

**ADVISORY COMMITTEE
ON
APPELLATE RULES**

**Atlanta, Georgia
November 1-2, 2007**

**Agenda for Fall 2007 Meeting of
Advisory Committee on Appellate Rules
November 1-2, 2007
Atlanta, Georgia**

- I. Introductions
- II. Approval of Minutes of April 2007 Meeting
- III. Report on June 2007 Meeting of Standing Committee
- IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements
- V. Update on Public Comments Received to Date
- VI. Action Item
 - A. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)
- VII. Discussion Items
 - A. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)
 - B. Item No. 06-06 (proposals to amend FRAP 4 and 40 with respect to cases involving state government litigants)
 - C. Item No. 07-AP-C (proposal to amend FRAP 4 in the light of proposed amendments to Rules 11 of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255)
 - D. Item No. 07-AP-D (FRAP 1 – definition of “state”)
 - E. Items Awaiting Initial Discussion
 - 1. Item No. 07-AP-E (consider possible FRAP amendments in response to *Bowles v. Russell* (2007))
 - 2. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)
 - 3. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for

panel rehearing)

4. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)

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

- A. Information item relating to Item No. 06-05 (statement of issues to be raised on appeal)

IX. Schedule Date and Location of Spring 2008 Meeting

X. Adjournment

Advisory Committee on Appellate Rules Table of Agenda Items — March 2007

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
03-02	Amend FRAP 7 to clarify whether reference to “costs” includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee Discussed and retained on agenda 04/07
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
03-10	Add new FRAP 25.1 to “protect privacy and security concerns relating to electronic filing of documents,” as directed by E-Gov’t Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04 Discussed and retained on agenda 11/04 Draft approved 04/05 for submission to Standing Committee Approved for publication by Standing Committee 06/05 Published for comment 08/05 Restyled draft approved 04/06 for submission to Standing Committee, with request that Style Subcommittee reconsider style changes Approved by Standing Committee 06/06 Approved by Judicial Conference 09/06 Approved by Supreme Court 04/07

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 <i>calendar</i> days after <i>service</i> of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Awaiting initial discussion Discussed and retained on agenda 04/06; awaiting report from Department of Justice Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Awaiting initial discussion Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/06; deadline subcommittee appointed Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J.), Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Awaiting initial discussion Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
06-06	Extend time for NOA and petitions for rehearing in cases involving state-government litigants.	William E. Thro, Virginia State Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/06 Discussed and retained on agenda 04/07
06-08	Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc.	Mark Levy, Esq.	Awaiting initial discussion
07-AP-B	Add new FRAP 12.1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal.	Civil Rules Committee 1/07	Awaiting initial discussion Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
07-AP-C	Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings.	Criminal Rules Committee 1/07	Awaiting initial discussion Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 Committee 06/07 FRAP 22 amendment published for comment 08/07
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Awaiting initial discussion Discussed and retained on agenda 04/07
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Awaiting initial discussion
07-AP-F	Amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing.	Hon. Jerry E. Smith	Awaiting initial discussion
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Awaiting initial discussion

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James Forrest Bennett	ESQ	Missouri	2005	2008
Kermit Edward Bye	C	Eighth Circuit	2005	2008
Paul D. Clement *	DOJ	Washington, DC	----	Open
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2009
Randy J. Holland	JUST	Delaware	2004	2007
Mark I. Levy	ESQ	Washington, DC	2003	2009
Maureen E. Mahoney	ESQ	Washington, DC	2005	2008
Stephen R. McAllister	ACAD	Kansas	2004	2007
Jeffrey S. Sutton	C	Sixth Circuit	2005	2008
Catherine T. Struve Reporter	ACAD	Pennsylvania	2006	Open

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DRAFT

Minutes of Spring 2007 Meeting of Advisory Committee on Appellate Rules April 26 and 27, 2007 Santa Fe, New Mexico

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 26, 2007, at 8:30 a.m. at the La Posada Hotel in Santa Fe, New Mexico. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. James F. Bennett, Mr. Mark I. Levy, and Ms. Maureen E. Mahoney. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Judge Paul J. Kelly, Jr., attended the portion of the meeting that concerned proposed Appellate Rule 12.1. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants and, in particular, welcomed Judge Hartz as the new Standing Committee liaison to the Appellate Rules Committee. Judge Stewart noted his regret that Justice Randy J. Holland was unable to attend.

II. Approval of Minutes of November 2006 Meeting

The minutes of the November 2006 meeting were approved.

III. Report on January 2007 Meeting of Standing Committee and on Status of Pending Amendments (new FRAP 32.1 and amendments to FRAP 25)

The Appellate Rules Committee had no action items on the agenda for the Standing Committee's January 2007 meeting. Judge Stewart reported to the Standing Committee that the Appellate Rules Committee had tentatively approved proposed amendments to Appellate Rule 4(a)(4)(B) and Appellate Rule 29 and that the Committee would finalize those proposed amendments at its April 2007 meeting. Judge Stewart also reported on the Appellate Rules Committee's work on the Time-Computation project; he provided the Committee's feedback on

the time-computation template rule and noted that the Committee's Deadlines Subcommittee was reviewing all appellate rule-based and statutory deadlines with a view to recommending adjustments to some deadlines in the light of the proposed shift to a days-are-days time-counting approach. Judge Stewart conveyed the fact that some Committee members have misgivings about the advisability of the time-computation project, but also noted that if the other Committees decide to proceed with the project the Appellate Rules Committee stands ready to proceed as well.

Judge Rosenthal and Professor Cooper reported to the Standing Committee on the status of various Civil Rules Committee projects. Of particular note to the Appellate Rules Committee, they reviewed the ongoing work on proposed Civil Rule 62.1 concerning indicative rulings. Judge Rosenthal noted that the Appellate Rules Committee had indicated it would consider adding a cross-reference to Civil Rule 62.1 in the Appellate Rules, and she stated that this would be very helpful.

Judge Kravitz and Professor Struve reported to the Standing Committee on the status of the Time-Computation Project. Judge Kravitz noted that the Time-Computation Subcommittee, after consultation, had decided not to attempt to define the concept of inaccessibility of the clerk's office, and that the Subcommittee had decided to retain state holidays in the definition of legal holidays. Judge Kravitz noted that members of the Appellate Rules Committee had expressed reservations about the project, and that those members assert that the proposed change in time-computation approach is unneeded and will create problems regarding statutory deadlines. But Judge Kravitz noted that despite members' reservations, the Appellate Rules Committee is moving forward with its review of appellate deadlines so as to be ready to proceed along with the other Advisory Committees. Judge Zilly discussed the special issues facing the Bankruptcy Rules Committee, including the fact that there are numerous proposed amendments that are currently out for public comment – which could complicate the prospects for proceeding at this time with the proposed time-computation changes for the Bankruptcy Rules. After the discussion of the various time-computation issues, the Standing Committee indicated its wish that the Advisory Committees proceed with the time-computation project. (The possibility that the Bankruptcy Rules Committee might seek to delay publication of its package of time-computation proposals was noted.)

In connection with the discussion of the Bankruptcy Rules issues, it was noted that at its March 2007 meeting the Bankruptcy Rules Committee expressed the goal of publishing its time-computation package in summer 2007 along with the other Advisory Committees. It was also noted that the Bankruptcy Rules Committee has decided to propose that the time to appeal in bankruptcy cases be enlarged from 10 to 14 days.

After the discussion of the January 2007 Standing Committee meeting, the Reporter reviewed the status of pending Appellate Rules items. New Rule 32.1 (concerning unpublished opinions) and amended Rule 25(a)(2)(D) (authorizing local rules to require electronic filing subject to reasonable exceptions) took effect December 1, 2006. New Rule 25(a)(5) (addressing

privacy concerns relating to court filings) is on track to take effect December 1, 2007. A judge member noted that since Rule 32.1 took effect, he has observed an increase in citations to unpublished opinions. In addition, he noted that his court sometimes gets requests to change an opinion's status from unpublished to published.

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

Judge Stewart updated the Committee on the responses to his letter to the Chief Judges of each circuit concerning circuit-specific briefing requirements. Since the November 2006 meeting, Judge Stewart has received written responses from the Fifth and Ninth Circuits. The Second, Third, Sixth, Seventh, Eighth and Eleventh Circuits have not yet responded; obtaining responses from all circuits may take time because some circuits may wish to consider the issues raised in the letter at circuit meetings or retreats. Mr. Fulbruge offered to raise the issue with the clerks of the relevant circuits at the next clerks' meeting. Professor Coquillette seconded that suggestion, and noted that local appellate rules had not historically received the same extended and systematic scrutiny accorded to local district court rules.

A judge member suggested that circuits are unlikely to discard their circuit-specific briefing requirements unless appellate practitioners make their complaints known to the relevant circuit; circuit judges, he suggested, do not perceive their local requirements as a problem. It was noted that on a prior occasion when a Ninth Circuit local rule concerning capital cases had come under scrutiny, the issue arose because a group of state attorneys general had written to complain about the rule. An attorney member noted that the clerk's office may not always make the judges aware of the many problems that arise; he stated that a large percentage of the briefs filed by his office are bounced by the relevant clerk's office for failure to comply with a local requirement. The member stressed the importance of urging each circuit to make its requirements readily available on the court's website. Ms. Leary agreed, noting that even after diligent searching it was very difficult to be sure that she had found all the relevant provisions for some of the circuits. A judge member stated that, realistically, the best approach to this issue is the one that the Committee is currently taking. Another attorney member suggested that some of the local requirements may be useful, and that the Committee may wish to consider compiling a list of 'best practices' based on the local requirements that seem like good ideas. Mr. Ishida noted that the Standing Committee has asked Professor Capra and Mr. Barr to look into ideas for improving and standardizing the way in which courts make their local rules available on their websites. An attorney member suggested that such a standard should include the requirement that each circuit summarize the ways in which their local requirements differ from those in the national rules. Judge Stewart noted that the Committee would continue to monitor developments concerning local rules; and he thanked Ms. Leary for producing the excellent FJC study concerning local briefing rules.

V. Action Items

A. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

Judge Stewart invited the Reporter to introduce 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.

* * * * *

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

* * * * *

Committee Note

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to “a judgment altered or amended upon” a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that “[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.” After the restyling, subdivision (a)(4)(B)(ii) provided: “A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.”

One court has explained that the 1998 amendment introduced ambiguity into the Rule: “The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment.” *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to “a judgment altered or amended upon” a post-trial motion, and refers instead to “a judgment’s alteration or amendment” upon such a motion.

The Reporter briefly reviewed the reasons for the Committee’s decision, at the November 2006 meeting, to amend Rule 4(a)(4)(B)(ii). The goal of the amendment is to eliminate ambiguity that arose from the 1998 restyling of Rule 4. Prior to 1998, the Rule provided that “[a] party intending to challenge *an alteration or amendment of the judgment* shall file a notice, or amended notice, of appeal” The relevant language was altered during the 1998 restyling, and the current Rule reads in relevant part: “A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or *a judgment altered or amended* upon such a motion, must file a notice of appeal, or an amended notice of appeal” As Judge Leval noted in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005), it is possible that a court might read the current Rule to require an appellant to amend a prior notice of appeal after the district court amends the judgment in the appellant’s favor. At the November 2006 meeting, the Committee voted to address this problem by amending the Rule to refer to “an alteration or amendment of a judgment” upon a post-trial motion. Subsequently, the Reporter consulted Professor Kimble concerning the style of the proposed amendment. Professor Kimble indicates that for style

reasons the proposed amendment should instead refer to “a judgment’s alteration or amendment.”

A member suggested that, because Judge Leval’s *Sorensen* opinion initially drew the issue to the Committee’s attention, the Committee might wish to seek Judge Leval’s input on the proposed amendment. The member volunteered to let Judge Leval know when the proposed amendment goes out for notice and comment. Another member noted that the previously suggested language (“an alteration or amendment of a judgment”) seems better than Professor Kimble’ suggested language (“a judgment’s alteration or amendment”); the Reporter noted, however, that on this matter of style the practice is to defer to Professor Kimble.

A member suggested that it would be helpful to add a sentence to the Note stating when a new or amended notice of appeal *is* required under Rule 4(a)(4)(B)(ii). The additional sentence fits at the end of the Note and reads as follows: Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment’s alteration or amendment upon such a motion.

Without objection, the Committee by voice vote approved the proposed amendment (with the addition to the Note).

B. Item No. 06-01 (FRAP 26(a) — time-computation template) & Item No. 06-02 (adjust deadlines to reflect time-computation changes)

Judge Stewart invited Judge Sutton to present the report of the Deadlines Subcommittee. Judge Sutton began by noting the three tasks before the Committee. First is the adoption of the time-computation template in the form of a proposed amendment to Appellate Rule 26(a). Second is the question of adjusting the Appellate Rules deadlines to account for the shift in time-computation approach. The third issue concerns the time-computation project’s impact on statutory deadlines that affect appellate practice.

Judge Sutton invited the Reporter to present the Subcommittee’s recommendation concerning the following proposed amendment to Rule 26(a):

Rule 26. Computing and Extending Time

- (a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
- (1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in

days or a longer unit of time:

- (A) exclude the day of the event that triggers the period;
- (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
- (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

- (A) begin counting immediately on the occurrence of the event that triggers the period;
- (B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and
- (C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

- (A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or
- (B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is

not a Saturday, Sunday, or legal holiday.

- (4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:
- (A) for electronic filing, at midnight in the court's time zone; and
 - (B) for filing by other means, when the clerk's office is scheduled to close.
- (5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.
- (6) ***"Legal Holiday" Defined.*** "Legal holiday" means:
- (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and
 - (B) 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.
- [The word 'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the

provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Appellate Procedure, a statute, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) “does not apply to situations where the court has established a specific calendar day as a deadline”), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10 days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, [CITE].

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule. *See, e.g.*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)’s directive to “count every day” is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 26(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int’l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk’s office

is inaccessible.

Where subdivision (a) formerly referred to the “act, event, or default” that triggers the deadline, new subdivision (a) refers simply to the “event” that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Appellate Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:30 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:30 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be “rounded up” to the next whole hour. Subdivision (a)(3) addresses situations when the clerk’s office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk’s office is not accessible because

of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g., Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf. William G. Phelps, When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may provide, for example, that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casaldue v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after*

an event. *See, e.g.*, Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed “within 30 days after the judgment or order appealed from is entered”). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 31(a)(1) (“[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.”). In determining what is the “next” day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines “legal holiday” for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a).

The Reporter highlighted changes made to the template since the Committee’s November 2006 meeting. Various style changes have been made. Rule 26(a) now opens by stating that it applies to the computation of “any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.” The latter phrase accounts for the fact that some statutes *do* specify a computation method (e.g., a statute that sets a time period of “ten business days”); under the new formulation, the time-computation rule will not affect statutes that specify a method of computing time. The template’s provisions concerning inaccessibility of the clerk’s office are now set forth in a new subdivision (a)(3); splitting inaccessibility out into a separate subdivision improves the template’s treatment of backward-counted filing deadlines. Subdivision (a)(4)’s definition of the “last day” no longer refers explicitly to after-hours in-person filing by delivery to a court official. However, subdivision (a)(4)’s definition applies “[u]nless a different time is set by a statute, local rule, or order in the case” – a formulation which is intended to leave undisturbed the caselaw that has developed under 28 U.S.C. § 452 concerning after-hours in-person filing. Subdivision (a)(6)(B) contains in brackets a definition of the term “state”; this definition is included in the proposed amendment to Rule 26(a) because the Appellate Rules do not currently define the term.¹ Among the changes to the Note, a paragraph has been added that explains that, when lengthening the Appellate Rules deadlines to offset the shift in time-computation approach, the Committee followed a presumption in favor of time periods set in multiples of seven days.

Judge Sutton observed that the Note’s discussion of subdivision (a)(2) gives an example using the time “2:30 p.m.” He stated that, on consideration, the note should use the example

¹ Another proposal, Item 07-AP-D, would add a definition that applies to the Appellate Rules generally; the Committee’s discussion of that proposal is described below.

“2:17 p.m.,” so as to correspond to the examples used in the notes that will accompany the proposed amendments to the other sets of Rules.

An attorney member asked why subdivision (a)(2)(C) provides that a deadline stated in hours that ends on a weekend or holiday is extended to “the same time” on the next day that is not a weekend or holiday. Why not provide that it is extended to the *beginning* of the next day that is not a weekend or holiday? The Reporter suggested that there might be difficulty in defining the beginning of the next day, since courts may open at varying times. Judge Sutton suggested that the Committee consult the Civil Rules Committee for its views on this issue.

Judge Sutton pointed out that subdivision (a)(4)(A)’s reference to “midnight in the court’s time zone” is ambiguous. A better formulation would be “midnight in the time zone of the circuit clerk’s principal office.” It was noted that this issue can also arise in the district courts, because some districts span more than one time zone (e.g., the Eastern District of Tennessee). Judge Sutton noted that this issue should also be raised with the other Advisory Committees.

Judge Hartz asked whether subdivision (a)(3)’s definition of inaccessibility will be compatible with existing local rules concerning inaccessibility of the clerk’s office. The Reporter noted that the Time-Computation Subcommittee had studied the issue of local rules concerning electronic filing and inaccessibility, and had found a variety of approaches. Notably, most local rules that address e-filing and inaccessibility do so without reference to the time-computation rules. The Reporter mentioned her understanding that a memo will be sent to the various local rulemaking bodies to alert them to the need to review their local rules in the light of the proposed changes in time-computation approach. That memo could also mention the need for local rules that address the question of inaccessibility, especially with respect to electronic filing.

Without objection, the Committee by voice vote approved the proposed amendment (with the changes, described above, to subdivision (a)(4)(A) and the Note to subdivision (a)(2)).

Judge Sutton next invited the Reporter to present the Subcommittee’s recommendations concerning the changes to Appellate Rules deadlines in the light of the shift in time-computation approach.² The Reporter highlighted a few aspects of the changes. Time periods stated in terms of “calendar days” will be stated simply in terms of “days.” Ten-day deadlines are in most

² These recommendations are contained in the Subcommittee’s March 23, 2007 memo and can be summarized as follows. References to “calendar days” in Rules 25, 26 and 41 become simply references to “days.” Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 30 days to correspond with changes in the Civil Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days.

instances lengthened to 14 days; this recommendation differs from the Subcommittee's tentative recommendation last fall. Last fall, the Subcommittee did not suggest lengthening the 10-day deadlines because those deadlines, prior to the 2002 amendments to the Appellate Rules, were computed using a days-are-days approach. But after learning that the other Advisory Committees are applying a robust presumption in favor of setting Rules-based deadlines in multiples of seven days, the Subcommittee reconsidered its position and recommends lengthening the 10-day periods to 14 days. There are three periods, however, for which the Subcommittee's proposals depart from the 7-day-multiple presumption: The 7-day periods in Rules 5(b)(2) and 19 and the 8-day period in Rule 27(a)(3)(A) should become 10 days rather than 14 days because lengthening to 14 days would increase the actual time significantly and would contravene the need for promptness in the contexts covered by these rules. By contrast, the Subcommittee recommends lengthening the 7-day period in Rule 4(a)(6) to 14 days; lengthening to 14 days comports with the 7-day-multiple presumption and does not unduly threaten any principle of repose. It should be noted that lengthening this 7-day period will make it advisable to ask Congress to make a corresponding change in 28 U.S.C. § 2107.

Without objection, the Committee by voice voted adopted the Deadlines Subcommittee's recommendations concerning adjustments in the time periods set by the Appellate Rules.

Next, the Subcommittee presented its recommendations concerning statutory deadlines relating to appellate practice; these recommendations are summarized in the Subcommittee's March 23, 2007 memo. Although the Committee need not finalize a list of specific recommendations concerning statutory time periods, it is important to get a sense of the provisions that the Committee believes should likely be changed in light of the proposed shift to a days-are-days time-computation approach; that tentative list will be helpful when the proposed amendments are published for comment and will become part of the working list of provisions as to which the rulemakers contemplate seeking legislative changes. The Reporter noted that the Subcommittee is not recommending changes in the various 10-day deadlines for taking appeals; prior to 2002 these deadlines would have been calculated using a days-are-days approach, and thus the Subcommittee does not believe that changes are needed. The Subcommittee's approach to these 10-day periods differs from its approach to the Rules-based 10-day periods because it is much easier to amend the Rules than to seek congressional action; thus, for the statutory 10-day periods the presumption in favor of 7-day multiples did not prevail. The Subcommittee recommends that the following statutes be considered for amendment: 28 U.S.C. § 2107(c); 18 U.S.C. § 3771(d); Classified Information Procedures Act § 7(b); and 28 U.S.C. § 1453(c).

Mr. McCabe noted that Judge Levi has met with members of the staffs of Congressman Conyers and Senator Leahy to discuss the possibility of legislation that would implement the recommended statutory changes effective December 1, 2009.

Without objection, the Committee by voice vote adopted the Subcommittee's recommendations concerning statutory deadlines.

C. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)

29: Judge Stewart invited the Reporter to present the following proposed amendment to Rule

Rule 29. Brief of an Amicus Curiae

* * * * *

(c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1. An amicus brief need not comply with Rule 28, but must include the following:

- (1) a table of contents, with page references;
- (2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;
- (3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;
- (4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and
- (5) a certificate of compliance, if required by Rule 32(a)(7); and
- (6) except in briefs filed by the United States, its officer or agency, a State, Territory, or Commonwealth, or the District of Columbia, a statement that,

in the first footnote on the first page:

- (A) indicates whether a party’s counsel authored the brief in whole or in part; and
- (B) identifies every person or entity — other than the amicus curiae, its members, or its counsel — who contributed money toward preparing or submitting the brief.

