsequent orders on rehearing; and processing multiple sets of motions to intervene.

Apart from these practical considerations, the proposed rule change is likely to skew the judicial administration statistics significantly, particularly for this Circuit, making them less useful and informative. The anticipated increased filings and larger number of cases held in abeyance would artificially inflate the number of pending cases, the age of pending cases, and the age of terminated cases.

Finally, as currently drafted the proposed rule is likely to generate considerable litigation over its scope and effect, creating additional burdens for the courts. Given the plethora of agency statutes and regulations, it is not possible to sweep the concept of finality into one general rule. Rather, we should continue to rely on the courts of appeals to determine whether and when additional agency proceedings render an appeal premature. We accordingly do not believe any amendment is necessary.

2. Alternatively, if the Committee determines that some amendment is required, the D.C. Circuit's precedent respecting premature appeals or petitions

for review of agency decisions could be codified. If the rule makes clear that a party may not simultaneously pursue administrative reconsideration and judicial review, unless specifically provided by statute, *see, e.g.*, 42 U.S.C. § 7607(b)(1) (under Clean Air Act, filing of petition for reconsideration by Administrator "shall not affect the finality" of rule or action for purposes of judicial review), there would be no trap.

3. Whether or not the Committee is inclined to adopt either of these proposals, we perceive other problems with the amendment. The proposed language could have some undesirable and presumably unintended results in some contexts, particularly in rulemaking or adjudication proceedings involving numerous parties before certain agencies, such as the Surface Transportation Board and Securities and Exchange Commission, where applicable law does not require a party to file a petition for agency rehearing or the like before seeking judicial review in a court of appeals. We suggest several changes.

a. The terms "non-final" and "non-appealable" may be confusing by suggesting that these are separate criteria, when the intent, reflected in the Note, was to refer to orders that are "non-final and *hence* non-appealable." We therefore suggest adding "hence" before "non-appealable."

b. A more fundamental problem concerns the potential application of the proposed rule to agency orders entered in proceedings involving multiple parties not subject to statutory requirements to petition for agency reconsideration of an order before seeking judicial review. In that context, it is quite common for some parties to seek agency rehearing and others to seek judicial review, either as to the same aspects of the agency's action or as to different aspects. Either way, a petition for agency reconsideration by one party ordinarily does not affect the finality and hence reviewability of the agency order as to other parties. *E.g.*, *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 919 (D.C. Cir. 1998) (party's pending request for agency reconsideration renders underlying agency action nonfinal "with respect to that party"); *City of New Orleans v. U.S.S.E.C.*, 137 F.3d 638, 639 (D.C. Cir. 1998) ("order is rendered nonfinal as to that party"). In such cases, depending upon the relationship of the issues raised by the petition for review or by the petition for rehearing, the court may or may not defer handling and disposition of the petitions for judicial review until disposition of the petitions for agency rehearing. In some cases the agency decision on rehearing will make material changes, and the petitioner for rehearing may or may not choose to seek judicial review, depending on such factors as the effect of the original agency order in light of the agency order on rehearing, or possibly a settlement with the agency or other parties.

The differential party-by-party approach to the timeliness of judicial review of agency action contrasts with the approach of the Federal Rules of Appellate Procedure, Rule 4(a)(4)(A) of which specifies that certain post-judgment motions by "a party" defer the time for appeal "for all parties." This difference creates potential problems in relying on Rule

4(a)(4)(B)(i) as a model and providing comparable treatment of "premature" petitions for review and "premature" notices of appeal. Accordingly, we suggest that the proposed subsection be limited in application to petitions for judicial review filed by a party who also files a petition for agency rehearing.

c. The proposed rule would also defer the effectiveness of the petition for judicial review or application for enforcement until "the agency disposes of the last such petition for rehearing, reopening, or reconsideration." If the change suggested in the preceding paragraph is made, we suggest deletion of "the last."

d. A further problem with the reference to the agency's disposal of "a petition for rehearing" concerns situations where the petition for agency rehearing is withdrawn or dismissed by the petitioner, in which event the agency may not have occasion to "dispose" of it by any clearly definable action. It has been held that withdrawal or dismissal of an optional petition for rehearing has the same effect as agency disposition on the tolling of the time within which to seek judicial review. *Columbia Falls*, 139 F.3d at 919; *Melcher v. FCC*, 134 F.3d 1143, 1164 (D.C. Cir. 1998).

The heading and text of subsection (f) as revised to reflect these alternative foregoing suggestions would provide as follows:

(f) Premature Petition or Application. If a party files a petition for judicial review or application to enforce after an agency issues its order -- but before the agency disposes of a petition for rehearing, reopening, or reconsideration that renders the order non-final and hence non-appealable as to that party, or before such administrative petition is withdrawn by the party who filed it -- the party's petition for judicial review or application for enforcement, except as otherwise provided by statute, is incurably premature and will be dismissed.

If the Committee adheres to the approach of its proposed subsection, then the last clause in the foregoing alternative should be replaced by: "becomes effective for that party to seek review or enforcement of the order upon such agency disposition, dismissal or withdrawal."

Corresponding changes in the Committee Note would also be required.

MEMORANDUM

DATE: March 28, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item Nos. 97-31 and 98-01

Attached is a draft amendment to Rule 47(a)(1) and a draft Committee Note. The amendment would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office. Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

The Committee approved this amendment at its April 1998 meeting. However, the Committee later decided not to submit this amendment to the Standing Committee because of several concerns. First, members of the Standing Committee and this Committee have expressed concern that prescribing a uniform effective date for changes to local rules would violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." Second, the A.O. has expressed concern that conditioning the enforcement of local rules upon their receipt by the A.O. would trigger a flood of inquiries to the A.O. Finally, the rules of practice and procedure should not differ on these points. If there is to be a uniform effective date for changes to local rules, or if there is to be a requirement that local rules be filed with the A.O., then those provisions should appear in all of the rules of practice and procedure, and not just in the Appellate Rules.

At its January 2002 meeting, the Standing Committee engaged in a lengthy discussion of the proliferation of local rules, in the context of a review of the progress of the new Local Rules Project. In the course of that discussion, members of the Standing Committee talked about both the uniform effective date proposal and the proposal to condition the effectiveness of local rule changes on their filing with the A.O. Several members of the Standing Committee expressed reservations about the two proposals; no one, as I recall, spoke in favor of either proposal. Moreover, the other advisory committees reported either that their members had objections to the proposals or that working on similar proposals was not a high priority for them. Finally, it seems clear that no action regarding local rules is going to be taken by the Standing Committee until the Local Rules Project completes its work and submits its recommendations. The recommendations that relate to all of the rules of practice and procedure are likely to be considered by a joint working group, consisting of members of all of the advisory committees.

In short, neither Item No. 97-31 nor Item No. 98-01 seems to have any chance of being approved by the Standing Committee in the next few years. In light of that fact, I recommend that this Committee remove these two items from its study agenda. These are two of the oldest items on the Table of Agenda Items, and there is simply no reason to continue to carry these items on the agenda year after year.

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Adoption and Amendment.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is ~~promulgated~~ adopted or amended. A local rule must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule — or any change to any local rule — prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

V-C

MEMORANDUM

DATE: March 30, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 99-05

Rule 3(c)(1)(C) provides that a notice of appeal must "name the court to which the appeal is taken." Public Citizen Litigation Group has suggested that Rule 3 be amended to prevent the dismissal of an appeal when a notice of appeal does not explicitly name the court to which the appeal is taken, but only one court of appeals has jurisdiction over the appeal.

This Committee removed an identical proposal from its study agenda at its April 2000 meeting. The proposal had been placed on the study agenda after a panel decision of the Sixth Circuit created a circuit conflict on this issue. *See United States v. Webb*, 157 F.3d 451 (6th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999). The proposal was removed from the study agenda after the en banc Sixth Circuit eliminated the circuit conflict by reversing the decision of the panel. *See Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en banc). The Sixth Circuit, citing the admonition in Rule 3(c)(4) that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal," held that a notice of appeal "name[s] the court to which the appeal is taken" as a *practical* matter when there is only one court to which an appeal could lie.

There is no reason to restore this item to the study agenda. The circuits that have addressed the issue continue to be unanimous. And, in the wake of the Supreme Court's decision in *Becker v. Montgomery*, 121 S. Ct. 1801 (2001), it is extremely unlikely that a future circuit

split will develop. The Supreme Court specifically stated in *Becker* that "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, *to which appellate court*." *Id.* at 1808.[1]

I recommend that Item No. 99-05 not be restored to the study agenda.

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[1]Public Citizen points out that *Becker* also reaffirmed that "Appellate Rules 3 and 4 a[re] 'jurisdictional in nature.'" *Id.* at 1806. But to say that the requirements of Rules 3 and 4 are "jurisdictional" says nothing about what those requirements *are*. There is absolutely no reason to believe, post-*Becker*, that any appellate court will create a circuit split by disagreeing with the en banc Sixth Circuit and every other appellate court that has addressed this issue.

99-05

PUBLIC CITIZEN LITIGATION GROUP
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August 2, 2001

Hon. Anthony J. Scirica
Chair, Standing Committee on Rules
of Practice and Procedure
Room 22614, United States Courthouse
601 Market Street
Philadelphia PA 19106

Hon. William L. Garwood
Chair, Advisory Committee on
Appellate Rules
Room 399, United States Courthouse
903 San Jacinto Boulevard
Austin TX 78701

Re: Proposed Amendment to Modify "Naming" Requirement of FRAP 3(c)

Dear Judges Scirica and Garwood:

I am writing you in your respective capacities as Chairs of the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Appellate Rules to propose an amendment to Federal Rule of Appellate Procedure 3(c)(4). The proposed amendment attached to this letter would modify the "naming" requirement of Rule 3(c)(1) to provide that when appellate jurisdiction is proper in only one court, an appeal will not be dismissed because the notice of appeal does not explicitly name the court to which the appeal is taken. This change would prevent appellants from losing their appeals on the basis of inconsequential errors that prejudice no one.

Rule 3(c)(1) states that "[t]he notice of appeal must . . . (C) name the court to which the appeal is taken." Strict application of this rule could cause appeals to be lost where there is no countervailing benefit in enforcing the rule. Our proposal is consistent with Rule 4(d) and 28 U.S.C. § 1631, both which are intended to preserve appeals where there is little or no countervailing benefit in strict application of the Rule.

1. **Rule 4(d).** Where a party files a notice of appeal in the court of appeals, rather than in the district court, the appeal will not be dismissed for lack of jurisdiction. Although Rule 3(a)(1) states that the notice of appeal is to be filed in the district court, Rule 4(d) provides that if a party files a notice of appeal in the court of appeals, the court of appeals must deliver the notice to the district court, and the filing date is deemed to be the date the notice was filed with the court of appeals.

2. **28 U.S.C. § 1631.** A party who errs not only by filing a notice of appeal in an appellate court, but who also files in the wrong circuit still will not have her claim dismissed for want of jurisdiction. 28 U.S.C. § 1631 provides that when the court finds that it lacks jurisdiction over an appeal, it may, in the interest of justice, transfer the appeal to the court that does have jurisdiction. As under Rule 4(d), section 1631 provides that the appeal will then proceed as if it had been filed on the date of the erroneous filing.

In contrast to the liberal treatment afforded appellants in the above examples, a party who makes the more benign error of neglecting to name the court to which she is appealing could have the appeal dismissed for lack of jurisdiction under a strict reading of Rule 3(c)(1)(C), even though, in almost all cases, there is only one

court to which the appeal may be taken. No court of appeals currently reads Rule 3(c)(1)(C) to bar appeals when the notice of appeals does not name the court to which the appeal was taken. *See, e.g., Ortiz v. John Butler Co.*, 94 F.3d 1121 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997); *McLemore v. Landry*, 898 F.2d 996 (5th Cir. 1990). However, that has not always been the case. In *United States v. Webb*, 157 F.3d 451 (6th Cir. 1998), *cert. denied*, 526 U.S. 1144 (1999), the Sixth Circuit held that it lacked jurisdiction to hear a criminal appeal because the notice failed to name the appellate court, and it dismissed the appeal despite acknowledging an absence of prejudice to the government. *Id.* at 453. Later, in a split decision, the en banc Sixth Circuit overruled *Webb*. *See Dillon v. United States*, 184 F.3d 556, 557 (6th Cir. 1999) (en banc) ("where only one avenue of appeal exists, Rule 3(c)(1)(C) is satisfied even if the notice of appeal does not name the appellate court").

Despite the current unanimity of authority, I believe that the Rule should be modified to ensure that the *Webb* approach is not followed in the future (as the en banc dissenters in *Dillon* thought appropriate). Four considerations underscore the need for a Rule change at this time.

First, based on our experience, the potential for unfairness to appellants is significant. I represented Mr. Webb in his effort to obtain Supreme Court review

and thus had occasion to witness *Webb*'s effect in the Sixth Circuit. After *Webb*, the Sixth Circuit dismissed several appeals for failure to name the Sixth Circuit in the notice of appeal prior to granting rehearing en banc in *Dillon*. In *Dillon*, I represented two amici whose Sixth Circuit appeal had been held in abeyance pending the outcome in *Dillon*. At that time, I was informed that a large number of appeals were on hold awaiting the outcome. (The lawyer for the United States in *Dillon* believed the figure was approximately 150). Thus, despite the ease of naming the court of appeals in the notice, it is obvious that many appellants fail to do so and that, therefore, an amendment to Rule 3 would avoid considerable potential hardship.

Second, the Supreme Court's recent decision in *Becker v. Montgomery*, 121 S. Ct. 1801 (2001), may cause confusion for courts construing Rule 3(c)(1)(C). On the one hand, *Becker* noted that "opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Id.* at 1808. At the same time, however, the Court reaffirmed that "Appellate Rules 3 and 4 are jurisdictional in nature," *id.* at 1806 (internal quotation marks omitted), and quoted without comment Rule 3(c)(1)(C)'s requirement that a notice of appeal "must . . . name the court to which the appeal is taken." *Id.* at 1807.

Third, as far as I can tell, amending the rule as suggested will not prejudice

anyone. In the vast majority of all appeals, the court to which an appeal must be taken is the circuit court that geographically comprises the district court from which the appeal arose. There are, of course, a small number of civil cases in which an appeal goes to a specialized national court — such as the Federal Circuit — but in those cases the parties and the court are generally aware of the proper appellate venue. Indeed, the participants' understanding of the proper appellate court is so ingrained that in all the "naming" cases of which I am aware, the parties apparently did not notice the purported jurisdictional defect. Rather, the notice of appeal was filed and the case was sent "upstairs" to the appropriate appellate court for briefing on the merits, with the Rule 3(c) issue being raised sua sponte by the court of appeals. *See, e.g., Webb*, 157 F.3d at 452. In any event, an appellant cannot gain an advantage by omitting the name of the court to which she is appealing. *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988). In short, there is no downside to the proposed amendment.

Fourth, and finally, I note that the Department of Justice agrees in substance with our position (although I do not know its position on a Rule change). The position of the government is important, not only because it is a frequent litigant, but because it appears that this issue has arisen most often in the criminal context (as in *Webb* and *Dillon*), where the government is always a party. In *Dillon*, after

consultation with the Solicitor General's Office, the Department of Justice argued to the en banc Sixth Circuit that the failure to name the appellate court in the notice of appeal did *not* divest an appellate court of jurisdiction. (The Sixth Circuit appointed an amicus to defend the *Webb* rationale). The government's position forcefully underscores that appellees will not be prejudiced by the proposed rule change.

In sum, Rule 3(c)(4) should be amended to clarify that a notice of appeal need not name the court to which the appeal is taken when only one court is available for the appeal. That amendment would place an appellant who files a timely notice of appeal, but neglects to name the court to which she is appealing, on equal footing with an appellant who complies with the naming requirement but files the notice of appeal in the wrong court or in the wrong circuit altogether.

Thank you for considering this request. If you have any questions or concerns, please contact me at the phone number or e-mail address listed above.

Sincerely,

Brian Wolfman

Brian Wolfman

cc: Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure

Theodore B. Olson
Solicitor General

PROPOSED AMENDED RULE 3(c)(4)

(new language italicized)

(c) Contents of the Notice of Appeal

* * *

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice, *or for failure to name the court to which the appeal is taken if there is only one court that has appellate jurisdiction.*

H

Supreme Court of the United States

Dale G. BECKER, Petitioner,
v.
Betty MONTGOMERY, Attorney General of Ohio, et al.

No. 00-6374.

Argued April 16, 2001.
Decided May 29, 2001.

State prisoner instituted a pro se civil rights action contesting conditions of his confinement. The United States District Court for the Southern District of Ohio dismissed complaint for failure to exhaust administrative remedies and failure to state claim upon which could be granted. Prisoner filed timely appeal. The United States Circuit Court for the Sixth Circuit dismissed appeal based on prisoner's failure to sign notice of appeal. Certiorari was granted. The United States Supreme Court, Justice Ginsburg, held that: (1) federal rules require signature on notice of appeal, and (2) failure to sign timely notice of appeal did not require the Court of Appeals to dismiss the appeal, as lapse was curable and not a jurisdictional impediment.

Reversed and remanded.

West Headnotes

[1] **Federal Courts** 666
170Bk666 Most Cited Cases

Governing federal rules, by requiring that notice of appeal must be filed with district court and that every paper filed in a district court shall be signed, call for signature on notices of appeal. F.R.A.P.Rules 1(a)(2), 4(a)(1), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11(a), 28 U.S.C.A.

[2] **Federal Civil Procedure** 660.1
170Ak660.1 Most Cited Cases

Federal civil procedure rule requiring that every pleading, written motion and other paper be "signed" by attorney or pro se party does not permit typed names. Fed.Rules Civ.Proc.Rule 11(a), 28 U.S.C.A.

[3] **Federal Civil Procedure** 660.1
170Ak660.1 Most Cited Cases

[3] **Federal Courts** 666
170Bk666 Most Cited Cases

Portion of federal civil procedure rule requiring signature on all papers filed in district court, and portion of same rule permitting cure for initial failure to meet requirement, must be applied as cohesive whole, such that permitted cure continues to apply with respect to notices of appeal filed in the district court once notice is transmitted to courtof appeals. Fed.Rules Civ.Proc.Rule 11(a), 28 U.S.C.A.

[4] **Federal Courts** 666
170Bk666 Most Cited Cases

Appellant who sua sponte proffered correction of defect in his unsigned notice of appeal by attempting to submit duplicate containing his signature after notice had been transmitted to Court of Appeals should not have suffered dismissal of appeal, as lapse was curable and not a jurisdictional impediment to pursuit of appeal F.R.A.P.Rules 3(c)(1), 4, 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11(a), 28 U.S.C.A.

[5] **Federal Courts** 666
170Bk666 Most Cited Cases

Requirement that notice of appeal be signed is not jurisdictional, inasmuch as only rule of civil procedure requiring that all papers filed in district court be signed requires signing of notices of appeal, and signature requirement is not among specifications for notices of appeal set forth in appellate rules. Fed.Rules Civ.Proc.Rule 11(a), 28 U.S.C.A.

[6] **Federal Courts** 666
170Bk666 Most Cited Cases

Rule of appellate procedure providing that pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children does not impose jurisdictional signature requirement on pro se parties that does not exist for represented parties, but is entirely ameliorative, with purpose of assuring that pro se litigant's spouse and minor children, if they were litigants below, will remain parties on appeal. F.R.A.P.Rule 3(c)(2), 28 U.S.C.A.

[7] **Federal Courts** 666
170Bk666 Most Cited Cases

Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. F.R.A.P.Rule 1 et seq., 28 U.S.C.A

[8] **Federal Courts** 666
170Bk666 Most Cited Cases

Failure to sign timely notice of appeal did not require the Court of Appeals to dismiss the appeal, and the Court of Appeals should have accepted party's corrected notice as perfecting his appeal. F.R.A.P.Rules 3, 4(a)(1), 28 U.S.C.A.; Fed.Rules Civ.Proc Rule 11(a), 28 U.S.C.A.

****1802** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***757** Petitioner Becker, an Ohio prisoner, instituted a *pro se* civil rights action contesting conditions of his confinement under 42 U.S.C. § 1983. The Federal District Court dismissed his complaint for failure to exhaust prison administrative remedies and failure to state a claim for relief. Within the 30 days allowed for appeal from a district court's judgment, see 28 U.S.C. § 2107(a); Fed. Rule App. Proc. 4(a)(1), Becker, still *pro se,* filed a notice of appeal using a Government-printed form on which he filled in all of the requested information. On the line tagged " (Counsel for Appellant)," Becker typed, but did not hand sign, his own name. The form contained no indication of a signature requirement. The District Court docketed the notice, sent a copy to the Court of Appeals for the Sixth Circuit, and subsequently granted Becker leave to proceed *in forma pauperis* on appeal. The Sixth Circuit Clerk's Office sent Becker a letter telling him that his appeal had been docketed, setting a briefing schedule, and stating that the court would not hold him to the same standards it required of attorneys in stating his case. Becker filed his brief in advance of the scheduled deadline, signing it on both the cover and the last page. Long after the 30-day time to appeal had expired, the Sixth Circuit dismissed the appeal on its own motion, holding, in reliance on its prior *Mattingly* decision, that the notice of appeal was fatally defective because it was not signed. The Court of Appeals deemed the defect "jurisdictional," and therefore not curable outside the time allowed to file the notice. No court officer had earlier called Becker's attention to the need for a signature.

Held: When a party files a timely notice of appeal in district court, the failure to sign the notice does not require the court of appeals to dismiss the appeal. Pp. 1805-1808

(a) The Sixth Circuit based its *Mattingly* determination on the complementary operation of two Federal Rules: Federal Rule of Appellate Procedure (Appellate Rule) 4(a)(1), which provides that "the notice of appeal required by Rule 3 [to commence an appeal] must be filed with the district clerk within 30 days after the judgment ... appealed from is entered"; and Federal Rule of Civil Procedure (Civil Rule) 11(a), which provides that "[e]very pleading, written motion, and other paper [filed ***758** in a district court] shall be signed" by counsel or, if the party is unrepresented, by the party himself. P. 1805.

(b) The Sixth Circuit is correct that the governing Federal Rules call fora signature on notices of appeal. Civil Rule 11(a), the signature requirement's source, comes into play on appeal this way. An appeal can be initiated, Appellate Rule 3(a)(1) instructs, "only by filing a notice of appeal with the district clerk within the time allowed by [Appellate] Rule 4." Whenever the Appellate Rules provide for a filing in the district court, Appellate Rule 1(a)(2) directs, "the procedure must comply with the practice of the district court." The district court practice relevant here is Civil Rule 11(a)'s signature requirement. Notices of appeal unquestionably qualify ****1803** as "other paper[s]" under that requirement, so they "shall be signed." Without a rule change so ordering, the Court is not disposed to extend the meaning of the word "signed" to permit typed names, as Becker urges. Rather, the Court reads Civil Rule 11(a) to call for a name handwritten (or a mark handplaced). Pp. 1805-1806.

(c) However, the Sixth Circuit erred in its dispositive ruling that the signature requirement cannot be met after the appeal period expires. As plainly as Civil Rule 11(a) requires a signature on filed papers, so the rule goes on to provide that "omission of the signature" may be "corrected promptly after being called to the attention of the attorney or party."

Corrections can be made, the Rules Advisory Committee noted, by signing the paper on file or by submitting a duplicate that contains the signature. Civil Rule 11(a)'s provision for correction applies to appeal notices. The rule was formulated and should be applied as a cohesive whole. So understood, the signature requirement and the cure for an initial failure to meet the requirement go hand in hand. Becker proffered a correction of the defect in his notice in the manner Rule 11(a) permits--he attempted to submit a duplicate containing his signature--and therefore should not have suffered dismissal of his appeal for nonobservance of that rule. The Court does not disturb its earlier statements describing Appellate Rules 3 and 4 as "jurisdictional in nature." *E.g., Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315, 108 S.Ct 2405, 101 L.Ed.2d 285 The Court rules simply and only that Becker's lapse was curable as Civil Rule 11(a) prescribes; his initial omission was not a "jurisdictional" impediment to pursuit of his appeal. While Appellate Rules 3 and 4 are indeed linked jurisdictional provisions, Rule 3(c)(1), which details what the notice of appeal must contain, does not include a signature requirement. Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional. Pp. 1806-1807.