* * * * *

Committee Note

Subdivision (c). Subdivision (c) is amended to require amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and to identify every person or entity (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. Entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court are exempt from this disclosure requirement.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties’ briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority’s suspicion “that amicus briefs are often used as a means of evading the page limitations on a party’s briefs”). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(6). *Cf.* Robert L. Stern et al., *Supreme Court Practice* 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not “require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . .”).

The Reporter noted that the Committee had approved this amendment in principle at its November 2006 meeting, and needed only to determine how to implement the change. Although the Committee decided to track the disclosure requirement in Supreme Court Rule 37.6, certain adjustments are necessary in order to adapt the provision to the context of the Appellate Rules. Supreme Court Rule 37.6 exempts entities that are permitted under Supreme Court Rule 37.4 to file amicus briefs without court permission. Likewise, the proposed amendment to Rule 29(c) exempts entities that are permitted under Rule 29(a) to file amicus briefs without court permission or party consent. A member suggested that a cleaner way to accomplish this would be to refer to “an amicus listed in the first sentence of Rule 29(a)” instead of to “the United States, its officer or agency, a State, Territory, or Commonwealth, or the District of Columbia.” It was also suggested that the corporate disclosure requirement imposed by the third sentence of Rule 29(c) should be moved into the numbered list as a new subdivision (c)(6); the new disclosure requirement concerning authorship and monetary contributions then becomes new subdivision (c)(7). Another member noted that the numbering of the list will not follow the order in which the requisite components must be placed in the amicus brief. It was suggested that the Note could clarify the question of appropriate ordering.

Without objection, the Committee by voice vote approved the proposed amendment (with the changes described in the preceding paragraph).

VI. Discussion Items

A. Item No. 06-06 (FRAP 4(a)(1)(B) and 40(a)(1) – extend time for NOA and petitions for rehearing in cases involving state-government litigants)

Judge Stewart invited Dean McAllister to present the report of the subcommittee tasked with researching the proposal by William Thro, the Virginia State Solicitor General, to amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. Dean McAllister chairs the subcommittee, which also includes Mr. Letter and Mr. Levy.

Dean McAllister summarized the results of the subcommittee’s research, which are described in detail in the Reporter’s March 27, 2007 and April 23, 2007 memoranda on behalf of the subcommittee. Richard Ruda of the State and Local Legal Center supports the proposal and argues that municipalities should be included within its scope. With respect to the question of whether Native American tribes should be included, Mr. Letter inquired of colleagues within the DOJ and his inquiries so far have produced no indication of any problem caused by the current FRAP deadlines in cases involving Native American tribes. The subcommittee has raised with Mr. Thro the question of the number of appeals that would be affected by the proposed amendment given that the amendment would extend to all appeals in litigation involving a state entity whether or not the state is the appellant.

A member noted that it would arguably be unfair to amend the Rules to give state litigants more time without also giving more time to other parties in the same case. Another member observed that such asymmetry would be unseemly and could lead litigants to believe that state government litigants were receiving preferential treatment. A third member stated that an asymmetrical rule would be untenable; this member also guessed that adoption of a symmetrical proposal (i.e., one that extended the time for all parties in cases involving state litigants) would cause significant delay.

A judge noted that filing a notice of appeal does not require a great deal of work, and that the courts can provide extensions if needed. The judge observed that the extra time in cases involving federal government litigants makes sense because the United States carefully considers policy concerns prior to taking an appeal; Mr. Letter agreed with this assessment.

Judge Stewart suggested that the Committee retain this item on its study agenda. A judge member stressed that the Committee should take time to consider the proposal carefully. Dean McAllister suggested that it would be helpful to obtain more information concerning the number of appeals taken in cases involving state litigants. Members suggested that the Subcommittee ask the states to provide more data on this question, and that the Subcommittee alert Mr. Thro to the fact that the Committee would not favor an asymmetrical provision. By consensus, the matter was retained on the study agenda.

B. Items Awaiting Initial Discussion

1. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative rulings)

Judge Stewart welcomed Judge Kelly, who is a member of the Civil Rules Committee and who joined the Appellate Rules Committee for its discussion of proposed new Appellate Rule 12.1. Judge Stewart invited the Reporter to present the proposed Rule:

Rule 12.1 [Remand After an] Indicative Ruling by the District Court [on a Motion for Relief That Is Barred by a Pending Appeal]

- (a) Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that it lacks authority to grant because an appeal has been docketed and is pending, the movant must notify the circuit clerk [when the motion is filed and when the district court acts on it] [if the district court states that it [might or]

would grant the motion].

- (b) **Remand After an Indicative Ruling.** If the district court states that it [might or] would grant the motion, the court of appeals may remand for further proceedings [and, if it remands, may retain jurisdiction of the appeal] [but retains jurisdiction [of the appeal] unless it expressly dismisses the appeal]. [If the court of appeals remands but retains jurisdiction, the parties must notify the circuit clerk when the district court has decided the motion on remand.]

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant relief under a rule such as Civil Rule 60(b). But it can entertain the motion and deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984). The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk [when the motion is filed in the district court and again when the district court rules on the motion] [if the district court states that it [might or] would grant the motion]. If the district court states that it [might or] would grant the motion, the movant may ask the court of appeals to remand the action

so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b).

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) (“[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.”). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

[If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.]

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (“[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited

remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.”).

The Reporter reviewed the genesis of the proposed Rule. It grows out of a proposal originally made by the Solicitor General in 2000. The proposal is designed to promote awareness of and uniformity in the practice of indicative rulings concerning motions which the district court lacks authority to grant due to a pending appeal. In 2001, the Appellate Rules Committee referred the question to the Civil Rules Committee; that Committee has now decided to propose a new Civil Rule 62.1 which would formalize the indicative-ruling practice in civil cases. The Civil Rules Committee will seek permission to publish the proposed Civil Rule in August 2007. Thus, if the Appellate Rules Committee decides to propose a corresponding Appellate Rule, the goal would be to seek permission to publish that Appellate Rule in August 2007 as well.

The Reporter gave a brief overview of current practice. A district court faced with a motion that it lacks authority to grant due to a pending appeal may defer consideration of the motion; in most circuits (but not the Ninth Circuit) it may deny the motion; or it may indicate that it would grant the motion if the court of appeals were to remand for that purpose. Local rules in the Sixth and Seventh Circuits address the practice, as does the D.C. Circuit’s Handbook of Practice and Internal Procedures.

Assuming that an Appellate Rule should be adopted, several questions arise. One issue is whether the Rule should cover appeals in criminal cases. The Seventh Circuit and D.C. Circuit provisions cover criminal cases, and a Supreme Court case – *United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984) – approves the use of the procedure with respect to new trial motions under Criminal Rule 33. Mr. Letter stated that the Department of Justice might prefer that the proposed Appellate Rule not cover criminal cases, but that the Department is still studying the matter. It was decided that the Note’s reference to Rule 12.1’s applicability to criminal cases should be placed in brackets for the purposes of publication.

Another question is whether the Rule should cover appeals in bankruptcy cases. There is some sparse caselaw reflecting the use of the indicative-ruling procedure in bankruptcy, but the Reporter’s impression is that the procedure is much less common in bankruptcy. Mr. Ishida noted that Judge Wedoff has stated that the indicative-ruling procedure is very rarely used in the bankruptcy context.

A key question concerns the nature of the indicative ruling that would be necessary before a remand occurs. The Civil Rules Committee has debated at length the relative merits of requiring the district judge to state that he or she “would” grant the motion in the event of a remand, versus requiring merely a statement that the district judge “might” grant the motion. The Civil Rules Committee intends to publish its Civil Rule 62.1 using the formulation “[might or] would.” A judge member expressed a preference for “would,” but he noted that the Committees will obtain further feedback on this issue when the proposed rules are published for

comment. An attorney member likewise expressed a preference for “would” rather than “might.” Another attorney member, though, noted that “would” would require a lot of work on the part of the district court. A judge observed that requiring “would” might make the district court feel that it needs full briefing before issuing the indicative ruling. An attorney member responded that the district court would have the indicative-ruling motion before it. A judge member noted that the district court’s docket pressures might preclude it from providing a full treatment of the issue in an expeditious fashion; but he also noted that “might” did not seem like a useful standard. Another judge member suggested that if a district judge’s indicative ruling merely said the district judge “might” grant the motion, the court of appeals would probably not remand the case – unless the appeal presented very difficult issues. An attorney member suggested that even an indicative ruling that used “might” could give the appellate court useful information. Another attorney member suggested that wording other than “might” could be preferable.

The proposed Rule 12.1 contains alternative options concerning the timing of the notification to the Court of Appeals. One option would require that the movant notify the Court of Appeals both when the motion is filed in the district court and when the district court acts on the motion; the other option would require notification only if the district court indicates an interest in granting the motion. The circuit clerks who have reviewed the proposed Rule 12.1 voice a strong preference for the latter. Judge Kelly observed that this choice presents an important question. At the Civil Rules meeting, Mr. Keisler had voiced the concern that a litigant could get in trouble if they moved in the district court for an indicative ruling and did not notify the appellate court. Mr. Letter echoed this concern, pointing out that it could pose a particular problem in circuits that hear appeals relatively quickly. Mr. Fulbruge stated that, in his experience, indicative-ruling motions are usually made by prisoners, and that the circuit clerk usually first hears of the matter from the district court itself. He also observed that the use of electronic filing will reduce the problems associated with notification.

Another question is whether docketing of the appeal is the right point of demarcation with respect to the passing of jurisdiction from the district court to the court of appeals, or whether jurisdiction passes at the time the notice of appeal is filed. Arguments can be made in support of either position; the clerks favor using docketing as the point of demarcation. The Reporter observed that the Civil Rules Committee appears to lean toward using the phrase “because of an appeal that has been docketed and is pending,” so as to avoid a strong position on the question of whether the docketing is key to the lack of jurisdiction. No objections to this adjustment in phrasing were voiced.

A judge member stated that he had never encountered a request for an indicative ruling. Another judge member stated that he, likewise, did not recall encountering remand requests associated with an indicative ruling. He noted, however, that the Civil Rules Committee has indicated its intention to proceed with the proposed Civil Rule 62.1, and not having a corresponding Appellate Rule would make the Civil Rules Committee’s task more complex.

A member noted that the procedure often arises in the context of appellate mediation:

parties to the mediation may agree to settle, but only if the judgment below is vacated as a condition of settlement. A judge member expressed strong disapproval of this practice. The Reporter suggested that she could convey to the Civil Rules Committee a request that the Note not use the practice of settlement on appeal as an example of the ways in which Civil Rule 62.1 would be useful beyond the context of Rule 60(b).

It was decided that the Committee should consider whether to propose an Appellate Rule on the subject at all, and after that the Committee could address particular choices concerning the wording of the proposed Rule. A member moved that the Committee adopt a proposed Rule designed to mirror proposed Civil Rule 62.1. The motion was seconded. A member observed that if the proposed Civil Rule 62.1 goes forward, the Appellate Rules Committee should be involved in the process; it is appropriate for the Appellate Rules Committee to have a say in the drafting of rules on this question. A judge member agreed that if a Civil Rule on the subject is adopted, there probably should also be an Appellate Rule; he stated, however, that he did not believe that a Civil Rule on the subject should be adopted. Judge Stewart assured the Committee that, whether or not the Committee voted to adopt Rule 12.1, he would convey to the Civil Rules Committee the concerns discussed by members of the Appellate Rules Committee. By a vote of 5 to 3, the Committee voted to adopt a proposed Appellate Rule concerning indicative rulings.

A judge suggested, as a possible alternative to “might,” the phrase “raises a substantial issue.” Two attorney members and a judge member agreed that “substantial issue” was a better choice than “might.” A judge illustrated the way in which the “substantial issue” language might apply: Suppose that the district court grants summary judgment dismissing the case. While the plaintiff’s appeal is pending, the plaintiff discovers new evidence, and moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion “raises a substantial issue,” the court of appeals may well wish to remand rather than proceeding to hear the appeal. Judge Stewart observed that the Note should explain the meaning of “raises a substantial issue.” A member suggested that another possible phrasing would be “or that there is a substantial probability that it would grant the motion.” A judge member disagreed, stating that “raises a substantial issue” is the better formulation. A judge member suggested deleting the alternative “would grant,” because the inclusion of that option might lead the district court to box itself in when ruling on the motion. An attorney member disagreed, noting that if the district court is willing to state that it “would” grant the motion, this conveys information that the court of appeals would want to know. A judge member asserted that there is no downside to including “would grant” as one of the two alternatives. A motion was made and seconded that the indicative ruling contemplated in Rule 12.1(a) & (b) be described as follows: “if the district court states that it would grant the motion or that the motion raises a substantial issue.” The motion passed unanimously.

The Committee voted unanimously to delete from Rule 12.1(a) the bracketed phrase “when the motion is filed and when the district court acts on it.”

The Committee next discussed whether Rule 12.1(b) should set a default rule that the court of appeals retains jurisdiction (when it remands) unless it expressly dismisses the appeal. A motion in favor of this default rule was moved and seconded and passed without opposition.

The Committee concluded that the word “promptly” should be added in both subdivisions to qualify the duties of notification set by those provisions.

2. Item No. 07-AP-C (FRAP 4(a)(4) and 22 – proposed changes in light of pending amendments to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255)

Judge Stewart invited the Reporter to present the following proposed amendments to Rules 4 and 22:

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 — or a motion for reconsideration under Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 —; the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
- (i) for judgment under Rule 50(b);
 - (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

- (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
- (iv) to alter or amend the judgment under Rule 59;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

* * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

- (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C.

§ 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or~~

~~state why a certificate should not issue.~~ The district clerk must send the certificate or, if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

The Reporter explained that these proposed amendments are designed to track the requirements set in the proposed new Rules 11 governing proceedings under 28 U.S.C. §§ 2254 and 2255. The Criminal Rules Committee voted at its spring meeting to seek permission to publish the new Rules 11 for comment in summer 2007. The Rules 11 are designed to define the mechanism for seeking reconsideration of a district court's order in a Section 2254 or Section 2255 proceeding. The proposed rules will also make the certificate-of-appealability ("COA") requirements more prominent by placing references to them in the Section 2254 and Section 2255 rules, and will change the timing of COA determinations by requiring the district court to grant or deny the COA at the time that it issues its decision rather than at the time the notice of appeal is filed.

The Reporter noted that the proposed Rules 11 adopted by the Criminal Rules Committee will not include the existing requirement that a district court state its reasons for denying a COA. The requirement of an explanation for such a denial is of long standing and was retained by Congress when it rewrote Appellate Rule 22 as part of the Antiterrorism and Effective Death Penalty Act of 1996. The Criminal Rules Committee, however, considered this point and concluded that the explanation for denials of the COA is superfluous and not required by statute. A judge member agreed with this assessment, noting that an explanation of the COA's denial

would not add anything to the reasoning provided in the underlying district court decision. The consensus of the Committee was that the requirement of an explanation for COA denials need not be retained.

In the light of that consensus, the Reporter suggested that the proposed amendment to Rule 22 be reworded by deleting “, if any,” from the text of the Rule and that the Note be reworded. By voice vote without opposition, the Committee approved the reworded proposed amendment to Rule 22 and approved the proposed amendment to Rule 4.

3. Item No. 07-AP-D (FRAP 1 – definition of “state”)

Judge Stewart invited the Reporter to introduce the following proposed amendment:

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

- (1) These rules govern procedure in the United States courts of appeals.
- (2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) [~~Abrogated~~] Definition. In these rules, “state” includes the District of Columbia and any commonwealth, territory, or possession of the United States.

(c) Title. These rules are to be known as the Federal Rules of Appellate

Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term “state” to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, as used in these Rules, “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

The Reporter explained that this proposed amendment grows out of the time-computation project. The time-computation template includes state holidays within the definition of legal holidays. But the relevant sets of rules apply to courts that sit in the District of Columbia, or a commonwealth, or a territory, as well as to courts that sit within a state. Thus, it seems advisable to define “state” to include D.C. and any commonwealth, territory or possession of the United States. The Appellate Rules do not contain an overarching definition of “state,” so a definition should be added either in Rule 26(a) or for the Appellate Rules more generally.

Professor Coquillette noted the need for care in working through the possible consequences of an overarching definition. He noted that American Samoa has objected in the past to a proposed rule change that would have affected it. The Reporter responded that defining “state” to include territories such as American Samoa would only result in additional protections for American Samoa’s interests, so it is to be hoped that American Samoa would not object to inclusion within the proposed definition. Mr. Letter seconded Professor Coquillette’s caution regarding possible unintended consequences. Mr. Letter undertook to consult with all the affected entities and to report his findings to the Committee. By consensus, the Committee retained this item on its study agenda.

A member asked how the Committee’s decision not to proceed at this time with the proposed definition would affect the time-computation project. The Reporter responded that Rule 26(a) can be published for comment with the definition of the term “state” in subdivision 26(a)(6)(B). Although the proposed overarching definition of “state” in Rule 1(b) presumably will not catch up with the time-computation package (assuming that package continues to move forward), if the Committee later decides to proceed with the overarching definition it can make a conforming change to Rule 26(a)(6)(B) at that time.

4. Item No. 06-07 (Proposed new rule concerning advance disclosure of panel composition)

Judge Stewart invited the Reporter to describe the proposal for a new rule concerning advance disclosure of panel composition. Howard J. Bashman, an appellate litigator who maintains a widely-read weblog on appellate practice, has suggested that the Committee consider proposing an Appellate Rule that would require the courts of appeals to give at least ten days’ advance notice of the identity of the members of an oral argument panel.

The Reporter noted that current practice in the courts of appeals spans a spectrum. At one end is the D.C. Circuit, which in civil cases provides more than two months’ advance notice of panel identity (with the result that counsel ordinarily knows the panel’s identity before the briefs are filed). The Eighth Circuit provides a month’s notice, the Sixth Circuit two weeks, and the Third Circuit ten days. The First, Fifth, Ninth, Tenth and Eleventh Circuits each provide a week’s notice. The Second Circuit announces the panel composition the Thursday prior to

argument. And the Fourth, Seventh and Federal Circuits announce the panel's identity only on the day of argument.

Advocates of advance disclosure of panel identity point to a number of benefits. Advance disclosure would help lawyers prepare for argument, and would be particularly useful to lawyers who are unfamiliar with the judges of the relevant circuit. Advance disclosure would facilitate recusal requests; it is more awkward to request recusal after the oral argument has already occurred. But critics of the practice contend that it may encourage an undue focus on panel judges' prior opinions. They also worry that lawyers might engage in strategic attempts to postpone argument (and thus obtain a different panel) or to moot the appeal. Strategic postponements can be headed off by pinning down the lawyers' schedules prior to announcing the panel composition. But strategic mooting may be a less tractable problem, as suggested by some who have commented on the Federal Circuit's recent and unsuccessful experiment with advance disclosure. Mr. Bashman's proposal would significantly alter the practice in three circuits, and judges on at least one of those circuits would be likely to oppose the proposal vigorously.

An attorney member stated that the proposed rule might be useful to lawyers but also that it makes sense to defer to the views of the judges on this issue. Another attorney member noted that the proposed rule would be useful with respect to recusal requests. For example, a Department of Justice attorney may represent (in an unrelated proceeding) a judge who turns out to be on an argument panel in another case the attorney is litigating. Knowing the panel's identity in advance would assist with handling recusal requests. A judge agreed that the proposed rule might help with recusal requests, but he asked whether the same goal could not be accomplished by requiring attorneys to list the circuit judges who should not sit to hear a case. The attorney member responded that the latter approach would be of little use in a circuit in which a great deal of time elapses between briefing and argument.

A judge member noted that the circuits' varying practices stem from the great variation in circuit cultures, and predicted that the proposed Rule would never be adopted. Professor Coquillette observed that the circuits' current practices are contained in Internal Operating Procedures, and he noted that practices that affect outsiders (as opposed to affecting only internal court procedures) should be placed in local rules.

By consensus, the Committee decided to remove this item from its study agenda.

5. Item No. 07-AP-A (Comments concerning FRAP 32.1)

Judge Stewart invited the Reporter to summarize the suggestions made by Robert Kantowitz concerning the recently-adopted Appellate Rule 32.1. The Reporter's memo attaching Mr. Kantowitz's suggestions detailed the following considerations. Mr. Kantowitz's proposal that the Rule be clarified to make clear that its ban on restriction or prohibition of citation applies

both to the issuing court and to other courts is unnecessary, since the Rule is clear on that point. Mr. Kantowitz's second suggestion is that the Rule be amended to require the courts of appeals to permit citation of pre-2007 unpublished opinions under certain circumstances. But the question of retroactivity was fully aired during the debate over Rule 32.1 and it seems unlikely that one would wish to revisit the question at this point. Mr. Kantowitz also raises issues relating to state court practice and to the citation of foreign court opinions; it is not evident, though, that rulemaking on those issues is called for. Finally, Mr. Kantowitz asks whether a panel or circuit could suspend Rule 32.1(a) in a particular case or in general under the authority of Rule 2. It is clear that Rule 2 does not authorize a general suspension of Rule 32.1(a), and suspensions of Rule 32.1(a) in a particular case seem unlikely.

By consensus, the Committee decided to remove this item from its study agenda. It was noted that there will be further occasions to consider Rule 32.1's operation after the Rule has been in effect for a longer period of time.

VII. Additional Old Business and New Business

A. Status of previously approved amendments

The Committee's practice is to hold approved amendments for submission to the Standing Committee in a package, rather than sending up a single proposal by itself. As a result, three proposals which the Committee approved in 2003 or 2004 have not yet been submitted to the Standing Committee. Now that the Committee is requesting permission to publish a number of other proposed amendments, it seems useful to consider whether to send up the previously approved amendments as well.

1. Item No. 01-03 (FRAP 26 – clarify operation of three-day rule)

Judge Stewart invited the Reporter to describe the proposed amendment to Rule 26(c). In 2003, the Committee approved an amendment to Rule 26(c) that would clarify the interaction between the three-day rule and Rule 26(a)'s time-computation provisions. At the time the amendment was proposed, the major goal was to clarify how the three-day rule interacted with Rule 26(a)'s directive to omit intermediate weekends and holidays when computing short time periods: Should the three days be ignored when determining how short the relevant period is, or should the three days be included for that purpose? The amendment's goal was to make clear that the three days should be ignored rather than included. That issue will be obviated if the time-computation project goes forward, since that project adopts a days-are-days approach to the computation of all time periods.

However, there are two reasons why the adoption of the proposed time-computation changes will not render Item 01-03 moot. First, the Civil Rules Committee already adopted a

parallel amendment to Civil Rule 6, and it is worthwhile for the Appellate Rules' approach to parallel that taken in the Civil Rules. Second, the proposed amendment will clarify the approach to be taken when a time period (computed without reference to the three-day rule) ends on a weekend or holiday. Suppose the period ends on a Saturday: Should one count forward to the Monday, and then add three days for an end point of Thursday? Or should one just add three days counting from the Saturday, for an end point of Tuesday? The proposed amendment will make clear that one should employ the former, not the latter, approach.

Two attorney members agreed that the amendment would provide a useful clarification. Because Item No. 01-03 will likely be published for comment at the same time as the time-computation project, it seems useful to include two versions of the Note to Item No. 01-03 – one that could be used if the time-computation project is adopted, and one that could be used if it is not.

Without opposition, the Committee by voice vote approved the proposed amendment to Rule 26(c).

2. Item No. 03-02 (FRAP 7 – clarify reference to “costs”)

Judge Stewart invited the Reporter to discuss the proposed amendment to Rule 7. This amendment, which the Committee approved in 2003, is designed to resolve a circuit split on whether the items secured by a Rule 7 bond can include attorney fees. The Reporter suggested that further study would be useful concerning the wording of the proposed amendment.

By consensus, the Committee decided to retain the proposed amendment on its study agenda rather than sending it forward to the Standing Committee at this time.

3. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Stewart invited the Reporter to discuss Item 03-09, which concerns proposed amendments to Rules 4 and 40. These amendments, which the Committee approved in 2004, are designed to clarify the application of the extended time periods for taking an appeal or seeking rehearing in cases where an officer or employee of the United States is sued in his or her individual capacity. As discussed earlier in the meeting, the pending proposal (Item 06-06) with respect to state-government litigants concerns the same two Rules; thus, one question is whether Item 03-09 should be held pending the Committee's further discussion of Item 06-06.

A member stated that the amendments concerning federal officers or employees should be sent forward without awaiting the Committee's further deliberations concerning the treatment of state-government litigants. By consensus, the Committee decided to request permission to

publish Item 03-09 in summer 2007.

B. New Business

The Reporter noted that Mr. Levy has proposed that the Committee consider adopting a Rule concerning amicus briefs with respect to rehearing en banc. Due to the press of other business, the Reporter was unable to fully investigate the merits of this proposal in advance of the Committee's spring meeting; but she expects to make a presentation on this issue at the fall meeting.

VIII. Date and Location of Fall 2007 Meeting

The Committee tentatively chose November 1 and 2 as the dates for the Committee's fall 2007 meeting. The location will be announced.

IX. Adjournment

The Committee adjourned at 10:15 a.m. on April 27, 2007.

Respectfully submitted,

Catherine T. Struve
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2007
San Francisco, California
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Monday and Tuesday, June 11 and 12, 2007. All the members were present:

- Judge David F. Levi, Chair
- David J. Beck, Esquire
- Douglas R. Cox, Esquire
- Judge Sidney A. Fitzwater
- Chief Justice Ronald M. George
- Judge Harris L Hartz
- John G. Kester, Esquire
- Judge Mark R. Kravitz
- William J. Maledon, Esquire
- Deputy Attorney General Paul J. McNulty
- Professor Daniel J. Meltzer
- Judge James A. Teilborg
- Judge Thomas W. Thrash, Jr.

The Department of Justice was also represented at the meeting by Ronald J. Tenpas, Associate Deputy Attorney General, and Alice S. Fisher, Assistant Attorney General for the Criminal Division.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Administrative Office senior attorney
Jeffrey N. Barr	Administrative Office senior attorney
Joe Cecil	Research Division, Federal Judicial Center
Matthew Hall	Judge Levi's rules law clerk
Professor Geoffrey C. Hazard, Jr.	Committee consultant
Professor R. Joseph Kimble	Committee consultant

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
 - Judge Carl E. Stewart, Chair
 - Professor Catherine T. Struve, Reporter
- Advisory Committee on Bankruptcy Rules —
 - Judge Thomas S. Zilly, Chair
 - Professor Jeffrey W. Morris, Reporter
- Advisory Committee on Civil Rules —
 - Judge Lee H. Rosenthal, Chair
 - Professor Edward H. Cooper, Reporter
- Advisory Committee on Criminal Rules —
 - Judge Susan C. Bucklew, Chair
 - Professor Sara Sun Beale, Reporter
- Advisory Committee on Evidence Rules —
 - Judge Jerry E. Smith, Chair
 - Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Levi noted that the agenda materials for the meeting were voluminous, consisting of five binders and several separate handouts. He suggested that the committee consider taking further steps to distribute the work more evenly between its January and June meetings, since the January meetings tend to have a lighter agenda. He expressed his gratitude to Judge Rosenthal for agreeing, on behalf of the Advisory

Committee on Civil Rules, to lighten the committee's agenda by deferring consideration of a proposed revision of FED. R. CIV. P. 56 (summary judgment) in order to pursue further dialog with the bar on the proposed rule.

Judge Levi reported with great sadness the death of Mark Kasanin, a distinguished San Francisco attorney and member of the Advisory Committee on Civil Rules from 1993 to 2002. He pointed to Mr. Kasanin's unrivaled expertise in admiralty law, his great insight and judgment, and his broad connections with the practicing bar. Judge Levi noted that Mr. Kasanin had brought to the committee's attention the difficult practical issues faced by the bar with regard to discovery of information stored in electronic form. Indeed, he had been instrumental in getting the advisory committee to initiate the project that eventually produced the package of "electronic discovery" amendments to the civil rules that took effect on December 1, 2006. Judge Levi said that Mark's wife, Anne, had come to all the committee meetings and was well loved by all. He asked the committee to send its condolences to her.

Judge Levi reported that the Chief Justice had named Judge Rosenthal to replace him as chair of the Standing Committee. He said that she would be an absolutely superb chair. He also reported that the Chief Justice had named: (1) Judge Kravitz to replace Judge Rosenthal as chair of the Advisory Committee on Civil Rules; (2) Judge Tallman (9th Circuit) to replace Judge Bucklew as chair of the Advisory Committee on Criminal Rules; (3) Judge Hinkle (N. D. Fla.) to replace Judge Smith as chair of the Advisory Committee on Evidence Rules; and (4) Judge Swain (S. D. N.Y.) to replace Judge Zilly as chair of the Advisory Committee on Bankruptcy Rules.

Judge Levi thanked Judge Kravitz for his enormous contributions to the Standing Committee, and most especially for his work in drafting and coordinating the package of time-computation rules to be considered by the committee later in the meeting. He expressed his delight that Judge Kravitz would soon take over as chair of the Advisory Committee on Civil Rules.

Judge Levi noted that Judge Bucklew had been in the eye of the storm during her term as chair of the Advisory Committee on Criminal Rules, as the committee considered several very controversial proposals of public importance that generated sharply divided views. He noted that it is extremely difficult to achieve common ground, but Judge Bucklew had been masterful in achieving it wherever possible.

Judge Levi pointed out that the Advisory Committee on Evidence Rules, under the leadership of Judge Smith, had worked hard to produce the proposed new FED. R. EVID. 502 (waiver of attorney-client privilege and work product protection), which should be of enormous benefit to the American legal system. He thanked Judge Smith for his exceptional leadership in producing a top-quality product.

Judge Levi pointed out that Judge Zilly had served as chair of the bankruptcy advisory committee during a period of extraordinary rules activity in the wake of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He noted that the committee had been amazingly productive in implementing the massive legislation in a very short period. He thanked Judge Zilly for his grace and good humor under pressure.

Judge Levi noted with regret that the terms on the Standing Committee of Judge Fitzwater and Judge Thrash were about to end and that they would attend their last meeting in January 2008. He said that they had been sensational committee members. Judge Fitzwater, he said, was exceptionally bright and a great problem-solver. Among other things, he noted, Judge Fitzwater had produced the template privacy rule used by the advisory committees to implement the E-Government Act of 2002.

Judge Thrash, he said, had been a member of the style subcommittee and had been instrumental in developing the electronic-discovery and class-action civil rules amendments. In addition, he pointed out, Judge Thrash had played a vital role in shaping the way that committee notes are written, believing that they should normally be short and to the point. He also praised Judge Thrash for his great wit and good heart.

Judge Levi also expressed appreciation for the superb support that he and the six rules committees have enjoyed from the staff of the Administrative Office. He noted that Judy Krivit had just announced her retirement after 16 years with the rules office, and he asked that the minutes reflect the committee's heartfelt thanks and gratitude for her dedicated service.

Judge Levi reported briefly on the rules changes approved by the Supreme Court in April 2007 that would take effect on December 1, 2007. He noted particularly the milestone achievement of restyling the entire Federal Rules of Civil Procedure. The restyled civil rules will also take effect on December 1, 2007.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee by voice vote voted without objection to approve the minutes of the last meeting, held on January 11-12, 2007.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters of interest to the committee. First, he said, a subcommittee of the Judiciary Committee of the House of Representatives had just held a hearing on the proposed Bail Bond Fairness Act. The legislation would

directly amend FED. R. CRIM. P. 46 (release from custody) to limit a judge's authority to forfeit a bond for violation of any condition of release other than failure of the defendant to appear at a court proceeding. He reported that Judge Tommy Miller, a former member of the Advisory Committee on Criminal Rules, had testified at the hearing to express the opposition of the Judicial Conference to the legislation. He noted that the Department of Justice was also opposed to the measure. The bill had been reported out of the House Judiciary Committee in the last Congress and was expected to be reported out again this year. But, he said, the prospects for ultimate enactment in this Congress were not favorable.

Mr. Rabiej reported that a draft response had been prepared to a letter from Senator Kyl, which expressed concerns about the limited nature of the changes proposed by the advisory committee to the criminal rules to accommodate the Crime Victims Rights Act. He said that the draft was still being reviewed, but would be sent shortly.

Finally, Mr. Rabiej reported that the privacy amendments to the rules required by the E-Government Act of 2002 will take effect on December 1, 2007. He noted that the amendments essentially codify, with some adjustments, the Judicial Conference's existing privacy policy developed originally by its Court Administration and Case Management Committee.

He said that the Court Administration and Case Management Committee was in the process of updating the privacy policy and was exploring three issues that might have a future impact on the federal rules. First, he said, the committee would encourage the courts not to place certain types of documents in the public case file because they contain personal information that would have to be redacted. Second, the committee was examining a number of problems raised by the posting of transcripts on the Internet. He said that the new policy will likely state that transcripts should not be posted until 90 days after the conclusion of a court proceeding.

The problem remains, though, as to who will be responsible for redacting personal information from the transcripts before they are posted. Under the new federal rules, responsibility falls on the person filing a document, but it is not reasonable to expect the court reporter to be responsible for redaction. Thus, he said, the Court Administration and Case Management Committee was considering requiring the parties to redact personal information and give their edits to the reporter. Finally, Mr. Rabiej said that the Court Administration and Case Management Committee was concerned about persons who surf the web in order to obtain embarrassing or sensitive information about individuals.

Mr. McCabe reported that the rules office was in the process of posting the rules committees' agenda books on the Internet. He noted that the staff was also continuing its efforts to locate and post historic rules committee documents.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center (Agenda Item 4). He directed the committee's attention specifically to a preliminary report by the Center on the processing of capital habeas corpus petitions in the federal courts. The research, he said, shows great variation among the courts as to the speed at which they handle and terminate these cases. He noted, too, that a great deal of the time charged against the federal courts really consists of the time that cases are pending on remand in the state courts.

Judge Levi thanked the Center for its work in compiling and analyzing the local district court rules, orders, and policies dealing with *Brady v. Maryland* requirements. He said that the Center would be prepared to conduct further research on how the rules, orders, and policies actually work in practice, if the committee requests it. Mr. Cecil also reported that the Center was in the process of studying the local rules and procedures of the federal courts in implementing the Crime Victims' Rights Act.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in their memorandum of May 9, 2007 (Agenda Item 5).

Judge Kravitz said that he and Professor Struve would address the time-computation template rule and substantive issues, and then each advisory committee would address its own specific rules. He noted that the template had been exceedingly difficult to perfect, but it had improved substantially over time due to many refinements suggested by the advisory committees and their reporters. He highlighted two changes that had been added to the template since the January 2007 meeting.

First, he explained that a number of statutes provide an explicit method for counting time, such as by specifying "business days" only. The template, he said, had been amended to apply only to statutes that do not themselves specify a method. Second, he said, the drafters of the template had struggled with how to count backwards when the clerk's office is inaccessible on the last day of a deadline. He thanked Judge Hartz for recommending that the inaccessibility provision be placed in a separate section. In addition, the committee note will emphasize that although a judge may set a different

time by order in a specific case, a district court may not overrule the provisions of the national rule through a local rule or standing order.

Professor Struve added that the template had been amended to add a definition of “state” that includes the District of Columbia and the commonwealths, territories, and possessions of the United States. She noted that the Advisory Committee on Appellate Rules was still considering the definition and whether to extend it to become a global definition for the appellate rules as a whole. She noted, too, that the template had been adjusted to take account of the fact that some circuits and districts span more than one time zone. She said that the advisory committees were still considering making that adjustment in their own rules.

Judge Kravitz pointed out that the committee was planning to seek legislation to change some short time periods set forth in statutes. The public comments, he said, should be helpful in identifying any statutes that need to be changed. Professor Struve added that the advisory committees had been working hard at identifying any statutes impacted by the proposed rules, and the Department of Justice should complete a comprehensive review of statutes by the end of June. She suggested that the rules web page could provide a link to the list of all the statutes that the committees discover.

Judge Kravitz said that consideration had been given to including language in the template authorizing a judge to alter statutory deadlines for a variety of circumstances, but the idea was not pursued. With regard to legal holidays, he said, the text of the rule will not be changed, but the committee note will include a new sentence addressing ad hoc legal holidays declared by the President, such as the holiday to honor the late President Gerald F. Ford. In addition, individual courts will have to coordinate all their local rules by December 1, 2009, to adjust to the new time-computation method. Finally, Judge Kravitz announced his appreciation that Judge Zilly and the Advisory Committee on Bankruptcy Rules had extended themselves to prepare a complete package of time-computation amendments to the bankruptcy rules so that they can be published at the same time as the time-computation amendments to the other rules.

Judge Kravitz reported that each of the advisory committees would publish its version of the time-computation amendments in August 2007. He said that careful consideration needed to be given to the format of the publication. He suggested that it would be best to include a covering memorandum from Professor Struve explaining what the committees are trying to do on a global basis, and also to put the bar at ease that the net result will be that existing deadlines will not be shortened. But, he said, each advisory committee will be publishing other rules amendments having nothing to do with time computation. So, it would be advisable to have a single time-computation package that stands out from any other proposed rule changes. It might also include a list of all

the specific time periods and rules being changed and alert the district courts to begin the process of making conforming changes in their local rules.

APPELLATE RULES TIME COMPUTATION

Judge Stewart reported that the Advisory Committee on Appellate Rules had adopted the template as a revision of FED. R. APP. P. 26. Professor Struve noted that the advisory committee had modified the template to add subparts to Rule 26(a)(4) to recognize that a court of appeals may span more than one time zone. This, she said, is more likely with the courts of appeals than the district courts. She also noted that the proposed definition of a “state” in the appellate rules is slightly different from the template version.

Professor Struve said that the advisory committee generally had increased the 7-day time periods in the rules to 14 days. But, she noted, the proposed change from 7 days to 14 days in Rule 4(a)(6) would require a statutory change to 28 U.S.C. § 2107 to make the rule and the statute consistent. In a couple of places, she added, the advisory committee had increased the time period from 7 days only to 10 days, rather than 14, based on policy considerations involving the need for prompt responses.

In addition, Professor Struve said that the advisory committee had compiled a list of statutory time limits that should be lengthened. But the list does not include various 10-day statutory periods for taking an appeal, *e.g.*, 28 U.S.C. §§ 1292(b), 1292(d)(1), and 1292(d)(2), which the new time-computation method would effectively shorten to 10 calendar days. She noted that before the 2002 amendments to FED. R. APP. P. 26, litigators had lived with 10 calendar days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

BANKRUPTCY RULES TIME COMPUTATION

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had agreed to publish its time-computation changes to the bankruptcy rules on the same schedule as the other rules. The advisory committee, he said, agreed with the text of the template rule and accompanying committee note, including the most recent modifications. The template would appear as FED. R. BANKR. P. 9006(a). In addition, specific time changes would be made in 39 separate bankruptcy rules. The advisory committee, he said, had agreed with all the proposed conventions adopted by the other advisory committees – such as increasing periods of fewer than 7 days to 7 days and increasing 10-day periods to 14 days – except in the case of two rules.

The committee concluded that two very short deadlines in the current rules should remain unchanged. First, under FED. R. BANKR. P. 1007(d) (list of 20 largest creditors), a debtor in a Chapter 9 case or Chapter 11 case has two days after filing the petition to file a list of its 20 largest unsecured creditors. Second, under FED. R. BANKR. P. 4001(a)(2) (ex parte relief from the automatic stay), after a party has obtained an ex parte lifting of the automatic stay, the other party has two days to seek reinstatement of the stay. The committee would retain both deadlines at two days.

Judge Zilly reported that the biggest controversy faced by the advisory committee was whether to change the current 10-day period for filing a notice of appeal under FED. R. BANKR. P. 8002. In the end, the committee decided to extend the deadline to appeal to 14 days, consistent with the general convention of increasing 10-day periods to 14 days.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CIVIL RULES TIME COMPUTATION

Judge Rosenthal reported that the civil version of the template rule appeared as proposed FED. R. CIV. P. 6(a). She noted that the definition of a “state” had been bracketed in proposed Rule 6(a)(6)(B), and it was also included as a proposed amendment to FED. R. CIV. P. 81 (applicability of rules in general) as a global definition that would apply throughout the civil rules. The current Rule 81, she explained, includes the District of Columbia. It would be amended to include any commonwealth, territory, or possession of the United States.

She explained that in recommending changes to rules that contain specific time limits, the advisory committee had followed the convention of increasing periods of fewer than 7 days to 7-day periods and increasing 10-day periods to 14 days. But Rule 6(b) precludes a court from extending the current 10-day period for filing certain post-trial relief motions. Rather than follow the normal course of extending 10-day time periods to 14 days, the advisory committee had decided to fix the period for filing post-trial motions at 30 days, which is a more realistic period for the bar.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

CRIMINAL RULES TIME COMPUTATION

Judge Bucklew reported that the Advisory Committee on Criminal Rules had adopted the template as FED. R. CRIM. P. 45(a). She said that it had not had the opportunity to review the most recent changes in the text of the template, but she did not expect that it would have any problem in accepting them. She explained that the current criminal rule governing time computation, unlike the counterpart provisions in the civil, appellate, and bankruptcy rules, does not specify that the rule applies to computing time periods set forth in statutes. Some courts nonetheless have applied the rule when computing various statutory periods.

Professor Beale explained that it is not clear whether courts in general apply existing FED. R. CRIM. P. 45(a) to criminal statutes. Before the restyling of the criminal rules in 2002, Rule 45(a) had applied explicitly to computing time periods set forth in statutes. Deletion of the reference to statutes apparently was an unintentional oversight occurring during the restyling process. Nevertheless, some attorneys and courts still apply Rule 45 in computing statutory deadlines, as they did before the restyling changes.

Judge Bucklew referred to a few changes in individual time periods. With regard to FED. R. CRIM. P. 5.1 (preliminary examination), she said that the advisory committee would increase the 10-day time period to 14 days and the 20-day period to 21 days, which will require conforming changes in the underlying statute. The committee as a matter of policy decided to increase from 7 days to 14 days the deadlines specified in FED. R. CRIM. P. 29 (motion for a judgment of acquittal), FED. R. CRIM. P. 33 (motion for a new trial), and FED. R. CRIM. P. 34(b) (motion to arrest judgment) in order to give counsel more time to prepare a satisfactory motion. The advisory committee lengthened from 10 days to 14 days the maximum time in FED. R. CRIM. P. 41 (search warrant) to execute a warrant, but there was some sentiment among the committee members not to extend the period.

Professor Beale added that magistrate judges commonly require the government to execute a search warrant in less than the maximum 10 days specified in the current rule. Accordingly, the advisory committee did not believe that it was necessary to retain the 10-day period, rather than extend it to 14 days. She noted, too, that there had been some concern among committee members over extending the time to file a motion for a new trial, but the Federal Rules of Appellate Procedure expressly allow the district court to retain jurisdiction in this circumstance. She said that the advisory committee was of the view that the short time period in the current rules frequently leads parties to file bare-bones motions.

Judge Bucklew reported that the advisory committee was also recommending increasing from 10 days to 14 days the time limits in Rule 8 of the §§ 2254 and 2255 Rules for filing objections to a magistrate judge's report.

Professor Beale added that the advisory committee would make additional, minor changes in the text and note to take account of last-minute changes to the template suggested by the other advisory committees.