(d) The Court rejects the argument that, even if there is no jurisdictional notice of appeal signature requirement for parties represented ***759** by attorneys, *pro se* parties, like Becker, must sign within Rule 4's time line to avoid automatic dismissal. The foundation for this argument is Appellate Rule 3(c)(2), which reads: "A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise." That provision does not dislodge the signature requirement from its Civil Rule 11(a) moorings and make of it an Appellate Rule 3 jurisdictional specification. Rather, Rule 3(c)(2) is entirely ameliorative; it assumes and assures that the *pro se* litigant's spouse and minor children, if they were parties below, will remain parties on appeal, unless the notice clearly indicates a contrary intent. This reading of Rule 3(c)(2) is in harmony with a related ameliorative rule, Appellate Rule 3(c)(4), which provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. See, *e.g., Smith v. Barry*, 502 U.S. 244, 245, 248-249, 112 S.Ct. 678, 116 L.Ed.2d 678 Pp. 1807-1808.

Reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

Jeffery S. Sutton, for petitioner.

Stewart A. Baker, by invitation of the Court to brief and argue as amicus curiae in support of the judgment below.

For U.S. Supreme Court Briefs See:

2001 WL 199421 (Pet.Brief)

2001 WL 199423 (Resp.Brief)

2001 WL 294022 (Amicus.Brief)

For Transcript of Oral Argument See:

2001 WL 417685 (U.S.Oral.Arg.)

****1804** Justice GINSBURG delivered the opinion of the Court.

Petitioner Dale G Becker, an Ohio prisoner, instituted a *pro se* civil rights action in a Federal District Court, contesting conditions of his confinement. Upon dismissal of his complaint for failure to state a claim for relief, Becker sought to appeal. Using a Government-printed form, Becker timely filed a notice of appeal that contained all of the requested information. On the line tagged "(Counsel for Appellant)," ***760** Becker typed, but did not hand sign, his own name. For want of a handwritten signature on the notice as originally filed, the Court of Appeals dismissed Becker's appeal. The appellate court deemed the defect "jurisdictional," and therefore not curable outside the time allowed to file the notice.

We granted review to address this question: "When a party files a timely notice of appeal in district court, does the failure to sign the notice of appeal require the court of appeals to dismiss the appeal?" 531 U.S. 1110, 121 S.Ct. 853, 148 L.Ed.2d 768 (2001). Our answer is no. For want of a signature on a timely

notice, the appeal is not automatically lost. The governing Federal Rules direct that the notice of appeal, like other papers filed in district court, shall be signed by counsel or, if the party is unrepresented, by the party himself. But if the notice is timely filed and adequate in other respects, jurisdiction will vest in the court of appeals, where the case may proceed so long as the appellant promptly supplies the signature once the omission is called to his attention.

I

This case originated from a civil rights complaint under 42 U.S.C. § 1983 filed *pro se* by Ohio prison inmate Dale G. Becker in the United States District Court for the Southern District of Ohio. Becker challenged the conditions of his incarceration at the Chillicothe Correctional Institution, specifically, his exposure to second-hand cigarette smoke. The District Court dismissed Becker's complaint for failure to exhaust prison administrative remedies and failure to state a claim upon which relief could be granted. App. 5-8.

Within the 30 days allowed for appeal from a district court's judgment, see 28 U.S.C. § 2107(a); Fed. Rule App. Proc. 4(a)(1), Becker, still *pro se,* filed a notice of appeal. Using a notice of appeal form printed by the Government Printing Office, Becker filled in the blanks, specifying himself as sole appellant, designating the judgment from which ***761** he appealed, and naming the court to which he appealed. See Fed. Rule App. Proc. 3(c)(1). He typed his own name in the space above "(Counsel for Appellant)," and also typed, in the spaces provided on the form, his address and the date of the notice. The form Becker completed contained no statement or other indication of a signature requirement and Becker did not hand sign the notice.

The District Court docketed the notice, sent a copy to the Court of Appeals, and subsequently granted Becker leave to proceed *in forma pauperis* on appeal. Becker received a letter from the Sixth Circuit Clerk's Office telling him that his appeal had been docketed and setting a briefing schedule. The letter stated: "The court is aware that you are not an attorney and it will *not* hold you to the same standards it requires of them in stating your case." App. 14.

Becker filed his brief more than two weeks in advance of the scheduled deadline. He signed it both on the cover and on the last page. Some six months later, on its own motion, the Sixth Circuit dismissed the appeal in a spare order relying on that court's prior, published decision in *Mattingly v. Farmers State Bank,* 153 F.3d 336 (1998) (*per curiam*). In Becker's case, the Court of Appeals said, summarily:

> "This court lacks jurisdiction over this appeal. The notice of appeal is defective because it was not signed by the pro se ****1805** appellant or by a qualified attorney." App. 16-17.

No court officer had earlier called Becker's attention to the need for a signature, and the dismissal order, issued long after the 30-day time to appeal expired, accorded Becker no opportunity to cure the defect.

Becker filed a timely but unsuccessful motion for reconsideration, to which he appended a new, signed notice of appeal. Thereafter, he petitioned for this Court's review. The Attorney General of Ohio, in response, urged us "to summarily ***762** reverse the judgment below," Brief in Response to Pet. for Cert. 1, stating:

> "We cannot honestly claim any uncertain[t]y about petitioner Becker's intention to pursue an appeal once he filed his timely, though unsigned, notice of appeal in the district court. We never objected to the lack of a signature on his notice of appeal, and fully expected the court of appeals to address his appellate arguments on the merits." *Id.,* at 5.

We granted certiorari, 531 U.S. 1069, 121 S.Ct. 783, 148 L.Ed.2d 659, 531 U.S. 1110, 121 S.Ct. 853, 148 L.Ed.2d 768 (2001), to assure the uniform interpretation of the governing Federal Rules, and now address the question whether Becker's failure to sign his timely filed notice of appeal requires the Court of Appeals to dismiss his appeal. [FN1]

> FN1. Without any party to defend the Sixth Circuit's position, we invited Stewart A. Baker to brief and argue this case, as *amicus curiae,* in support of the judgment below. 531 U.S. 1110, 121 S.Ct. 853, 148 L.Ed.2d 768 (2001). His able representation, and that of Jeffrey S. Sutton, whom we appointed to represent Becker, 531 U.S. 1069, 121 S.Ct. 783, 148 L.Ed.2d 659 (2001), permit us to decide this case satisfied that the relevant issues have been fully aired.

II

[1] In *Mattingly v. Farmers State Bank,* 153 F.3d

336 (1998) (*per curiam*), the Sixth Circuit determined that a notice of appeal must be signed, and that a signature's omission cannot be cured by giving the appellant an opportunity to sign after the time to appeal has expired. For this determination, that court relied on the complementary operation of two Federal Rules: Federal Rule of Appellate Procedure (Appellate Rule) 4(a)(1), which provides that "the notice of appeal required by Rule 3 [to commence an appeal] must be filed with the district clerk within 30 days after the judgment or order appealed from is entered"; [FN2] and Federal Rule of Civil *763 Procedure (Civil Rule) 11(a), which provides that "[e]very ... paper [filed in a district court] shall be signed." We agree with the Sixth Circuit that the governing Federal Rules call for a signature on notices of appeal. We disagree, however, with that court's dispositive ruling that the signature requirement cannot be met after the appeal period expires.

FN2. On motion filed no later than 30 days after expiration of the original appeal time, the appeal period may be extended upon a showing of "excusable neglect or good cause," but the extension "may [not] exceed 30 days after the [originally] prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later." Fed. Rule App. Proc. 4(a)(5).

Civil Rule 11(a), the source of the signature requirement, comes into play on appeal this way. An appeal can be initiated, Appellate Rule 3(a)(1) instructs, "only by filing a notice of appeal with the district clerk within the time allowed by [Appellate] Rule 4." Whenever the Appellate Rules provide for a filing in the district court, Appellate Rule 1(a)(2) directs, "the procedure must comply with the practice of the district court." The district court practice relevant here is Civil Rule 11(a).

Rule 11(a)'s first sentence states the signature requirement:

"Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party."

**1806 Notices of appeal unquestionably qualify as "other paper[s]," so they "shall be signed."

[2] Becker maintains that typing one's name satisfies the signature requirement and that his original notice of appeal, containing his name typed above "(Counsel of Record)," met Civil Rule 11(a)'s instruction. We do not doubt that the signature requirement can be adjusted to keep pace with technological advances. A 1996 amendment to Civil Rule 5 provides in this regard:

"A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent *764 with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." Fed. Rule Civ. Proc. 5(e).

See, *e.g.*, Rule 5.1 (ND Ohio 2000) (permitting "papers filed, signed, or verified by electronic means"). The local rules on electronic filing provide some assurance, as does a handwritten signature, that the submission is authentic. See, *e.g.*, United States District Court for the Northern District of Ohio, Electronic Filing Policies and Procedures Manual 4 (April 2, 2001) (available at http://www.ohnd.uscourts.gov/Electronic_Filing/user.pdf) (allowing only registered attorneys assigned identification names and passwords to file papers electronically). Without any rule change so ordering, however, we are not disposed to extend the meaning of the word "signed," as that word appears in Civil Rule 11(a), to permit typed names. As Rule 11(a) is now framed, we read the requirement of a signature to indicate, as a signature requirement commonly does, and as it did in John Hancock's day, a name handwritten (or a mark handplaced).

[3] As plainly as Civil Rule 11(a) requires a signature on filed papers, however, so the rule goes on to provide in its final sentence that "omission of the signature" may be "corrected promptly after being called to the attention of the attorney or party." "Correction can be made," the Rules Advisory Committee noted, "by signing the paper on file or by submitting a duplicate that contains the signature." Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U.S.C.App., p. 666.

Amicus urges that only the first sentence of Civil Rule 11(a), containing the signature requirement--not Rule 11(a)'s final sentence, providing for correction of a signature omission--applies to appeal notices. Appellate Rule 1(a)(2)'s direction *765 to "comply with the practice of the district court" ceases to hold sway, *amicus* maintains, once the notice of appeal is

transmitted from the district court, in which it is filed, to the court of appeals, in which the case will proceed. Brief of *Amicus Curiae* in Support of the Judgment Below 15-18, and nn. 18-20.

[4] Civil Rule 11(a), in our view, cannot be sliced as *amicus* proposes. The rule was formulated and should be applied as a cohesive whole. So understood, the signature requirement and the cure for an initial failure to meet the requirement go hand in hand. The remedy for a signature omission, in other words, is part and parcel of the requirement itself. Becker proffered a correction of the defect in his notice in the manner Rule 11(a) permits--he attempted to submit a duplicate containing his signature, see *supra,* at 1804--and therefore should not have suffered dismissal of his appeal for nonobservance of that rule.

The Sixth Circuit in *Mattingly* correctly observed that we have described Appellate Rules 3 and 4 as "jurisdictional in nature." 153 F.3d, at 337 (citing *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), and *Smith v. Barry,* 502 U.S. 244, 248, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992)). We do not today hold otherwise. We rule simply and only that Becker's lapse was curable as **1807Civil Rule 11(a) prescribes; his initial omission was not a "jurisdictional" impediment to pursuit of his appeal.

[5] Appellate Rules 3 and 4, we clarify, are indeed linked jurisdictional provisions. Rule 3(a)(1) directs that a notice of appeal be filed "within the time allowed by Rule 4," *i.e.,* ordinarily, within 30 days after the judgment appealed from is entered, see *supra,* at 1805, and n. 2. Rule 3(c)(1) details what the notice of appeal must contain: The notice, within Rule 4's timeframe, must (1) specify the party or parties taking the appeal; (2) designate the judgment from which the appeal is taken, and (3) name the court to which *766 the appeal is taken. [FN3] Notably, a signature requirement is not among Rule 3(c)(1)'s specifications, for Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional.

FN3. Appellate Rule 3(c)(1), as currently framed, provides in full:
"(1) The notice of appeal must: "(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X';
"(B) designate the judgment, order, or part thereof being appealed; and
"(C) name the court to which the appeal is taken."

Amicus ultimately urges that even if there is no jurisdictional notice of appeal signature requirement for parties represented by attorneys, *pro se* parties, like Becker, must sign within Rule 4's time line to avoid automatic dismissal. See Tr. of Oral Arg. 34-36. Appellate Rule 3(c)(2) is the foundation for this argument. That provision reads: "A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise."

[6] We do not agree that Rule 3(c)(2)'s prescription, added in 1993 to a then unsubdivided Rule 3(c), see Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U.S.C.App., p. 590, places *pro se* litigants in a singularly exacting time bind. The provision, as we read it, does not dislodge the signature requirement from its Civil Rule 11(a) moorings and make of it an Appellate Rule 3 jurisdictional specification. The current Rule 3(c)(2), like other changes made in 1993, the Advisory Committee Notes explain, was designed "to prevent the loss of a right to appeal through inadvertent omission of a party's name" when "it is objectively clear that [the] party intended to appeal." Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U.S.C.App., p. 590. Seen in this light, the Rule is entirely ameliorative; it assumes and assures that the *pro se* litigant's spouse and minor children, *767 if they were parties below, will remain parties on appeal, "unless the notice clearly indicates a contrary intent." *Ibid.*

If we had any doubt that Appellate Rule 3(c)(2) was meant only to facilitate, not to impede, access to an appeal, we would find corroboration in a related ameliorative rule, Appellate Rule 3(c)(4), which provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Cf. this Court's Rule 14.5 ("If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule [governing the

content of petitions for certiorari] or with Rule 33 or Rule 34 [governing document preparation], the Clerk will return it with a letter indicating the deficiency. A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely.").

[7] In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), it is true, we held, that a notice of appeal that omitted the name of a particular appellant, through a clerical ****1808** error, was ineffective to take an appeal for that party. *Id.*, at 318, 108 S.Ct. 2405 (construing Rule 3(c) prior to the ameliorative changes made in 1993). [FN4] Becker's notice, however, did not suffer from any failure to "specify the party or parties taking the appeal." Fed. Rule App. Proc. 3(c)(1)(A). Other opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. See *Smith v. Barry*, 502 U.S. 244, 245, 248-249, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992) (holding that "a document intended to serve as an appellate brief [filed within the time specified by Appellate Rule 4 and containing the information required by Appellate Rule 3] may qualify as the notice of ***768** appeal"); *Foman v. Davis*, 371 U.S. 178, 181, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (holding that an appeal was improperly dismissed when the record as a whole--including a timely but incomplete notice of appeal and a premature but complete notice--revealed the orders petitioner sought to appeal).

> FN4. The Advisory Committee intended the elaborate 1993 amendment of Appellate Rule 3(c) "to reduce the amount of satellite litigation spawned by [*Torres*]." Advisory Committee's Notes on Fed. Rule App. Proc. 3, 28 U.S.C.App., p. 590.

* * *

[8] In sum, the Federal Rules require a notice of appeal to be signed. That requirement derives from Civil Rule 11(a), and so does the remedy for a signature's omission on the notice originally filed. On the facts here presented, the Sixth Circuit should have accepted Becker's corrected notice as perfecting his appeal. We therefore reverse the judgment dismissing Becker's appeal and remand the case for further proceedings consistent with this opinion.

It is so ordered.

END OF DOCUMENT

V-D

MEMORANDUM

DATE: March 29, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 99-09

Item No. 99-09 arose out of a suggestion by Judge Anthony Scirica that this Committee study the way that the circuit courts process requests for certificates of appealability ("COAs") and consider whether the Appellate Rules should be amended to bring about more uniformity. At the April 2000 meeting of this Committee, the Department of Justice agreed to study this matter.

The Department reported back to the Committee at its April 2001 meeting. The Department argued, and the Committee agreed, that the variation in circuit procedure was not creating a problem for litigants and that this Committee should allow more time for circuit-by-circuit experimentation before trying to impose detailed rules. The Committee concluded that this matter should be removed from its study agenda, with one exception.

The Department complained that, in some circuits, the government is required to file a brief on the merits before the court decides whether to grant a COA. The government believes that this practice defeats the purpose of the COA procedure, which is to spare the government from having to participate in meritless habeas proceedings. The Department proposed that this Committee approve a new Rule 22(b)(4), which would provide that the government cannot be required to submit a brief until the court first decides whether to grant a COA.

Members of this Committee expressed opposition to the Department's proposal for various reasons, which are described in the minutes of the April 2001 meeting. The Committee did not vote on the Department's proposal, but suggested to the Department that it reconsider whether it wanted to pursue its proposal, given the opposition of several Committee members.

Douglas Letter has informed me that the Department has decided to withdraw its proposed amendment. Thus, Item No. 99-09 can be removed from the Committee's study agenda.

United States Court of Appeals,
Fourth Circuit.
AMZURA ENTERPRISES, INCORPORATED, d/b/a Amzco/Surgical Devices, U.S.A.,
Plaintiff-Appellee,
v.
Javaid A. RATCHER, an individual; Affiliated Industries, Incorporated; Frank Francois, an individual, Defendants-Appellees,
Global Financial Corporation, Intervenor-Appellant,
and
Stanley V. Campbell; Mark Fowler; Rowe Incorporated; Anderson Funding Group, Defendants.
Amzura Enterprises, Incorporated, d/b/a Amzco/Surgical Devices, U.S.A.,
Plaintiff-Appellee,
v.
Stanley V. Campbell; Rowe Incorporated, Defendants-Appellants,
Javaid A. Ratcher, an individual; Affiliated Industries, Incorporated; Frank Francois, an individual, Defendants-Appellees,
and
Mark Fowler; Anderson Funding Group, Defendants,
Global Financial Corporation, Intervenor-Defendant.
Nos. 97-2697, 97-2698.
Argued Oct. 27, 1999.
Decided Sept. 7, 2001.

Lender sued borrower and its president, alleging fraud, breach of contract, and intentional interference with a business relationship. Defendants counterclaimed, alleging, inter alia, breach of contract and fraud, and seeking declaratory judgment as to ownership of vehicles. Subsequent lender also sued original lender to protect its interest in the vehicles, and asserting tort and contract claims. The United States District Court for the Eastern District of Virginia, Claude M. Hilton, Chief Judge dismissed in part, granted summary judgment in part, and ordered transfer of title to the vehicles, but denied consequential damages to borrower. All parties appealed. The Court of Appeals held that: (1) though corporate borrower's initial notice of appeal was signed only by its president, a non-lawyer, Court of Appeals had jurisdiction following filing of a corrected notice of appeal; (2) district court's failure to give ten-days notice before granting an oral motion for summary judgment was at most harmless error; (3) lender's failure to return title to vehicles after it was paid was breach of contract, not fraud; and (4) borrower was not precluded, as a matter of law, from recovering consequential damages resulting from lender's breach of the financing agreement.
Affirmed in part, reversed in part, and remanded.

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)1 In General
115k21 Natural and Probable Consequences of Breaches of Contract
115k23 k. Under Circumstances Within Contemplation of Parties. Most Cited Cases

Under Virginia law, borrower was not precluded, as a matter of law, from recovering consequential damages resulting from lender's breach of the financing agreement, on theory those damages were not foreseeable, where those damages were Army's termination of a contract with the borrower and borrower's subsequent financial collapse, and where the financing contract was intended, from the beginning, to fund the Army contract and its related costs.

[12] KeyCite Notes

115 Damages
115X Proceedings for Assessment
115k208 Questions for Jury
115k208(1) k. In General. Most Cited Cases

Under Virginia law, the foreseeability of consequential damages is generally a question for the jury.
*97 Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Chief District Judge. (CA-96- 1601-A, CA-97-956-A).
ARGUED: Timothy Brian Mills, Patton Boggs, L.L.P., Washington, DC, for appellant. Walter Elmer Diercks, Rubin, Winston, Diercks, Harris & Cooke, L.L.P., Washington, DC, for appellees. **ON BRIEF:** William E. Slade, Carol L. Hoshall, Patton Boggs, L.L.P., Washington, DC, for appellant. Frederick D. Cooke, Jr., Rubin, Winston, Diercks, Harris & Cooke, L.L.P., Washington, DC, for appellees.

Before LUTTIG, WILLIAMS, and KING, Circuit Judges.

OPINION

PER CURIAM.
***1** This appeal requires us to determine whether a notice of appeal signed by a corporate officer on behalf of the corporation is defective; whether the district court erred on the first day of trial by inviting and granting the oral summary judgment motion of AMZURA Enterprises, Incorporated (AMZURA), doing business as AMZCO/Surgical Devices, U.S.A. (AMZCO), on the state law claims of Rowe, Incorporated (Rowe), its president, Stanley V. Campbell (Campbell), and Global Financial Corporation (Global); and whether, as a matter of law and under the facts presented, consequential damages may not be recovered. We conclude that although Campbell signed the notice of appeal on behalf of Rowe, Rowe's notice of *98 appeal was not jurisdictionally defective. We also conclude that the district court did not commit reversible error in granting AMZCO's oral motion for summary judgment as to Rowe, Campbell, and Global's fraud claims with less than ten-days notice. However, we remand Rowe, Campbell, and Global's other state law claims for further proceedings consistent with this opinion because the record before us is unclear as to whether there is a triable issue of fact as to those claims. Finally, we reverse the district court's conclusion that, as a matter of law, consequential damages may not be recovered for AMZCO's breach of the financing agreement.

I.

In February 1996, the United States Small Business Administration (the Government) awarded a subcontract (the Army Contract) to Rowe under which Rowe would lease twenty-nine medical vehicles to the Army for a one-year term, with four one-year options to extend the lease. The Army Contract called for Rowe to receive $310,808.08 for the first year of the lease and a total of $1,554,040.40 if the Army exercised all four of its one-year options. In order to perform the Army Contract--which required Rowe to purchase parts, vehicles, and other equipment--Rowe sought financing from AMZCO. By a letter agreement dated July 19, 1996 (the July 19 agreement) and an amendment dated July 26, 1996 (the July 26 amendment), AMZCO agreed to finance Rowe for "up to $1 million." (J.A. at 287, 290.) In exchange, AMZCO received an assignment of revenues due Rowe under the Army Contract, as well as a security interest in the vehicles, to secure Rowe's indebtedness to AMZCO. Under the agreement, MashreqBank was designated to provide funds for AMZCO. The July 19 agreement was signed by Javaid Ratcher, AMZCO's president, on behalf of AMZCO and by Campbell on behalf of Rowe. Neither Campbell nor Ratcher signed the agreement in his individual capacity. Similarly, Campbell signed the July 26 amendment on behalf of Rowe. As part of the financing arrangement, Rowe asked Frank Francois, president of Affiliated Industries, to coordinate AMZCO's purchase of ten of the medical vehicles on behalf of Rowe. AMZCO titled these ten vehicles in its own name. After providing funding in the amount of $470,696.56, AMZCO sought to impose additional conditions on its financing agreement with Rowe before providing further funding for the medical vehicles. Because of the lack of financing, several creditors threatened to sue Rowe. At least one creditor, Richmond Motor Company, did file suit against Rowe. Rowe notified AMZCO of the pending suit, but AMZCO did not pay the amounts due to Richmond Motor Company or other creditors.

***2** On or about September 9, 1996, Rowe sought alternative financing and engaged in a purchase agreement with Anderson Funding Group (Anderson), under which Rowe conveyed all of its rights in the medical vehicles to Anderson. [FN1] Anderson then assigned all of its rights to Global. Global agreed to provide the necessary financing, and Rowe assigned Global the right to receive all of Rowe's revenues under the Army Contract. After Global began to finance Rowe, Rowe filed a notice of release with the Government and MashreqBank advising them to assign the proceeds of the Army Contract to Global, rather than to AMZCO. Campbell spoke with Francois and Ratcher and informed them of Rowe's new arrangement with ***99** Global. Believing that AMZCO had agreed to transfer title of the ten vehicles to Rowe in exchange for repayment of the funds that AMZCO had already financed, Global paid $470,696.56 to AMZCO on behalf of Rowe. AMZCO deposited the money but refused to transfer title of the ten vehicles. AMZCO claimed that it owned the vehicles because it had purchased them.

> FN1. Anderson and its president, Mark Fowler, were originally parties to this suit, but both were dismissed from this action and are not parties on appeal.