The committee without objection by voice vote approved the proposed time-computation rule amendments for publication.

EVIDENCE RULES TIME COMPUTATION

Judge Smith pointed out that the Federal Rules of Evidence do not lend themselves to a time-computation rule, and there is no need for one. Professor Capra added that there are no short time periods in the evidence rules, and a review of the case law had revealed no problems with the current rules. Accordingly, the Advisory Committee on Evidence Rules voted unanimously not to draft a time-computation rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of May 25, 2007 (Agenda Item 10).

Amendments for Publication

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on page 8, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

FED. R. APP. P. 12.1

Judge Stewart reported that his committee had been asked by the Advisory Committee on Civil Rules to consider adopting a new appellate rule to conform with the proposed new FED. R. CIV. P. 62.1 (indicative rulings). Several circuits, he said, have local rules or internal operating procedures recognizing the practice of issuing indicative rulings. Under the practice, a district court – after an appeal has been docketed and is still pending – may entertain a post-trial motion, such as a motion for relief from a judgment, and either deny it, defer it, or “indicate” that it might or would grant the motion if the court of appeals were to remand the action.

The proposal to formalize the indicative ruling practice in the national rules, he said, had been pending for several years, but had not aroused much enthusiasm in the appellate advisory committee. Some members simply saw no need for a rule. Nevertheless, the committee voted 5-3 to recommend a new appellate rule in order to conform with the new civil rule proposed by the civil advisory committee.

Judge Stewart noted that the original proposal from the Advisory Committee on Civil Rules had contained alternative language choices. One would authorize a district court to state that it “would” grant the motion if the court of appeals were to remand. The other would authorize the district court to state that it “might” grant the motion if remanded.

He said that the appellate advisory committee was of the view that the second formulation was too weak to justify a remand by the court of appeals, and the first formulation was too restrictive. After consulting with the other committees and their reporters, substitute language was agreed upon that allows the district court to “state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.” He added that even if the district judge decides to rule on the matter, the court of appeals still has discretion to decide whether to remand.

Judge Stewart noted that the proposed FED. R. APP. P. 12.1 states that the moving party in the district court must provide prompt notice to the clerk of the court of appeals, but only after the district court states that it would grant the motion or that it raises a substantial issue. He noted that the clerks of the courts of appeals had stated strongly that they did not want to be notified at the time a motion is filed.

Judge Stewart pointed out that the proposed appellate rule covers rulings in both civil and criminal cases. The accompanying committee note explains that FED. R. APP. P. 12.1 could be used, for example, with motions for a new trial under FED. R. CRIM. P. 33. In addition, he said, the text sets the default in favor of the court of appeals retaining jurisdiction. It states that the appellate court may remand for further proceedings in the district court, but retains jurisdiction unless it expressly dismisses the appeal.

Judge Rosenthal explained that the proposed new FED. R. CIV. P. 62.1 had been presented to the Standing Committee at the January 2007 meeting. At that time, several suggestions were made regarding the text of the rule and the need to coordinate closely with the appellate advisory committee. That coordination, she said, had been very productive, and the resulting civil and appellate rules provide an intelligent way to frame precisely what the district court must do. Professor Cooper added that there are a few places in which the committee notes need to be modified further.

Several members said that the proposed rules would promote efficiency. One asked whether the appellate rule would govern bankruptcy appeals. Professor Struve replied that, as written, it would cover bankruptcy appeals, although they are not mentioned specifically in the text. She added that if the Federal Rules of Bankruptcy Procedure were amended to address indicative rulings, the proposed appellate rule would accommodate the change.

The committee without objection by voice vote approved both proposed new rules – FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1 – for publication.

FED. R. APP. P. 4(a)(4)(A) and 22(b)

Judge Stewart reported that the proposed amendments to Rules 4(a)(4)(A) (time to file an appeal) and 22(b) (certificate of appealability) were designed to conform the Federal Rules of Appellate Procedure to changes proposed by the Advisory Committee on Criminal Rules to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255.

The committee without objection by voice vote approved the proposed amendments for publication. [But later in the meeting, the committee voted to publish only the proposed amendment to Rule 22(b), which dealt just with the certificate of appealability. See page 41.]

FED. R. APP. P. 4(a)(4)(B)(ii)

Judge Stewart explained that the proposed amendment would eliminate an ambiguity created as a result of the 1998 restyling of the Federal Rules of Appellate Procedure. The current, restyled rule might be read to require an appellant to amend its prior notice of appeal if the district court amends the judgment after the notice of appeal is filed – even if the amendment is insignificant or in the appellant’s favor. The advisory committee, he explained, would amend the rule to return it to its original meaning. Thus, a new or amended notice of appeal would be required only when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or an alteration or amendment of a judgment on such a motion.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. APP. P. 4(a)(1)(B) and 40(a)(1)

Judge Stewart reported that the advisory committee had approved amendments to Rule 4(a)(1)(B) (time for filing a notice of appeal) and Rule 40(a)(1) (time to file a petition for a panel rehearing) to make clear that they apply to cases in which a federal

officer or employee is sued in his or her individual capacity. The committee decided, however, to batch the proposals and await a time to present them with other amendments to the Standing Committee.

Judge Stewart added that the advisory committee also has under study the broader question of whether to treat state government officials and agencies the same as federal officers and agencies in providing them with additional time. The study, though, is unrelated to these proposed amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. APP. P. 26(c)

Judge Stewart reported that the proposed amendment to Rule 26(a) (computing and extending time – additional time after service) would clarify the operation of the “three-day rule.” It would give a party an additional three days to act after being served with a paper unless the paper is delivered on the date of service stated in the proof of service. The proposal, he said, would bring FED. R. APP. P. 26 into line with the approach taken in FED. R. CIV. P. 6. He noted that the amendment had been approved by the advisory committee in 2003, but batched for submission to the Standing Committee at a later time as part of a larger package of amendments.

Professor Struve explained that the advisory committee recommended publishing the amendment with two alternative versions of the committee note. Option A would be used if the time-computation amendments are adopted. Option B would be used if they are not. Judge Kravitz recommended that the rule be published with Option A of the note only, and Judge Stewart concurred.

The committee without objection by voice vote approved the proposed amendment and Option A of the accompanying committee note for publication.

FED. R. APP. P. 29(c)

Judge Stewart reported that the proposed amendment to Rule 29 (amicus curiae brief) would add a new paragraph (c)(7) to require an amicus brief to state whether counsel for a party authored the brief in whole or in part and list every person or entity contributing to the brief. Government entities, though, would be excepted. The proposed amendment, he said, tracked the Supreme Court’s Rule 37.6 on amicus briefs.

Judge Stewart added that the matter became more complicated after the advisory committee's April 2007 meeting, when the Supreme Court published a proposed amendment to its rule that would require additional disclosures. The Court's proposal, he said, has produced some controversy and opposition both on constitutional and policy grounds. Therefore, the advisory committee was uncertain whether the Court would adopt the pending amendment to Rule 37.6.

As a result, the committee considered the matter by e-mail after the April meeting and proposed two alternative formulations of proposed FED. R. APP. P. 29. Option A would be published for public comment if the Supreme Court were to reject the proposed amendment to its Rule 37.6, and Option B would be published if the Court were to approve the amendment. The difference between the two lies in paragraph (c)(7) of Option B, which adds a requirement that the amicus brief identify every person or entity – other than the amicus, its members, or its counsel – contributing money toward preparing or submitting the brief.

Judge Stewart pointed out that the August 2007 publication date for the proposed amendment to FED. R. APP. P. 29(c) will arise after the Supreme Court is expected to act on its own rule. Accordingly, the advisory committee suggested that the Standing Committee approve both options. If the Court were to drop the amendment to its rule, Option A would be published. But if it were to proceed with the amendment, Option B would be published. In any event, he said, the rule does not present an emergency.

One member expressed concern about the substance of the proposal, especially its requirement that members be disclosed. Others suggested that it would make sense to await final Supreme Court action before proceeding with a proposed change to the appellate rules. Judge Thrash moved to defer the proposed amendment.

The committee without objection by voice vote agreed to defer action on publication of the proposed amendment to Rule 29(c).

Informational Item

Judge Stewart reported that the advisory committee was continuing to hear from the chief judges of the circuits regarding the briefing requirements set forth in their local rules. He added that the committee was working with the attorneys general of the states on the advisability of giving them the same additional time that the appellate rules give to the federal government. And, he said, the committee would continue to examine the definition of a "state" in the appellate rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 8, 2007 (Agenda Item 8).

Amendments for Final Approval by the Judicial Conference

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT PACKAGE

Amendments to Existing Rules

FED. R. BANKR. P. 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019
1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002,
4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 8001, 8003, 9006, and 9009

New Rules

FED. R. BANKR. P. 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011

Judge Zilly noted that most of the amendments presented for final approval had already been seen by the Standing Committee at earlier meetings and are part of a package of 32 rule amendments and 7 new rules necessary to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He explained that most of the amendments had been issued initially in October 2005 as interim rules. All the courts adopted them as local rules and have been operating under them since that time with very little difficulty.

He pointed out that the advisory committee had made some minor changes in the interim rules, added other rules not included in the interim rules, and published the whole package for public comment in August 2006. In addition, since the advisory committee did not have time to publish the proposed revisions in the Official Forms before they took effect in October 2005, the package also included all the forms for public comment.

Judge Zilly reported that the advisory committee had received 38 comments before publication and another 60 following publication. Several public comments addressed many different rules. He said that the advisory committee had not conducted the scheduled public hearing because there were no requests for in-person testimony. Nevertheless, there had been a great deal of written comment on the proposed rules, which are the product of a long process that began in 2005 with the interim rules.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. BANKR. P. 7012, 7022, 7023.1, and 9024

Judge Zilly reported that the proposed amendments to Rules 7012 (defenses and objections), 7022 (interpleader), 7023.1 (derivative proceedings by shareholders), and 9024 (relief from judgment or order) were necessary to conform the Federal Rules of Bankruptcy Procedure to the restyling of the Federal Rules of Civil Procedure effective December 1, 2007. He added that the proposed changes to the bankruptcy rules were purely technical, and there was no need to publish them for public comment.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments to the Forms for Final Approval by the Judicial Conference

OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 9A-I, 10,
16A, 18, 19, 21, 22A, 22B, 22C, 23, and 24

Judge Zilly explained that the advisory committee had published for public comment all Official Forms in which any change was being recommended, even though the forms have been in general use since September 2005. As a result of the public comments, he said, the advisory committee had made some minor and stylistic changes in the forms.

He noted that Official Forms 19A and 19B, both dealing with the declaration of a bankruptcy petition preparer, would be consolidated. He said that new Official Form 22, the means test, had been extremely difficult to draft and had attracted a good deal of comment. He pointed out that the governing statutory provisions were unclear, and the public comments had raised 24 different categories of issues regarding the contents of the form. He explained that the committee had designed the form to capture all potentially relevant information from the debtor, but in some instances had left it up to individual courts to determine whether particular information is needed and how it should be used.

Professor Morris added that several of the changes in Form 22 made after the public comment period were designed to bring the text of the form closer to the text of the statute. He also explained that the advisory committee had added new language to the signature box on Form 1 (the petition) warning that the signature of the debtor's attorney constitutes a certification that the attorney has no knowledge after an inquiry that the information filed with the petition is incorrect.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2007.

OFFICIAL FORMS 25A, 25B, 25C, and 26

Judge Zilly explained that new Official Forms 25A (reorganization plan) and 25B (disclosure statement) implement § 433 of the 2005 bankruptcy legislation, which specifies that the Judicial Conference should prescribe a form for a reorganization plan and a disclosure statement in a small business Chapter 11 case. New Official Form 25C (small business monthly operating report) implements §§ 434 and 435 of the legislation and provides a standard form to assist small business debtors in Chapter 11 cases to fulfill their financial reporting responsibilities under the Code. New Official Form 26 (periodic report concerning related entities) implements § 419 of the legislation, which requires every Chapter 11 debtor to file periodic reports on the profitability of any entities in which the estate holds a substantial or controlling interest. He added that the advisory committee recommended that these four new forms be approved by the Judicial Conference effective December 1, 2008.

The committee without objection by voice vote approved the proposed amendments to the Official Forms for final approval by the Judicial Conference, to take effect on December 1, 2008.

OFFICIAL FORM 1, EXHIBIT D

Judge Zilly explained that the proposed amendment of Exhibit D to Official Form 1 (individual debtor's statement of compliance with credit counseling requirement) would provide a mechanism for a debtor to claim an exigent-circumstances exemption from the pre-petition credit counseling requirements of the 2005 legislation. By using the form, the debtor would not have to file a motion to obtain an order postponing the credit counseling requirement. The revised Exhibit D would implement proposed new FED. R. BANKR. P. 1017.1, described below, which is being published for comment and would take effect on December 1, 2009.

The committee without objection by voice vote approved the proposed revision of Exhibit D for final approval by the Judicial Conference, to take effect on December 1, 2009.

Amendments to the Rules for Publication

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

As noted above on pages 8-9, the committee approved the proposed time-computation changes in the Federal Rules of Bankruptcy Procedure for publication.

OTHER RULES

FED. R. BANKR. P. 1017.1

Judge Zilly noted that the new Rule 1017.1 (exemption from pre-petition credit counseling requirement) would provide a procedure for the court to consider a debtor's request to defer the pre-petition credit counseling requirement of the 2005 statute because of exigent circumstances. It states that a debtor's certification seeking an exemption from the counseling requirement will be deemed satisfactory unless the bankruptcy court finds within 21 days after the certification is filed that it is not satisfactory. He added that Exhibit D, described above, was being added to Form 1 (the petition) to implement the proposed amendment.

FED. R. BANKR. P. 4008

Judge Zilly reported that the proposed amendment to Rule 4008 (filing of a reaffirmation agreement) would require that a reaffirmation agreement be accompanied by a cover sheet, as prescribed by a new official form. The new Official Form 27, he said, would gather in one place all the information a judge needs to determine whether the reaffirmation rises to the level of a hardship under the Bankruptcy Code.

FED. R. BANKR. P. 7052, 7058, and 9021

Judge Zilly reported that the proposed amendments to Rules 7052 (findings by the court) and 9021 (entry of judgment) and new Rule 7058 (entering judgment in an adversary proceeding) deal with the requirement that a judgment be set forth on a separate document. He noted that the Standing Committee at its January 2007 meeting had approved the advisory committee's recommendation that the separate document requirement be required for adversary proceedings, but not for contested matters. He

added that the advisory committee had made some changes in the language of the proposed rules at its last meeting.

The committee without objection by voice vote approved the proposed amendments and new rule for publication.

New Official Forms for Publication

OFFICIAL FORM 8

Judge Zilly reported that the proposed amendment to Official Form 8 (individual debtor's statement of intention) would implement the 2005 legislation by expanding the information that the debtor must provide regarding leased personal property and property subject to security interests. The form had been published for comment in August 2006 and rewritten by the advisory committee as a result of the comments. The committee recommended that the revised version be published for comment.

OFFICIAL FORM 27

Judge Zilly explained that proposed new Official Form 27 (reaffirmation agreement cover sheet), which is tied to the proposed amendment to Rule 4008, noted above, would provide the key information to enable a judge to determine whether the reaffirmation agreement creates a presumption of undue hardship for the debtor under § 524(m) of the Code.

The committee without objection by voice vote approved the proposed amendments to Official Form 8 and the proposed new Official Form 27 for publication.

Informational Items

Judge Zilly reported that the advisory committee had considered correspondence from Senators Grassley and Sessions regarding implementation of an uncodified provision in the 2005 bankruptcy legislation. The legislation includes a provision stating the sense of Congress that FED. R. BANKR. P. 9011 (signing of papers – representations and sanctions) should be amended to require a certification by debtors' attorneys that the schedules and statements of the debtor are well grounded in fact and warranted by existing law. The committee, he said, had spent a great deal of time on the issue and concluded after thorough examination that the suggested rule amendment would have an adverse impact on the management of bankruptcy cases and set a different standard for debtors' lawyers than for creditors' lawyers. Accordingly, the committee decided not to recommend amending Rule 9011.

Judge Zilly added that a separate requirement in the Act itself, 11 U.S.C. § 707(b)(4)(C) and (D), imposes a higher standard of review and accountability for attorneys filing Chapter 7 consumer cases. But it deals only with the schedules filed with the petition. The advisory committee, he said, had explored whether: (1) to expand the requirement to include schedules and amended schedules filed after the petition is filed; (2) to apply the requirement to other chapters of the Code; and (3) to apply it to creditor attorney filings as well as those of debtor attorneys. In the end, he said, the advisory committee decided to make none of the changes. It did, however, add a statement to the signature box of the petition reminding the attorney of the statutory requirements.

Judge Zilly added that the committee had received a letter from Representatives Conyers and Sanchez of the House Judiciary Committee commending it for the interim rules and its ongoing efforts to implement the 2005 bankruptcy legislation. The letter, he said, made three observations. First, it complimented the committee for its proposed Official Form 22 (the means test) and its instruction that debtors who fall below the statutory threshold income levels do not have to complete the entire form. Second, it agreed with the advisory committee's proposed amendment to Rule 1017(b) (dismissal or conversion of a case), which requires that a motion to dismiss a case for abuse under 11 U.S.C. § 707(b) or (c) state with particularity the circumstances alleged to constitute the abuse by the debtor. Third, it suggested that Rule 4002(b) (duty of the debtor to provide documentation) places too high a burden on a consumer debtor to provide documentation to the U.S. trustee. Judge Zilly explained that the U.S. trustees had wanted debtors to provide substantially more materials than the proposed rule requires. The advisory committee, he said, had worked on the matter for a long time and was sensitive to the burdens imposed on debtors. But it concluded that the documents required in the rule were either required by the statute or are important in a case.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of May 25, 2007 (Agenda Item 9).

Amendments for Publication

TIME COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52,
53, 54, 55, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G

As noted above on page 9, the committee approved the proposed time-computation changes in the Federal Rules of Civil Procedure for publication.

FED. R. CIV. P. 62.1

As noted above on pages 12-13, the committee approved the proposed new Rule 62.1 (indicative rulings) for publication.

Informational Items

EXPERT-WITNESS DISCOVERY

Judge Rosenthal reported that the advisory committee was examining the experience of the bench and bar with the 1993 amendment to FED. R. CIV. P. 26 (a)(2)(B) (expert witness testimony). In particular, the committee was considering the extent to which communications between an attorney and an expert witness need be disclosed. The American Bar Association, she said, had urged that restrictions be placed on discovery of those communications, such as by limiting it to communications that convey facts only, and not opinion or strategy.

The advisory committee, she added, had thought that it would be very difficult to draw bright lines to guide attorneys in this area, but it had been encouraged by a recent mini-conference held with a group of experienced New Jersey lawyers. The state court rule in New Jersey limits discovery of conversations between attorneys and expert witnesses. The lawyers at the mini-conference uniformly expressed enthusiasm for the state rule and said that the rule minimizes satellite litigation over non-essential matters and improves professional collegiality. Judge Rosenthal added that the advisory committee was continuing to explore the issue and might come back at the next Standing Committee meeting with a request to publish a proposed amendment to Rule 26.

SUMMARY JUDGMENT

Judge Rosenthal reported that the advisory committee had approved a thorough revision of FED. R. CIV. P. 56 (summary judgment) at its April 2007 meeting, but had decided to defer publishing a proposal in order to engage in further dialogue with the bar.

She noted that Rule 56 had not been amended significantly since 1963. In 1992, there had been an unsuccessful attempt by the advisory committee to rewrite the rule thoroughly. That effort had produced a proposed rule that, among other things, would have codified the standard for granting summary judgment announced by the Supreme Court in its 1986 “trilogy” of landmark summary judgment cases.

By contrast, she emphasized, the current proposal does not address the standard. Rather, it focuses only on procedure. It is, moreover, a default rule that will apply only if a judge does not issue a specific order addressing summary judgment in a particular case. The proposed rule, she said, had been drawn largely from the best practices currently used in the district courts. She thanked the staff of the Federal Judicial Center and James Ishida and Jeffrey Barr of the Administrative Office for their comprehensive work in gathering and analyzing all the local rules of the district courts.

The proposed rule would require a party moving for summary judgment to set forth in separately numbered paragraphs the pertinent facts that are not in dispute and that entitle it to summary judgment as a matter of law. The opposing party, in turn, would have to set out in the same manner the facts that it claims are genuinely in dispute. The parties would also have to make appropriate references and file a separate brief as to the law.

She explained that lawyers had told the advisory committee that it would be extremely helpful to require these statements of undisputed facts. But, she added, in many cases the dueling statements of the parties are akin to ships passing in the night. They are often very lengthy and simply do not address each other. As a result, the advisory committee had attempted to draft the proposed rule in a manner that emphasizes that the parties must specify only those facts that are critical and relied on for, or against, summary judgment. She emphasized the importance of drafting a clear rule. To that end, it would be very beneficial to continue working with the bar to refine the text.

Judge Rosenthal pointed out that the advisory committee was concerned about what to do when an opposing party fails to respond to a summary judgment motion. She said that the case law of the circuits holds that a trial judge may not simply grant the summary judgment motion by default without a response. The local rules of some courts, she said, specify that any facts not responded to are deemed admitted, and judges in those courts say that they find these local rules helpful.

The advisory committee, she explained, had tried to set out in a clear way the steps that the court must follow under these circumstances. Accordingly, the proposed rule authorizes a trial judge to grant a motion for summary judgment, but only after following specific procedural steps and being convinced that the record supports granting the motion. Among other things, the judge would have to give the non-moving party another opportunity to respond before deeming facts admitted.

Judge Rosenthal said that the advisory committee's proposed rule did not address the substantive standard for granting summary judgment. But it would require the judge to state reasons for his or her decision on the motion. In addition, the rule mentions "partial summary judgment" by name for the first time.

A member noted that the draft proposed rule specifies the default procedures that must be followed unless the judge orders otherwise in a specific case. He asked whether the rule would also allow variation from the national rule by issuance of a local rule of court. He pointed out that the local rules of the court in which he practices most often differ substantially from the proposed national rule.

Judge Rosenthal responded that the rule would indeed allow judges to vary from the national default rule by orders in individual cases. But the national rule could not be overridden by local rules of court. In short, it would discourage blanket local court variations, but would allow case-specific variations. Professor Cooper added that the issue of local rules was addressed in the draft committee note to the rule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 19, 2007 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

CRIME VICTIMS' RIGHTS ACT AMENDMENTS FED. R. CRIM. P. 1, 12.1, 17, 18, 32, 60, and 61

Judge Bucklew reported that the package of rules changes to implement the Crime Victims' Rights Act, 18 U.S.C. § 3771, consisted of: (1) amendments to five existing rules; (2) a new stand-alone Rule 60 (victim's rights); and (3) renumbering current Rule 60 (title) as new Rule 61. The advisory committee, she said, had begun work on the package soon after passage of the Crime Victims' Rights Act in 2004, and it had reached two key policy decisions: (1) not to create new rights beyond those that Congress had specified in

the Act; and (2) to place the bulk of the victims' rights provisions in a single new rule to make it easier for judges and lawyers to apply. She said that additional rule amendments beyond this initial package might be recommended in the future, but the advisory committee had decided to defer making more extensive changes in order to monitor practical experience in the courts and case law development under the Act.

The proposed amendments, she said, had generated a good deal of controversy during the public comment period and had attracted criticism from both sides. The defense side expressed the fear that the proposed rules would tip the adversarial balance too far against criminal defendants. Victims' rights groups, on the other hand, objected that the proposals did not go far enough to enhance the rights of victims. A letter from Sen. Jon Kyl, she said, had stressed the latter point.

FED. R. CRIM. P. 1

Judge Bucklew explained that proposed Rule 1(b)(11) (scope and definitions) would incorporate the Act's definition of a crime victim. In response to the public comments, she noted, the advisory committee had added language to proposed Rule 60(b)(2) to specify that a victim's lawful rights may be asserted by the victim's lawful representative. In addition, the committee note had been revised to make it clear that a victim or the victim's lawful representative may participate through counsel, and the victim's rights may be asserted by any other person authorized by 18 U.S.C. § 3771(d) and (e). The committee note had also been amended to state that the court has the power to decide any dispute over who is a victim.

Professor Beale reported that one objection raised in several public comments was that the proposed rules do not define precisely who may be a victim. She suggested that if it turns out that the lack of a comprehensive definition causes any problems in actual practice, the advisory committee could come back later and propose a clarifying amendment.

FED. R. CRIM. P. 12.1

Judge Bucklew reported that the proposed amendments to FED. R. CRIM. P. 12.1 (notice of alibi defense) specify that a victim's address and telephone number will not be provided to the defendant automatically. The victim's address and telephone number will be provided only if the defendant establishes a need for them, such as in a case where the government intends to rely on a victim's testimony to establish that the defendant was present at the scene of the alleged offense. Moreover, even if the defendant establishes the need for the information, the victim may still file an objection.

Professor Beale pointed out that the federal defenders had commented that the proposed rule would upset the constitutional balance between prosecution and defense. Moreover, they argued that its requirement that a defendant establish a need for such basic information is unconstitutional because it is not a reciprocal obligation. She replied, though, that the rule does not violate the principle of reciprocal discovery. Rather, it is merely a procedural device, requiring the defendant to state that he or she has a need for the information and then giving the court a chance to decide the matter.

A member questioned the language that would require the defendant to establish a “need” for a victim’s address and telephone number. He suggested that the word “need” was misleading and asked what showing of need the defendant would have to make beyond merely asking for the information. He noted that if the advisory committee had intended for the term “need” to mean only that the defendant *wants* the information, a different word should be used. Judge Levi replied that removing the requirement that the defendant show a “need” for the information would be seen as a big step backwards by victims’ rights groups. Moreover, it would require that the rule be sent back to the advisory committee.

The member responded that he understood the highly politicized context of the rule. Nevertheless, he said that the proposed amendment as written simply does not say what the advisory committee apparently intended for it to say. He suggested that it might be rephrased to state simply that if the defendant “seeks” the information, the court may fashion an appropriate remedy. Judge Bucklew added that the advisory committee had something more than “seeks” in mind, but it had intended that the standard for the defendant’s showing be relatively low. Professor Beale added that the advisory committee had rejected several alternative formulations because of the delicate balance of interests at stake. She said that the advisory committee did not want to turn the defendant’s request into an automatic entitlement.

Another participant added that the proposed committee note explains that the defendant is not automatically entitled to a victim’s address and phone number. Thus, the rule and the note together clearly suggest that “need” means something more than just a naked request from the defendant.

FED. R. CRIM. P. 17

Judge Bucklew stated that the proposed amendment to FED. R. CRIM. P. 17 (subpoena) would provide a protective device for third-party subpoenas. It would allow a subpoena requiring the production of personal or confidential information about a victim to be served on a third party only by court order. It also contains a provision allowing a court to dispense with notice to a victim in “exceptional circumstances.”

She noted that the advisory committee had modified the rule after publication to make it clear that a victim may object by means other than a motion to quash the subpoena, such as by writing a letter to the court. In addition, based on public comments, the committee had eliminated language explicitly authorizing ex parte issuance of a subpoena to a third party for private or confidential information about a victim. Instead, a reference had been added to the committee note explaining that the decision on whether to permit ex parte consideration is left to the judgment of the court.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require a court to consider the convenience of any victim when setting the place of trial in the district. She added that no changes had been made in the text of the rule after publication, but some unnecessary language had been deleted from the committee note. In addition, language had been added to the note emphasizing the court's discretion to balance competing interests.

FED. R. CRIM. P. 32

Judge Bucklew said that the proposed revisions to Rule 32 (sentencing and judgment) would eliminate the entire current subdivision (a) – which defines a victim of a crime of violence or sexual abuse – because Rule 1 (scope and definitions) would now incorporate the broader, statutory definition of a crime victim.

Rule 32(c)(1) would be amended to require that the probation office investigate and report to the court whenever a statute “permits,” rather than requires, restitution. In Rule 32(d)(2)(B), the advisory committee would delete the language of the current rule requiring that information about victims in the presentence investigation report be set forth in a “nonargumentative style.” As amended, the rule would treat this information like all other information in the presentence report. Professor Beale added that some public comments had argued that all information in the presentence investigation report should also be verified. She added that some of the comments suggested additional changes that went beyond the scope of the current amendments, and these suggestions would be placed on the committee's future agenda.

Judge Bucklew reported that Rule 32(i)(4) (opportunity to speak) contained a number of proposed language changes. She said that the language of the current rule authorizing a victim to “speak or submit any information about the sentence” would be changed to require that a judge permit the victim to “be reasonably heard” because that is the precise term adopted by Congress in the statute.

FED. R. CRIM. P. 60

Judge Bucklew stated that proposed new Rule 60 (victim's rights) was the principal rule dealing with victims' rights. It would implement several different provisions of the Act and specify the rights of victims to notice of proceedings, to attendance at proceedings, and to be reasonably heard. It would also govern the procedure for enforcing those rights and specify who may assert the rights.

Paragraph (a)(1) would require the government to use its best efforts to give victims reasonable, accurate, and timely notice of any public court proceeding involving the crime. Paragraph (a)(2) would provide that a victim may not be excluded from a public court proceeding unless the court finds that the victim's testimony would be materially altered.

Paragraph (a)(3) would specify that a victim has a right to be reasonably heard at any public proceeding involving release, plea, or sentencing. Professor Beale explained that the advisory committee had limited the proposed rule to those specific proceedings. Victims' rights advocates, she said, had argued to expand the rule beyond the statute and give victims the right to be heard at other stages of a case. She added that it is possible that case law over time may expand the right to additional proceedings.

Judge Bucklew said that subdivision (d) of the proposed rule would implement several different sections of the Crime Victims' Rights Act. It would: (1) require the court to decide promptly any motion asserting a victim's rights under the rules; (2) specify who may assert a victim's rights; (3) allow the court to fashion a reasonable procedure when there are multiple victims in order to protect their rights without unduly prolonging the proceedings; (4) require that victims' rights be asserted in the district in which the defendant is being prosecuted; (5) specify what the victim must do to move to reopen a plea or sentence; and (6) make it clear that failure to accord a victim any right cannot be the basis for a new trial. She said that the primary criticism from victims' rights groups was that the new rule did not go far enough to expand the rights of victims.

Professor Beale added that, after publication, language addressing who may assert a victim's rights had been moved from Rule 1 to Rule 60. In addition, Rule 60 had been amended because the published version could have been read to require the court to pay the costs of a victim to travel to the trial – a right not required by statute. In addition, language had been added to clarify the procedure a court should follow “in considering whether to exclude the victim.”

Professor Beale emphasized that questions had been raised throughout the rules process as to how far the limited, general rights specified in the statute should be repeated or elaborated upon in the rules. Judge Bucklew explained that victims' advocates had

argued that the basic statutory right that victims be treated with “fairness and dignity” should be the basis for providing a greater array of more specific rights in the rules.

FED. R. CRIM. P. 61

Judge Bucklew reported that the final change in the package was purely technical in nature – to renumber the current Rule 60 (title) as Rule 61. The rule states merely that the rules may be known and cited as the Federal Rules of Criminal Procedure. She said that structurally it should remain the last rule in the criminal rules.

Professor Meltzer moved that the package of crime victims’ proposals be approved, but that proposed Rule 12.1 be remanded to the advisory committee for further consideration.

The committee by a vote of 6 to 3 rejected the motion to remand Rule 12.1. Then, with one objection, it voted by voice vote to approve the package of proposed amendments for final approval by the Judicial Conference.

Judge Bucklew noted that the package of victims’ rights amendments had required a great deal of time and effort by the advisory committee. She thanked Judge Levi and John Rabiej for their invaluable assistance. Judge Teilborg added that he had been the Standing Committee’s liaison to the advisory committee on the project, and he complimented both the advisory committee and Judge Bucklew personally for the superb way that they had navigated the package of rules in light of powerful forces and competing interests.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee’s proposed amendment to Rule 41 (search and seizure) would provide a procedure for issuing search warrants to assist criminal investigations in U.S. embassies, consulates, and possessions around the world. She said that the proposal had originated with the Department of Justice, based on practical problems that it had encountered in investigating crimes occurring in overseas possessions and embassies. Under the proposal, jurisdiction to issue warrants for execution overseas would be vested in the district where the investigation occurs or – as a default – in the U.S. District Court for the District of Columbia.

Judge Bucklew explained that the Judicial Conference had forwarded a proposed rule amendment on the same topic to the Supreme Court in 1990, but the Court had rejected it. She explained, however, that the current proposal was much more limited than the 1990 proposal, which would have applied beyond U.S. embassy and consular properties.

Judge Bucklew stated that the primary issue raised about the current proposal concerned its inclusion of American Samoa. The Pacific Islands Committee of the Ninth Circuit had suggested that if an amendment were to be made, it should be reviewed first by the judiciary of the territory and have the support of the Chief Justice of the High Court of American Samoa. This course of action would be consistent with long-standing practice based on the original treaties between the United States and American Samoa. Therefore, for purposes of public comment, the advisory committee had included American Samoa in brackets in the published text. Nevertheless, she said, the only comment responding to the issue had been made by the Federal Magistrate Judges Association, which saw no need to exclude American Samoa. In addition, the Department of Justice continued to express support for the proposal, noting that the current status was adversely affecting its law-enforcement efforts.

Judge Bucklew reported that the advisory committee had contacted the Pacific Islands Committee of the Ninth Circuit and explained that American Samoa would need to comment on the proposal if it wished to be excluded from the rule. But no communication had been received. Therefore, the advisory committee approved the rule without excluding American Samoa.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

FED. R. CRIM. P. 45

Judge Bucklew reported that the proposed amendment to Rule 45 (computing time) was purely technical in nature. As part of the recent restyling of the Federal Rules of Civil Procedure, some subdivisions of the civil rules governing service had been re-numbered. As a result, cross-references in FED. R. CRIM. P. 45(c) to various provisions of the civil rules will become incorrect when the restyled civil rules take effect on December 1, 2007. Therefore, the advisory committee recommended amending Rule 45(c) to reflect the re-numbered civil rules provisions. Because the amendment is purely technical, she said, the advisory committee suggested that there would be no need for publication.

The committee voted unanimously by voice vote to approve the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had voted to recommend publishing a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeaching evidence favorable to the defendant. She traced the history of the proposal, beginning with a position paper submitted by the American College of Trial Lawyers in 2003. The College argued that unlawful convictions and unlawful sentencing have occurred because prosecutors have withheld exculpatory and impeaching evidence.

Judge Bucklew emphasized that the advisory committee had devoted four years of intensive study to refining the substance and language of the proposed amendment. She pointed out that the rule eventually approved by the advisory committee was considerably more modest than the changes recommended by the College, which had called for more extensive amendments both to Rule 16 and Rule 11 (pleas). The committee, she said, had debated and rejected proceeding with any amendments to Rule 11.

Judge Bucklew noted that the Federal Judicial Center had prepared an extensive report for the advisory committee in 2004 surveying all the local rules and standing orders of the district courts in this area. At the committee's request, the Center then updated the document on short notice in 2007. The report revealed that 37 of the 94 federal judicial districts currently have a local rule or district-wide standing order governing disclosure of *Brady* materials. She explained, however, that the Center had not searched beyond local rules and standing orders to identify the orders of individual district judges, which may be numerous. In addition, she said, most states have statutes or court rules governing disclosure.

The advisory committee, she said, had also reviewed a wealth of other background information, including a summary of the case law addressing *Brady v. Maryland* issues, pertinent articles on the subject, the American Bar Association's model rules of professional conduct governing the duty of prosecutors to divulge exculpatory information, and correspondence from the federal defenders.

Judge Bucklew reported that the Department of Justice strongly opposed the proposed amendment. In light of that opposition, she noted, former committee member Robert Fiske had suggested that in lieu of pursuing a rule amendment, it might be more practical for the committee to encourage the Department to make meaningful revisions in the U.S. Attorneys' Manual to give prosecutors more affirmative direction regarding their *Brady* obligations.

As a result of the suggestion, she said, the Department did in fact amend the manual to elaborate on the government's disclosure obligations. Judge Bucklew thanked the Department on behalf of the advisory committee for its excellent efforts in this respect. She gave special recognition to Assistant Attorney General Alice Fisher for leading the efforts and emphasized that the entire advisory committee believed that the changes had improved the manual substantially.

Nevertheless, she added, the advisory committee ultimately decided for two reasons that the manual changes alone could not take the place of a rule change. First, as a practical matter, the committee would have no way to monitor the practical operation of the changes or even to know about problems that might arise in individual cases. Second, the U.S. Attorneys' Manual is a purely internal document of the Department of Justice and not judicially enforceable.

Judge Bucklew added that the reported case law does not provide a true measure of the scope of possible *Brady* problems because defendants and courts generally are not made aware of information improperly withheld. She said that the advisory committee had received a letter from one of its judge members strongly supporting the proposed amendment. In the letter, the judge claimed that in a recent case before him the prosecutor had improperly failed to disclose exculpatory material and, despite the judge's prodding, the Department of Justice failed to discipline the attorney appropriately for the breach of *Brady* obligations.

Judge Bucklew stated that there are numerous cases in which courts have found that the prosecution had failed to disclose exculpatory material – if one includes cases in which the failure to disclose did not rise to constitutional dimensions and therefore did not technically violate the constitutional requirements of *Brady v. Maryland*. Beyond that, she said, it is simply impossible to know how many failures actually occur because only the prosecution itself knows what information has not been disclosed.

Judge Bucklew observed that the local rules and orders of many district courts address disclosure obligations, but they vary in defining disclosure obligations and specifying the timing for turning over materials to the defense. Some rules, for example, impose a “due diligence” requirement on prosecutors, while others do not. She added that the sheer number of local rules, together with the lack of consistency among them, argue for a national rule to provide uniformity. Moreover, just publishing a proposed rule for comment, she added, could produce meaningful information as to the magnitude of the non-disclosure problem. If the public comments were to demonstrate that the problems are not serious, the advisory committee could withdraw the amendment.

Professor Beale observed that two central trends currently prevail in the criminal justice system: (1) to recognize and enhance the rights of crime victims; and (2) to reduce

the incidence of wrongful convictions. The proposed rule, she said, would advance the second goal. It would also promote judicial efficiency by regulating the timing and nature of the materials to be disclosed.

The proposed amendment, she said, would require the government to disclose not just “evidence,” but “information” that could lead to evidence. It also would require a defendant to make a request for the information. It speaks of information “known” to the prosecution, including information known by the government’s investigative team. She noted that this provision was consistent with a line of *Brady* cases requiring disclosure of matters known not just to attorneys but also to law enforcement agents. She added that the Department of Justice was deeply concerned about the breadth of this particular formulation.

Professor Beale reported that a great deal of the advisory committee’s discussion had focused on the need to have *Brady* materials disclosed during the pretrial period, rather than on the eve of trial. So, for purposes of timing, the proposed rule distinguishes between exculpatory and impeaching information. Impeaching evidence generally relates to testimony, and the Department is concerned that early disclosure increases potential dangers to witnesses. Therefore, the proposed amendment specifies that a court may not order disclosure of impeaching information earlier than 14 days before trial. That particular timing, she said, is more favorable to the prosecution than the current limits imposed by many local court rules. Moreover, the government has the option of asking a judge to issue a protective order in a particular case when it has specific concerns about disclosure.

Professor Beale reported that the Department had argued that the proposed rule is inconsistent with *Brady v. Maryland*. But, she said, the advisory committee was well aware that the proposed amendment is not compelled by *Brady*. Rather, *Brady* and related cases set forth only the minimal constitutional requirements that the government must follow. The proposed amendment, by contrast, goes beyond what the Supreme Court has said is the minimum that must be turned over. Moreover, it would provide consistent procedural standards for the turnover of exculpatory information.

Professor Beale explained that the advisory committee saw no need to include in the rule a definition of “exculpatory” or “impeaching” evidence. The amendment also does not require that the information to be turned over be “material” to guilt in the constitutional sense, such that withholding it would necessitate reversal under *Brady*. Professor Beale explained that the advisory committee did not want to use the word “material” because it might be read to imply all the familiar constitutional standards. She noted that other parts of Rule 16 use the term “material” in a different sense, referring to information “material” to the preparation of the defense.

Professor Beale stated that the proposed amendment would establish a consistent national procedure and bring the federal rules more in line with state court rules and the rules of professional responsibility. It would also introduce a judicial arbiter to make the final decision as to what must be disclosed. Accordingly, she said, the key dispute over the proposed amendment is whether the policy and practice it seeks to promote should be enforced through the U.S. Attorneys' Manual or a federal rule of criminal procedure.

Deputy Attorney General McNulty thanked Judge Bucklew and the advisory committee for working cooperatively and openly with the Department of Justice on the proposed rule. He pointed out that the Department had set forth its position in considerable detail in a memorandum recently submitted to the committee.

He emphasized the central importance of Rule 16 to prosecutors, and he pointed to the recent revisions in the U.S. Attorneys' Manual as tangible evidence of the Department's willingness to address the concerns expressed by the advisory committee and others and to ensure compliance with constitutional standards. He said, though, that the proposed amendment was deeply disturbing and would fundamentally change the way that the Department does business.

Mr. McNulty argued that there was simply no need for the amendment because the Constitution, Congress, and the Supreme Court have all specified the requirements of fairness and the obligations of prosecutors. All recognize the balance of competing interests. But the proposed rule, he said, goes well beyond what is required by the Constitution and federal statutes, and it would upset the careful balance that Congress and the courts have established.

The disclosure obligations proposed in the amendment, he said, also conflict with the rights of victims. The rule would move the Department of Justice towards an open file policy and make virtually everything in the prosecution's files subject to review by the defense, including information sensitive to victims, witnesses, and the police. In cases involving a federal-state task force, moreover, it might require that state information be turned over to the defense, in violation of state law. The amendment, also, he said, is inconsistent with the Jencks Act, with the rest of Rule 16, and with other criminal rules limiting disclosure and the timing of disclosure.

The proposed amendment, he added, would inevitably generate a substantial amount of litigation on such matters as whether exculpatory or impeachment information is "material." There is some question, he said, whether the rule removes "materiality" as a disclosure standard or whether it contains some sort of back-door materiality standard. At the very least, he said, the rule has not been thought through or studied adequately. In the final analysis, moreover, the rule will not achieve the goal of its proponents to prevent

abuses and miscarriages of justice because an unethical prosecutor determined to withhold specific information will find a way to avoid any rule.

Mr. McNulty concluded his presentation by emphasizing that the case for a rule change had not been made, and the proposed amendment should be rejected. Moreover, the significant revisions just made to the U.S. Attorneys' Manual should be given time to work. In the alternative, he said, the rule could be sent back to the advisory committee to work through the many difficult issues that have not yet been resolved.

Assistant Attorney General Fisher added that the advisory committee had made a conscious decision not to include a materiality standard in the amendment. In that respect, she said, the proposal is inconsistent with current local court rules, very few of which have eliminated the materiality requirement. It would also be inconsistent with the rest of Rule 16 in that respect. And it would undercut the rights of victims and their ability to rely on prosecutors to protect them. The proposal, in short, would create major instability and insecurity among witnesses, who will be less willing to come forward.