On November 6, 1996, AMZCO filed suit in the Eastern District of Virginia, asserting diversity jurisdiction and alleging that Campbell and Rowe had breached their financing agreement. AMZCO asserted claims of fraud, breach of contract, and intentional interference with its business relationship with the Government and MashreqBank. AMZCO also sought punitive damages. On December 9, 1996, counsel for Campbell and Rowe filed an answer and counterclaim seeking damages for breach of contract. Rowe and Campbell also requested a declaratory judgment that Rowe owned the ten medical vehicles.

On May 2, 1997, the district court granted a motion by Campbell and Rowe's counsel to withdraw

from the case, leaving Campbell and Rowe to proceed *pro se.* [FN2] On June 18, 1997, Global filed suit to protect its interest in the ten medical vehicles, asserting claims of detinue and unjust enrichment (against AMZCO and Ratcher), trover, unlawful conversion, fraud in the inducement and breach of contract (against AMZCO, Ratcher, Francois, and Affiliated) (collectively, Global's state law claims). Global requested declaratory relief, as well as compensatory and punitive damages. The district court granted Global's motion to consolidate its case with the pending suit between AMZCO and Rowe and Campbell.

FN2. Although the district court considered and granted the motion by Rowe and Campbell's counsel to withdraw, we find nothing in the record to suggest that the district court considered the issue of whether Rowe, as a corporation, was capable of proceeding *pro se.* Moreover, there is no

evidence in the record that Campbell is a licensed attorney admitted to practice in the Eastern District of Virginia or the Fourth Circuit. Nevertheless, no issue was raised as to the effect on the district court's judgment of Rowe's participation in the district court without counsel. On remand Rowe may only proceed with licensed counsel.

Global filed a motion for partial summary judgment against AMZCO and Ratcher on its detinue and unjust enrichment counts, and against AMZCO, Ratcher, Francois, and Affiliated on its trover/unlawful conversion counts. Global argued that there was no genuine issue of material fact regarding its claim that AMZCO had no right to retain title to the ten medical vehicles and that Rowe's repayment of the money discharged Rowe's obligations to AMZCO. Rowe and Campbell, acting *pro se,* filed a motion for summary judgment against AMZCO on all counts of AMZCO's complaint and in favor of their own breach-of-contract counterclaim, arguing that AMZCO breached its contract by failing to provide the full amount of financing. AMZCO did not file its own motion for summary judgment but did submit memoranda of law, along with various attachments, exhibits, and affidavits, in opposition to the motions filed by Rowe, Campbell, and Global.
3 After Rowe, Campbell, and Global filed their motions for summary judgment, AMZCO filed a first amended complaint, which added a constructive fraud claim against Rowe and Campbell. Rowe and Campbell then filed an amended answer and counterclaims that asserted counts of trover and unlawful conversion; fraud in inducement and breach of contract to convey title; unjust enrichment; and tortious ***100*** interference with contracts and business relationships (collectively, Rowe and Campbell's state tort law claims) against AMZCO. Campbell signed the amended answer and counterclaims "Individually and As President Of Rowe Incorporated." (J.A. at 127R.) [FN3] On the same day, Global responded to AMZCO's amended complaint with its own answer and also filed a motion to dismiss AMZCO's fraud and constructive fraud counts for failure to plead with particularity. AMZCO did not file any summary judgment motions against Rowe, Campbell, or Global.

FN3. Rowe and Campbell's motion for summary judgment and their amended answer and counterclaims were apparently prepared by former counsel before he withdrew from the case. We do not know whether Campbell modified these documents prior to filing them.

The parties convened for trial as scheduled on September 8, 1997. On the first day, the district court heard arguments on the previously filed summary judgment motions, as well as Global's new motion to

dismiss. The district court dismissed AMZCO's fraud and constructive fraud counts, and also granted partial summary judgment in favor of Rowe, Campbell, and Global on the breach- of-contract issue. The district court found that AMZCO breached its contract to provide financing and that AMZCO was not entitled to any of the medical vehicles. The district court ordered AMZCO to transfer title of the vehicles to Global. The district court also concluded that Campbell and Rowe could not recover consequential damages resulting from AMZCO's breach of contract because, as a matter of law, those damages were not foreseeable. It also held that AMZCO had no valid claims against Rowe, Campbell, or Global.

At the hearing, the district court invited AMZCO to move orally for summary judgment against Global, Campbell, and Rowe on their state tort law claims. After brief argument, the district court granted AMZCO's oral motion for summary judgment. Neither Campbell nor Rowe, who each were proceeding *pro se,* objected to the district court's action. Global, which was represented by counsel, also did not object. On October 24, 1997, the district court issued its final written order disposing of the entire case. [FN4]

FN4. The district court specifically mentioned only Rowe, Campbell, and Global's "fraud" claims in its final order.

On November 21, 1997, AMZCO filed its notice of appeal as to the district court's ruling on Rowe and Campbell's breach-of-contract counterclaim. [FN5] On November 24, 1997, Global filed its notice of appeal and on December 3, 1997, Campbell and Rowe filed a joint notice of appeal, which was signed only by Campbell "*Pro se* and for Rowe, Inc." (J.A. at 284.) On June 2, 1998, Global's trial counsel entered an appearance on behalf of Campbell and Rowe. Since that time, Global's trial counsel has filed joint briefs on behalf of Rowe, Campbell, and Global, and has represented them jointly in this appeal.

FN5. AMZCO later voluntarily withdrew its appeal.

***4** Rowe, Campbell, and Global raise several issues on appeal. First, they argue that the district court erred by inviting and granting AMZCO's oral summary judgment motion against their state tort law claims because the district court did not give them adequate notice or an opportunity to respond. Second, Rowe and Campbell contend that the district court erred in concluding, as a matter of law, that Rowe and Campbell could not recover consequential damages for AMZCO's breach of ***101** contract because, they argue, foreseeability is a question of fact for the jury.

[1] At oral argument, AMZCO questioned for the first time whether we lack jurisdiction to hear Rowe's appeal because licensed counsel did not sign its notice of appeal. At our request, the parties filed supplemental briefs on this issue. In conjunction with its supplemental brief, Rowe also filed a motion for leave to file its notice of appeal out of time. We must address questions of subject matter jurisdiction first " 'because they concern the court's very power to hear the case.' " *Owens-Illinois, Inc. v. Meade,* 186 F.3d 435, 442 n. 4 (4th Cir.1999) (quoting 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.30[1] (3d ed. 1998)). Moreover, "the absence of jurisdiction may be raised at any time during the case, and may be based on the court's review of the evidence." *Lovern v. Edwards,* 190 F.3d 648, 654 (4th Cir.1999). Therefore, we begin by considering whether we have jurisdiction to hear Rowe's appeal.

II.

[2] AMZCO argues that the notice of appeal, signed by a *pro se* litigant on behalf of the corporation for which he is president rather than by licensed counsel, is invalid to bring the corporation's appeal within our jurisdiction. Reviewing this question of subject matter jurisdiction de novo, *see Tillman v. Resolution Trust Corp.*, 37 F.3d 1032, 1034 (4th Cir.1994) (reviewing de novo a dismissal based upon lack of subject matter jurisdiction), we conclude that we have jurisdiction over Rowe's timely noted appeal because although Rowe's original notice of appeal was technically defective for lack of a proper signature, Rowe remedied that defect by filing a corrected notice of appeal. *See* ***Becker v. Montgomery***, 532 U.S. 757, 121 S.Ct. 180, 149 L.Ed.2d 9831 (2001) (stating that although Becker's notice of appeal was defective because it lacked a proper signature, the Court of Appeals for the Sixth Circuit erred in refusing to accept Becker's corrected notice of appeal).
In *Becker*, the Supreme Court addressed the question of whether, "[w]hen a party files a timely notice of appeal in district court, ... the failure to sign the notice of appeal require[s] the court of appeals to dismiss the appeal." *Id.* at 1803-04 (internal quotation marks omitted). Becker, a *pro se* inmate, had timely filed a notice of appeal in which he had typewritten, but did not hand sign, his own name. *Id.* The Court of Appeals for the Sixth Circuit dismissed Becker's appeal on the ground that Becker's failure to sign his notice of appeal was jurisdictional "and therefore not curable outside the time allowed to file the notice." *Id.* The Supreme Court agreed that Becker's notice of appeal was defective due to the lack of his signature, but it disagreed with the Sixth Circuit's conclusion that Becker could not cure the defect by filing a corrected notice of appeal after expiration of the appeal period. *Id.* at 1805-07.
***5** The Court reasoned that Federal Rule of Civil Procedure 11 governed the signature requirement for the notice of appeal. [FN6] Federal Rule of Civil Procedure 11 provides, in pertinent part,

> FN6. In *Covington v. Allsbrook*, 636 F.2d 63 (4th Cir.1980), we concluded that Federal Rule of Civil Procedure 11 does not apply to
>
> notices of appeal. *See id.* at 64 n. 2. To the extent that our decision in *Covington* is inconsistent with the Supreme Court's decision in ***Becker v. Montgomery***, 532 U.S. 757, 121 S.Ct. 1801, 149 L.Ed.2d 983 (2001), *Becker*, of course, controls.

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the ***102** attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
Fed.R.Civ.P. 11(a). The Court noted that although Becker typed his name and although the Civil Rules now recognize certain technological advances, such as electronic filing, "[a]s Rule 11(a) is now framed, we read the requirement of a signature to indicate, as a signature requirement commonly does, and as it did in John Hancock's day, a name handwritten (or a mark handplaced)." *Id.* at 1805-06.
The Court stated, however, that "[a]s plainly as Civil Rule 11(a) requires a signature on filed papers, ... so the rule goes on to provide in its final sentence that 'omission of the signature' may be 'corrected promptly after being called to the attention of the attorney or party.' " *Id.* at 1805-06. Consequently, because Becker offered a corrected notice of appeal containing his signature, the Court ruled that his appeal should not have been dismissed: "We rule simply and only that Becker's lapse was curable as Civil Rule 11(a) prescribes; his initial omission was not a 'jurisdictional' impediment to pursuit of his

appeal." *Id.* at 1806-07. In sum, the Court held that

The governing Federal Rules direct that the notice of appeal, like other papers filed in district court, shall be signed by counsel or, if the party is unrepresented, by the party himself. But if the notice is timely filed and adequate in other respects, jurisdiction will vest in the court of appeals, where the case may proceed so long as the appellant promptly supplies the signature once the omission is called to his attention.

Id. at 1803.

In the present case, Rowe timely filed a notice of appeal that was signed only by Campbell, a non-lawyer, on Rowe's behalf and not by licensed counsel. After AMZCO questioned the validity of Rowe's notice of appeal at oral argument on the basis that Rowe, as a corporation, could not sign its own notice of appeal and that Campbell, as a non-lawyer, was not authorized to sign the notice on Rowe's behalf, Rowe promptly submitted a corrected notice of appeal signed by counsel. [FN7] Assuming, without deciding, that Campbell's signature on Rowe's initial notice of appeal was insufficient to satisfy Federal Rule of Civil Procedure 11's signature requirement, *Becker* mandates the conclusion that we nevertheless have jurisdiction over Rowe's appeal because Rowe promptly filed a corrected notice of appeal. *See Becker,* 121 S.Ct. at 1808 (concluding that the court of appeals erred in refusing to accept Becker's corrected notice of appeal).

> FN7. We heard oral argument on October 27, 1999, and requested supplemental briefing on the issue of the validity of Rowe's notice of appeal. On November 23, 1999, within the time allotted by us to file supplemental briefing, Rowe filed a motion for leave to file an amended notice of appeal, with an attached amended notice of appeal signed by counsel. We grant Rowe's motion and accept Rowe's amended notice of appeal. We note that licensed counsel filed Rowe's briefs and orally argued before us. At all times, AMZCO and this Court were well aware that both Campbell and Rowe were on appeal.

III.

***6** Having concluded that we have jurisdiction to consider Rowe's appeal, we next ***103** address Rowe, Campbell, and Global's claims. Rowe, Campbell, and Global first argue that the district court erred in inviting and granting AMZCO's oral motion for summary judgment on their state law claims without giving them ten days' notice and any opportunity to respond. They also argue that the district court erred in concluding that there is no triable issue of fact as to their state law claims. With regard to Rowe, Campbell, and Global's assertion of procedural error, we conclude that the district court did not commit reversible error in failing to give ten-days notice before granting AMZCO's oral motion for summary judgment. With regard to the substance of Rowe, Campbell, and Global's state law claims, we conclude that Rowe, Campbell and Global failed to raise a triable issue of fact as to their fraud claims, and, therefore, we affirm the district court's grant of summary judgment as to those claims. Because the record before us is unclear as to whether there is a triable issue of fact as to Rowe, Campbell, and Global's other state law claims, however, we reverse and remand the district court's judgment for further proceedings consistent with this opinion. Finally, we conclude that the district court erred in ruling as a matter of law that consequential damages are not recoverable for AMZCO's breach of the financing agreement, and we reverse and remand the district court's judgment on that issue for further proceedings consistent with this opinion.

A.

[3] [4] We turn first to Rowe, Campbell, and Global's claim of procedural error--that the district court erred by not affording them ten-days notice before granting AMZCO's oral motion for

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March 28, 2002

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Re: Classification Of Post-Judgment Motions, Writs, and Petitions In Criminal Cases

Dear Patrick:

At the April 2001 meeting of the Federal Rules of Appellate Procedure Advisory Committee, there was discussion concerning whether the time for filing an appeal in Hyde Amendment cases should be governed by civil or criminal time limits. This discussion also addressed a proposal by Judge Easterbrook that there should be a rule classifying the many post-judgment motions in criminal cases. Judge Easterbrook has written that "[a] rule could be something simple like 'an order formally in a criminal case is treated as civil for purposes of this rule unless it is a sentence of imprisonment or a criminal fine.' That would put restitution orders on the civil side (properly so, since they are functionally civil). * * * The orders that have given trouble in my court include forfeiture (which could be criminal or civil, but which ought to be treated as civil for the time to appeal), post-judgment motions for the return of property, and a variety of ancillary matters."

These points raise very difficult issues, which admit of no easy answer. We have prepared an analysis of the problem, and provide several different ways of looking at them, depending upon different policy choices. At this stage, the Department of Justice is not ready to make a specific proposal on how to solve these issues. I hope to have such a proposal for the Committee's next meeting. I did nevertheless want to give the Committee a sense of the breadth of the inquiry.

1. Current State of the Law

The current state of the law confirms that there is a need for further guidance on the question of how to classify post-judgment motions related to criminal cases. The various types of motions, writs and petitions, and how they are currently treated by the federal courts, are set forth below:[1]

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[1] As far as we have determined, the federal courts have not considered the timeliness of appeals from extradition orders, if those orders are subject to appeal at all.

(1) *Motions to Vacate Sentence under 28 U.S.C. § 2255.* Pursuant to statutory rule, these motions are treated as "civil" for purposes of FRAP 4, and are therefore governed by the timing for civil appeals. See Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts. The Advisory Committee Notes to this Rule observe that a § 2255 motion is a "further step in the movant's criminal case rather than a separate civil action," but ultimately conclude, based on the Supreme Court's language in United States v. Hayman, 342 U.S. 205 (1952), that appeals from § 2255 rulings are analogous to appeals from habeas corpus petitions, which are treated as civil for purposes of time to appeal.

(2) *Writs of coram nobis.* The writ of error coram nobis is most often used to correct legal and factual errors by persons who have finished serving their federal sentences (and hence are no longer "in custody" for § 2255 purposes). The circuit courts are badly split on how they are to be treated. Compare United States v. Keogh, 391 F.2d 138 (2d Cir. 1968) (using "civil" time for appeals); United States v. Cooper, 876 F.2d 1192 (5th Cir. 1989) (same); United States v. Craig, 907 F.2d 653 (7th Cir. 1990) (same) with United States v. Mills, 430 F.2d 526 (8th Cir. 1978) (using "criminal" time for appeals); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985) (same).

(3) *Hyde Amendment cases.* Criminal defendants seeking to recover attorneys fees for vexatious, frivolous, or bad faith prosecutions may file Hyde Amendment claims. As with coram nobis, the circuit courts are split over how to approach these cases in terms of time to appeal. Compare In re 1997 Grand Jury, 215 F.3d 430 (4th Cir. 2000) (treating Hyde Amendment as "civil" for purposes of FRAP 4); United States v. Truesdale, 211 F.3d 898 (5th Cir. 2000) (same) with United States v. Robbins, 179 F.3d 1268 (10th Cir. 1999) (treating Hyde Amendment case as "criminal" for purposes of FRAP 4).

(4) *Rule 41(e) motions to recover property.* Motions filed by criminal defendants to recover property obtained in an unlawful search or seizure have usually been deemed "civil" for purposes of FRAP 4. See United States v. Garcia, 65 F.3d 17 (4th Cir. 1995); Hunt v. Department of Justice, 2 F.3d 96 (5th Cir. 1993); United States v. Taylor, 975 F.2d 402 (7th Cir. 1992); United States v. Martinson, 809 F.2d 1364 (9th Cir. 1987); United States v. Madden, 95 F.3d 58 (10th Cir. 1996).

(5) *Forfeiture actions.* The appellate courts have divided over how to treat the appeals of criminal forfeiture orders. Some courts treat them as civil matters. See United States v. Lavin, 942 F.2d 177, 181-82 (3d Cir. 1991). Other courts view them as part of the criminal proceeding. See United States v. Casas, 999 F.2d 1225, 1232 (8th Cir. 1993) (criminal forfeiture proceeding under 21 U.S.C. § 853(a)(2)); United States v. Yerardi, 192 F.3d 14, 19 (1st Cir. 1999) (criminal forfeiture proceedings under 18 U.S.C. §§ 982, 1963); United States v. Apampa, 179 F.3d 555, 556-57 (7th Cir. 1999) (criminal forfeiture proceedings under 21 U.S.C. § 853 "criminal" as to defendant; "civil" as to third parties); United States v. Alcaraz-Garcia, 79 F.3d 769,

772 n.4 (9th Cir. 1996) (implying the same in dicta); United States v. Gilbert, 244 F.3d 888, 906-07 (11th Cir. 2001) (criminal forfeiture proceedings under 18 U.S.C. § 1963(l) are "criminal" as to defendant; "civil" as to third parties).

(6) *Remaining common law writs (e.g., coram vobis, audita querela).* As an initial matter, the existence and/or utility of these writs is still uncertain, but these writs are ostensibly authorized by the All Writs Act, 28 U.S.C. § 1651. There have been few cases that have addressed the status of these writs for purposes of appellate time limits, so these cases may need to be addressed by analogy to coram nobis or other analogous types of filings detailed above.

The Committee should be aware that the question of whether an appeal is "in a criminal case" (and thus governed by the Rule 4(b)) or "in a civil case" (and thus governed by Rule 4(a)) does not arise solely for sentencing and post-sentencing rulings. That issue also arises for pre-trial rulings, such as orders by a grand jury judge denying a motion to quash a grand jury subpoena and granting a motion to compel, which the Third Circuit recently held was an order in a civil case. Impounded, 277 F.3d 407, 410-11 (3d Cir. 2002). If such rulings, or rulings on Rule 41(e) motions filed before the indictment or information, or other orders appealable on an interlocutory basis, are regarded as civil for purposes of Rule 4, such a determination could delay investigation and prosecution of criminal cases.

I also note that, while Rule 4 does not define what a "civil case" or "criminal case" is, the 1967 and 1979 Advisory Committee Notes state that a "civil case" includes bankruptcy, admiralty, maritime, and arbitration matters, and possibly suggests that there are no other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b). More importantly, the 1967 Notes make clear that Rule 4(a) was derived from former Civil Rule 73(a), and Rule 4(b) from former Criminal Rule 37(a)(2), both "without any change of substance" -- which suggests that Rules 4(a) and 4(b) might be intended to apply to those proceedings to which the Civil and Criminal Rules respectively apply. The Civil Rules are applicable "in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty," including habeas corpus, mandamus and quo warranto. Fed. R. Civ. P. 1, 81(a)(2), (b). The Criminal Rules are applicable "in all criminal proceedings," and, where provided, "to preliminary, supplementary, and special proceedings" before Magistrate Judges, but not to civil forfeitures, extradition, collection of fines and penalties, or perhaps to delinquency proceedings. Fed. R. Crim. P. 1, 54.

2. Possible Classification Rationales

In a very literal respect, every one of the above-mentioned post-judgment filings is a "step in the criminal process." As a result, relying upon this observation may be of marginal utility. However, there are several possible policy rationales that might serve as a suitable mechanism for sorting "civil" post-judgment motions from "criminal" ones.

There is one practical consideration to keep in mind at the outset -- consistency. Some of the various post-judgment filings listed above, are interchangeable -- that is, a person may have the

option of proceeding under one or more of these remedies as alternatives to one another. Any rule adopted needs to account for this possibility, to avoid the result of having persons circumventing the "criminal" time limits ascribed to one form of relief by simply filing its "civil" counterpart, and to avoid jurisdictional traps for litigants.

With these considerations in mind, there are various policy options we have identified so far:

(1) *Liberty interests demand shorter time limits.* There is a strong policy interest in the quick and orderly disposition of criminal cases. The Speedy Trial Clause of the Sixth Amendment and the federal Speedy Trial Act, 18 U.S.C. § 3161 et seq., implement this policy. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration.").

This policy would dictate a rule that uses the criminal time limits for motions filed while the defendant's liberty interests are necessarily being infringed (presumably because the defendant is in custody). Thus, for example, a Rule 35 motion to correct a sentence would almost always be subject to criminal appeal time limits (but not always, since the defendant might not be in custody at that time), while a petition for a writ of coram nobis would never be criminal, because a defendant is by definition out of custody. Motions under Rule 41(e) and the Hyde Act would probably be "civil," because they will most often (though not always) be filed by a person who is out of custody. Thus, this rule provides a way of classifying motions that more or less corresponds with the policy that supports it.

The drawback to using this policy to justify a rule is that it is inconsistent with Rule 11 governing § 2255 motions. By definition, § 2255 movants are "in custody" and yet § 2255 motions are explicitly designated as "civil" for purposes of appellate time limits.[2] To the extent that the Committee takes § 2255's civil time limits as the expression of a policy that it does not wish to disturb (and with potentially good reason, given the interchangeability between § 2255 and § 2241), this policy could still provide a workable rule -- every post-judgment motion in a "criminal" case, with the exception of a Rule 35 motion or the direct appeal of the conviction or sentence, is to be treated as a "civil" motion for time purposes. This would provide for consistency and clarity, albeit at the expense of theoretical crispness (which would mandate that all motions filed while the movant is likely to be in custody be deemed criminal). This trade-off could nevertheless be justified as a necessary -- and reasonable -- balance of competing policies.

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[2] It might be possible to change the rule governing § 2255. This may not be wise as a policy matter, however, because the potential alternative to § 2255, a writ of habeas corpus under 28 U.S.C. § 2241, is still treated as "civil" under the relevant case law. Because, as discussed above, consistency is important, changing the time limits governing § 2255 may lead to a rash of § 2241 petitions seeking leave to proceed under § 2241 on the ground that § 2255's new time limits may be "unavailable" or "ineffective" under § 2255's "safety valve" language.

(2) *Finality of convictions demands shorter time limits.* In numerous opinions, the Supreme Court has repeatedly emphasized the importance of bringing an end to constant litigation over criminal convictions. See, e.g., Teague v. Lane, 489 U.S. 288 (1989). Shorter time limits for appeals of post-judgment motions would certainly serve the goal of bringing post-conviction litigation to an end more quickly.

As one might expect, this policy would dictate a rule that treated any litigation touching upon the validity of the underlying conviction or sentence as "criminal" for purposes of FRAP 4. This would call for Rule 35 motions, § 2255 motions, coram nobis petitions, and any All Writs Act petitions attacking the conviction or sentence to be deemed "criminal." Rule 41(e) motions and Hyde Amendment actions, because they do not affect the validity of the underlying conviction or sentence, could conceivably be deemed "civil."

The difficulty with this approach is that it ignores the current treatment of § 2255 motions as "civil." It would allow for "gaming" as defendants attempt to file § 2255 motions or § 2241 motions -- which are treated civilly -- in lieu of coram nobis or other All Writs Act filings. Thus, this may not be an ideal rule.