The committee chair suggested that the proposed amendment was not yet ready for publication, and he observed that the changes in the U.S. Attorneys' Manual were a very important achievement that should be given time to work. Another member added that his district has an open file system that works very well. But, he said, it would be very helpful to obtain reliable empirical evidence to support the need for a change. The Department of Justice, he said, had done an excellent job in producing a detailed set of revisions to the prosecutors' manual. In the face of that achievement, he said, the committee should give the Department the courtesy of seeing whether or not the manual changes make a difference before going forward with a rule amendment that contains a major change in policy. He noted that there may well be problems in monitoring the impact of the manual changes but suggested that the committee work with the Department to explore practical ways to measure the impact of the manual changes.

Another member agreed and added that the essential impact of the proposed amendment will be to change the standard of review for failure to disclose – a very significant change. Professor Beale responded that the purpose of the amendment was not to change the standard of review, but to change pretrial behavior and provide clear guidance on what needs to be disclosed. She explained that in civil cases the parties are entitled to a great deal of discovery early in a case. In federal criminal cases, however, defendants often have to wait until trial before obtaining certain essential information. That, she said, is a glaring difference. She added that a court is more likely to require government disclosure at trial if it is required by Rule 16, and not just by the constitutional case law.

Another member stated that the proposed amendment would do far more than change the standard of review. It would, he said, radically expand the defendant's rights to pretrial discovery – a fundamentally bad idea. As drafted, he said, the rule has major flaws, and if published, the public comments will be completely predictable. The defense side will strongly favor an amendment that radically expands its pretrial discovery. The Department of Justice, on the other hand, will vigorously oppose the change.

He predicted that if the amendment were forwarded by the committee to the Judicial Conference, it would likely be rejected by that body. And if it were to reach the Supreme Court, it might well be rejected by the justices. Proceeding further with the proposed amendment, he said, would do irreparable damage to the reputation of the Standing Committee as a body that proceeds with caution and moderation. He added that there is nothing wrong with controversy *per se*, but the proposed rule is both controversial and wrong.

The amendment, he argued, takes a constitutional-fairness standard and converts it into a pretrial discovery procedure that gives the defense new trial-preparation rights. The case, he said, had not been made that the rule is necessary or that violations of disclosure obligations by prosecutors cannot be handled adequately by existing processes. He added that the most radical effect of the rule is found not in the text of the rule itself, but in the committee note asserting that the current requirement of materiality would be eliminated and that all exculpatory and impeachment information will have to be turned over to the defense, whether or not material to the outcome of a case.

Another member concurred and explained that when the Standing Committee agrees to publish a rule, there is an understanding that it has been vetted thoroughly. Publication, moreover, carries a rebuttable presumption that the proposal enjoys the committee's tentative approval on the merits. But, he said, the proposed amendment to Rule 16 does not meet that standard. The Rules Enabling Act process is structured to ensure that the Executive Branch has an opportunity to be heard. In this instance, he argued, the Executive Branch has expressed serious opposition to the proposal. Thus, with controversial proposals such as this, he argued, the committee owes it to the Judicial Conference, the Supreme Court, Congress, and the bench and bar generally that the rule is substantially ready when published.

One of the judges pointed out that his court's local rules require that information be disclosed before trial if it is material. He emphasized that if the committee were to approve an amendment, it should include a materiality standard. Without it, he said, courts will be inundated with essentially meaningless disputes over whether immaterial information must be turned over. The proposed rule, he argued, would also conflict with the Jencks Act and with constitutionally sound principles. He urged the committee to reject the amendment. Alternatively, he suggested that if the committee believes it

necessary to produce a rule to codify *Brady*, it should at least incorporate a materiality requirement.

Another member agreed with the criticisms expressed, but suggested it would be useful to have a uniform rule for the federal courts to provide greater guidance on *Brady* issues. The *Brady* standard, he said, applies after the fact. It is not really a discovery standard, but a sort of harmless error standard on appeal.

He said that the proposed amendment would represent a radical change for the federal courts. But, on the other hand, it would bring federal practice closer to that of the state courts. He noted that many believe that the state courts strike a fairer balance between giving defendants access to information and protecting witnesses and victims against harmful disclosures. He said that additional review of state and local practices might be useful.

Another member concurred in the criticisms of the amendment but said that the central issue before the Standing Committee was whether to publish the rule for public comment. Comments, he suggested, could be very useful. He noted that the proposal had been approved by the advisory committee on an 8-4 vote, demonstrating substantial support for it and arguing for publication. Moreover, he said, empirical research is very difficult to obtain in this area because the defense never finds out about material improperly withheld by prosecutors. He added that current practice under *Brady* is self-serving because it is only natural for a prosecutor in the middle of a case to convince himself or herself that a particular statement is not material. He concluded that disclosure of exculpatory and impeaching information is a matter that needs to be addressed, and the public comment period should be helpful in shedding light on current practices.

He expressed some skepticism regarding revisions to the U.S. Attorneys' Manual. For decades, he said, the Department of Justice has insisted that the manual is not binding, but it is now characterizing the recent changes on *Brady* materials as crucial. He was concerned, too, that the manual could be changed further at any time in the future.

Another participant concurred that quantitative information is difficult to obtain and suggested that the committee could gather a good deal more anecdotal information through interviews with judges, lawyers, and former prosecutors. If that were done, he said, it would be important to identify the nature of the criminal offense involved because it may turn out that disclosure is not handled the same way in different types of cases.

The committee's reporter stressed the importance of protecting the integrity and credibility of the Rules Enabling Act process. He said that the committee should proceed with caution and not risk its credibility by publishing a proposed amendment that is very controversial and not supported by sufficient research. He suggested that the rule be

deferred and the committee consider asking the Federal Judicial Center to conduct additional research.

Judge Hartz moved to reject the amendment outright and not to send it back to the advisory committee for further review. He suggested that the debate appeared to come down to an ideological difference of opinion over what information should be disclosed by prosecutors to defendants. The dispute, he said, is not subject to meaningful empirical investigation, and it would not be a good use of resources to return the matter to the advisory committee or to ask the Federal Judicial Center for further study.

Judge Bucklew said that the advisory committee had spent four years on the proposal and had discussed it at every committee meeting. A majority of the committee, she explained, believed strongly that the proposal was the right and fair thing to do. She agreed, though, that it was hard to see what good additional research, including anecdotal information, would produce. Therefore, she said, if the Standing Committee were to disagree with the merits of the proposal, it should simply reject the rule and not send it back to the advisory committee nor keep it on the agenda.

Professor Beale added that the advisory committee could continue to work on refining the proposal or conduct additional research, if that would help. But, she said, if the Standing Committee were to conclude that the amendment is fundamentally a bad idea in principle, it would ultimately be a waste of time to attempt to obtain more information.

She noted that conditions and prosecution policies vary enormously among judicial districts. In some districts, disclosure seems not to be a problem, but in others there may have been improper withholding of information. A study could be crafted to examine the differences among the districts and ascertain why there are disclosure problems in some districts, but not others. In the final analysis, though, if it appears that the Standing Committee will still oppose any amendment – even after additional research and tweaking – it would be wise just to end the matter and not expend additional time and resources on it.

One member suggested that it would be helpful to survey lawyers and judges on disclosure in practice. He pointed to the influential and outcome-determinative research conducted for the committee by the Federal Judicial Center in connection with FED. R. APP. P. 32.1, governing unpublished opinions. By analogy to that successful research effort, he recommended that more research be conducted – unless the committee concludes as a matter of policy that no amendment to Rule 16 would be acceptable.

Another member stated that he worried about the message the committee would send the bar by rejecting an amendment to Rule 16 out of hand. He noted that the bar is concerned that prosecutors do not always disclose information that they should. He

commended the Department of Justice for its good faith efforts to work with the committee and recommended that, rather than rejecting the proposed amendment outright, the matter be returned to the advisory committee to monitor the impact of the recent changes in the U.S. Attorneys' Manual.

The committee chair noted that there are many different local rules governing disclosure of exculpatory and impeachment information. With regard to the Federal Rules of Civil Procedure, he explained that the committee had found the lack of uniformity among districts to be intolerable. Consistency, he said, is very important to the unity of the federal judicial system. A defendant's right to exculpatory information should not vary greatly from court to court. Thus, if there is to be a national rule to codify *Brady* obligations, it should contain a clear standard. There is, he said, little support for a national open-file rule, but achieving consensus on the right balance would be very complex and difficult.

The chair suggested that there are various ways to elicit meaningful information from the legal community other than by publishing a rule or asking the Federal Judicial Center for additional research. He noted, for example, that the Advisory Committee on Civil Rules had conducted a number of conferences with the bar on specific subjects, and the committee's reporter had sent memoranda to the bar seeking views on discrete matters. He concluded that the Standing Committee should not tell the advisory committee that criminal discovery is off the table. It is, he said, a topic that needs further study. But the advisory committee should proceed slowly and methodically with any study.

Two members agreed that there is room for continuing study and input from bench and bar regarding pretrial discovery, the conduct of prosecutors, and uniformity among the districts. Nevertheless, they recommended that all work cease on the pending amendment to Rule 16 because it is too radical and cannot be fixed. Another member agreed that the proposed amendment is not the right rule, but suggested that the issues it raises are very important and need to be considered further. He said that there is room for further research and analysis to see whether a consensus can be developed on a uniform rule for the entire federal system. Thus, he recommended that the proposal be returned to the advisory committee, but not rejected outright.

Deputy Attorney General McNulty observed that even if the Standing Committee rejects the proposal, the advisory committee could still continue to explore the issues on its own in a slow and methodical manner. Slowing down the process, he said, was important to the Department, which has been concerned that it must continue to stay on the alert because the proposed amendment could resurface in revised form.

Judge Thrash observed that a consensus appeared to have emerged not to publish the proposed amendment, but to defer further consideration of it indefinitely, with the

understanding that the advisory committee will be free to study the topic matter further and take such further action as it deems appropriate at some future date. **He offered this course of action as a substitute motion for Judge Hartz's motion, with Judge Hartz's agreement.**

Deputy Attorney General McNulty agreed and added that the advisory committee would not be proceeding under any expectation as to when, if ever, the issue should come back to the Standing Committee.

The committee with one objection voted by voice vote to adopt Judge Thrash's substitute motion.

FED. R. CRIM. P. 7, 32, and 32.2

Professor Beale reported that the proposed amendments to Rules 7 (indictment and information), 32 (sentence and judgment) and 32.2 (criminal forfeiture) would clarify and improve the rules governing criminal forfeiture. She noted that the amendments were not controversial, and they had been approved unanimously by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee recommended publishing proposed amendments to Rule 41 (search and seizure) to govern searches for information stored in electronic form. The amendments would acknowledge explicitly the need for a two-step process – first, to seize or copy the entire storage medium on which the information is said to be contained, and, second, to review the seized medium to determine what electronically stored information contained on it falls within the scope of the warrant.

Judge Bucklew explained that the search frequently occurs off-site after the computer or other storage medium has been seized or copied by law enforcement officers. She added that the revised rule specifies that in the case of seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to a description of the physical storage media seized or copied.

The committee voted unanimously by voice vote to approve the proposed amendments for publication.

RULE 11 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

Professor Beale explained that the proposed companion amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings (certificate of appealability and motion for reconsideration) would provide the procedure for a litigant to seek reconsideration of a district court's ruling in a habeas corpus case. They would specify that a petitioner may not seek review through FED. R. CIV. P. 60(b) (relief from judgment or order).

She reported that the advisory committee had considered a much broader proposal by the Department of Justice to eliminate coram nobis and other ancient writs, but it had decided on fundamental policy grounds against the change. Instead, the committee's proposal specifies that the only procedure for obtaining relief in the district court from a final order will be through a motion for reconsideration filed within 30 days after the district court's order is entered.

A member observed that the proposed amendment may narrow the scope of reconsideration in a way that the advisory committee did not intend. He noted that proposed Rule 11(b) may preclude the use of FED. R. CIV. P. 60(a) to seek reconsideration based on a clerical error – relief most often sought by the government. He suggested that the proposed rule may not be needed, and the stated justification for it was confusing. He also questioned whether the proposed rule did what it was intended to do, namely codify the Supreme Court's decision in *Gonzalez v. Crosby*. And he objected to the proposed 30-day time limit on the grounds that an unrepresented pro se litigant should not face a shorter time-limit than others.

Judge Levi asked whether, given these concerns, the advisory committee would be willing to hold the proposal for possible publication at a later time. Judge Bucklew agreed to recommend that only the proposed amendment to Rule 11(a) be published for public comment, and that the remainder of the rule be deferred for further consideration by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments to Rule 11(a) of both sets of rules for publication and to defer consideration publishing the proposed amendments to Rule 11(b) of both sets of rules.

Professor Struve noted that if the proposed amendment to Rule 11(b) did not go forward for publication, the Standing Committee should also not publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A), which makes reference to the proposed new Rule 11(b). **Accordingly, the committee voted unanimously by voice vote not to publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A).**

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58, 59
RULE 8 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

As noted above on pages 10-11, the committee approved for publication the proposed time-computation amendments to the Federal Rules of Criminal Procedure.

Informational Items

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee had decided not to submit to the Standing Committee any proposed amendments to FED. R. CRIM. P. 29 (motion for a judgment of acquittal). The proposal published by the committee would have required a judge to wait until after a jury verdict to direct a verdict of acquittal unless the defendant were to waive his or her double jeopardy rights and give the government an opportunity to appeal the pre-verdict acquittal.

She noted that there had been a good deal of public comment on the proposal, most of it in opposition. Several different grounds had been offered for the objections – most noticeably that the amendments would exceed the committee’s authority under the Rules Enabling Act, impose an unconstitutional waiver requirement, fail to provide needed flexibility to sever multiple defendants and multiple counts when necessary, and intrude on judicial independence. Several comments added that the proposed amendments were simply not needed because directed acquittals are rare in practice.

Judge Bucklew reported that the advisory committee first had voted 9 to 3 to reject the proposed rule, and then it voted 7 to 5 to table it indefinitely and not continue working on it. She added that most members of the advisory committee had simply not been convinced that a sufficient showing of need had been made to justify moving forward a proposal in the face of the many different objections raised.

A member explained that the Department of Justice had cited as a need for the rule several examples of pre-verdict acquittals that the Department considered improper. But, he said, research set forth in the committee materials suggested that the acquittals in those particular cases, upon closer examination, appear to have been justified. Professor Beale explained that the materials included a letter from the federal defenders containing detailed transcript quotations and references to demonstrate the reasons for the pre-verdict acquittals in those cases. This letter, she said, had had a large impact on the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2007 (Agenda Item 6).

Amendment for Final Approval of the Judicial Conference

FED. R. EVID. 502

Judge Smith reported that the advisory committee's primary impetus in proposing new Rule 502 (waiver of attorney-client privilege and work-product protection) was to address the high costs of discovery in civil cases. He explained that if the rules governing waiver were made more uniform, predictable, and relaxed, attorneys could reduce the substantial efforts they now expend on privilege review and decrease the discovery costs for their clients. Lawyers today, he said, must guard against the most draconian federal or state waiver rule in order to protect their clients fully against the danger of inadvertent subject-matter waiver.

Judge Smith added that national uniformity is greatly needed in this area. The bar, he said, has been strongly supportive of the proposed new rule, and their comments have been very useful in improving the text. He explained that proposed Rule 502(b) specifies that an inadvertent disclosure will not constitute a waiver if the holder of the privilege or protection acts reasonably to prevent disclosure and takes reasonably prompt measures to rectify an error. Subject-matter waiver will occur only when one side acts unfairly and offensively in attempting to use a privilege waiver as to a particular document or communication.

Professor Capra added that the bar believes strongly that the rule will be very beneficial. It would provide national uniformity and liberalize the current waiver standard in the federal courts. He noted that the text had been refined further since the April 2007 advisory committee meeting in response to suggestions from a Standing Committee member and the Style Subcommittee.

Professor Capra noted that Rule 502(c) deals with disclosure and waiver in state-court proceedings. He pointed out that the advisory committee had been very sensitive to federal-state comity concerns and had revised the rule to take account of comments made by the Federal-State Jurisdiction Committee of the Judicial Conference and state chief justices.

He emphasized that the rule will provide protection in state proceedings and, indeed, must do so in order to have any real meaning. But, he said, the rule does not

explicitly address disclosures first made in the course of state-court proceedings. Thus, if a party seeks to use in a federal proceeding a disclosure made in a state proceeding, the federal rule will not necessarily govern. Rather, the most protective rule would apply, *i.e.*, the one most protective of the privilege.

Professor Capra explained that Rule 502(d) is the heart of the new rule. It specifies that a federal court's order holding that a privilege or protection has not been waived in the litigation before it will be binding on all persons and entities in all other proceedings – federal or state – whether or not they were parties to the federal litigation. Rule 502(e) provides that parties must seek a court order if they want their agreement on the effect of disclosure to be binding on third parties.

Professor Capra reported that the Department of Justice had expressed concern over the committee's decision to extend Rule 502(b) to inadvertent disclosures made "to a federal office or agency," as well as "in a federal proceeding." He noted that members of the bar had argued that the cost of pre-production review of materials disclosed to a federal agency can be just as great as that before a court.

He explained that the Department of Justice was concerned that an Executive Branch officer does not generally know whether there has been a waiver. A matter before an agency is not yet a "proceeding," and there is no judge to whom the agency can go for a ruling on waiver. As a practical matter, then, an agency may get whip-sawed later if a party claims that it did not intend to waive protection or privilege. That scenario may occur now, but the Department believes that it is likely to happen more often under the proposed rule. He noted that the advisory committee was aware of the Department's concerns, but it was willing to accept that risk in return for the benefits of reducing the costs of discovery before government agencies.

Professor Capra reported that, as published, the rule had set forth in brackets a provision governing "selective waiver." The bracketed selective waiver provision had specified that disclosure of protected information to a federal government agency exercising regulatory, investigative, or enforcement authority does not constitute a waiver of attorney-client privilege or work-product protection as to non-governmental persons or entities, whether in federal or state court.

Professor Capra pointed out that the advisory committee had not voted affirmatively for the provision, but had included it for public comment at the request of the former chairman of the House Judiciary Committee. During the comment period, he said, the provision had evoked uniform and strong opposition from the bar, largely on the grounds that it would further encourage a "culture of waiver" and weaken the attorney-client privilege. On the other hand, he said, representatives of government regulatory agencies supported the selective waiver provision.

Professor Capra said that, as a result of the public comments, the advisory committee had decided that selective waiver was essentially a political question and should be removed from the rule. Instead, it agreed to prepare a separate report for Congress containing appropriate statutory language that Congress could use if it wanted to enact a selective waiver provision. The draft letter, he said, would state that the committee's report on selective waiver is available on request if Congress wants it. Professor Capra emphasized that the advisory committee did not want to let a controversial issue like selective waiver detract from, or interfere in any way with, enactment of the rest of the proposed new rule, which is non-controversial and will have enormous benefits in reducing discovery costs.

A member asked what good it does, once a disclosure in a state proceeding has been found to have waived the privilege in that state proceeding, for the privilege to be found protected in a later federal proceeding. As a practical matter, the disclosed information is already out. Professor Capra responded that the advisory committee had discussed these issues with the Conference of Chief Justices and had reached an agreement that the federal rule would apply if more protective of the privilege than the applicable state rule. In fact, though, most states have a rule on inadvertent disclosure similar to the proposed new federal rule, and the rule of some states is more protective of the privilege. Given those circumstances, he said, the concern may be largely theoretical. He added that it would be very complex to apply a state law of waiver that is *less* protective of the privilege than the federal rule. The proposed new rule would avoid that situation.

A member pointed out that even though the advisory committee had decided that the proposed new rule would not address the matter, selective waiver is still present. As a practical matter, once there is a federal judicial proceeding involving the federal government, proposed Rule 502(d) may function as a mechanism for a selective waiver. For example, a party may permit a document to be disclosed to its federal government opponent. Even if the privilege is found waived as to that document, there will not be a subject-matter waiver unless the exacting requirements of Rule 502(a) are met. If the court rules that there is no subject-matter waiver, the ruling will be binding in later proceedings under Rule 502(d). Thus, the new rule will give the government an incentive to initiate a judicial proceeding in the hope of extracting what would amount to a selective waiver.

Mr. Tenpas observed, regarding selective waiver, that the Department has been told for years by parties under investigation that they would like to turn over specific documents to the government, but could not afford to do so for fear of waiving the privilege as to everybody else. Ironically, he said, the same people now say that they are strongly opposed to a selective waiver rule.

He added that the Department would prefer that the rule proceed to Congress with a selective waiver provision included. He wanted to make sure that the issue is preserved and that the Department's support for sending the rest of the rule forward is not interpreted as a lack of support for selective waiver.

A member stated that he was distressed by the length of the proposed committee note. He said that it reads like a law review article and should be cut substantially. Professor Capra responded that a longer note was needed in this particular instance because it will become important legislative history when the rule is enacted by Congress. Another member pointed out that committee notes help to explain the rationale for a rule during the public comment process. But once the rule is promulgated, it might be better to have a shorter note on the books. He suggested that the note might be made shorter and some of its points transferred to a covering letter to Congress.

Professor Capra observed that when Congress enacted FED. R. EVID. 412 (relevance of alleged victim's past sexual behavior or predisposition) it had declared that the committee note prepared by the rules committees would constitute the legislative history of the statute. Congress, he said, could do the same thing with the proposed new Rule 502. That possibility, he said, would argue for a relatively lengthy note. He further commented that the signals the advisory committee reporters receive from the Standing Committee are not uniform as to what the committee notes are supposed to do. In any event, he said that he would cut back the length of the note in response to the members' comments.