(3) *Remedial / punitive nature of the relief sought.* Some courts have suggested that the nature of the relief sought by the order appealed should dictate the classification. Appeals of orders that are punitive should be treated like criminal motions, while those seeking remedial relief should be treated like civil motions. Judge Easterbrook's proposal is a variant of this approach, as he would deem as criminal the appeal of orders that involve a "sentence of imprisonment or a criminal fine," see Judge Easterbrook letter at 2 -- both of which are arguably "punitive."

Neither the broader principle nor Judge Easterbrook's proposal seems workable. With respect to the former, the difference between motions that are "remedial" in nature and those that are "punitive" in nature would often be a very difficult one to discern. The Supreme Court has had a great deal of difficulty in distinguishing between the two in its Double Jeopardy jurisprudence, see, e.g., United States v. Ursery, 518 U.S. 267 (1996), and the instant situation is unlikely to fare much better. While Rule 41(e) motions and Hyde Amendment motions appear to be "remedial," so is almost every other type of motion directed at the criminal conviction or sentence -- Rule 35 motions, for example, are "remedial" insofar as they "remedy" an unlawful or invalid conviction or sentence. To the extent the difference between "remedial" and "punitive" turns on whether the type of relief sought is monetary versus declaratory or injunctive, this distinction may also be clumsy and unclear. See, e.g., Heck v. Humphrey, 512 U.S. 477 (1994) (distinguishing between § 2241 and 42 U.S.C. § 1983 actions based on the remedy sought); Edwards v. Balisok, 520 U.S. 641 (1997) (same).

Judge Easterbrook's proposal may suffer from many of the same infirmities. Nearly every type of post-judgment motion except for Hyde Amendment claims and Rule 41(e) motions attack a "sentence of imprisonment or a criminal fine" -- either directly (in the case of a direct appeal) or, most commonly, collaterally (in the case of § 2255 motions, coram nobis petitions, or Rule 35 motions). Judge Easterbrook does not appear to advocate this straightforward reading of his proposed rule, however, as he notes that coram nobis would likely be "civil" under his proposed rule,

see id., and he does not seem to advocate changing the "civil" nature of § 2255 motions under Rule 11 of the 2255 Rules. Thus, without further clarification, this rule also seems unworkable.

(4) *Judicial economy / identity of issues.* Judge Motz of this Committee wrote, in a concurring opinion in United States v. Holland, 214 F.3d 523 (4th Cir. 2000), that post-conviction motions should be deemed "criminal" if they would involve resolution of the same issues contested at trial (e.g., guilt or sentencing). Thus, in her view, because Hyde Amendment awards and Rule 41(e) motions turn on the validity of the underlying prosecution, they should be deemed "criminal" for purposes of FRAP 4. This policy would dictate a rule that deems almost every post-conviction motion "criminal." Such a rule would serve the important purpose of reducing delay in proceedings arising out of criminal matters. Nevertheless, for the reasons noted above, this rule might be inconsistent with the current rules governing § 2255 motions.

3. Conclusions

As noted at the outset, the issues here are devilishly complex. The Department of Justice is not yet ready to make a formal proposal to the Committee, but we are working on one. As between listing the various motions explicitly in a new rule, or announcing a broad principle, it may be of greatest assistance to judges and litigants to list the particular types of motions in a rule, with language in an Advisory Note explaining the rationale behind the classifications, thereby providing courts with a helpful reference as they are forced to examine new pre- and post-conviction filings that may be created in the future. In any event, I hope to be able to propose a new rule at the next meeting after this one.

Sincerely,

Douglas Letter
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February 13, 2002

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
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Post Office Box 999
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Dear Judge Alito:

Following the Appellate Rule Committee's spring 2001 meeting in New Orleans, Judge Garwood requested assistance from the Federal Judicial Center in order to respond to a request by Judge Edward Carnes of the United States Court of Appeals for the Eleventh Circuit to amend Federal Rule of Appellate Procedure 35(a) and 28 U.S.C. Section 46(c). Specifically, Judge Carnes was concerned about the circuit split on the question of whether judges who are recused are counted in calculating what constitutes a "majority" of circuit judges in regular active service required by Rule 35(a) in order to hear a case en banc.

We sent questionnaires to the chief judges and clerks of the courts of appeals to gather information on the courts' current interpretation of Rule 35(a) and other relevant practices regarding their procedures for determining whether or not to hear a case en banc. Sections II and III of the enclosed report describes our findings from the questionnaire responses. Very generally, we found three approaches currently being used in the courts of appeals to interpret Federal Rule of Appellate Procedure 35(a) (i.e., absolute majority, case majority, and modified case majority approaches). The majority (eight) of the courts of appeals have adopted the absolute majority approach (i.e., they interpret "circuit judges who are in regular active service" to mean all of the active judges on the court of appeals in the circuit when the vote is taken, including all judges who have recused themselves or are disqualified from participating in the case or unable to vote for some other reason). Section IV outlines the arguments that have been made in support of and against the absolute majority interpretation of FRAP 35(a). Finally, Section V describes several remedies that have been proposed to alleviate the intercircuit conflict over the interpretation of FRAP 35(a).

Although I am temporarily out of the office on maternity leave, if you have any questions concerning the report please contact me through email or please call me at (703) 368-5772. I hope that this report will assist the Committee as it examines FRAP 35(a).

Sincerely,

Marie Leary

cc: Professor Patrick J. Schiltz
Judge Will Garwood
John Rabiej

Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals

Report to the Judicial Conference
Advisory Committee on Appellate Rules

Marie Leary

Federal Judicial Center

February 2002

Contents

I. Introduction

A. Background

Federal Rule of Appellate Procedure 35(a) and section 46(c) of Title 28 of the United States Code both require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc.[1] However, neither Rule 35(a), section 46(c), nor any other provision defines whether judges who are disqualified,[2] recused,[3] or otherwise unavailable (e.g., because of illness or personal circumstances) are to be included when calculating the majority of circuit judges needed to hear a case en banc.

Furthermore, it appears that neither Congress nor the U.S. Supreme Court have provided definitive guidance on the appropriate interpretation of the majority requirement of section 46(c).[4] Congress did not define the word "majority" when it enacted section 46(c) in 1948:[5] "There is no indication that the use of the word 'majority' in 46(c) is anything more than a general prescription of the means by which judges may order en banc hearings."[6] In 1973, the Judicial Conference pro-

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1. Fed. R. App. P. 35(a) provides in part: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." Fed. R. App. P. 35(a). Section 46(c) provides in part: "Cases and controversies shall be heard and determined by a court or panel of not more than three judges. . . unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. § 46(c) (1982).

2. All federal judges, including justices of the U.S. Supreme Court, are disqualified from sitting in cases where their impartiality reasonably may be questioned, including situations where the judge has a personal or family financial interest in the proceeding, has personal knowledge of evidentiary facts, or has acted as counsel or a witness in the matter. 28 U.S.C. § 455(b) (1988).

3. Recusal differs from disqualification in that recusal is a voluntary abstention.

4. *See* James J. Wheaton, Note, *Playing With Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L. Rev. 1505 (1984); Thomas J. Waters, Note, *The En Banc Requirements of 28 U.S.C. § 46(c): What Constitutes a Majority in the Event of a Recusal or Disqualification?*, 11 J. Legis. 373 (1984).

5. The House Report generally referred to preserving the Supreme Court's holding in Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1941), as the limited purpose for the new section. H.R. Rep. No. 306, 80th Cong., 1st Sess. A6–A7 (1947). The Court in *Textile Mills* held that notwithstanding the three-judge panel limitation, a court of appeals sitting en banc could properly consist of a greater number of judges. 314 U.S. at 333.

6. Wheaton, *supra* note 4, at 1513. *See also* Waters, *supra* note 4, at 383 ("The House Report to the 1948 amendment clearly demonstrates that Congress did not intend to consider how a majority was to be determined in the event of a recusal or disqualification.").

posed an amendment to section 46(c) that would have "[made] clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case," and would have excluded recused judges when determining what constitutes the majority of circuit judges necessary to convene en banc.[7] A bill including the Conference proposal died without hearings or other action.[8] In September 1984, the Judicial Conference rescinded its 1973 proposal and suggested that each court of appeals clearly describe its en banc voting procedures by formulating a standard that would make litigants aware of the definition of "majority" that applied in that court.[9]

Only three Supreme Court cases[10] have addressed the procedural requirements of 28 U.S.C. § 46(c), and of these only one, in 1963, came close to deciding the section 46(c) majority requirement issue. In *Shenker v. Baltimore & Ohio Railroad Co.*, after a three-judge panel of the Third Circuit reversed the district court, the full court of appeals denied a petition for a rehearing en banc pursuant to a poll that yielded four votes to rehear the case en banc, two votes to deny, and two abstentions.[11] The Supreme Court upheld the court of appeal's decision to deny rehearing en banc even though four of the six circuit judges *voting* favored en banc rehearing.[12] The Court concluded that it was clearly within the court of appeal's discretion to require a ma-

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7. Administrative Office of the U.S. Courts, 1973, Reports of the Proceedings of the Judicial Conference of the United States (1974).

8. *See* Wheaton, *supra* note 4, at 1516–17 & n.68 ("[T]he inaction of Congress with regard to the 1973 Judicial Conference proposal renders its legislative history inconclusive; although Congress took no action to reject the absolute majority interpretation, neither did it endorse that reading of the statute."). Congress amended Section 46 twice, once in 1978 (*see* Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1629 (codified in scattered sections of 28 U.S.C.)), and again in1982 (*see* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.)). In both instances the majority requirement issue of section 46(c) was not addressed, but since the amendments focused on different topics (i.e., creating additional judgeships to ease the growing caseload of federal courts and clarifying the appropriate role for senior circuit judges in rehearings en banc), it does not support a conclusion that Congress was satisfied with the status quo. *See* Waters, *supra* note 4, at 385–88.

9. *Judicial Conference Moves a Wide-Ranging Agenda at Fall Meeting*, Third Branch (Administrative Office of the U.S. Courts), Nov. 1984, at 3.

10. Textile Mills Sec. Corp. v. Commissioner of Internal Revenue, 314 U.S. 326 (1941) (Court held that circuit courts of appeals are not limited to sitting in three-judge panels where the court is sitting en banc); Western Pacific R.R. Case, 345 U.S. 247 (1953) (Court held that while a circuit court could not restrict a litigant's access to the en banc procedure, no applicant had the right to compel a circuit judge to consider such an en banc petition formally); Shenker v. Baltimore & Ohio R.R. Co., 374 U.S. 1 (1963).

11. *Shenker*, 374 U.S. at 4.

12. *Id.* at 5 ("For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals.").

jority of all the active judges of the court to grant rehearing en banc.[13] Thus, five of the eight active judges would have had to vote in favor of rehearing the case en banc. In refusing to adopt a particular definition of "majority" in *Shenker* and by denying certiorari in another appellate court case that would have required the Court to decide whether recused judges must be counted when calculating a majority,[14] it seems that the Supreme Court has allowed each court of appeals to choose for itself which rule it will follow.[15] Thus, this lack of controlling Supreme Court authority or congressional action or legislation has left the definition of the majority requirement up to the individual courts of appeals, which have adopted inconsistent rules and procedures as to how they determine whether to hear a case en banc.[16]

Recently, an opinion by Judge Carnes of the Eleventh Circuit in *Gulf Power Co. v. Federal Communications Commission*,[17] examined the important intercircuit variations in the proper definition of the majority requirement. At the time the court voted whether to rehear *Gulf Power Co.*, five of the twelve judges in active status were disqualified, and thus only seven judges voted.[18] The court of appeals uses an absolute majority interpretation of Federal Rule of Appellate Procedure 35(a). That is to say, an en banc rehearing requires the votes of a majority of all active circuit judges on the court at the time of the poll, including disqualified judges. The en banc rehearing was denied, even though six of the seven judges voting voted for the rehearing. Judge Carnes thought that *Gulf Power Co.* was a "good example of why the absolute majority provision of Federal Rule of Appellate Procedure 35(a) needs to be changed by Congress or by the Supreme Court . . ." because even if six of the seven

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13. *Id.*

14. Arnold v. Eastern Airlines, Inc., 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984) (Fourth Circuit concluded that the majority requirement of section 46(c) did not oblige the court to count a recused judge when calculating whether a majority of the circuit's judges in regular active service had voted to grant en banc rehearing; with one of the circuit's ten active judges disqualified, the court ordered rehearing based on the affirmative votes of five of the court's nine remaining active judges).

15. *See* Waters, *supra* note 4, at 379; Wheaton, *supra* note 4, at 1520.

16. *See* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 854 (1993) (Citing the Supreme Court's deference in the Western Pacific R.R. Case, 345 U.S. 247 (1953), to the administrative powers vested in the circuit courts, Stein concluded that "the individual circuits may promulgate rules and internal operating procedures that would allow modification in the way en banc votes are tallied."). *See also* Wheaton, *supra* note 4, at 1506, 1524 ("[I]nterpretation of the majority requirement remains within the authority of each circuit." "The rules and statutes do not require the circuits to adopt identical procedures . . . the several circuits have adopted significantly different rules.").

17. 226 F.3d 1220 (11th Cir. 2000) (opinion concerning per curiam denial of rehearing en banc).

18. 226 F.3d at 1222.

nonrecused judges in active service wanted to hear the case en banc, it would not be possible because six is not a majority of twelve.[19] "The result is that the law of this circuit is decided not on the basis of the votes of a majority of the seven nondisqualified judges of this court in active service," but instead by the vote of one judge.[20] Further, Judge Carnes argued that "there is no good reason why a uniform rule should not be followed in all the circuits."[21]

In April 2001, the Judicial Conference Advisory Committee on Appellate Rules decided to study Judge Carnes' request to amend Federal Rule of Appellate Procedure 35(a) and requested assistance from the Federal Judicial Center. Specifically, the Center was asked to provide information on the following:[22]

> (1) How do each of the thirteen federal courts of appeals interpret Rule 35(a) and 28 U.S.C. § 46(c)? How many apply the "absolute majority" rule adopted by the Eleventh Circuit? How many apply some other rule?
>
> (2) What arguments have been made to justify the "absolute majority "rule? What arguments have been made against the rule?
>
> (3) Are there any other intercircuit disagreements concerning either how courts decide whether to hear a case en banc or how courts decide cases that have been "en banced"? For example, do the circuits disagree about the participation of senior judges (i.e., judges who became senior after the panel decision) either in the decision whether to hear a case en banc or in the decision of the case on the merits?[23]

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19. *Id.* at 1221, 1222–23.

20. *Id.* at 1223. In *Gulf Power Co.*, although six of the seven judges qualified to vote voted in favor of hearing the case en banc, the author of the panel majority opinion (the one vote against rehearing en banc) was able to prevent the case from being heard en banc because of the absolute majority rule (i.e., since the Eleventh Circuit court of appeals had twelve judges in regular active service at the time, all seven nondisqualified judges needed to vote in favor of rehearing in order to vote the case en banc). *Id.* at 1222.

21. *Id.* at 1225.

22. Letter from Judge Will Garwood, Fifth Circuit Court of Appeals, to Marie Leary, FJC research associate (May 14, 2001) (on file with author).

23. Section 46(c) of Title 28 of the U.S. Code makes it clear that senior judges cannot participate in the vote to hear a case en banc. We did not find any rule or any procedures in the courts of appeals to the contrary. Section 46(c) does define two circumstances in which a judge can elect to participate in an en banc hearing after taking senior status. In addition to rules and practices incorporating one or both of these exceptions, we did find several rules or practices that permit judges to continue to participate in the final resolution of an en banc case after taking senior status in circumstances not covered under the statute. *See infra* Section III.

B. Methods for Collecting Information

In order to provide the Appellate Rules Committee with information on each appellate court's current interpretation of Federal Rule of Appellate Procedure 35(a), we sent a questionnaire to the chief judge and the clerk of each court of appeals. The questionnaires were tailored for each court and consisted of two parts. In the first part, we asked how a "majority" was calculated under Rule 35(a). If we were able to locate a relevant local rule or internal operating procedure, chief judges and clerks were asked to verify that this rule or operating procedure was still in effect. If the rule was no longer in effect, or if no formal rule was located, chief judges and clerks were asked to describe their courts' current practice. We asked about policies (if any) concerning temporary absences, why the courts of appeals adopted their current interpretation of Rule 35(a) and about any problems or expressions of dissatisfaction with their current approach.

Part two of the questionnaires sought to verify any rules or internal operating procedures we had located concerning the participation of senior judges in rehearings en banc.[24] In addition, we asked the chief judges and clerks to describe their courts' policies (if any) concerning the participation in the rehearing vote of judges who took senior status after the panel decision, and the participation in the en banc rehearing itself of judges who took senior status after the vote on whether to hear the case en banc.

We received responses to the questionnaires from all thirteen courts of appeals, either directly from the chief judge or from the clerk with the chief judge's approval. Follow up phone calls were made to several circuits to clarify ambiguous responses or to obtain additional information.

In order to describe arguments that have been made to justify the absolute majority approach and any arguments made in opposition to the rule, we conducted a search of case law and secondary sources. With the exception of Judge Carnes' opinion in *Gulf Power Co.*, most of these articles and cases are well over a decade old, suggesting that the debate over the interpretation of the majority requirement in 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a) has been dormant for a while. The articles that were most insightful and on point were written after the Fourth Circuit's opinion in *Arnold v. Eastern Airlines,*[25] which was a rare examination of the importance of the question of whether 28 U.S.C. § 46(c) and Rule 35(a) *require* a court to count a recused judge when calculating whether a majority of the circuit's judges in regular active service had voted to grant en banc rehearing. In

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24. *Id.*

25. 712 F.2d 899 (4th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1040 (1984).

Arnold, the Fourth Circuit concluded that the majority requirement of section 46(c) did not require a court of appeals to count recused judges.[26]

C. Overview of the Report

The following sections of the report present the findings from the research described above. Specifically, Section II describes the responses from part one of the questionnaires concerning each court of appeal's current interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a). Section III presents responses to inquiries about the treatment of senior judges in en banc hearings from part two of the questionnaires. Section IV discusses the arguments found in case law and secondary sources for and against the absolute majority approach. Finally, Section V lays out several proposals that commentators have suggested for clarifying the definition of majority in 28 U.S.C. § 46(c) and Rule 35(a) to make the procedures uniform across the courts of appeals.

26. *Id.*

II. Interpretation of the "Majority" Vote Requirement by the Courts of Appeals

A. Three Approaches

The courts of appeals use one of three different approaches to define their en banc voting procedures.[27]

Eight[28] use the absolute majority approach in that they interpret "circuit judges who are in regular active service" to mean all of the active judges on the court of appeals in the circuit when the vote is taken, including all judges who have recused themselves or are disqualified from participating in the case or unable to vote for some other reason. For example, if a court of appeals has twelve judges in regular active service then a majority of all those judges (seven of the twelve judges, an "absolute majority") must vote to hear a case en banc, even though one or more of the twelve active judges may not be eligible to vote.

Four courts of appeals[29] have adopted the case majority approach.[30] They define a majority of the active circuit judges as a majority of the active judges eligible to participate in the case at issue. For example, on a court of appeals with twelve judges in regular active service and five judges disqualified from participating in a case, the case will be heard en banc if four of the remaining seven judges vote in favor of en banc review.

The U.S. Court of Appeals for the Third Circuit has adopted a modified case majority approach:[31] It requires a "majority" of circuit judges in regular active service who are not disqualified, but in addition requires that the voting judges constitute a majority of circuit judges who are in regular active service. The court has twelve judges in regular active service, and thus an en banc vote cannot occur if six or more judges are disqualified in the case because at least seven judges must vote to hear a case en banc.

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27. We borrowed the terms used to describe the three approaches (i.e., absolute majority, case majority, modified case majority) from a report prepared by members of the Civil Practice and Procedure Committee of the American Bar Association Section of Antitrust Law recommending that the ABA propose an amendment to Fed. R. App. P. 35(a). Janet L. McDavid & Henry T. Reath, *Report to the House of Delegates on Procedures for Rehearing En Banc*, 55 Antitrust L. J. 665 (1987) [hereinafter ABA Report].

28. First Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Eighth Circuit, Eleventh Circuit, District of Columbia Circuit, and Federal Circuit. *See infra* Table 1.

29. Second Circuit, Seventh Circuit, Ninth Circuit, and Tenth Circuit. *See infra* Table 1.

30. *See supra* note 27.

31. *Id.*

Table 1 indicates which approach each court of appeals used at the time of our survey and whether the court has formally defined its voting procedures for en banc hearings in its local rules, internal operating procedures, or by some other means.

Table 1. Current Interpretation of Federal Rule of Appellate Procedure 35(a) by the Courts of Appeals

Circuit	Description of approach	Source of procedures
First	Absolute majority	"For the purposes of determining a majority under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), the term 'majority' means more than one-half of all the judges of the Court in regular active service, without regard to whether a judge is disqualified." Local Rule 35.
Second	Case majority	"Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in regular active service' shall be calculated, pursuant to 28 U.S.C. § 46(c), for purposes of ordering a hearing or rehearing in banc." Local Rule 35.
Third	Modified case majority	"[R]ehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service." App. I, Internal Operating Procedure 9.5.3.
Fourth	Absolute majority	"A majority of the circuit judges who are in regular active service may grant a hearing or rehearing en banc. For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving, without regard to whether a judge is disqualified." Local Rule 35(b).
Fifth	Absolute majority	"For purposes of en banc voting under 28 U.S.C. § 46(c), the term 'majority' is defined as a majority of all judges of the court in regular active service presently appointed to office. Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." Local Rule 35.6.
Sixth	Absolute majority	Although there is no current local rule or operating procedure defining a majority for the purpose of en banc voting, the practice in the U.S. Court of Appeals for the Sixth Circuit continues to reflect the explicit definition embodied in former Internal Operating Procedure 20.7, which was eliminated by the court in December 1997 ("Only judges of the court in regular active service at the time of the filing of the petition are eligible to vote on the request for a poll. . . . A majority is determined by calculating the majority vote of all active judges on the court, not the number qualified to hear the case.").
Seventh	Case majority	"A simple majority of the voting active judges is required to grant a rehearing en banc." Seventh Circuit Operating Procedure 5(d).

Table 1 (cont'd)

Circuit	Description of approach	Source of procedures
Eighth	Absolute majority	Although not embodied in its local rules or internal operating procedures, the U.S. Court of Appeals for the Eighth Circuit requires an affirmative vote by an absolute majority of all the judges in active service in order to grant a petition for rehearing en banc, regardless of disqualifications or other temporary reasons. *See* Ahlers v. Norwest Bank Worthington, 794 F.2d 388 (8th Cir. 1986) (petition for rehearing en banc denied even though five of the nine participating judges voted to grant it; since the court had ten judges in active service, six affirmative votes were required to grant the petition).
Ninth	Case majority	"Any active judge who is not recused or disqualified and who entered upon active service before the request for an en banc vote is eligible to vote." Local Rule 35-3, Advisory Committee Notes.
Tenth	Case majority	"A majority of the active judges who are not disqualified may order rehearing en banc." Local Rule 35.5.
Eleventh	Absolute majority	Although not embodied in its local rules or operating procedures, the U.S. Court of Appeals for the Eleventh circuit defines majority for purposes of a vote granting a rehearing en banc as a majority of all active judges, both qualified and disqualified.[32]
District of Columbia	Absolute majority	"[O]nly active judges of the Court may vote [on the question of whether there should be a rehearing *en banc*], and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing *en banc* in order for it to be granted." Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit, Part XIII.B.2.
Federal	Absolute majority	"A case will be reviewed en banc if a majority of the judges in regular active service agree to hear it en banc. Judges who are recused or disqualified from participating in the case are counted as judges in regular active service." Local Rule 35(a)(1).

B. Courts' Rationales for Adopting Current Approaches

We asked each chief judge to explain why his or her court adopted its particular interpretation of Federal Rule of Appellate Procedure 35(a). Only four responded to this inquiry. The other nine said they either did not recall or could not locate the rulemaking history that would explain the reasons their court adopted one approach over another.