Professor Coquillette added that committee notes often become fossilized over time. Statements that are very useful at the time a rule is adopted can, several years later, become unnecessary, disconnected, or wrong. The rules committees, however, cannot change a note without changing the rule. Also, he said, some lawyers only use the text of the rule, and they do not have ready access to committee notes and the treatises.

A member questioned the language of proposed Rule 502(b)(2) that the holder of a privilege must take "reasonable steps" to prevent disclosure. The whole point of the rule, he said, is that in a big document-production case an attorney need not search each and every document to uncover embedded privilege issues. But what, in fact, constitutes the "reasonable steps" that the attorney must take? He pointed out that he personally would avoid problems by reaching an early agreement in every case with his opponent to address inadvertent waiver. Professor Capra responded, however, that not every party can obtain such an agreement. Moreover, an attorney cannot know for certain in advance that he or she will reach an agreement with the opponent or be able to obtain a court order. He predicted that in time, few issues will arise under the language of Rule 502(b).

Mr. Tenpas explained further the Department of Justice's concern over extending the inadvertent waiver provision to documents turned over "to a federal office or agency." He explained that the Department was well aware that it is very expensive for a party to conduct privilege review of documents given to a federal agency, just as it is in litigation before a court. The proposed new rule, therefore, is designed to change parties' conduct in this regard, and reduce the costs of privilege review.

The problem for the government, though, is that the federal office or agency does not know whether a disclosure will constitute a waiver until it can obtain a ruling from a judge in some future litigation. He recognized that that is also the case now. But he argued that no one knows how many more privileged documents will slip through under the new rule, as compared to the current regime. The Department, he said, was concerned that it will occur more frequently under the proposed rule.

He suggested that it would make sense at this point to limit the new rule to federal court proceedings only. The committee could at a later date consider whether to extend it to documents disclosed to federal regulators.

Mr. Tenpas moved to amend proposed Rule 502(b) by striking from line 18 the words "or to a federal office or agency."

A member noted that consideration of proposed Rule 502 is different from the committee's usual rulemaking process because any rule pertaining to privileges must be affirmatively enacted by Congress. This circumstance creates practical problems if the committee wants to make additional changes later in light of experience under the rule. The committee could not then merely make changes through the rulemaking process, but would have to return to Congress for a further statutory amendment. This, he said, is an argument against making the change that the Department of Justice urges, i.e., deleting "or to a federal office or agency."

Judge Smith stated that the issue of including "a federal office or agency" in the inadvertent disclosure provision was not a deal-breaker for the advisory committee. The public comments, he said, had made it clear that something needs to be done as soon as possible to reduce the costs of privilege review in discovery. Thus, getting a new Rule 502 enacted by Congress is the main goal. Beyond that, he said, the rule should cover as many contexts as possible.

Mr. Tenpas stated that the main focus of the proposed rule is on litigation in court, not on dealings with federal agencies. Productions of documents to federal agencies outside litigation, he argued, do not entail huge document productions nearly so often as in litigation.

The committee voted by voice vote, with two objections, to deny the motion to strike the words “or to a federal office or agency.”

Judge Hartz moved to approve Rule 502, subject to possible further refinements in the language regarding state proceedings.

Judge Levi stated that the proposed new rule is extremely important and will reduce the cost of litigation in a significant way. He recognized that the Department of Justice has had concerns about applying the rule’s inadvertent waiver principles to documents disclosed “to a federal office or agency.” Nevertheless, he implored the Department not to allow its opposition to that particular provision to be interpreted by Congress in any way as opposition to the rule. He said that Congress must not be sent signals that the rule is either complicated or controversial. To the contrary, he said, the public comments had demonstrated that the rule is universally supported, very important, and urgently needed. Mr. Tenpas responded that the Department of Justice would vote in favor of the proposed new rule.

The committee without objection by voice vote agreed to send the proposed new rule to the Judicial Conference for final approval.

ADAM WALSH CHILD PROTECTION ACT

Professor Capra reported that the Adam Walsh Child Protection and Safety Act of 2006 directed the committee to “study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against (1) a child of either spouse; or (2) a child under the custody or control of either spouse.”

Professor Capra pointed out that the Congressional reference had been generated by concern over a 2005 decision in the Tenth Circuit. The court in that case had refused to apply a harm-to-child exception to the adverse testimonial privilege. The defendant had been charged with abusing his granddaughter, and the court upheld his wife’s refusal to testify against him based on the privilege protecting a witness from being compelled to testify against her spouse.

Professor Capra explained that the decision is the only reported case reaching that conclusion, and it does not even appear to be controlling authority in the Tenth Circuit. Moreover, there are a number of cases from the other circuits that reached the opposite conclusion. He said that the advisory committee had decided that there was no need to propose an amendment to the evidence rules to respond to a single case that appears to have been wrongly decided. He added that that the committee had been unanimous in its

decision not to recommend a rule, although the Department of Justice saw the enactment of a statute at the initiative of Congress as raising a different question.

Professor Capra reported that the advisory committee had prepared a draft report for the Standing Committee to send to Congress concluding that an amendment to the evidence rules is neither necessary nor desirable. At the request of the Department, however, the report also included suggested language for a statutory amendment should Congress decide to proceed by way of legislation. Mr. Tenpas added that cases involving harm to children are a growing part of the Department's activity, and the Department likely would not oppose a member of Congress introducing the draft rule language as a statute.

The committee without objection by voice vote approved the report for submission to Congress.

Informational items

Professor Capra reported that the advisory committee would begin the process of restyling the evidence rules in earnest at its November 2007 meeting. He noted that Professor Kimble, the committee's style consultant, was already at work on an initial draft of some rules.

Professor Capra said that the advisory committee had decided to defer considering any amendments to the evidence rules that deal with hearsay in order to monitor case law development following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). He noted that earlier in the current term, the Court had ruled that if a hearsay statement is not testimonial in nature, there are no constitutional problems with admitting it. As a result, the advisory committee might begin to look again at possible hearsay exceptions.

REPORT ON STANDING ORDERS

Professor Capra said that Judge Levi had asked him to prepare a preliminary report on the proliferation of standing orders and how and whether it might be possible to regulate standing orders. He thanked Jeffrey Barr and others at the Administrative Office for gathering extensive materials on the subject for him.

He noted that standing orders are general orders of the district courts. But the term is also used to include the orders of individual judges. In addition, the difference between local rules and standing orders is not clear, as subject matter appearing in one court's local

rules appears in another's standing orders. In some instances, standing orders abrogate a local court rule, and some standing orders conflict with national rules.

Standing orders, unlike local rules, do not receive public input. They are easier to change but are not subject to the same review by the court or the circuit council. They are also harder for practitioners to find, as they are located in different places on courts' local web sites. Some courts, moreover, do not post standing orders, and many judges do not post their own individual orders. And the courts' web sites do not have an effective search function.

Professor Capra suggested that one question for the Standing Committee was to decide what can, or should, be done about the current situation. A few districts, he said, had made some attempt to delineate the proper use of standing orders, such as by limiting them to administrative matters and to temporary matters where it is difficult to keep up with changes, such as electronic filing procedures. He suggested that another approach would be to include basic principles in a local court rule and supplement them with a more detailed local practice manual.

Professor Capra pointed out that his preliminary report had set forth some suggestions as to the role that the Standing Committee might assume vis a vis standing orders. One possibility would be to initiate an effort akin to the local-rules project to inform the district courts of problems with their standing orders. But, he said, that course would require a massive undertaking. Another approach would be to focus only on those orders that conflict with a rule. Alternatively, the committee could list the topics that should be included in local rules and those that belong in standing orders. In addition, the committee might address best practices for local court web sites.

Members said that Professor Capra's report was excellent and could be very helpful to judges and courts. One suggested that the Judicial Conference should distribute the report to the courts and adopt a resolution on standing orders. Judge Levi added that the report was not likely to encounter much resistance because it does not tell courts what to do, but just recommends where information might be placed in rules or orders. He suggested that the report be presented at upcoming meetings of chief district judges and the district-judge representatives to the Judicial Conference. Finally, Judge Levi recommended that his successor as committee chair consider the best way to make use of the report.

REPORT ON SEALING CASES

Mr. Rabiej reported that the Executive Committee of the Judicial Conference had asked the rules committees, in consultation with other Conference committees, to address the request of the Court of Appeals for the Seventh Circuit that standards be developed for regulating and limiting the sealing of entire cases. He noted that there had been problems in a handful of courts regarding the docketing of sealed cases. The electronic dockets in those courts had indicated that no case existed, and gaps were left in the sequential case-numbering system. This led some to criticize the judiciary and accuse it of concealing cases. Corrective action has been taken, in that the electronic docket now states that a case has been filed, but sealed by order of the court.

Mr. Rabiej said that a complete solution to the problems of sealed cases may require a statute. Judge Levi decided to appoint a subcommittee, chaired by Judge Hartz and including members of other Conference committees, to study the matter and respond to the request of the Seventh Circuit. He said that a representative from each of the advisory committees should be included on the new subcommittee, as well as a representative from the Department of Justice.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held on January 14-15, 2008, in Pasadena, California.

Respectfully submitted,

Peter G. McCabe,
Secretary

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY J. SCIRICA
CHIEF JUDGE

22014 UNITED STATES COURTHOUSE
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May 10, 2007

Honorable Carl E. Stewart
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101

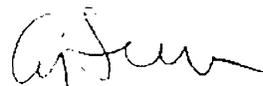
Dear Judge Stewart:

Please forgive my belated reply to your letter requesting that courts review local rules for briefs that impose requirements in addition to those of the Federal Rules. We are currently undertaking a review of all our local rules. We will include in this review the rules identified by the FJC and highlighted in your letter.

We will advise you of the results of our review.

Thank you.

Sincerely,


Anthony J. Scirica

AJS:dm



"Alex Luchenitser"
<luchenitser@au.org>
09/04/2007 05:17 PM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject comment on time-counting rules

With respect to the proposed time-counting amendments, the new rules should be revised to clarify how to properly add the three days that must be added based on mail or electronic service. There can be confusion on this point both right now and under the new rules. Consider the following example (under the proposed new rules):

A motion in a court of appeals is served by mail on Wednesday, September 5. Is it proper to add the three days for mail service to the 10-day default period to respond (of the proposed new rules) to get a 13-day period, and count 13 days from September 5 so that the opposition brief is due Tuesday, September 18? Or is it correct to first determine when the original 10-day period would expire, which would be Monday, September 17 (because the 10 days run to Saturday, September 15, which is not a business day), and then count three days from Monday, September 17, to get a due date of Thursday, September 20?

Under the current Appellate Rule 26(c), it seems the due date is September 18, if the rule is read literally, as the rule states that the three days are "added to the prescribed period." But, under the current Rule 6 of the Federal Rules of Civil Procedure, if we were considering a September 5 filing in a district court and the local rule required a response within 10 calendar days, then the due date (if you read Rule 6 literally) would seem to be September 20, as Rule 6 provides that "3 days are added after the period would otherwise expire under Rule 6(a)."

I suggest that the amended rules clarify the working of the 3-day rule so that it is clear and is consistent among the district and appellate rules.

Alex Luchenitser
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MEMORANDUM

DATE: October 2, 2007
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 06-04

This memo discusses the Committee’s proposed amendment to FRAP 29 concerning amicus brief disclosures. Part I reviews the history of the proposed amendment, and Part II sets forth new proposed language for the amendment.

I. The history of the proposed amendment

At the November 2006 meeting, the Committee voted to amend the FRAP to require that amicus briefs indicate whether counsel for a party authored the brief and to identify persons who contributed monetarily to the preparation or submission of the brief. The Committee’s consensus was that the Rule should be modeled upon Supreme Court Rule 37.6, which then provided:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

In April 2007, the Committee approved a proposed amendment to FRAP 29 that read as follows:

1 **Rule 29. Brief of an Amicus Curiae**

2 * * * * *

3 (c) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to
4 the requirements of Rule 32, the cover must identify the party or parties supported

1 and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae~~
2 ~~is a corporation, the brief must include a disclosure statement like that required of~~
3 ~~parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must
4 include the following:

- 5 (1) a table of contents, with page references;
- 6 (2) a table of authorities — cases (alphabetically arranged), statutes and other
7 authorities — with references to the pages of the brief where they are
8 cited;
- 9 (3) a concise statement of the identity of the amicus curiae, its interest in the
10 case, and the source of its authority to file;
- 11 (4) an argument, which may be preceded by a summary and which need not
12 include a statement of the applicable standard of review; and
- 13 (5) a certificate of compliance, if required by Rule 32(a)(7);
- 14 (6) if filed by an amicus curiae that is a corporation, a disclosure statement
15 like that required of parties by Rule 26.1; and
- 16 (7) unless¹ filed by an amicus curiae² listed in the first sentence of Rule 29(a),
17 a statement that, in the first footnote on the first page:
- 18 (A) indicates whether a party’s counsel authored the brief in whole or

¹ The version approved by the Committee in April read “except in briefs filed [etc].” I substituted “unless filed [etc],” based on style guidance from Professor Kimble.

² The version approved by the Committee used the term “amicus,” but I substituted “amicus curiae,” in order to be consistent with other places in the Appellate Rules where the term appears.

1 in part; and
2 (B) identifies every person or entity — other than the amicus curiae, its
3 members, or its counsel — who contributed money toward
4 preparing or submitting the brief.

5 * * * * *

6 **Committee Note**

7 **Subdivision (c).** Two items are added to the numbered list in subdivision (c).
8 The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of
9 existing items. The disclosure required by subdivision (c)(6) should be placed before the
10 table of contents, while the disclosure required by subdivision (c)(7) should appear in the
11 first footnote on the first page of text.

12
13 **Subdivision (c)(6).** The requirement that corporate amici include a disclosure
14 statement like that required of parties by Rule 26.1 was previously stated in the third
15 sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6)
16 for ease of reference.

17
18 **Subdivision (c)(7).** New subdivision (c)(7) requires amicus briefs to disclose
19 whether counsel for a party authored the brief in whole or in part and to identify every
20 person or entity (other than the amicus, its members, or its counsel) who contributed
21 monetarily to the preparation or submission of the brief. Entities entitled under
22 subdivision (a) to file an amicus brief without the consent of the parties or leave of court
23 are exempt from this disclosure requirement.

24
25 The disclosure requirement, which is modeled on Supreme Court Rule 37.6,
26 serves to deter counsel from using an amicus brief to circumvent page limits on the
27 parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the
28 majority's suspicion "that amicus briefs are often used as a means of evading the page
29 limitations on a party's briefs"). It also may help judges to assess whether the amicus
30 itself considers the issue important enough to sustain the cost and effort of filing an
31 amicus brief.

32
33 It should be noted that coordination between the amicus and the party whose
34 position the amicus supports is desirable, to the extent that it helps to avoid duplicative
35 arguments. This was particularly true prior to the 1998 amendments, when deadlines for
36 amici were the same as those for the party whose position they supported. Now that the
37 filing deadlines are staggered, coordination may not always be essential in order to avoid

1 duplication. In any event, mere coordination – in the sense of sharing drafts of briefs –
2 need not be disclosed under subdivision (c)(7). Cf. Robert L. Stern et al., Supreme Court
3 Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not “require disclosure of any
4 coordination and discussion between party counsel and *amici* counsel regarding their
5 respective arguments . . .”).

After our April 2007 meeting, the Supreme Court published for comment a proposed amendment to Supreme Court Rule 37.6. As originally published for comment, the proposed amendment read as follows:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part, whether such counsel or a party is a member of the *amicus curiae*, or made a monetary contribution to the preparation or submission of the brief, and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution to ~~the preparation or submission of the brief~~. The disclosure shall be made in the first footnote on the first page of text.

The Clerk’s Comment to the proposed rule change stated that “the change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity of a member of the entity filing as *amicus curiae*.”

Because our proposed amendment was modeled on the Supreme Court rule, it seemed advisable to consider alternative language that would conform Appellate Rule 29 to the amended language then proposed for Supreme Court Rule 37.6. By email, the Committee decided to present two alternative amendments to the Standing Committee, with a request that the Standing Committee authorize publication of Option A if the Rule 37.6 amendment were rejected, and Option B if the Rule 37.6 amendment were adopted. (The Supreme Court rule amendment was then slated for adoption in late June, to take effect in August.)

After that decision, and shortly prior to the Standing Committee meeting, we became aware that comments had been submitted to the Court that were highly critical of the proposed amendment to Supreme Court Rule 37.6. (The two letters – one from a group of Supreme Court practitioners, and one from the National Chamber Litigation Center and National Association of Manufacturers (the “Chamber”) – are enclosed.) The practitioners argued that the proposed amendment could deter lawyers from joining organizations for fear that their membership would trigger the disclosure obligation in unrelated litigation, and they also contended that the reference to making a “monetary contribution[s] to the preparation or submission of the brief” was ambiguous and might be construed to include general membership dues. The Chamber asserted that the disclosure requirement would chill *amicus* participation, that compelling disclosure that a

party was a member of an amicus would impair the member's First Amendment freedom-of-association rights,³ and that compelling disclosure of monetary contributions would impair groups' ability to raise funds for amicus filings.

Because the Appellate Rules Committee had not had a chance to consider those comments, and because it was not yet known what the Supreme Court would decide to do in response to those comments with respect to Rule 37.6, the Standing Committee at its June meeting decided it was better to hold off for the moment, rather than publish the Rule 29 proposal this August.

In late July, the Supreme Court adopted a revised version of Rule 37.6, to take effect October 1, 2007. The revised version reads as follows; the blacklining shows the changes as compared to the existing Rule:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person ~~or entity~~, other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution ~~to the preparation or submission of the brief~~. The disclosure shall be made in the first footnote on the first page of text.

The Clerk's Comment to the amended Rule 37.6 states: "The change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity as a member of the entity filing as *amicus curiae*. Such disclosure is limited to monetary contributions that are intended to fund the preparation or submission of the brief; general membership dues in an organization need not be disclosed."

³ It is not clear that the First Amendment argument is a persuasive one. "The Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 91 (1982). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958). But even where a government requirement of membership disclosure would chill members' exercise of their free association rights, the requirement could be upheld if the government demonstrates "a controlling justification for the deterrent effect on the free enjoyment of the right to associate," *Patterson*, 357 U.S. at 466, and the disclosure requirement is tailored to that justification, *see Brown*, 459 U.S. at 91-92. In any event, this question is moot because the amended Rule adopted by the Supreme Court this July does not require disclosure of parties' or lawyers' membership in an amicus.

The revised version, as adopted this July, clearly responds to the concerns voiced by the commenters. As adopted, the Rule does not require disclosure of the fact that a lawyer or party is a member of the amicus. Nor does it require disclosure of a lawyer's or party's monetary contribution to the amicus unless the contribution was intended to fund the preparation or submission of the brief; as the Clerk's Comment points out, that excludes general membership dues.

II. New proposed language for the amendment

In the light of the newly amended Supreme Court Rule 37.6, I propose that the Committee consider adopting the following amendment to Rule 29. The new language is in subdivisions (c)(7)(B) and (C) of the text, and in the first paragraph of the note to subdivision (c)(7). Subdivision (c)(7)(C) now refers to "every other person" rather than "every person or entity" (the language in the previous version). I inserted "other" because subdivision (c)(7)(B) now refers to some persons who might have contributed money. And I deleted "or entity" to conform to the language adopted by the Supreme Court for revised Rule 37.6. Though the Clerk's Comment did not address the deletion of "or entity," I think it likely that "entity" was deleted as redundant since a "person" can be construed to include corporate and other "entities." This interpretation is supported by the structure of proposed subdivision (c)(7)(C), which refers to "every other person – other than the amicus curiae ... ," clearly indicating that amici (which include many organizations) count as "persons." To remove any doubt on this score, the Note now states that "person" includes artificial as well as natural persons.

1 **Rule 29. Brief of an Amicus Curiae**

2 * * * * *

3 **(c) Contents and Form.** An amicus brief must comply with Rule 32. In addition to
4 the requirements of Rule 32, the cover must identify the party or parties supported
5 and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae~~
6 ~~is a corporation, the brief must include a disclosure statement like that required of~~
7 ~~parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must
8 include the following:

9 **(1)** a table of contents, with page references;

1 The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of
2 existing items. The disclosure required by subdivision (c)(6) should be placed before the
3 table of contents, while the disclosure required by subdivision (c)(7) should appear in the
4 first footnote on the first page of text.

5
6 **Subdivision (c)(6).** The requirement that corporate amici include a disclosure
7 statement like that required of parties by Rule 26.1 was previously stated in the third
8 sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6)
9 for ease of reference.

10
11 **Subdivision (c)(7).** New subdivision (c)(7) sets certain disclosure requirements
12 for amicus briefs, but exempts from those disclosure requirements entities entitled under
13 subdivision (a) to file an amicus brief without the consent of the parties or leave of court.
14 Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored
15 the brief in whole or in part and whether a party or a party's counsel contributed money
16 with the intention of funding the preparation or submission of the brief. A party's or
17 counsel's payment of general membership dues to an amicus need not be disclosed.
18 Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than
19 the amicus, its members, or its counsel) who contributed money with the intention of
20 funding the brief's preparation or submission. "Person," as used in subdivision (c)(7),
21 includes artificial persons as well as natural persons.

22
23 The disclosure requirement, which is modeled on Supreme Court Rule 37.6,
24 serves to deter counsel from using an amicus brief to circumvent page limits on the
25 parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the
26 majority's suspicion "that amicus briefs are often used as a means of evading the page
27 limitations on a party's briefs"). It also may help judges to assess whether the amicus
28 itself considers the issue important enough to sustain the cost and effort of filing an
29 amicus brief.