Absolute majority rule. Chief Judge Wilkinson of the U.S. Court of Appeals for the Fourth Circuit, which follows an absolute majority approach, explained that this

32. A proposed amendment to the Eleventh Circuit's local rules to reflect the current practice has been approved for distribution for public comment and is presently being considered by the Eleventh Circuit's Lawyers Advisory Committee.

approach "spares us the resource drain of too many en banc hearings and, more importantly, safeguards the circuit against the imposition of an en banc ruling which does not actually reflect the views of a majority of judges on the circuit. . . [I]t would be altogether unwise to adopt a high-visibility rule in an en banc case with a large number of recusals which would only have to be changed at a later date, and to which a majority of a court decidedly does not subscribe." Chief Judge Wilkinson is not in favor of a uniform rule, and supports a continuation of the current variation in practice among the courts of appeals.

Similarly, Chief Judge Mayer of the U.S. Court of Appeals for the Federal Circuit explained that the Federal Circuit adopted the absolute majority approach "to ensure that the decision to grant rehearing en banc and the court's en banc decision would reflect the views of a majority of judges. Otherwise, the decision to grant and the ultimate resolution of the en banc issue could turn on the vagaries of recusal and unavailability. If an en banc case were decided by a majority of the participating judges, which is the only situation in which the choice of rule would make a difference, it would set the stage for a possible reversal of the en banc decision in a later case in which all of the active judges could participate, thus defeating the purpose of en banc to settle circuit law for the foreseeable future."

Case majority. In 1984, the Ninth Circuit Court of Appeals approved a change in the definition of majority for en banc purposes. The court departed from the absolute majority approach under which a recusal or abstention was counted as a no vote, and adopted a case majority approach because it believed that under the absolute majority rule, a recusal was in essence a negative vote.

Modified case majority. Chief Judge Becker of the U.S. Court of Appeals for the Third Circuit, which is unique in following a modified case majority approach (i.e., a majority of the circuit judges permitted to participate in a case have the power to grant en banc review, as long as the participating judges constitute a majority of the circuit judges in regular active service), explained that the change from an absolute majority approach was proposed and adopted because the absolute majority rule "made it too difficult to get rehearing in deserving cases" such as cases against a local university or large corporation where three or four active judges may be recused. Further, the additional requirement that the base constitute a majority of judges in active service provides a "'brake' so that an en banc decision could not be made by just a few judges on a large court."

C. Vacancies and Temporary Absences

Although most courts of appeals did not address whether unfilled vacancies should affect the calculation of a "majority" required under section 46(c),[33] we assume based

33. *See contra* Second Circuit Local Rule 35 ("Neither vacancies nor disqualified judges shall be counted in determining the base on which 'a majority of the circuit judges of the circuit who are in

on additional language in some rules[34] and the plain meaning of 28 U.S.C. §§ 43–46[35] that all courts of appeals interpret "circuit judges of the circuit who are in regular active service" to refer to the number of judges actually appointed to the court, not the number of positions potentially available (i.e., the number of authorized judgeships). Thus, under all three approaches the majority is calculated with reference to the number of active judges presently on the appellate court excluding any vacancies not currently filled.

Chief judges were asked how temporary absences such as extended illness, travel, or other personal circumstances rendering a judge unavailable are treated when determining the base for calculating a section 46(c) majority. Four chief judges said that this issue had never arisen and thus they do not have a policy for temporary absences. The Third Circuit Court of Appeals (which follows a modified case majority approach) reported that temporary absences are not treated like disqualified judges when calculating a majority (i.e., judges who are temporarily unavailable are included in the base from which a majority of judges in regular active service is calculated; judges who are recused or disqualified are not included). The Second Circuit Court of Appeals (which follows a case majority approach) does count temporary absences in the base from which a majority is calculated. Likewise, the Ninth Circuit Court of Appeals (which follows the case majority approach) reported that temporary absences are not treated like disqualified or recused judges (i.e., temporary absences are counted for purposes of calculating a majority). The clerk of the Ninth Circuit Court of Appeals explained that every judge must respond to a request to hear a case en

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regular active service' shall be calculated, pursuant to 28 U.S.C. Section 46(c), for purposes of ordering a hearing or rehearing in banc.")

34. *See, e.g.*, Fourth Circuit Local Rule 35(b) ("For purposes of determining a majority under this rule, the term majority means of all judges of the Court in regular active service who are presently serving . . . ."); Fifth Circuit Local Rule 35.6 ("For purposes of en banc voting under 28 U.S.C. § 46(c), the term 'majority' is defined as a majority of all judges of the court in regular active service presently appointed to office . . . .").

35. In a memo to all circuit judges in the Ninth Circuit regarding the calculation of a majority for en banc purposes, a staff attorney pointed out that including vacant judgeships in the count of active judges presently on a court would "wreak havoc" with 28 U.S.C. §§ 43–46. He cites section 43(b), which states that "[e]ach court of appeals shall consist of the circuit judges of the circuit in regular active service. . . " and concludes that "[i]f 'judges. . . in regular active service' meant the same thing as authorized judgeships, the court would, by definition, cease to exist whenever a vacancy occurred." Memo from Bob Lohn, Office of Staff Attorneys for the Ninth Circuit Court of Appeals, to All Judges Re: Calculation of a Majority for En Banc Purposes 5 & n.2 (Sept. 24, 1984). *See also* United States v. Leichter, 167 F.3d 667 (1st Cir. 1999) (Although 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) require an absolute majority of the court's active judges to vote in favor of the petition, vacant judgeships are to be excluded from the count.); Arnold v. Eastern Air Lines, 712 F.2d 899, 910 n.2 (4th Cir. 1983) (en banc) (Widener, J., concurring and dissenting), *cert. denied*, 464 U.S. 1040 (1984).

banc by either voting in favor of an en banc hearing, or informing the court that he or she has recused himself or herself or is disqualified from participating in that particular case. If a judge fails to respond to an en banc poll, his or her nonresponse is treated as a negative vote for rehearing en banc.

Although the Sixth Circuit (which follows an absolute majority approach) does not have a formal policy regarding temporary absences, their informal practice allows the judge who will be temporarily unavailable to request an extension of the voting deadline to ensure that all judges who desire to cast a vote in an en banc poll may do so regardless of temporary absences. The clerk of the Fifth Circuit (which follows the absolute majority approach) stated that they had never addressed the issue, but assume that if a judge was unavailable, he or she would be treated as a recused judge (i.e., counted for purposes of calculating a majority). Likewise, the Sixth, Eighth, Eleventh, District of Columbia,[36] and Federal Circuits (which all follow the absolute majority approach) treat temporary absences identically to recused judges (i.e., they are counted in the base for purposes of calculating a majority).

D. Satisfaction with Current Approach

We asked the chief judges and clerks about problems or expressions of dissatisfaction with the court's current interpretation of Federal Rule of Appellate Procedure 35(a). Almost all responded that they had not experienced any problems nor were they aware of dissatisfaction with their current approach. The chief judge of the Fourth Circuit Court of Appeals (which follows the absolute majority approach) explained that the rule in their court has met with satisfaction because it safeguards the coherence and stability of circuit law. The chief judge of the First Circuit Court of Appeals (which follows the absolute majority approach) reported that the only real problem that the circuit encountered with the rule was when a majority of the circuit judges were recused and en banc review was unavailable. Similarly, the clerk of the Fifth Circuit (which follows the absolute majority approach) reported that there have been instances where a majority of the judges were recused so that rehearing was not possible. Finally, the clerk of the Eleventh Circuit referred us to Judge Carnes' criticism of its absolute majority approach in his *Gulf Power Co.* opinion.[37]

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36. U.S. Court of Appeals for the District of Columbia Circuit, *Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit*, Part XIII.B.2, explicitly states that "only active judges of the Court may vote [on the question of whether there should be a rehearing en banc], and a majority of all active judges, regardless of recusals *or temporary absences*, must approve rehearing en banc in order for it to be granted" (emphasis added).

37. 226 F.3d 1220 (11th Cir. 2000).

III. Participation of Senior Judges in En Banc Hearings

Although normally an en banc court comprises only circuit judges in regular active service, 28 U.S.C. § 46(c) defines two circumstances in which senior judges are eligible to participate in an en banc hearing: (1) if the senior judge sat on the original panel that heard the case that is now under en banc review, the senior judge can elect to participate as a member of the en banc court; or (2) if the judge was in regular active service when a case was heard or reheard by the court en banc and then took senior status, the judge can continue to participate in the decision of the case after taking senior status.[38]

Inquiries were included in the questionnaire to identify whether one or both of the above statutory exceptions reflect the current practice in each court of appeals, and whether there were additional practices or rules in a particular court regarding the participation of senior judges in en banc hearings. Table 2 shows that in practice all courts of appeals permit senior judge participation in en banc hearings pursuant to the two circumstances defined in section 46(c). In addition, some appellate courts restated one or both of the exceptions defined in 28 U.S.C. § 46(c) in their local rules or internal operating procedures.

Besides the two circumstances defined in section 46(c), four courts of appeals have additional rules or practices permitting senior judges to participate in en banc hearings. The courts of appeals for the Third, Fifth, and Seventh Circuits permit a senior judge to participate in the final resolution of a case after taking senior status, if the senior judge only participated in the en banc poll for the case while in regular active service and then took senior status. Thus, the senior judge need not have sat on the en banc court that heard or reheard the case while in regular active service in order to participate in the resolution of the case as required by 28 U.S.C. § 46(c). Further, in the court of appeals for the Sixth Circuit a senior judge need only be in regular active service when a poll was requested on a petition for rehearing en banc in order to sit on an en banc court. It is not required for the judge to have participated in the vote before taking senior status.[39]

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38. 28 U.S.C. § 46(c) (1982).

39. Concerned that its current rule is inconsistent with 28 U.S.C. § 46(c) because it allows senior judge participation on an en banc court in a circumstance not provided for under section 46(c), the court of appeals for the Sixth Circuit is currently undertaking an internal review of its en banc practice regarding the participation of senior judges.

Table 2. Current Local Rules or Practices Re: the Participation of Senior Judges in En Banc Hearings in the Courts of Appeals

Circuit	Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)?	Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)?	Circuit has additional practices or rules re: participation of senior judges in en banc hearings?
First	Yes. Provision referenced in U.S. Court of Appeals for the First Circuit, Local Rule 35(a).	Yes. Provision referenced in U.S. Court of Appeals for the First Circuit, Local Rule 35(a).	No.
Second	Yes.	Yes.	No.
Third	Yes. Provision restated in U.S. Court of Appeals for the Third Circuit, Internal Operating Procedure 9.6.4.	Yes. Provision restated in U.S. Court of Appeals for the Third Circuit, Internal Operating Procedure 9.6.4.	Yes. Third Circuit Internal Operating Procedure 9.6.4 also allows a judge to continue to participate in the final resolution of a case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service.
Fourth	Yes. Provision restated in U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c).[40]	Yes. Provision restated in U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c).	Yes. In addition to Local Rule 35 setting forth the court's en banc procedures, there is a standing order signed by former Chief Judge Sam J. Ervin III, making participation of senior circuit judges en banc consideration of a case in which a senior judge sat on the original panel mandatory instead of voluntary upon the senior judge's election.[41]

40. U.S. Court of Appeals for the Fourth Circuit, Local Rule 35(c), also provides that "A judge who joins the Court after argument of a case to an en banc Court will not be eligible to participate in the decision of the case. A judge who joins the Court after submission of a case to an en banc Court without oral argument will participate in the decision of the case."

41. Chief Circuit Judge (Fourth Circuit), Order Regarding Performance of Judicial Duties, *reprinted in* Federal Civil Judicial Procedure and Rules (West 2001) following 28 U.S.C. § 46.

Table 2 (cont'd)

Circuit	Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)?	Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)?	Circuit has additional practices or rules re: participation of senior judges in en banc hearings?
Fifth	Yes. Provision restated in U.S. Court of Appeals for the Fifth Circuit, Local Rule 35.6.	Yes. Provision restated in U.S. Court of Appeals for the Fifth Circuit, Local Rule 35.6.	Yes. Fifth Circuit Local Rule 35.6 also allows a judge to continue to participate in the final resolution of a case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service.
Sixth	Yes. Provision restated in U.S. Court of Appeals for the Sixth Circuit, Internal Operating Procedure 35(a).	Yes.	Yes. Sixth Circuit Internal Operating Procedure 35(a) allows a senior judge to sit on an en banc court if the judge "was in regular active service at the time a poll was requested on the petition, for rehearing en banc."[42]
Seventh	Yes. Provision restated in U.S. Court of Appeals for the Seventh Circuit, Internal Operating Procedure 5(f).	Yes.	Yes. Although not specifically provided for by local rule or internal operating procedure, the Seventh Circuit indicated that it would permit a judge to continue to participate in the resolution of an en banc case after taking senior status, if the judge participated in the en banc poll for the case while in regular active service.
Eighth	Yes.	Yes.	No.[43]

42. The Sixth Circuit is currently undertaking an internal review of its en banc practice vis-à-vis the participation of senior judges. This issue will be discussed at the fall meeting of the Sixth Circuit's Rules Committee.

43. Note that the Eighth Circuit specifically refuses to allow a judge to participate in a rehearing en banc if the judge was active at the time of the vote granting the petition for rehearing en banc, but became a senior judge before the case was heard and submitted for en banc decision.

Table 2 (cont'd)

Circuit	Circuit allows senior judge to participate in an en banc hearing if the senior judge sat on the original panel as provided in 28 U.S.C. § 46(c)?	Circuit allows a judge to continue to participate in the decision of a case after taking senior status, if the judge was in regular active service when the case was heard or reheard by the court en banc as provided in 28 U.S.C. § 46(c)?	Circuit has additional practices or rules re: participation of senior judges in en banc hearings?
Ninth	Yes. Provision restated in U.S. Court of Appeals for the Ninth Circuit, Local Rule 35-3 Advisory Committee Notes (2).	Yes. Provision restated in U.S. Court of Appeals for the Ninth Circuit, Local Rule 35-3 Advisory Committee Notes (2).	No.
Tenth	Yes. Provision restated in U.S. Court of Appeals for the Tenth Circuit, Local Rule 35.5.	Yes.	No.
Eleventh	Yes. Provision restated in U.S. Court of Appeals for the Eleventh Circuit, Local Rule 35-9.	Yes. Provision restated in U.S. Court of Appeals for the Eleventh Circuit, Local Rule 35-9.	No.
District of Columbia	Yes. Provision restated in U.S. Court of Appeals for the District of Columbia Circuit, Handbook of Practice and Internal Procedures, Part XIII.B.2.	Yes.	No.
Federal Circuit	Yes. Provision restated in U.S. Court of Appeals for the Federal Circuit, Local Rule 35 Historical Notes.	Yes.	No.

IV. The Arguments For and Against the Absolute Majority Approach

A majority of appellate cases that have considered the issue have interpreted section 46(c) and Federal Rule of Appellate Procedure 35(a) as requiring the vote of an absolute majority of circuit judges in order to convene an en banc hearing or rehearing (i.e., requiring recused judges to be counted in the base from which a majority is calculated).[44] The various points of contention about the rule are summarized below.

A. Minority Control of the Law of the Circuit

Defenders of the absolute majority rule argue that it prevents a minority of the court from determining the law of the circuit and thus effectuates what they see as the goal of section 46(c) and Rule 35(a): intracircuit uniformity by assuring that courts of appeals establish the law of the circuit on questions of exceptional importance by the vote of a majority of the full court rather than by a three-judge panel.[45] Judge Walter Mansfield, Second Circuit Court of Appeals, argued in 1972 that under the case majority approach, if four members of a nine-member court were disqualified, three of the five voting members could take a case en banc and determine the law of the circuit.[46]

Opponents of the absolute majority rule respond that votes to rehear a case do not necessarily predict votes to reverse.[47] In addition, in the great majority of cases,

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44. *See, e.g.,* Lewis v. University of Pittsburgh, 725 F.2d 910, 928 (3d Cir. 1983) (en banc) (order denying en banc rehearing), *cert. denied,* 105 S. Ct. 266 (1984); Clark v. American Broad. Cos., 684 F.2d 1208, 1226 (6th Cir. 1982), *cert. denied,* 460 U.S. 1040, *mandamus denied sub nom. In re* American Broad. Cos., 104 S. Ct. 538 (1983); Copper & Brass Fabricators Council v. Department of Treasury, 679 F.2d 951 (D.C. Cir. 1982), reh'g en banc denied by unpublished order No. 81-2091 (D.C. Cir. Aug. 3, 1982); Curtis-Wright Corp. v. General Elec. Co., 599 F.2d 1259 (3d Cir. 1979), *cert. denied,* 449 U.S. 1022 (1980); Porter City Chapter of Izaak Walton League v. Atomic Energy Comm'n, 515 F.2d 513 (7th Cir. 1975); Zahn v. International Paper Co., 469 F.2d 1033, 1040 (2d Cir. 1972) (order denying en banc rehearing), *aff'd on other grounds,* 424 U.S. 291 (1973).

45. *See* Waters, *supra* note 4, at 374, 380; Wheaton, *supra* note 4, at 1529, 1529–35 (quoting United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689–90 (1960) ("The principal claimed purpose of the en banc procedure is to make it possible for a 'majority of [a circuit's] judges always to control and thereby to secure uniformity and consistency in its decisions.'")). *See also* Zahn v. International Paper Co., 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in denial of en banc rehearing), *aff'd on other grounds,* 414 U.S. 291 (1973); Lewis v. University of Pittsburgh, 725 F.2d 910, 928–29 (3d Cir. 1983) (opinion of Adams, J., on the petition for rehearing).

46. *Zahn,* 469 F.2d at 1041.

47. Waters, *supra* note 4, at 381 (The absolute majority approach does not guarantee that the majority will control the law of the circuit because even if "four judges of a nine-member circuit recuse themselves from a case, each of the remaining five judges could vote in favor of en bancing the

three-judge panels establish the law of the circuit without en banc rehearings. In fact, said one opponent, "[b]y insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of judges in active service."[48] Finally, opponents argue, the examples cited of large numbers of disqualifications in fact occur rarely.[49]

B. Overuse of the En Banc Procedure

Supporters of the absolute majority approach contend that it limits en banc review to the most important cases, thereby avoiding overuse of the en banc procedure and resulting judicial inefficiency.[50]

Opponents respond that under the absolute majority approach, en banc review is limited to those cases in which the absolute majority would grant review and not necessarily to the most important cases.[51] These opponents also make the distinction that the purpose of the en banc vote is to decide whether or not to convene an en banc hearing or rehearing based on an evaluation of the relative importance of a given case, and is not a vote on the merits of that case nor is it a vote to decide whether to limit en banc hearings to questions of exceptional importance.[52] Responding to the claim that not adopting the absolute majority approach will encourage en banc hearings in every case where a minority of the court may desire a decision by the full court, Judge Carnes pointed out that "[e]n banc rehearings take a lot of judicial resources and no court of appeals is going to drift into the habit of having

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case and yet split on the merits."); ABA Report, *supra* note 27, at 668; Wheaton, *supra* note 4, at 1531–32 ("If a vote for or against rehearing is truly a vote distinct from the merits of the case, a 3-2 split on the en banc panel is as likely under an absolute majority rule, where all five available judges might vote for rehearing but divide on the merits, as it is under a standard that makes a majority of eligible judges sufficient to order rehearing.")

48. Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000) (Carnes, J., opinion concerning the denial of rehearing en banc).

49. Waters, *supra* note 4, at 381.

50. *Zahn*, 469 F.2d at 1041 (Judge Mansfield, in his concurring opinion denying en banc rehearing, suggested that the absolute majority requirement "serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court."). *See also* Lewis v. University of Pittsburgh, 725 F.2d 910, 928–29 (3d Cir. 1983) (opinion of Adams, J., on the petition for rehearing); ABA Report, *supra* note 27, at 667 (citing Waters, *supra* note 4, at 379–80 and Note, *En Banc hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities*, 40 N.Y.U. L. Rev. 563, 574–77 (1965)).

51. ABA Report, *supra* note 27, at 668.

52. Waters, *supra* note 4, at 389; Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220, 1224 (11th Cir. 2000) (Carnes, J., opinion concerning the denial of rehearing en banc).

too many of them" regardless of how a circuit interprets the majority requirement of Rule 35(a).[53]

C. Frustrates the Will of the Majority of Voting Judges

Opponents contend that requiring an absolute majority to en banc a case in which there are recusals or disqualifications often frustrates the will of the majority that wants to en banc an important case.[54] For example, on a court with nine active judges, if three judges are recused and thus excluded from voting, the absolute majority rule requires five of the six nondisqualified judges to en banc the case, thus permitting only two judges to block a rehearing.[55] In such cases where the absolute majority approach requires the concurrence of a supermajority of judges eligible to vote, opponents further allege that recusals may disable a court from rehearing an issue en banc.[56]

D. Contradicts the Language of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a) and the Purpose of Judicial Disqualification

Opponents of the absolute majority approach contend that the language of 28 U.S.C. § 46(c) and Rule 35(a) permits en banc hearings based on the affirmative votes of less than an absolute majority of the circuit's active judges.[57] Judge Murnaghan of the U.S. Court of Appeals for the Fourth Circuit argued in his concurring opinion that the court had properly granted the request for an en banc rehearing by a vote of five to four even though the court consisted of ten judges at the time with

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53. *Gulf Power Co.*, 226 F.3d at 1224.

54. *See* ABA Report, *supra* note 27, at 668; Waters, *supra* note 4, at 374; Gulf Power Co. v. Federal Communications Comm'n, 226 F.3d 1220 (11th Cir. 2000) (opinion concerning per curiam denial of rehearing en banc).

55. *See also* Boraas v. Village of Belle Terre, 476 F.2d 806, 828 (2d Cir. 1973) (Timbers, J., dissenting from denial of rehearing en banc), *rev'd on other grounds*, 416 U.S. 1 (1974).

56. For a period of time the District of Columbia Circuit was prevented from hearing some telecommunications issues en banc because of the negative votes of only three judges. Douglas H. Ginsberg & Donald Falk, *The Court En Banc: 1981–1990*, 59 Geo. Wash. L. Rev. 1008, 1048 n.37 (1991) (citing New England Tel. & Tel. Co. v. FCC, No. 85-1087 (D.C. Cir. Nov. 2, 1988) (denying rehearing en banc of decision at 826 F.2d 1101 (D.C. Cir. 1987) where two of the eleven active judges then serving recused themselves, requiring six of the remaining nine votes for the court to grant en banc rehearing)). *See also* Wheaton, *supra* note 4, at 667 ("This problem could also arise in a circuit that is the home of a major university, where so many judges on that circuit are likely to have to disqualify themselves because they teach at or are otherwise affiliated with the university that no case involving the university could be heard en banc.").

57. Waters, *supra* note 4, at 376 (discussing Arnold v. Eastern Air Lines, Inc., 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); Wheaton, *supra* note 4, at 1514.

one disqualified judge.[58] Judge Murnaghan concluded that in order to give substance to the phrase "judges in regular active service" in 28 U.S.C. § 46(c) a disqualified judge is not in regular active service and, therefore, should not be included in the group from which the requisite majority is determined.[59]

Further, opponents argue that interpreting section 46(c) to include disqualified judges in the calculation of the necessary majority would contradict the purpose of the statutes and ethics rules that control judicial disqualifications because it would treat a disqualified judge as if he or she were not disqualified at all:[60] "Considering the presence of the recused judge for the purpose of determining the appropriate majority, but not allowing him to cast a vote, is in effect counting the judge as a no vote. Although this may not directly violate [28 U.S.C.] section 455—which only requires the judge to withdraw from the case—the policy of the disqualification statute is not given effect when the recused judge has this negative impact on the vote for rehearing."[61] Further, since the absolute majority rule counts a recused judge as a no vote, it causes potential interference with the ethical goal of ensuring the neutrality of a disqualified judge because an order to deny rehearing assumes some secondary character as a decision to leave intact the conclusions of the three-judge panel.[62]

E. Potential for U.S. Supreme Court Review Negates Any Unfairness

Advocates of the absolute majority approach contend that it does not result in any particular injustice of unfairness to individual litigants in cases where a judge's abstention or disqualification has the effect of a vote against rehearing en banc because "[i]n cases of exceptional importance, or where there is a conflict between circuits, it may be expected that the Supreme Court will grant certiorari and settle the questions in issue."[63]

Opponents criticize this claim because access to the Supreme Court is never guaranteed, even in important cases.[64] Further, "[s]uggesting that the Supreme Court's authority to correct any error in the lower courts somehow diminishes the

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58. Arnold v. Eastern Air Lines, Inc., 712 F.2d 899, 902 (4th Cir. 1983) (en banc) (Murnaghan, J., concurring), *cert. denied*, 464 U.S. 1040 (1984).

59. 712 F.2d at 903–04.

60. Wheaton, *supra* note 4, at 1539. *See also Arnold*, 712 F.2d at 904.

61. Wheaton, *supra* note 4, at 1540–41.

62. *Id.*

63. Zahn v. International Paper Co., 469 F.2d 1033, 1041 (2d Cir. 1972) (Mansfield, J., concurring in the denial of rehearing en banc), *aff'd on other grounds*, 414 U.S. 291 (1973).

64. Waters, *supra* note 4, at 382.

need for en banc hearings denies the Supreme Court the benefit of full en banc opinions."[65]

65. *Id.*

V. Suggested Remedies to the Intercircuit Conflict over the Interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a)

Despite the apparent willingness of Congress, the U.S. Supreme Court, and the Judicial Conference to leave it up to the individual circuits to formulate a standard for calculating a "majority of judges in regular active service" in order to en banc a case,[66] some argue in favor of a single, nationally applicable interpretation of 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a).

In his opinion concerning the denial of rehearing en banc in *Gulf Power Co. v. Federal Communications Commission*, Judge Carnes clearly expressed his view that the current circuit split over the interpretation of 28 U.S.C. § 46(c) and Rule 35(a) should be addressed by code and rule amendments because "there is no good reason why a uniform rule should not be followed in all circuits . . . a litigant who loses before a panel in this circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit."[67]

In 1986, the American Bar Association Section of Antitrust considered the arguments for and against the absolute majority rule and the case majority rule, and consistent with the policy that a uniform rule should govern procedures used by the circuits for granting or denying motions for rehearing en banc, recommended that the ABA propose an amendment to Federal Rule of Appellate Procedure 35(a) that adopts a modified case majority approach.[68] In 1987, the ABA House of Delegates approved a resolution to amend Rule 35(a) to provide that a majority of court of appeals judges in a circuit permitted to participate in a case have the power to grant en banc review, provided that the participating judges constitute a majority of the judges

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66. *See supra* section I.A.

67. *Gulf Power Co.*, 226 F.3d at 1225. *But see* Wheaton, *supra* note 4, at 1522 (The Supreme Court should not resolve the confusion caused by competing definitions of majority because "[n]onuniformity is the precise result contemplated by the permissive grant of authority to make any rules 'not inconsistent' with the binding standards of federal law and the federal appellate rules. The possibility that one court will impose a more stringent definition of majority than another is not more offensive than the likelihood that judges of one circuit will be more willing to grant an en banc rehearing than those of a second court. . . [T]he en banc power is simply a tool of judicial administration—it is not intended to serve litigants. Litigants can demand little more than a prospectively announced rule.") (citing 28 U.S.C. § 2071 (1982) (federal courts can make rules consistent with acts of Congress and the rules prescribed by the Supreme Court) and Fed. R. App. P. 47 (courts of appeals may adopt practice rules "not inconsistent" with the Federal Rules of Appellate Procedure)).

68. ABA Report, *supra* note 27, at 668.

in regular active service.[69] The Antitrust Section explained that "[t]his amendment will permit the court to hear all cases that at least a substantial minority believe are important, while also insuring that en banc decisions are not rendered by a panel that includes only a minority of the judges in the circuit."[70] This policy remained in effect until August 1999 at which time it was archived and thus is no longer active ABA policy. At this time we are unaware of any current section activity in this area.

After examining the arguments in support of both positions, one commentator suggested that "the time has long since come for Congress to clarify 28 U.S.C. § 46(c). In acting, Congress must realize that it need not adopt either the majority position or the minority position. Compromise is possible. Any proposed solution must recognize two facts: 1) no proposal can completely neutralize the effect of a disqualification or recusal; and 2) both the current majority and minority positions have raised important issues that must be considered."[71] As an alternative to the majority and minority approaches, he suggested the adoption of the minority position with a quorum requirement:

> This compromise would require that a definite number of judges be available to sit before any en banc court could be convened. Thereafter, the majority would be determined from the number of circuit judges qualified to participate in a case. Thus, only a majority of the judges qualified to vote would be required to convene an en banc hearing. But at the same time, the quorum requirement would protect against the undesirable possibility that a minority of judges could decide the law of the circuit in an important case. . . .
>
> Whatever quorum is selected, it must strike a balance between maintaining uniformity in the circuit and encouraging circuit courts to en banc difficult or important cases. It would not be unreasonable to set the quorum requirement at a somewhat high level in light of the fact that, most frequently, only one or two judges are disqualified from any given case. Additionally, an exception from the quorum requirement could be made for cases in which an absolute majority of judges have voted in favor of en bancing a case. In any event, the number of judges which would be required to hear a case must be determined according to the number of judges in each of the circuit courts of appeals. Alternatively, Congress could allow

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69. *Id.* at 669. *See also* U.S. Court of Appeals for the Third Circuit, App. I, Internal Operating Procedure 9.5.3, which describes a very similar approach.

70. ABA Report, *supra* note 27, at 669. The ABA Report pointed out that the approach taken in its proposed amendment to Fed. R. App. P. 35(a) was generally consistent with the 1973 recommendation of the Judicial Conference that section 46(c) be amended to "make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case." 1973 Rep. of the Proc. of the Jud. Conf. of the U.S. 47. *See supra* section I.A.

71. Waters, *supra* note 4, at 390.

> each circuit to set its own quorum requirement while strongly encouraging them to hear cases in which relatively few judges are disqualified. Should Congress choose not to adopt either alternative, it should simply adopt the minority rule. But, Congress must act.[72]

One commentator explained that although two possible definitions of majority fit within the meaning of the current language of 28 U.S.C. § 46(c) (i.e., an absolute majority of the judges of the circuit or a majority of the judges of the circuit eligible to vote in the rehearing decision), the definition of majority should depend in each case on the number of judges eligible to participate because the absolute majority definition uniquely weakens the effectiveness of disqualification guidelines.[73] Further, the concerns for circuit workload and for majority control of circuit precedents that are implicated by a rule that focuses on a majority of the judges eligible to vote are insufficient to outweigh the danger to judicial integrity that would accompany a definition that considers a disqualified judge, as explained by the following commentary:[74]

> Counting a recused judge as a no vote affects the final outcome of a case in a way that counting the recusal as a yes vote does not. If by treating a disqualification as a yes vote the outcome of the voting decision is altered, the merits of the case remain unaffected by the changed outcome; granting a rehearing does not, a priori, represent a choice between competing position[s] on the merits of a controversy. If the disqualification is equivalent to a no vote, on the other hand, the disqualified judge's presence may indeed determine the final outcome of a case. Although a denial of rehearing is primarily tied only to interests in judicial administration, the order to deny rehearing also assumes some secondary character as a decision to leave intact the conclusions of the three-judge panel. Because the no vote has then affected the disposition of the case by allowing a particular resolution of the underlying merits, an absolute majority rule cannot avoid potential interference with the ethical goal of ensuring the neutrality of a disqualified judge.[75]

This commentator concludes that the responsibility for adopting the appropriate definition of majority rests with each individual circuit for now[76] in light of: (1) Congress's failure to select or impose a particular meaning of majority in 28 U.S.C. § 46(c); (2) the Supreme Court's consistent choice not to examine current circuit constructions of the en banc statute despite the intracircuit conflict over the

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72. *Id.* at 390–92.

73. Wheaton, *supra* note 4, at 1540.

74. *Id.* at 1542.

75. Id. at 1540–41.

76. Wheaton, *supra* note 4, at 1542.

definitional question;[77] and (3) the Judicial Conference's decision not to resurrect its 1973 proposal that Congress rewrite the en banc statute and its suggestion that circuits adopt en banc voting rules that will provide notice to litigants of the definition of majority applied by each circuit. This commentator further believes that each court of appeals should reexamine its en banc voting procedures and reconcile its chosen definition with the traditional importance of intracircuit uniformity of law and the importance of effective judicial disqualification statutes.[78]

77. *See, e.g.,* Lewis v. University of Pittsburgh, 105 S. Ct. 266 (1984), *denying cert. to* 725 F.2d 910 (3d Cir. 1983); Adams v. Proctor & Gamble Mfg. Co., 104 S. Ct. 1318 (1984), *denying cert. to* 697 F.2d 582 (4th Cir. 1983); Arnold v. Eastern Air Lines, 464 U.S. 1040 (1984), *denying cert. to* 712 F.2d 899 (4th Cir. 1983); *In re* American Broadcasting Cos., 104 S. Ct. 538 (1983), *denying mandamus to* Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982), *cert. denied,* 460 U.S. 1040 (1983); American Broadcasting Cos. v. Clark, 460 U.S. 1040 (1983), *denying cert. to* 684 F.2d 1288 (6th Cir. 1982).

78. *Id.* at 1529.

V-H

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

January 16, 2001

The Honorable Will Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendment to the Federal Rules of Appellate Procedure Concerning the Citation of Unpublished Decisions

Dear Judge Garwood:

I am writing to propose the adoption of a new provision in the Federal Rules of Appellate Procedure that would establish uniform national standards governing the citation of unpublished court of appeals decisions. As you know, the various circuits have divergent rules in this area, and the need for uniformity has been discussed at previous meetings. Although this is a sensitive topic, I believe that the attached proposal is narrowly framed and focused solely on citation rules that, by their nature, are an appropriate topic for national rule-making.

BACKGROUND

All the federal courts of appeals issue unpublished decisions and all of the circuits, except the Second and Third Circuits, have promulgated local rules governing the circumstances and manner in which unpublished decisions may be cited. All circuits agree that unpublished decisions are not binding precedent, and this proposed amendment would not alter that practice.[1] Beyond that basic

[1] A panel of the Eighth Circuit recently struck down that court's rule authorizing the issuance of non-precedential

similarity, however, the rules governing citation of unpublished decisions diverge:

The D.C., First, Seventh, and Ninth Circuits generally prohibit the citation of unpublished decisions, with only limited exception. Those exceptions variously permit citation in "related cases" (1st Cir. R. 36.2) or to establish "law of the case," "res judicata," "collateral estoppel" (7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3), or an earlier case's "binding or preclusive effect" (D.C. Cir. R. 28(c)).[2] Similarly, the Federal Circuit provides that a panel may designate a decision "as not citable as precedent" on the ground that it does "not add[] significantly to the body of law." Fed. Cir. R. 47.6(b). Although not explicitly linked to publication, the rule does forbid citation of specifically designated decisions, except to establish "claim preclusion, issue preclusion, judicial estoppel, law of the case or the like." Ibid.

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decisions as unconstitutional under Article III of the Constitution. That decision subsequently was vacated as moot. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated, 2000 WL 1863092 (8th Cir. Dec. 18, 2000) (en banc). While the United States disagrees with the Anastasoff panel's constitutional analysis, the rule I am proposing does not address or depend upon the resolution of that constitutional question.

[2] The Ninth Circuit recently adopted, on a temporary and "experimental" basis, a rule allowing citation of that court's own unpublished dispositions "in a request to publish [an unpublished decision] or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." 9th Cir. R. 36-3(b)(iii). The experimental rule also allows citation of unpublished dispositions "for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case." 9th Cir. R. 36-3(b)(ii). The new rule became effective July 1, 2000. Unless adopted on a permanent basis, the rule will expire on December 31, 2002, and the Ninth Circuit will revert to a strict prohibition on the citation of its unpublished dispositions.

Six other circuits -- the Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits -- allow more liberal citation of unpublished decisions. Most of those courts discourage practitioners from relying on unpublished decisions, noting that they have only limited precedential value. Citation of unpublished cases is "disfavored" (4th Cir. R. 36(c); 6th Cir. R. 28(g); 10th Cir. R. 36.3(B)), and "parties generally should not cite" such decisions (8th Cir. R. 28A(i)). However, several courts recognize that an unpublished decision may have "persuasive" value (5th Cir. R. 47.5.4; 8th Cir. R. 28(A)(i); 10th Cir. R. 36.3(B)(1); 11th Cir. R. 36-2). Some courts limit citation to circumstances where "no published opinion * * * would serve as well" (4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A(i)), or where an unpublished decision concerns "a material issue that has not been addressed in a published opinion" (10th Cir. R. 36.3(B)(1)).

Two courts of appeals (the D.C. and Seventh Circuits) restrict citation of other courts' unpublished decisions (as well as their own) if the issuing court has a rule similarly restricting citation. D.C. Cir. R. 28(c); 7th Cir. R. 53(b)(2)(iv). The Fourth Circuit permits citation of "an unpublished disposition of [another] court" if "there is no published opinion that would serve as well." 4th Cir. R. 36(c). The other circuits' local rules do not address the citation of unpublished decisions issued by other courts.

DISCUSSION

In light of the divergent local rules governing citation of unpublished opinions, a uniform rule on this topic is both necessary and appropriate. In addition to the typical problems posed by fractured local rules, the current state of the law leaves litigators substantially uncertain concerning how to treat an unpublished decision issued by a court that recognizes the persuasive value of such decisions (such as the Fifth Circuit), when litigating in a court (such as the Ninth Circuit) that prohibits citation of its own unpublished decisions but does not specifically address the citation of decisions issued by other courts.[3]

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[3] Ethical considerations add another dimension to the problem. The American Bar Association has concluded that "[i]t

A proposed amendment, adding a new Federal Rule of Appellate Procedure 32.1, is attached.[4] Consistent with current practice, the rule would expressly discourage citation of such decisions, but would specifically allow citation for two purposes: first, for any binding effect the decision may have on the parties to that case (such as res judicata or law of the case); second, for the decision's persuasive authority on a proposition not adequately addressed in a published opinion. Finally, the rule would provide that a copy of any unpublished decision must be attached to any document in which it is cited.

This rule would be beneficial to both courts and practitioners. As the rules of many circuits recognize, some judges might, for purposes of consistency, want to know how identical matters have been resolved in the past. In addition, an unpublished decision may contain reasoning that is persuasive to judges considering a later case. Judges, however, would retain their present authority to disregard or depart from an unpublished opinion's disposition on the ground that it is not binding precedent.

Six circuits have rules in place allowing citation of unpublished decisions where there is some good reason for doing so, such as when the analysis in the unpublished decision is particularly persuasive or when there is a lack of relevant published authority. We are aware of nothing in the experience

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is ethically improper for a lawyer to cite to a court an unpublished opinion of [any court if the] forum court has a specific rule prohibiting reference in briefs to [unpublished opinions]." ABA Formal Op. 94-386R (1995).

[4] Most circuits include their local rules on this subject under Federal Rule of Appellate Procedure 28 (briefs) or Rule 36 (judgments). Neither location is ideal for a national rule, which should provide general guidance for the citation in any document (including motions and other papers, as well as briefs) of unpublished decisions issued by any court (not just the rule-making court). Rule 32 governs the form of briefs, appendices, and other papers. The new citation rule is more substantive than formal, but it would apply to all papers filed in the courts of appeals, so inserting the amendment in the vicinity of Rule 32 seems to be the most appropriate course of action.

of those six courts to indicate that the practice has been detrimental to the efficiency of litigants or judges. See, e.g., Hon. Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L. J. 177, 195 (1999) (Sixth Circuit's 1988 change to allow citation to unpublished decisions "has not opened the floodgates[;] * * * perhaps ten to twenty percent of the briefs we see include citation of unpublished opinions"). The experience under those rules suggests that the proposed revision would prove eminently workable as a nationwide rule.

Finally, this proposal is deliberately narrow. The rule would implicitly acknowledge that the courts of appeals designate some of their decisions as unpublished or non-precedential, but it would take no position on the ongoing debate concerning the propriety of that practice, nor would it purport to dictate to courts or judges what weight should be given to unpublished decisions. See, e.g., Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (striking down 8th Cir. R. 28A(i) as unconstitutional), vacated, 2000 WL 1863092 (8th Cir. Dec. 18, 2000) (en banc). Further, the rule takes no position regarding what decisions should be published, in what media they should be available, or any of the other difficult questions that have arisen concerning the courts' practice of deciding cases by unpublished dispositions.

Sincerely yours,

Seth P. Waxman

cc: Professor Patrick J. Schiltz

Rule 32.1. Citation of Unpublished or Non-Precedential Decisions

(a) **Citation Disfavored.** Citation of an opinion or other decision designated by the issuing court as unpublished or non-precedential is disfavored. However, an unpublished or non-precedential decision of any court may be cited in a brief, motion, or other paper filed with a court of appeals in the following circumstances:

(1) **Related Cases.** Any decision may be cited to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or similar doctrines.

(2) **Persuasive Value.** An unpublished or non-precedential decision may be cited if a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue.

(b) **Procedure.** A copy of any unpublished or non-precedential decision must be provided to counsel and the court if the decision is cited in a brief, motion, or other paper. The copy of the decision should be included in an attachment or addendum that accompanies the filing.

Committee Note

Rule 32.1 is designed to provide a uniform national rule governing the citation of unpublished decisions, a topic that has divided the circuits. Rule 32.1 follows the lead of the majority of the courts whose rules address the issue -- including the Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits. Each court is entitled to dictate the precedential value of its own decisions, and nearly every circuit has a local rule designating some decisions as unpublished or non-precedential. This rule does not affect those provisions; it addresses only the citation of such decisions. Subdivision (a) identifies the background rule that an unpublished or non-precedential decision normally should not be cited as precedent, and identifies the two exceptions permitting citation. The first exception allows citation in a related case, when the earlier unpublished decision has some direct or binding effect on the parties. Nearly all courts recognize that an unpublished decision is binding on the parties and can be invoked to establish res judicata, collateral estoppel, and law of the case, or to claim such principles as double jeopardy or a party's notice of a previously litigated matter. The second exception allows citation of an unpublished decision to address a material issue on appeal, where the published case law does not sufficiently support a party's argument. This limitation is drawn from the practices of the Fourth, Sixth, Eighth, and Tenth Circuits, and is designed to emphasize that parties should look to unpublished decisions only as a last resort, when published decisions would not serve as well. Permitting citation of unpublished decisions, even in this limited context, is a departure from the stricter practices of some circuits (including the D.C., First, Seventh, Ninth, and Federal Circuits), but it does not dispense with the basic rule that unpublished decisions normally should not be cited. Nor does the rule require a court to give any particular weight to unpublished decisions when cited. Finally, subdivision (b) requires that any party citing an unpublished decision must include a copy of that decision as an attachment or addendum to the brief, motion, or other paper in which it is cited. This procedure has been required by the D.C., Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, and ensures that the opposing party and the court have ready access to the full decision.

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March 28, 2002

Professor Patrick J. Schiltz
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University of St. Thomas School of Law
1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Re: Supplement To Proposed Amendment To The Federal Rules Of Appellate Procedure Concerning The Citation Of Unpublished Decisions

Dear Patrick:

As you know, on January 16, 2001, the Department of Justice made a proposal to the Advisory Committee for the Federal Rules of Appellate Procedure for a uniform rule allowing citation to unpublished opinions of courts of appeals under certain circumstances. This proposal was discussed during the April 2001 meeting, and is slated for further discussion at the upcoming April 2002 meeting. Since we made our proposal, there have been several relevant developments that I wish to call to the Committee's attention.

First, the D.C. Circuit has radically changed its rule regarding citation of unpublished opinions. That court previously allowed such citation under highly limited circumstances. However, the court has issued a new Rule 28(c), which permits citation "as precedent" of any decision issued by the court after January 1, 2002. The court's new rule does refer counsel to Rule 36(c), which states that "[w]hile unpublished orders and judgments may be cited to the court in accordance with Circuit Rule 28(c)(1)(B), a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." In addition, D.C. Circuit Rule 28(c)(2) states that unpublished dispositions of other courts of appeals may be cited (with one exception) "only under the circumstances and for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts may not be cited."

Second, the Third Circuit has announced a new policy under which its decisions will be deemed either "precedential" or "not precedential," which will be stated on the face of the opinion. See Third Circuit Internal Operating Procedure 5.1. All of the court's opinions will now be on the court's web site and available to legal publishers. Under IOP 5.7, "[b]ecause the court historically has not regarded unreported opinions as precedents that bind the court, as such opinions do not circulate to the full court before filing, the court by tradition does not cite to its unreported opinions as authority." However, there still does not appear to be any Third Circuit rule or internal operating procedure concerning the citation by counsel of unpublished opinions.

Third, my understanding is that the First Circuit is considering adopting a rule that would allow citation of unpublished decisions if there is no published decision of the court supporting the same proposition. Such decisions would be treated by that court for their persuasive value, but not as binding precedent.

Fourth, as we had noted in our proposal, a panel of the Eighth Circuit had ruled in Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), that a rule against citation of unpublished opinions was unconstitutional. That decision was vacated by the full Eighth Circuit as moot. 235 F.3d 1054 (8th Cir. 2000). The Ninth Circuit has more recently disagreed with the vacated panel ruling in Anastasoff, and has upheld the constitutionality of its own rule generally prohibiting citation of unpublished opinions. See Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001). (In addition, in two appeals that were resolved on lack of standing grounds, the Department of Justice defended the constitutionality of the Ninth and Eleventh Circuit rules restricting the citation of unpublished opinions.)

Finally, during the Committee's discussion at our last meeting, I recall that the point was raised that the Supreme Court sometimes grants review even from unpublished court of appeals rulings. I note that this happened not long ago in Major League Baseball Players Association v. Garvey, 532 U.S. 1015 (2001), in which the Court reversed an unpublished disposition of the Ninth Circuit that was reported merely in table form at 243 F.3d 547 (9th Cir. 2000).

I thought the Committee would want to have this additional information as it considers the proposal made by the Department of Justice.

Sincerely,

Douglas Letter
Appellate Litigation Counsel

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
MICHAEL BOUDIN
CHIEF JUDGE

JOHN JOSEPH MOAKLEY
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(617) 748 - 4431

February 26, 2002

Honorable Samuel A. Alito, Jr.
United States Court of Appeals
for the Third Circuit
P.O. Box 999
United States Courthouse & Post Office
Newark, New Jersey 07102

Dear Judge Alito:

My colleagues are currently scattered, and we have an upcoming court sitting where we are divided between two cities. Thus, it seems to me best to respond to your letter of February 22 by expressing my own views, telling you what I conjecture about the views of my colleagues, and sending them your letter and mine so that they can send any thoughts of their own to you directly.

In a nutshell, my view is that the DOJ proposal presents two quite different questions: whether it makes sense as a local rule (and I think it does) and whether it should be adopted nationwide prescriptively through a federal appellate rule (about which I have grave doubts). I would be less troubled by a federal rule that made the DOJ proposal the default rule; but it seems to me better--I recognize at some cost to efficiency--to preserve in the end local circuit autonomy on this issue.

To elaborate on the first point, my circuit is one of those which has prohibited citation of unpublished opinions except for res judicata and similar purposes; but we have been studying recently the possibility of allowing citation, just as the Department proposes, for its persuasive force but without binding effect on the panel wherever there is no equally apt statement published. My own guess is that my colleagues will be divided on this issue; but my own present inclination, subject to hearing objections of my colleagues, is that I would probably favor the change.

The original no citation rule made substantial sense, at least to me, at a time when omitting unpublished opinions from West meant that they were generally unavailable and, to the extent they were available, there was a prospect of quite uneven access. This reason is of considerably diminished force where unpublished opinions are generally included on West or Lexis and the coup de grace is West's new efforts to publish these opinions in a new appendix volume. The argument that such opinions should not bind the panel remains but this can be done without barring citation.

The proponents of citation make free speech claims that seem to me overdrawn but it is a nuisance to have to explain constantly why a no citation or a limited citation rule makes sense and the DOJ proposal would certainly mollify many critics. Further, some district judges use these unpublished opinions to inform themselves about the direction of circuit law regardless of the no citation policy. Finally, it is quite convenient for us to know that the court has said one thing in an unpublished opinion and is proposing to say something else in a published one; we may well find this out ourselves but the DOJ rule would make counsel help.

There are perfectly good arguments on the other side. The most important is that it is very efficient with ever-increasing caseloads to be able to give the parties an explanation without embarking on a full-scale opinion; and for obvious reasons partial or full use of "unpublished" opinions could easily push judges to say almost nothing or alternatively much more, either of which would defeat the purpose. But these matters involve balancing of advantage and disadvantage, and the advantages of the DOJ proposal as a local rule strike me as somewhat more weighty than the disadvantages.

By contrast, the notion that this should be done by uniform mandatory rule seems to me unsound. I fully understand why DOJ would like a uniform national rule and this would also be convenient to other lawyers who practice in multiple circuits. But the difficulty is that the decisions as to whether and when to publish, what kind of explanation to give, and what force should be given to a limited or no citation opinion are bound up together and are substantially affected by conditions that may vary from one circuit to another.

The circuits already vary considerably in their procedures for unpublished dispositions. Some of these may simply reflect historical differences but others are sensitive to the volume of cases, the expectations of lawyers, the size of the circuit and the use of different methods of screening cases and drafting short-form dispositions. To impose national rules with respect to some elements in this complicated equation undermines

the ability of different circuits to maintain or adapt procedures that work best in their local circumstances.

Further, apart from internal differences in circumstances, there has been some benefit in having the circuits experiment with different solutions to this and other matters of practice. My own circuit, for example, has a form of overruling prior precedent that depends on informal consultation that is feasible in our small circuit; it is only tentative because it is subject to rehearing en banc, but it has proved highly efficient. Accordingly, I am nervous about mandatory federal rules that begin to make inroads on the decisions of individual circuits as to just how to handle and weigh the significance of their own prior decisions.

It may be that most circuits would be happy voluntarily to adopt the DOJ proposal and a federal default rule would nudge them in this direction. In all events, such rule, as I indicated at the outset, would trouble me much less than one that inflicted the outcome on all circuits. As with most things, it is a matter of finding a reasonable compromise.

Sincerely,

cc: (with enclosure)
Judge Torruella
Judge Selya
Judge Stahl
Judge Lynch
Judge Lipez

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Chief Judge

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March 4, 2002

Honorable Samuel A. Alito, Jr.
Chair, Judicial Conference Advisory Committee
on Appellate Rules
357 United States Post Office and
Courthouse
Post Office Box 999
Newark, NJ 07101-0999

Dear Sam:

I support the notion of a uniform rule, and would also support the Justice Department proposal, subject to the rule and the accompanying note being updated to conform to current practice and nomenclature. I note that, with the advent of not precedential opinions being put on line and published in the Federal Appendix, subsection (b) could be eliminated.

Sincerely,

Edward R. Becker

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHAMBERS OF
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CHIEF JUDGE

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March 15, 2002

The Honorable Samuel A. Alito
Circuit Judge
United States Court of Appeals
for the Third Circuit
United States Courthouse & Post Office
P.O. Box 999
Newark, NJ 07102

Dear Judge Alito:

Upon receipt of your letter of February 22, 2002, I conducted an informal poll of the judges of my court, asking for their views concerning the proposal by the Department of Justice that there be a uniform national rule concerning the citation of unpublished opinions. I furnished them with a copy of the Department's proposal.

By way of background, we have a local rule on that topic, and the DOJ proposal is more restrictive than our local rule.

Several different views were expressed, and there was no consensus. A couple of judges thought that having a FRAP rule would further uniformity in this area and would be beneficial, particularly for litigants having an extensive multi-circuit practice. Several other judges simply said that they were opposed to having a national rule.

Another judge provided a particularly detailed, thoughtful memorandum on the subject which I will summarize because it may be useful to you:

1) He began by noting some possible downsides. First, it may simply open up the question of unpublished opinions again or be viewed by some as a stepping stone to that. As he noted, the latter step may be more of a psychological than a logical one because there is absolutely nothing inconsistent with allowing the publication of nonpublished opinions while treating them as nonprecedential. He pointed

out that briefs frequently cite English decisions, texts, law review articles and the like, which are completely nonprecedential, to say nothing of the decisions from other circuits, or state courts in other circuits, which are in no sense binding on the appellate court with which the brief is filed.

2) He agreed with the Solicitor General that allowing the citation of unpublished opinions will likely not lead to the proliferation of such citations (as it has not in our court), but he says that this suggests that there may not be a very significant need for a national rule on the topic.

3) He noted that the Solicitor General's proposal has two requirements that our rule does not: the unpublished opinion must "persuasively address" an issue in the appeal, and there must be "no published opinion" of the court to which it is cited on that issue. He doesn't see the need for these restrictions or, indeed, the need for any restrictions on what can be cited in a brief. He notes that a possible difficulty with the additional restrictions is that they may encourage pointless wrangling on whether a particular unpublished opinion cited met the terms of the restrictions.

Several judges joined in the above comments, but ended by stating (possibly inconsistently with those comments) that they were reluctant to support a national rule and that they were more comfortable with confining citation to related cases or to establish law of the case, res judicata or collateral estoppel.

So I think it is fair to say that our judges were all over the map on the proposal, with a majority expressing reluctance to support a national rule.

I hope this has been helpful to you.

Sincerely,

Carolyn Dineen King

Carolyn Dineen King

United States Court of Appeals
For the Sixth Circuit

CHAMBERS OF
THE CHIEF JUDGE

Room 209
601 West Broadway
Louisville, KY 40202

February 27, 2002

Honorable Samuel A. Alito, Jr.
United States Court of Appeals
357 United States Post Office and Courthouse
P.O. Box 999
Newark, New Jersey 07101-0999

Dear Judge Alito:

Thank you for your letter of February 22, 2002 regarding the work of the Advisory Committee on the Appellate Rules investigation of unpublished opinions. Needless to say, as you are aware from most of what has been written, there seems to be a great diversity of opinion. It is certainly something that is not easily debated by many of my colleagues. I do think that the idea of something uniform in the way it is reported makes sense. For me, this is an issue that would be an appropriate discussion at the meeting of United States Circuit Judges in October if the Federal Judicial Center would be willing to incorporate it in the program.

Generally, on behalf of my Court, our Judges are uniform in their belief that our rule is the appropriate one for our circuit, and are not inclined to change the way we proceed.

Personally, and I speak only for myself, I think that the Justice Department idea on citation at least is a good starting point. Hopefully, we could have a unified system even though we have a non-unified application of how these opinions would be treated. Regrettably, this is not unlike our debate in the law clerk hiring arena, and I feel that it is going to be a long time before we can find any common ground where all will agree.

Again, I admire your undertaking this endeavor, and hopefully some good will come of your work.

With my best wishes, I remain,

Sincerely,

Boyce F. Martin, Jr.

BFM,jr:dp

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

DAVID R. HANSEN
CHIEF JUDGE
UNITED STATES COURTHOUSE
101 FIRST STREET SE
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319-364-5815

April 1, 2002

Honorable Samuel A. Alito
United States Circuit Judge
Chair, Advisory Committee on Appellate Rules
P.O. Box 999
United States Courthouse & Post Office
Newark, New Jersey 07102 (Also sent by facsimile 973-645-3961)

Re: Department of Justice Proposal for a National Rule on Citing Unpublished Opinions

Dear Judge Alito:

This letter is in response to your letter of February 22, 2002, with reference to the above subject.

I sent your letter and its attachments to all of the judges, both active and senior, of our court. I also referred the letter to our court's Rules Committee. The Rules Committee's 2-1 majority was decidedly negative about the proposal, and the dissenting member of the Rules Committee was, at best, merely unopposed to the proposal and unwilling to champion it. The majority of those members of the court who responded to my invitation for comment was likewise opposed to the Department's proposal. Three judges expressed the belief that they would favor a national rule only if it provided that all opinions of any court could be cited in any court without restriction.

Accordingly, I believe it safe to say that this court would urge the rejection of the proposal.

Respectfully yours,

David R. Hansen

United States Court of Appeals
Tenth Circuit

Deanell Reece Tacha
Chief Circuit Judge
643 Massachusetts Street, Suite 301
Lawrence, Kansas 66044-2292

Telephone
(785) 842-8556

March 27, 2002

The Honorable Samuel A. Alito, Jr.
Chair, Advisory Committee on Appellate Rules
United States Court of Appeals, Third Circuit
357 United States Post Office and Courthouse
Post Office Box 999
Newark, NJ 07101-0999

RE: Department of Justice Proposed Amendment to the Federal Rules of Appellate Procedure Concerning the Citation of "Unpublished" Decisions

Dear Judge Alito:

At our administrative meeting last week, the judges of the United States Court of Appeals for the Tenth Circuit considered the Justice Department proposal regarding a uniform national rule concerning the citation of "unpublished" court of appeals opinions. It was the consensus of the judges of the Tenth Circuit that we would be comfortable with a uniform rule on citations so long as there is no uniform mandate regarding the precedential weight, if any, of any particular category of opinions. We further would not favor any effort to restrict the authority of each court of appeals to control the dissemination of its opinions in print or electronic media. It is our understanding that the Justice Department proposal is directed exclusively at citation and not at precedential effect or dissemination. With this understanding, we do not oppose the proposal. I hope this helpful to your committee.

Yours very truly,

Deanell Reece Tacha
Chief Circuit Judge

cc: Tenth Circuit Judges

UNITED STATES COURT OF APPEALS
Eleventh Circuit

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Post Office Box 977
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February 26, 2002

Honorable Samuel A. Alito, Jr.
Chair, Advisory Committee on appellate Rules
United States Court of Appeals
United States Courthouse and Post Office
Post Office Box 999
Newark, NJ 07102

Re: Proposal for Uniform National Rule Concerning Citation of Unpublished Opinions

Dear Judge Alito:

I can see some benefit of a uniform national rule with respect to the citation of unpublished opinions, especially for that growing segment of the legal profession frequently litigating in numerous circuits. With respect to the Solicitor General's proposal, I see very little disadvantage on the downside. For example, the Solicitor General's proposal would seem to be substantially similar to the third sentence of our Eleventh Circuit Rule 36-2:

> 11th Cir. R. 36-2 Unpublished Opinions. An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

The proposed rule does not deal at all with the subject matter of the first and second sentences of our Eleventh Circuit Rule, and therefore would not be inconsistent, as I understand it.

Sincerely,

R. Lanier Anderson, III

United States Court of Appeals
for the Federal Circuit
Washington, D.C. 20439

Chambers of
Haldane Robert Mayer
Chief Judge

March 12, 2002

Dear Judge Alito:

Thank you for your letter of February 22, 2002, about a proposal for a uniform national rule of appellate procedure for unpublished opinions. It is the unanimous view of the judges of this court that there should not be a national rule on that subject.

Sincerely,

H. Robert Mayer

Honorable Samuel A. Alito, Jr.
United States Court of Appeals
for the Third Circuit
357 United States Post Office
and Courthouse
Post Office Box 999
Newark, New Jersey 07101-0999

The Reporter summarized the comments.

A member said that she was inclined to agree with those commentators who argued that the limit on the size of Rule 5 papers should be expressed in words rather than in pages. Other members expressed reservations about using word limits. A member said that abuses such as manipulating font size or margins were a real problem with briefs, but have never been much of a problem with such things as Rule 5 papers. That is why, when the D.C. Circuit adopted word limits on briefs, it did not adopt word limits on motions or other papers.

The Reporter asked about enforcement. Unless this Committee requires a certificate of compliance to be filed with every Rule 5 paper, a word limit could be enforced only if the clerks counted every word of every paper. Mr. Fulbruge said that, in the Fifth Circuit, about half of all petitions and motions are handwritten and filed by pro se litigants (usually prisoners). Word limits cannot effectively be enforced against such papers; page limits provide at least some restraint.

A member moved that proposed Rule 5(c) be approved as published. The motion was seconded. The motion carried (unanimously).

From the minutes of the April 2001 meeting

MEMORANDUM

DATE: March 27, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-03

Attorney Roy H. Wepner has called the Committee's attention to an ambiguity in the way that Rule 26(a)(2) interacts with Rule 26(c). (A copy of Mr. Wepner's letter is attached.)

Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." For example, under Rule 31(a)(1), the appellee must serve and file a brief within 30 days after the appellant's brief is served. If the appellant serves its brief by mail, the appellee's brief must be served and filed within 33 days — the 30 days prescribed in Rule 31(a)(1) plus the 3 days added to that prescribed period by Rule 26(c).

Rule 26(a)(2) currently provides that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 7 days, and included when the period of time is 7 days or more. This Committee has proposed amending Rule 26(a)(2) so that the demarcation line is changed from 7 days to 11 days. The purpose of the proposed amendment is to make time calculation under the Appellate Rules consistent with time calculation under the Civil Rules and Criminal Rules.

The ambiguity is this: In deciding whether a deadline is less than 7 days or 11 days, should the court "count" the 3 days that are added to the deadline under Rule 26(c)? Suppose, for example, that a party has 5 days to respond to a paper that has been served upon her by mail. Is she facing a 5-day deadline — that is, a deadline "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by excluding intermediate Saturdays, Sundays, and legal holidays? Or is she facing an 8-day deadline — that is, a deadline that is *not* "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by including intermediate Saturdays, Sundays, and legal holidays?

This question never arises under the current version of Rule 26(a)(2). The question would arise only with respect to 4-, 5-, or 6-day deadlines, as only then would including the 3 extra days provided by Rule 26(c) change the deadline from one that is less than 7 days to one that is 7 days or more. But there are no 4-, 5-, or 6-day deadlines in the Appellate Rules.

This question will arise under the *amended* version of Rule 26(a)(2). (The amendment will take effect on December 1, 2002, barring Supreme Court or Congressional action.) Under amended Rule 26(a)(2), the question will arise with respect to 8-, 9-, and 10-day deadlines. There are no 8- or 9-day deadlines in the Appellate Rules, but there are several 10-day deadlines.

A lot turns on this question. Suppose that a party has 10 days to respond to a paper that has been served by mail. If the 3 days *are* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline is *not* "less than 11 days," intermediate Saturdays, Sundays, and legal holidays do count, and the party would have at least 13 calendar days to respond. If the 3 days are *not* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2),

then the deadline *is* "less than 11 days" for purposes of Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays do *not* count, and the party would have at least 17 calendar days to respond.

Mr. Wepner is correct that this problem should be fixed. But it is difficult to know exactly how the problem should be fixed or by whom.

The district courts have wrestled with this problem under the Civil Rules for 17 years, yet they have failed to agree on a solution. Professor Arthur Miller devotes 7 pages to this problem in the new edition of Volume 4B of *Federal Practice & Procedure*.[1] Professor Miller's discussion outlines three possible ways of solving the problem (actually four, as the second option has two "sub-options"), but cites disadvantages to each. The problem is a complicated one.

The problem is also one that should not be addressed only by the Appellate Rules Committee. After December 1, the identical issue will arise under the Appellate Rules, the Civil Rules, and the Criminal Rules. If time is to be calculated the same under all three sets of rules, the issue will have to be resolved at the same time and in the same manner by the three advisory committees. One of those committees will have to take the lead.

Judge Alito and I believe — and the Reporter to the Civil Rules Committee agrees — that the Civil Rules Committee should take the lead on this matter. The Civil Rules Committee is, if you will, the "biological parent" of this issue; this Committee is only the "adoptive parent." The Civil Rules Committee has 17 years' experience with this issue; this Committee has none. And this issue is a bigger problem for the Civil Rules than for the (amended) Appellate Rules. The

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[1]*See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002). A copy of this section is attached.

problem does not arise unless a party is required to act within a prescribed period of 8, 9, or 10 days after a paper is *served* on that party. The Appellate Rules contain no 8- or 9-day deadlines and only a handful of 10-day deadlines that are triggered by *service* (as opposed to by the filing of a paper or the entry of an order). Only one of these 10-day deadlines is of any real consequence — the deadline in Rule 27(a)(3)(A) regarding responding to motions.[2] By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service.

I recommend that the Committee refer Mr. Wepner's letter to the Civil Rules Committee.

[2]This Committee has proposed amending Rule 27(a)(3)(A) so that it provides 8 days to respond to a motion, rather than 10. But the change will not eliminate the problem cited by Mr. Wepner.

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November 27, 2000

00-AP-006

00-CV-H

Mr. Peter G. McCabe
Secretary of The Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules
Of Appellate Procedure

Dear Mr. McCabe:

In accordance with the request for comments published in the November 1, 2000 advance sheet of West's Supreme Court Reporter, I am writing to comment on the proposed amendments to Rule 26 of the Federal Rules of Appellate Procedure.

I heartily concur with the notion of amending Fed. R. App. P. 26 so that it is congruent with Fed. R. Civ. P. 6. However, it is unfortunate that the Committee has not seen fit to take this opportunity to remove an ambiguity in these rules which has spawned extensive and needless litigation and which has still left the issue without a definitive resolution. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1171 at 516-21 (Supp. 2000).

The problem is this: when in the calculation process does one add the three calendar days where service has been made by mail? The answer to that question can and does impact on the ultimate calculation, as a simple example will illustrate.

Suppose an adversary serves a paper by mail, and the recipient is obligated to respond within ten days. If you add the three days for service by mail first, we are now above the 11-day threshold, which would suggest that we do not exclude intermediate Saturdays, Sundays and holidays. The final tally, then, is 13 calendar days.

Alternatively, one can first look at the original 10-day deadline, conclude that it is less than the 11-day threshold, and thereby first determine that intermediate Saturdays, Sundays and holidays do not count. This will provide a tentative time period which would typically be 10 business days or 14 calendar days. If we *now* add the three extra days for mailing, we are up to a

total of 17 calendar days. This four-day discrepancy is significant, and can become even more so if the 17th day is a Saturday, Sunday or holiday, which could then result in a final tally of 19 calendar days or even more.

I take no position on which interpretation leads to the proper result. But I do believe that the rule should be clear so that everyone can readily calculate the correct amount of time. To that end, here are two alternative suggested rewrites of the existing first sentence of Fed. R. App. P. 26(c):

> [1] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period before making of the determination set forth in Rule 26(a)(2) as to whether the period is less than 11 days, unless the paper is delivered on the date of service stated in the proof of service.
>
> [2] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period after the deadline has been determined pursuant to Rule 26(a)(2),unless the paper is delivered on the date of service stated in the proof of service.

Should the Committee believe that one of these proposed changes to Fed. R. App. P. 26(c) is desirable, it would obviously make sense to make a similar change in Fed. R. Civ. P. 6, since failing to do so would defeat one object of the present amendment, which was to conform the two rules. If it is too late in the amendment process to make a similar change in Fed. R. Civ. P. 6, perhaps the foregoing proposal could be considered for a separate set of rule changes in the future.

The Committee's consideration of these comments is very much appreciated.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,
KRUMHOLZ & MENTLIK, LLP

ROY H. WEPNER

RHW/dg
283479_1.DOC

When the original period is eleven days or more, the three additional days allowed when service has been made by mail should be added to the original period, rather than treated as a separate period, and the total treated as a single period for purposes of computation.[9] This simplifies computation and accomplishes adequately the purpose of Rule 6(e), which is to protect parties served by mail from suffering a systematic diminution of their time to respond.[10] Thus, suppose that thirty days normally are given to perform a particular act following service of a notice, and the thirtieth day would fall on a Sunday if the party were served personally. It has been argued under state provisions similar to Rule 6(e) that if service is made by mail, the original thirty-day period is then extended to Monday and the three-day addition then makes Thursday the final day for taking action. The better view,

7. Rule 5(b)

See the discussion in § 1147.

8. Advisory Committee

The Advisory Committee Note to the 2001 amendment to Rule 6(e) is reprinted in vol. 12A, App.C.

9. Method of computation

Pagan v. Bowen, D.C.Fla.1987, 113 F.R.D. 667, 668, **citing Wright & Miller.**

10. Purpose of Rule 6(e)

See the discussion in the text at notes 1–5, above.

however, is that there is simply one thirty-three day period and that the thirty-third day, Wednesday, is the final day of the extended period.[11]

When the original period is less than eleven days, however, the issue of whether or not to add the three days into the original period becomes more problematic. This particularly is true in the frequent situation of a governing ten-day period.[12] The problem is caused by the 1985 amendment to Rule 6(a), which provides that intermediate Saturdays, Sundays, and legal holidays are excluded from the computation of periods of less than eleven days.[13] As a result of the amendment, when a notice triggering a ten-day period is served personally, Saturdays, Sundays, and legal holidays are excluded from the period under Rule 6(a). But when the same notice is served by mail, these days arguably should not be excluded since the relevant time frame has become a single time period of thirteen days under Rule 6(e). Unfortunately, the 1985 amendment of the rule does not address the proper integration of Rules 6(a) and 6(e) in this context. A choice therefore has to be made among three possible methods of interpreting these two provisions.

11. Three days added to original period

Wheat State Tel. Co. v. State Corp. Comm'n, 1965, 403 P.2d 1019, 195 Kan. 268.

In re Iofredo's Estate, 1954, 63 N.W.2d 19, 241 Minn. 335.

See also

EEOC v. TruGreen Ltd. Partnership, D.C.Wis.1998, 185 F.R.D. 552, **quoting Wright & Miller.**

Wallace v. Warehouse Employees Union No. 730, D.C.App.1984, 482 A.2d 801, 809, **citing Wright & Miller.**

But compare

Kessler Institute for Rehabilitation v. NLRB, C.A.3d, 1982, 669 F.2d 138, 141 (computing three additional days granted under 29 C.F.R. § 102.114, which is virtually identical to Rule 6(e), as separate period in order to protect number of working days party being served had to respond when response period was only 10 days and court took judicial notice of delays in postal system).

No additional time

When no notice of any kind was served upon indemnitors by mail and the indemnitors were not required to await notification by the district court clerk that the amended answer had been approved for filing before they could make the jury demand, the indemnitors' time in which to demand jury trial was not extended by Rule 6(e). Engbrock v. Federal Ins. Co., C.A.5th, 1967, 370 F.2d 784, 787–788.

12. Ten-day periods

See, e.g., Rule 12(a)(4)(A), (B) (responsive pleading after grant or denial of motion for more definite statement); Rule 38(b) (demand for jury trial); Rule 56(c) (summary judgment motion); Rule 59(c) (affidavit opposing motion for new trial); Rule 68 (offer of judgment); Rule 72(b) (objection to magistrate's findings).

13. 1985 amendment

See the discussion in § 1162.

First, the additional three days allowed under Rule 6(e) when service has been made by mail simply can be added to the original period. This method is consistent with the application of Rule 6(e) to periods of more than eleven days, discussed above, and is easy to apply. However, it probably should be rejected as inconsistent with the intent of the 1985 amendment to Rule 6(a), as well as with the underlying purpose of Rule 6(e).[14] The Advisory Committee Note accompanying the 1985 amendment refers specifically to protecting the number of working days parties will have in which to act under rules with ten-day periods.[15] The amendment assures that when service is made personally at least four additional days (from the two intervening weekends) are added to virtually all ten-day periods[16] (along with any legal holidays that fall within the period). If,

14. Purpose of Rule 6(e)

See the discussion in the text at notes 1–5, above.

15. Advisory Committee Note

The Advisory Committee Note accompanying the 1985 amendment to Rule 6(a) is set out in vol. 12A, App. C, and is reprinted at 98 F.R.D. 337, 356–357.

See the discussion in § 1162.

See also

Peabody Coal Co. v. NLRB, C.A.9th, 1983, 709 F.2d 567, 569–570, **citing Wright & Miller** (29 C.F.R. § 102.114, virtually identical to Rule 6(e), interpreted to call for separate 10-day and three-day periods).

Kessler Institute for Rehabilitation v. NLRB, C.A.3d, 1982, 669 F.2d 138, 141 (29 C.F.R. § 102.114, virtually identical to Rule 6(e), interpreted to call for separate periods in order not to eliminate too many working days from 10–day period in which to file exceptions to report of hearings officer).

Coles Express v. New England Teamsters & Trucking Indus. Pension Fund, D.C.Me.1988, 702 F.Supp. 355.

Nalty v. Nalty Tree Farm, D.C.Ala.1987, 654 F.Supp. 1315.

Pre–1985 practice

A previous edition of this Treatise recommended the first method of integration under the pre-1985 version of Rule 6(a), which excluded "dies non" only from periods of less than seven days. This position probably was correct at that time given the fact that the exclusion under former Rule 6(a) never would add up to more than the three days allowed under Rule 6(e). As a result of the 1985 amendment, however, Rule 6(a) routinely adds four days to ten-day periods when service is made personally. Thus the first method of integration no longer clearly is the proper choice.

The 1985 amendment to Rule 6(a) renders the old practice of adding the three mailing days before deciding whether to except intermediate holidays inapplicable. National Savs. Bank of Albany v. Jefferson Bank, D.C.Fla. 1989, 127 F.R.D. 218, **citing Wright & Miller**.

16. Virtually all

In the unusual situation when a notice triggering a ten-day period is served personally on a weekend, the period commences on Monday, and only one complete weekend is excluded under Rule 6(a). In the vast majority of cases, however, personal service is made on working days, and Rule 6(a) assures that two weekends are excluded from the computation of the period.

however, service is made by mail and Rule 6(e) is applied to create a single time span, intervening Saturdays, Sundays and legal holidays are not excluded and the time in which to act is reduced effectively from fourteen calendar days to thirteen. Such a reduction runs counter to the purpose of Rule 6(e), which is to leave a party served by mail in no worse position than a party served personally.[17]

The unfairness of the first method of integration is underscored further by the fact that the longer fourteen-day period following personal service does not begin until actual receipt of the notice, but the shorter thirteen-day period following service by mail begins on the date of mailing.[18] Viewed in this light, computation of the three days granted under Rule 6(e) as part of a single time span, rather than as a separate period, results in precisely the situation Rule 6(e) is supposed to prevent—a systematic diminution of the number of working days available to a party to respond when notice is served by mail.[19] Although the diminution is not great, and despite the fact that enlargements of time are available liberally under Rule 6(b)(1),[20] the first method of integration should be rejected for the reasons stated.

The second method of integrating Rules 6(a) and 6(e) is to compute two separate time spans of ten and three days, and exclude weekends and holidays from each. This method solves the diminution of time problem caused by the first method discussed above. It also is relatively easy to implement. In addition, it applies

17. Purpose of Rule 6(e)

See the discussion in the text at notes 1–5, above.

See also

"It would be queer if service by mail, which delays actual knowledge of the decision, would reduce the time to object." Lerro v. Quaker Oats Co., C.A.7th, 1996, 84 F.3d 239, 242 (Easterbrook, J.), **citing Wright & Miller.**

National Savs. Bank of Albany v. Jefferson Bank, D.C.Fla.1989, 127 F.R.D. 218, **citing Wright & Miller** (agreeing with the text at note 21 of the Second Edition of this Treatise and explicitly disapproving of Pagan v. Bowen, cited below).

But see

Pagan v. Bowen, D.C.Fla.1987, 113 F.R.D. 667 (construing Rules 6(a) and 6(e) to create single 13-day period). The court cited a previous edition of this Treatise to support its decision. As a result of the 1985 amendment to Rule 6(a), the position taken in that edition no longer seems to be optimum. See the text at note 13, above.

18. Service complete on mailing

Rule 5(b) provides that service of a notice is complete upon mailing. See the discussion in § 1148.

19. Purpose of Rule 6(e)

See the discussion in the text at notes 1–5, above.

20. Enlargements available

See the discussion in § 1165.

the literal terms of Rule 6(a) to the computation of both time periods in a consistent manner, thereby producing a seemingly desirable result.[21]

On the other hand, the second method can lead to an unjustified lengthening of the permitted time. For example, assume a ten-day period with service by mail occurring on Friday. By eliminating weekends and holidays from both periods, the aggregated period ends on the Wednesday nineteen days later (or Thursday if a holiday intervenes). Even granting that a party served personally would have had fourteen calendar days, and that three additional days should be allowed because service is made by mail, the aggregated period should add up only to seventeen days, not the nineteen (or twenty) permitted by the second method. Of course it should be noted that the unjustified lengthening amounts at most to three days, and this arguably is not grounds for serious concern. It also should be remembered that if the calculation of separate periods results in excessive delay in urgent cases, one of the parties always can request the court to shorten the response time under Rule 6(d).[22] Despite these important ameliorating elements, any discrepancy in the computation of time caused by the method of service of court papers, regardless of how slight it may be, should be eliminated, if possible, in order to avoid giving parties improper incentives to choose a particular method of service (in this case personal service) in the hope of shortening another party's response time.[23]

The third method of integration attempts to eliminate any unjustified discrepancies based on the type of service employed. Under this method, the ten-day period is computed under Rule 6(a), excluding weekends and holidays, and three calendar days are added to the resulting period pursuant to Rule 6(e). To assure consistent application, and to reflect accurately the presumption that the three days allowed under Rule 6(e) represent transmission time in the mail, the three days always should be counted first,

21. Desirable result

The desirability of applying Rule 6 consistently to the computation of all time periods is discussed in § 1163 at notes 21–24.

22. Shorten time

See the discussion in § 1162 at notes 12–13.

23. Improper incentives

Incentives always will exist for parties to choose particular days of the week to serve notices. The point being made in the text is that no additional incentives should be provided to influence a party to choose one method of service over another in hopes of minimizing the response time available to another party.

followed by a counting of the ten-day period.[24] Thus, in the example given of service by mail on a Friday, the three days are Saturday, Sunday, and Monday, and the ten-day period runs from Tuesday through the Monday seventeen days after service. Regardless when the three days end, the ten-day period should begin on the next business day. The ten-day period should not begin on a Saturday, Sunday, or holiday, inasmuch as these days are excluded from the computation period.[25]

Because the third method of integration most closely achieves the apparent purposes of Rule 6(e) and the 1985 amendment to

24. Three days first

In some cases, computation of the three days after the ten-day period, rather than before, will cause the aggregated period to end on a weekend when it otherwise would not have. To avoid confusion under the third method of integration, it thus is necessary to adopt a convention of always counting the three days either first or last. Counting them first appears more consistent with the purpose of allowing three additional days to account for the transmission time of papers in the mail. The purpose of Rule 6(e) is discussed in the text above, at notes 1–5.

Kruger v. Apfel, D.C.Wis.1998, 25 F.Supp.2d 937, **quoting Wright & Miller**, vacated on other grounds C.A.7th, 2000, 214 F.3d 784.

EEOC v. TruGreen Ltd. Partnership, D.C.Wis.1998, 185 F.R.D. 552.

Littrell v. Shalala, D.C.Ohio 1995, 898 F.Supp. 582.

Epperly v. Lehmann Co., D.C.Ind.1994, 161 F.R.D. 72, **citing Wright & Miller.**

Compare

CNPq–Conselho Nacional de Desenvolvimento Cientifico e Technologico v. Inter–Trade, Inc., C.A.D.C.1995, 50 F.3d 56, 311 U.S.App.D.C. 85.

Vaquillas Ranch v. Texaco Exploration & Production, Inc., D.C.Tex.1994, 844 F.Supp. 1156.

In Nalty v. Nalty Tree Farm, D.C.Ala. 1987, 654 F.Supp. 1315, the district judge, without addressing the question of whether the three days should come first or last, applied a modified version of the third method of integration proposed in text, and put the three days after the ten-day period.

But see

The only way to carry out the Rule 6(e) function of adding time to compensate for delays in mail delivery is to employ Rule 6(a) first. Treanor v. MCI Telecommunications Corp., C.A.8th, 1998, 150 F.3d 916.

Consistency with prior cases and ease of computation suggest that the three-day period be computed after the originally prescribed period. National Savs. Bank of Albany v. Jefferson Bank, D.C.Fla.1989, 127 F.R.D. 218, 221, **quoting Wright & Miller.**

25. Excluded

Although Rule 6(a) excludes "intermediate" Saturdays, Sundays, and legal holidays, a liberal construction of "intermediate," which seems called for in view of the brevity of the time period involved, excludes from the computation any Saturday, Sunday, and legal holiday falling between the day of the event from which the period begins to run and the final day of the period. See the discussion in § 1162 at notes 12–13.

Rule 6(a), it probably should be preferred. It should be noted, however, that the third method suffers from three drawbacks when compared to the second method. First, it is more complicated; second, it requires the use of a convention (always counting the three-day period first) that is not provided for on the face of either federal rule; and, third, it arguably violates a literal reading of Rule 6(a) by failing to exclude weekends and holidays from the separate three-day transmission period, which, after all, is a period "less than eleven days." These points are well taken, and may lead some courts to adopt the second method of computing time. Nevertheless, the third method still seems preferable, because of its fidelity to the purposes of Rules 6(a) and 6(e), and because it avoids creating undesirable incentives for parties to choose one form of service over another.[26]

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Douglas Letter
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March 26, 2002

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
University of St. Thomas School of Law
1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Re: Time To File Notice Of Appeal In Criminal Cases

Dear Patrick:

At the April 2001 meeting of the Federal Rules of Appellate Procedure Advisory Committee, there was discussion concerning an amendment to FRAP 26(a)(2) to make the time-computation provisions of FRAP consistent with those of the Federal Rules of Civil Procedure. During that discussion some members of the Committee raised the issue of whether the time within which defendants can file appeals in criminal cases should be increased beyond ten days because the Government has 30 days in which to appeal in such cases. See FRAP 4(b)(1). I was asked by Judge Garwood to study this issue and report to the Committee, which I am now doing by this letter. We do not believe that any change in the current rule is warranted.

There are persuasive policy and practical reasons for the Government to have more time than defendants to decide whether to appeal a criminal case. First, it takes the Government, because of its sheer size and bureaucratic organization, more time than most private parties to decide whether or not to appeal a decision. By regulation, any appeal must be authorized by the Solicitor General. See 28 C.F.R. § 0.20(b). This process entails memoranda by the United States Attorney's Office that tried the matter and by the Criminal Division at the Main Justice Department, followed by consideration by attorneys in the Solicitor General's Office. For obvious reasons, this process of winnowing the cases in order to pursue only appropriate appeals takes time.

We note that, in many instances, there is a strong preference for obtaining final appellate authorization -- or at least an indication that authorization to appeal likely will be forthcoming -- before any notice of appeal is filed. This practice is beneficial to the courts because it minimizes the number of protective notices of appeal that must be filed.

The Federal Rules of Appellate Procedure generally recognize that the appeal consideration process within the Department of Justice requires extra time. These rules grant more time to the Government to file a notice of appeal in civil cases (60 days when the Government is a party, versus 30 days when the appeal involves only private litigants) (see FRAP 4(a)(1)), and more time to seek

en banc review of adverse appellate decisions. See FRAP 40(a) (granting parties 45 days, instead of 14 days, to file a petition for rehearing in a civil case when the United States is a party).

Second, the Government's decision to appeal -- apart from the time-consuming institutional review associated with that process -- usually entails a probing substantive analysis of both the merits of the issue as well as the institutional consequences of pursuing an appeal. This consideration is necessary because the Government must not only consider whether an appeal makes sense in a particular case, but also the ramifications of such an appeal in terms of presenting a uniform position across the nation and in terms of consistency with whatever the Government's overarching policy is in the particular area. These are factors that an individual defendant simply need not consider.

We recognize that in the civil context, both the Government and private parties are given the same extra time to file an appeal in cases involving the Government. See FRAP 4(a). Apparently, this equal-time rule was adopted in the civil context because, in the view of the 1946 Advisory Committee, "[i]t would be unjust to allow the United States * * * extra time and yet deny it to other parties in the case." See 9 Moore's Federal Practice § 203.25[1], § 3-102 (2d ed. 1985).

However, the dynamics of criminal cases are fundamentally different from civil cases, and there is no good reason to extend the practice in civil cases to criminal ones. There is a special public policy interest in the speedy and orderly disposition of criminal cases -- embodied most prominently in the Speedy Trial Clause in the Constitution, the Speedy Trial Act (18 U.S.C. §§ 3161 et seq.), and the resulting priority given to criminal cases on court dockets. Indeed, the very fact that the Government is granted only 30 days in criminal cases to file a notice of appeal -- instead of the 60 days it is accorded in civil cases -- indicates that time is of the essence in criminal cases, and that the extra time given to the Government in criminal cases is a necessary concession to practical realities, a concession that should not be extended to other parties who do not face that reality.

Not surprisingly, the one appellate decision we have found to evaluate the time disparity contained in FRAP 4(b) for the Government and for defendants upheld that disparity against an equal protection challenge. Then-Ninth Circuit Judge Anthony Kennedy wrote:

> Applying [the rational basis] test, we have no difficulty finding that the different periods provided the government and criminal defendants for filing an appeal do not deny defendants the equal protection of the laws. It is reasonable to presume that it takes a large, bureaucratic organization such as the government, responsible for prosecuting thousands of cases across the country, a greater time to assess the merits of an appeal than it does an individual defendant. In reaching its decision whether or not to appeal, the government must be concerned, moreover, with the consistency of its positions and the future impact of the case, considerations that do not weigh as heavily, if at all, in the decision of the defendant.

United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986).

In addition, the appeal rights of the Government and of defendants are quite different in criminal cases. The Government may appeal in criminal cases only when authorized by statute and not barred by the Double Jeopardy Clause. Thus, the Government may appeal only in limited circumstances, authorized by 18 U.S.C. §§ 3731 and 3742, which usually involve interlocutory orders that have the effect of terminating a prosecution, post-verdict rulings that disregard a jury's verdict, or the severity of a sentence. The Government cannot appeal a not guilty verdict. By contrast, a defendant generally cannot appeal except from the final judgment of conviction (with some narrow exceptions). Thus, a defendant's decision to appeal typically involves only the verdict and sentence.

Moreover, we are aware of no pressing problem that would seem to favor amendment of Rule 4(b) to allow more time for defendants to appeal.

As noted already, there is a strong policy interest in the speedy resolution of criminal cases. The restrictive time limits for criminal cases in the Constitution, statutes, and rules embody the principle that criminal defendants should proceed expeditiously with challenges to their convictions and sentences, so that the convictions can become final and, presumably, the defendants can accept the convictions and begin the journey of rehabilitation. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. * * * [R]ule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely."); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (noting the "policy considerations supporting prescription of a very short time for appeal in a criminal case").

Balanced against the need for quick finality is the fairness consideration of allowing criminal defendants sufficient time to file a timely appeal. At this point, however, we know of no evidence suggesting that ten days is proving insufficient for criminal defendants to decide whether to appeal and to file a notice. Because such a high percentage of defendants convicted in disputed criminal proceedings do appeal, it seems clear that this decision is not generally a difficult one. Further, the federal rules do not obligate defendants to file a brief or even file a list of issues to be preserved or questions presented within that time. Thus, the need for defendants to decide quickly that they want a notice of appeal filed is not an onerous burden,

In our view, given the strong public policy favoring fair but expeditious processing of criminal matters, and the absence of any evidence suggesting that the current ten-day time limit needs to be lengthened, there is no reason to propose amendments to FRAP 4(b) at this time.

Sincerely,

Douglas Letter
Appellate Litigation Counsel

02-01

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7654
600 CAMP STREET
NEW ORLEANS, LA 70130

March 18, 2002

Honorable Samuel A. Alito, Jr.
United States Court of Appeals for the Third Circuit
357 United States Post Office and Courthouse
Post Office Box 999
Newark, NJ 07101–0999

Re: Proposed FED. R. APP. P. 27

Dear Judge Alito:

Last Monday I was in Austin, Texas at a Fifth Circuit Bar Association meeting and was asked an obscure question concerning proposed FED. R. APP. P. 27. Specifically the inquiry is whether there is anything in the proposed changes to the federal rules which governs permissible typeface and type styles for motions. I was confident this matter was covered, but I cannot locate a reference in any Rule to cover the question.

FED. R. APP. P. 27(d)(1), (2) and (3) discuss the format of motions and cover such matters as "reproduction," "binding," "paper size, line spacing and margins," "page limits" and "number of copies." There does not appear to be a reference to FED. R. APP. P. 32(a)(5) and (6) covering permissible typeface, or type styles.

FED. R. APP. P. 5(c) and 21(d) require conformance with FED. R. APP. P. 32(c). Rule 32(c)(2) states that "any other paper including a petition for rehearing" or "rehearing en banc", and "any response to such a petition must be reproduced" as prescribed by "Rule 32(a)" except that no cover is required and the length limits of Rule 32(a)(7) do not apply. The reference to Rule 32(a) encompasses the limitations on typeface and type style in Rule 32(a)(5) and (6). Thus, it appears briefs; petitions for permission to appeal; writs of mandamus, prohibition and other extraordinary writs; petitions for panel and en banc rehearing; and "other papers" must comply with Rule 32(a)(5) and (6). Were it not for Rule 32(c)(1), apparently a motion would also have to comply with all of Rule 32(a). However, Rule 32(c)(1) states that the form of a "motion" is governed by Rule 27(d). Unfortunately, that rule does not specify that proportionally spaced and monospaced face may be used. The rule also does not include the restriction that proportionally spaced face must include serifs, except in headings and captions, and that 14 point or larger face must be used, or that monospaced face may not exceed 10½ characters per inch. Likewise Rule 27(d) does not require "plain roman style type, although italics or boldface may be used for emphasis."

The questioner's argument is that under the FED. R. APP. P. a person may file a motion in virtually any size typeface and may use italics or script typeface, and that a court must accept such a motion for filing. This is not an earth shaking question, and in view of the late stage for the proposed rule changes, we may be unable to affect any change, if one is warranted at all, before December 2002. However, this may be a discussion topic for our April Appellate Rules Advisory Committee meeting. Hopefully, wiser legal scholars than I can find an answer without resorting to a rule change.

If you have any questions, please call me at (504) 310-7654, or send a Lotus Notes message or internet e-mail to <charles_fulbruge@ca5.uscourts.gov>.

Sincerely,

Fritz Fulbruge

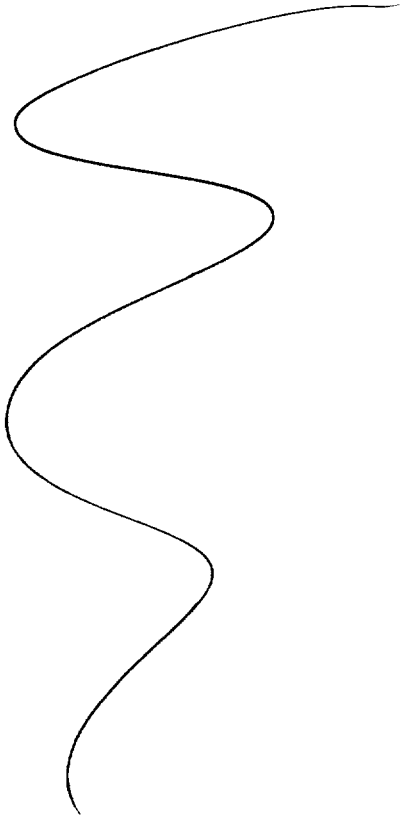
cc: Professor Patrick Schiltz
John Rabiej
Marcy Waldron

Supplemental

Agenda

Book

Materials



Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804

Rule 804. Hearsay Exceptions; Declarant Unavailable*

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is not admissible under this subdivision unless A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate ~~the~~ its trustworthiness ~~of the statement~~ or (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness.

* * *

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* Matter to be omitted is lined through.

COMMITTEE NOTE

The Rule has been amended in two respects:

1) To require a showing of corroborating circumstances when a declaration against penal interest is offered in a civil case. *See, e.g., American Automotive Accessories, Inc. v. Fishman,* 175 F.3d 534, 541 (7th Cir. 1999) (requiring a showing of corroborating circumstances for a declaration against penal interest offered in a civil case).

2) To require the prosecution to provide a showing of "particularized guarantees of trustworthiness" when a declaration against penal interest is offered against an accused in a criminal case. This standard is intended to assure that the exception meets constitutional requirements, and to guard against the inadvertent waiver of constitutional protections. *See Lilly v. Virginia,* 527 U.S. 116, -- (1999) (holding that the hearsay exception for declarations against penal interest is not "firmly-rooted"and requiring a finding that hearsay admitted under a non-firmly rooted exception must bear "particularized guarantees of trustworthiness" in order to be admissible under the Confrontation Clause).

The "particularized guarantees" requirement assumes that the court has already found that the hearsay statement is genuinely disserving of the declarant's penal interest. *See Williamson v. United States*, 512 U.S. 594, 603 (1994) (statement must be "squarely self-inculpatory" to be admissible under Rule 804(b)(3)). "Particularized guarantees" therefore must be independent from the fact that the statement tends to subject the declarant to criminal liability. The "against penal interest" factor should not be double-counted as a particularized guaranty. *See Lilly v. Virginia, supra at* ---- (fact that statement may have been disserving to the declarant's interest does not establish particularized guarantees of trustworthiness because it "merely restates the fact that portions of his statements were technically against penal interest.").

The case law identifies some factors that may be useful to consider in determining whether corroborating circumstances clearly indicate the trustworthiness of the statement. Those factors include (*see, e.g., United States v. Hall,* 165 F.3d 1095 (7th Cir. 1999)):

(1) the timing and circumstances under which the statement was made;

(2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie;

(3) whether the declarant repeated the statement and did so consistently, even under different circumstances;

(4) the party or parties to whom the statement was made;

(5) the relationship between the declarant and the opponent of the evidence; and

(6) the nature and strength of independent evidence relevant to the conduct in question.

Other factors may be pertinent under the circumstances. The credibility of the witness who relates the statement in court is not, however, a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the credibility of the witness would usurp the jury's role in assessing the credibility of testifying witnesses.

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible under this subdivision unless A) if offered to offered to exculpate the accused, is supported by corroborating circumstances that clearly indicate the trustworthiness of the statement or B) if offered to inculpate the accused, is supported by particularized guarantees of trustworthiness.

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 804

Rule 804. Hearsay Exceptions; Declarant Unavailable*

* * *

(b) Hearsay exceptions. – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * *

(3) Statement against interest. – A statement ~~which~~ that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. ~~A~~ But statement tending to expose the declarant to criminal liability ~~and offered to exculpate the accused~~ is ~~not~~ admissible under this subdivision ~~unless~~ IN THE FOLLOWING CIRCUMSTANCES ONLY: (A) if offered in a civil case or to exculpate an accused in a criminal case, it is supported by corroborating circumstances that clearly indicate the its trustworthiness of, ~~the statement~~ or (B) if offered to inculpate an accused, it is supported by particularized guarantees of trustworthiness. Need Harms

* * *

* Matter to be omitted is lined through.

Do you need "under this subdivision"? If not, then "is admissible in these circumstances only:"

April 5, 2002

The Honorable Samuel A. Alito, Jr.
Chair
Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington D.C. 20544

Dear Sam:

I am writing in response to your letter of February 22, 2002 in which you solicited the views of my Court concerning the Department of Justice's proposal to have a uniform national rule governing the citation of "unpublished" dispositions.

Our Court discussed your letter at its recent administrative meeting on March 22, 2002. Our Court has not changed its view on this topic. It does not favor a national rule. It is our view that it would be inappropriate to impose national standards for unpublished dispositions when the federal rules are silent as to any national criteria for published dispositions.

The Court also suggested that I advise you of our experimental rule concerning this same topic. Subsection (b)(iii) of the rule was the result of a lengthy debate. It reads:

CIRCUIT RULE 36-3
CITATION OF UNPUBLISHED DISPOSITIONS OR ORDERS

(a) Not Precedent: Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.

(b) Citation: Unpublished dispositions and order of this Court may not be cited to or by the courts of this circuit, except in the following circumstances.

(i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.

(ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.

(iii) **They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.**

(c) Attach Copy: A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix. *(New Rule 7/1/2000)*

CIRCUIT ADVISORY COMMITTEE
NOTE TO RULE 36-3

Circuit Rule 36-3 has been adopted for a limited 30-month period, beginning July 1, 2000 and ending December 31, 2002. Litigants are invited to submit comments regarding the rule to the Clerk during the first 24 months of the trial period. After the rule has been in effect for 24 months, the Advisory Committee on Rules will study and report to the Court on the frequency with which unpublished dispositions are cited to the Court and on any problems or concerns associated with the rule. The Advisory Committee will also issue a recommendation on whether the rule should be made permanent. Unless, by December 31, 2002, the Court votes affirmatively to extend the rule, it will automatically expire on December 31, 2002, and the former version of Circuit Rule 36-3 will be reinstated. *(New Rule 7/1/2000)*

We will keep your committee advised of any further action taken with respect to our rule and the results of our study. If I may respond to any questions, please let me know.

Sincerely,

Mary M. Schroeder
Chief Judge