30
31 It should be noted that coordination between the amicus and the party whose
32 position the amicus supports is desirable, to the extent that it helps to avoid duplicative
33 arguments. This was particularly true prior to the 1998 amendments, when deadlines for
34 amici were the same as those for the party whose position they supported. Now that the
35 filing deadlines are staggered, coordination may not always be essential in order to avoid
36 duplication. In any event, mere coordination – in the sense of sharing drafts of briefs –
37 need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., Supreme Court
38 Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any
39 coordination and discussion between party counsel and *amici* counsel regarding their
40 respective arguments . . .").

Encls.



1615 H STREET, NW
WASHINGTON, DC 20062-2000
202/463-5337 • 202/463-5346

June 4, 2007

Clerk of the Court
Att: Rules Committee
Supreme Court of the United States
Washington, D.C. 20543

Ladies and Gentlemen:

On May 14, 2007 the Court invited public comment on proposed revisions to its rules of procedure. The proposed revisions include an amendment to Rule 37.6 which, as we understand it, would require an *amicus curiae* to indicate, in addition to the current required disclosures, (i) whether a party (or its counsel) is a member of the *amicus curiae* (e.g., whether a party is a member of a trade association submitting an *amicus* brief), and if so, (ii) whether the party (or its counsel) made a monetary contribution to the preparation or submission of the brief. This represents a significant change from the current rule, which does not require *amicus curiae* to make either of these disclosures.

The Chamber of Commerce of the United States of America and its affiliate, the National Chamber Litigation Center, and the National Association of Manufacturers are jointly submitting these comments to discuss why we believe that the proposed amendment to Rule 37.6 not only is unnecessary, but also would be detrimental to organizations that frequently submit *amicus* briefs to the Court. We are deeply concerned that if adopted, the proposed amendment to Rule 37.6 would have a serious chilling effect on our organizations' ability both to attract and retain members and to prepare high quality *amicus* briefs that benefit the Court in its consideration of cases that are important to the American business community.

Our associations raised a similar concern in April 1996 when the Court was in the process of considering adoption of Rule 37.6. The Court considered our comments, and the current rule does not require *amicus curiae* to reveal whether a party to the appeal is a member of the association, much less whether a party that is a member made a financial contribution to the brief. Despite the passage of more than a decade, the Court now apparently believes that both such disclosures are needed to deter parties from exercising control or undue influence over the content of *amicus*

briefs. We can assure the Court, however, that based on our own extensive experience in preparing *amicus* briefs, including routinely interacting with parties and their counsel, there is no “control” or “undue influence” problem. Indeed, the current rule, which requires *amicus curiae* to indicate whether a party or its counsel authored the *amicus* brief in whole or part, has served as a strong and effective deterrent. Accordingly, we urge the Court to retain Rule 37.6 in its current form.

INTEREST OF THE COMMENTERS

The *Chamber of Commerce of the United States of America* (“Chamber”) is the world’s largest federation of business organizations. It represents more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of the Chamber’s primary missions is to represent the collective interests of its members by filing *amicus curiae* briefs in cases involving issues of national importance to American business. The *National Chamber Litigation Center* (“NCLC”) is the separately incorporated and separately funded legal affiliate of the Chamber. NCLC, which has its own membership, acts as a public policy law firm, by filing *amicus* briefs on behalf of the Chamber in the Supreme Court and in the lower courts. Because NCLC receives no fees for its services, it depends solely upon voluntary contributions from its supporters to fund its activities, including preparation and submission of *amicus* briefs.

The *National Association of Manufacturers* (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America’s economic future and living standards.

REASONS WHY RULE 37.6 SHOULD NOT BE AMENDED

The Chamber and the NAM are united in our belief that the proposed amendment to Rule 37.6 not only is unnecessary, but also would be highly detrimental to the very purpose of *amicus* practice in the Supreme Court—to be of “considerable help to the Court” by “bring[ing] to the attention of the Court relevant matter not already brought to its attention by the parties.” R. 37.1.

1. The Proposed Amendment Is Unnecessary

The Clerk's comment on the proposed amendment to Rule 37.6 is that "the change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity of a member of the entity filing as *amicus curiae*." Although no further explanation is provided, we infer the Court's concern is that a party may be presumed to have exerted undue influence over the content of an *amicus* brief if it is a member of the organization that submitted the brief and made a monetary contribution to preparation of the brief. We respectfully submit, however, that there is no basis for any such presumption, and therefore, no need for additional disclosure requirements.

First, the current Rule 37.6 already requires an *amicus curiae* to "indicate whether counsel for a party authored the brief in whole or in part." This current disclosure requirement applies regardless of whether the party or its counsel is a member of the *amicus curiae* or made a monetary contribution to preparation of the brief. It functions as a powerful deterrent against a party or its counsel exercising a heavy hand in the preparation of an *amicus* brief. See Robert L. Stern et al., *Supreme Court Practice* 661-62 (8th ed. 2002) ("The Rule 37.6 disclosure requirements will discourage party counsel from taking over the preparation and submission of supporting *amici* briefs. And those counsel intent on continuing such practices should expect the Court to accord their *amicus* briefs a lesser degree of credibility.").

Second, each of our organizations exercises great care in selecting cases, both at the petition and merits stages, for submission of *amicus* briefs. Equally important, after deciding to submit an *amicus* brief, we exercise our own judgment in determining which issues to address and what arguments to present on behalf of our respective memberships. For example, before NCLC selects a case for submission of an *amicus* brief on behalf of the Chamber, a memorandum is prepared discussing the case background, issues on appeal, parties' positions, and importance of the case and issues to the Chamber's membership and the business community. This memorandum, which sometimes conveys a party's request for *amicus* support, is carefully reviewed and discussed by one of NCLC's case selection committees (e.g., Constitutional & Administrative Law Advisory Committee; Environmental and Energy Law Advisory Committee; Labor & Employment Law Advisory Committee; Securities Litigation Advisory Committee; California Litigation Advisory Committee). If the appropriate NCLC advisory committee recommends that an *amicus* brief be filed, that recommendation must be reviewed and approved by NCLC's senior management. Then, if preparation of an *amicus* brief is approved and sufficient funding is available, NCLC engages its own *amicus* counsel, who generally are highly skilled Supreme Court

practitioners, to draft the brief after consulting with NCLC's legal staff regarding what arguments to present on behalf of the Chamber.

To help ensure that the *amicus* brief will be beneficial to the Court and not duplicative, the supported parties' counsel often are afforded an opportunity to review and comment on a final draft of the brief. *See Stern et al., supra* at 662 (“Often some form of consultation and communication is both appropriate and essential if the *amicus* brief is to be confined, as it should be under Rule 37.1, to ‘relevant matter not already brought to [the Court’s] attention by the parties.’”). This is the extent of “control” or “influence” that the party and its counsel exerts. NCLC never has submitted—and never would submit—an *amicus* brief which has been controlled or directed, much less authored, by a party’s counsel.

The NAM follows similar procedures in preparing *amicus* briefs. While there are no formal case selection committees at the NAM, there is a review and approval process that is designed to ensure that cases are selected not merely because of the parties that are involved but because the legal issues are ones that affect a wide range of manufacturers other than the parties. Since briefs are expensive, voluntary contributions are limited, and there are many more cases considered than can be selected, the NAM must necessarily focus on the cases that will have the greatest impact on manufacturers in general. It would be a poor use of member contributions to file in cases with issues that only affect one company.

In view of our organizations’ discriminating procedures for selection and preparation of *amicus* briefs, and the well established *de facto* prohibition in current Rule 37.6 against a party’s counsel authoring an *amicus* brief, there simply is no basis for assuming that a party’s membership in and/or financial support of an *amicus* association enables it to utilize the association as a surrogate for the filing of a “second” brief.

2. The Proposed Amendment Would Undermine the Fundamental Purpose of Associations and Deprive the Court of Beneficial *Amicus* Briefs

In view of the increasing number of references to private party *amicus* briefs in the Court’s opinions, *see generally* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) (presenting statistics), we are confident that the Court finds high quality *amicus* briefs to be valuable both in determining whether to grant certiorari, and where review is

granted, in deciding the merits.¹ To prepare *amicus* briefs that are suitable for submission to the Supreme Court, our organizations endeavor to engage the best possible appellate counsel who have the requisite substantive knowledge, analytical and legal writing skills, and experience. The cost in terms of legal fees is very substantial, especially for associations, like ours, that are frequent *amici curiae*. We largely rely upon our members' financial contributions to fund such *amicus* activity. As a result, we become very concerned when a proposed Supreme Court rule would discourage either membership or financial contributions.

The current version of Rule 37.6 deters parties and their counsel from attempting to control or direct the content of *amicus* briefs while satisfactorily addressing the concerns that we expressed regarding the Court's original, broadly worded proposed rule, which the Court released for public comment in March 1996. The *current* proposed revisions are even more onerous than the Court's original, 1996 proposed rule because they would explicitly require disclosure of information that is sacrosanct among the vast majority of associations— whether a particular corporation, individual, or group is a member of the association. Coupled with the additional proposed requirement to disclose whether a supported party not only is an association member, but also made a “monetary contribution” toward preparation of an *amicus* brief, the proposed amendment to Rule 37.6 would severely impair our ability to prepare and submit the very type of high quality *amicus* briefs that the Court has come to expect from us.

The whole idea behind an *amicus* brief prepared and submitted by an association is to advocate the *collective* views of its members on important legal issues that affect the members' interests. “The First Amendment does not mention the ‘right of association’ in so many words, but the [S]upreme [C]ourt has long interpolated the right to associate with other individuals as being a necessary corollary of the rights that are mentioned in the text.” George D. Webster, *The Law of Associations*, § 1.01 (Oct. 2006 ed.). “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958). Indeed, “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *Ibid*

¹ See, e.g., *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 n.9 (2004) (citing Chamber *amicus* brief); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 537 (1999) (same); *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) (same).

The Court repeatedly has recognized that “compelled disclosure” of an association’s membership would “affect adversely” the “members’ ability ‘to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” *McCormell v Fed. Election Comm’n*, 540 U.S. 93, 198 n.82 (2003) (quoting *NAACP v Alabama*, 357 U.S. at 463-63). “It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association.” *NAACP*, 357 U.S. at 462; *see also Eastland v U.S. Servicemen’s Fund*, 421 U.S. 491, 498 (1975) (“The right of voluntary associations . . . to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times.”) (citing *NAACP* and other cases); *Bates v Little Rock*, 361 U.S. 516, 524 (1960) (holding that there must be a “cogent” and “compelling” interest “to justify the substantial abridgement of associational freedom which such disclosures [of membership lists] will effect”).

The proposed amendment to Rule 37.6 would compel an *amicus curiae* association to disclose whether the supported party is a member. Yet, as discussed above, there is no compelling, or even cogent, reason to do so. The effect of this proposed infringement of associational freedom and membership privacy would not be to discourage a party or its counsel from asserting control or undue influence over the content of an *amicus* brief. Instead, the effect would be to discourage corporations, especially those frequently involved in litigation, from joining or continuing as members of associations and/or to deter associations from filing *amicus* briefs in cases where members are parties. This adverse impact would be greatly magnified in large associations such as the Chamber, which has *numerous* members that find themselves involved in litigation that potentially could reach the Court. For this reason the proposed association membership disclosure requirement not only raises First Amendment concerns, but also would erode abruptly one of the principal benefits provided by associations such as ours, namely *amicus* advocacy in Supreme Court proceedings.

Disclosure of membership affects more than simple participation in *amicus* briefs. Our associations engage in advocacy activities on many fronts, including substantial work before Congress and in Executive Branch regulatory proceedings, on controversial and often emotional national policy issues. Our members are free to engage in such activities on their own, but they rely on us in many cases to carry forward their message so that they will not be directly and publicly identified as supporting a particular view. Companies may be subjected to threats of boycotts, strikes, adverse publicity, or other acts that would make it more difficult for them to carry on their businesses, even though their acts of issue advocacy are fully protected by the First Amendment. This Court’s proposed rule would incrementally expose the

membership of our organizations to public scrutiny, raising the specter of adverse consequences and discouraging participation in all of our association activities.

Equally important, the proposed requirement that an *amicus* association disclose whether a supported party that is a member of the association made a “monetary contribution” to preparation or submission of an *amicus* brief would hinder our organizations’ ability to raise the funds necessary to engage in *amicus* activity. This is because many associations finance their *amicus* programs through special fundraising mechanisms. While some fundraising efforts raise general funds for *amicus* activity, others focus upon specific issues or cases and are directed to the most interested or affected industry sectors. This would include, of course, any members that are parties, or *potential* parties, in Supreme Court appeals. We are concerned that the proposed monetary contribution disclosure requirement would discourage financial contributions, especially because, as discussed below, the requirement is broad and vague, and could affect members that make financial contributions even before they become parties to appeals. Indeed, although an individual corporation’s monetary contribution to one of our organizations does not entitle or enable it to control or exert undue influence over an *amicus* brief, adoption of the disclosure requirement would imply, contrary to reality, that a party’s financial support means that they somehow are “buying” the right to file a second brief.

Moreover, it does not make sense for companies or associations to have to give up First Amendment rights in order to exercise their right to appeal to the Supreme Court of the United States. While this Court may want to be abundantly cautious to prevent undue influence on *amici* by the parties, the current rule accomplishes that goal. Imposing this new additional disclosure is largely irrelevant to the question of influence, and runs counter to the practice of most other federal appellate courts.

3. The Proposed Amendment’s Disclosure Requirements Are Vague and Overly Broad

The proposed amendment’s broad language raises interpretative questions in a trade association context and only exacerbates the new disclosure requirements’ potential adverse impacts.

For example, the proposed new language would require an *amicus* association to indicate whether a party or its counsel “is a *member* of the *amicus curiae*” (emphasis added). That seemingly simple question actually may be difficult to answer given the complex and varying structures of many national (or international) trade associations, business federations, and other non-profit organizations and advocacy groups. In the case of the Chamber, it has its own membership (consisting of companies, individuals,

and other chambers and associations) which is separate from, and in some instances overlaps with, the memberships of its affiliates, such as NCLC. If the *amicus curiae* is the Chamber, would a brief submitted on behalf of the Chamber by NCLC have to indicate that a party is a “member” if it belongs to NCLC but not to the Chamber? Further, many organizations have different categories of membership, and some, such as professional societies, are comprised primarily of individuals. Under the proposed amendment, would an *amicus* brief submitted by a professional society have to indicate that a corporate party is a member if some of its personnel are members, but their dues are paid or reimbursed by their employers?

Moreover, given many associations’ complex structures and multiple fund-raising mechanisms, the meaning of “*monetary contribution* to the preparation or submission of the brief” (emphasis added) is unclear in an association context. For example, if a party is a general dues-paying member of an *amicus* association, but has not made a cash contribution earmarked for a particular *amicus* brief, does the payment of dues represent a “monetary contribution” to the brief? Such payments might be viewed as contributing to the brief in that staff time is spent preparing or submitting the brief. Thus, any member of our large associations would be disclosed in any brief we filed in support of their position. Or if the association seeks financial support from companies in a specific industry sector to help fund *amicus* briefs in appeals involving issues important to that sector, does that represent a monetary contribution to a particular Supreme Court brief under the proposed amendment? What if the party made the monetary contribution before the case in which it is involved was even filed in the Supreme Court? There are no time limitations proposed in the rule, nor are there *de minimis* thresholds. If a party makes a contribution to our *amicus* program on January 1, would disclosure be required in any *amicus* brief subsequently filed, for years into the future, as long as the association’s *amicus* program has not spent all of its contributions? How close in time would a contribution be related to a brief?

These examples of interpretive questions are just the tip of the iceberg. Every association is structured and funded differently. Responsible associations would err on the side of disclosure, and that would only heighten the unintended, but nevertheless deleterious, effects of these unnecessary disclosure requirements.

CONCLUSION

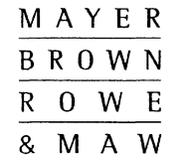
Our organizations, which are among the Supreme Court’s most ethical, experienced and active *amici curiae*, urge the Court to retain Rule 37.6 in its current form.

Respectfully submitted,



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June 4, 2007

BY E-MAIL AND HAND DELIVERY

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Re: Proposed revisions to the rules of the Court

Dear General Suter:

I write in response to the Court's invitation for comments on the recently proposed revisions to the rules of the Supreme Court. These comments have been circulated to a variety of active members of the Court's Bar, and a number of other bar members have asked to join them; a list of these signatories is included as an addendum to this letter.

These comments are organized in the order of the rules to which the proposed amendments apply, though in a number of instances specific comments relate to other rules as well.

1. Revised Rule 15.3: Requirement to file *in forma pauperis* briefs in opposition.

The revision to Rule 15.3—the addition of the word “shall” in the sentence “If the petitioner is proceeding *in forma pauperis*, the respondent shall file an original and 10 copies of a brief in opposition prepared as required by Rule 33.2.”—may be ambiguous. According to the Clerk's Comment, this revision is designed to make “an 8½- by 11-inch paper response to an *in forma pauperis* petition mandatory.” But arguably this revision mandates the *submission* of a brief in opposition, instead of merely requiring that such a brief, *if filed*, comply with Rule 33.2 rather than Rule 33.1. To be sure, Rule 15.1 specifies that briefs in opposition are not mandatory except in capital cases or when ordered by the Court; nonetheless, we would suggest modifying this revision to eliminate this ambiguity. One proposed revision would be:

“If the petitioner is proceeding *in forma pauperis*, the respondent shall prepare its brief in opposition, if any, as required by Rule 33.2, and shall file an original and 10 copies of that brief.”

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2. Revised Rules 25.2 and 25.3: Time periods for the preparation of merits briefs.

The amendments to Rule 25.2 and 25.3 change the time period for the respondent or appellee to prepare its brief on the merits—from 35 days to 30 days—and the time period for the petitioner or appellant to prepare its reply brief—from 35 days to 25 days. The clerk's comment explains that this alteration is being proposed because "the time period between the granting of a petition for a writ of certiorari and the date of oral argument has decreased in recent years," and because "technological improvements have decreased the amount of time needed to prepare booklet-format briefs."

We question the need for or desirability of this change. As the clerk's comment explains, in a number of instances a somewhat-shortened briefing schedule is necessary to accommodate the time period between a grant of certiorari and the date of oral argument. But the Court has successfully addressed this issue in the recent past by issuing accelerated briefing schedules in instances in which the normal briefing schedule would cause the Court problems in scheduling cases on the argument calendar—a relatively small percentage of cases, we believe. The effect of this rule would be to mandate accelerated briefing in all cases. We acknowledge that under the proposed rules litigants may seek extensions of the briefing time periods (from the Clerk or an individual Justice, depending on the type of brief), but we nonetheless believe that there is little reason to change the default rule governing the timing of briefs. Given the time it takes to prepare top-notch briefs, and the press of other business that counsel frequently must juggle, we would respectfully suggest that the Court reconsider these changes. Alternatively, the Court could modify the amendment to Rule 25.3 to allow the petitioner 30 days to prepare its reply brief.

3. Revised Rule 25.8 and Rule 26.1: Electronic submission of Joint Appendices.

Proposed rule 25.8 would mandate that the parties submit electronic versions of briefs on the merits to the Clerk of Court (and to opposing counsel). We have no objection to this revision, which has been reflected in the Court's *Guide for counsel in cases to be argued before the Supreme Court of the United States* for some time. In fact, we respectfully suggest that the Court also modify rule 26.1 to mandate that the parties submit an electronic version of the joint appendix to the Clerk. Joint appendices could thereafter be posted on the ABA's web site and elsewhere, thus increasing the public's access to relevant information about pending cases.

A possible method to effectuate this change would be to add, at the end of Rule 26.1, the following sentence:

An electronic version of the joint appendix shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the appendix is filed in accordance with guidelines established by the Clerk. The elec-

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tronic transmission requirement is in addition to the requirement that booklet-format copies of the appendix be timely filed and served.

4. Revised Rule 33.1(b): New Century Schoolbook font.

The revision to Rule 33.1(b) changes the font required for booklet-format documents. The prior rule mandated that briefs be typeset in “Roman 11-point or larger type,” with footnotes in “9-point or larger” type. The revised rule specifies that booklet-format documents be typeset in “New Century Schoolbook 12-point type,” with footnotes in “New Century Schoolbook 10-point type.”

Some members of the bar question this proposed revision. Few dispute that a somewhat-larger typeface might be wise, and we understand that many believe that Roman—and in particular Times New Roman—is a problematic font for brief-length documents. See the Seventh Circuit’s *Requirements And Suggestions For Typography In Briefs And Other Papers*. But some question whether it is wise for the Court to specify as the required font a font that comes neither with Windows nor with the Macintosh operating system. Although New Century Schoolbook is available online for around \$100 (one must purchase the plain font, italicized font, bolded font, and bold-italicized font separately, each for around \$25), we worry that many litigants—and in particular litigants who appear less frequently in the Court—may be confused by this requirement and may unintentionally violate it. Furthermore, although \$100 is not much money in comparison to the cost of producing a booklet-format brief, a large law firm might need to purchase this font for 100 or more individuals, and thereafter keep track of which individuals were licensed to use the font.

Thus, we respectfully suggest that the Court consider modifying this revision. Three options would be (1) to encourage counsel strongly to use this specific font, but to allow other, similarly sized, fonts also to be used; (2) to specify two alternative fonts in addition to this font—one native to Windows and one native on Macintosh computers—that would also be acceptable; or (3) to include, either in the clerk’s comments or on the Court’s web site, more specific information about how to obtain and install this specific font.

5. Revised Rules 33.1(d) & (g): Word Limits.

The proposed revision to Rule 33.1(d) and (g) would replace the Court’s current page limits for booklet-format briefs with word count limits. There is some concern that the specific word-counts proposed in Rule 33.1(g)—which seem to be based on a conversion factor of 300 words under the new rule per page under the old rule—will mandate slightly shorter briefs than before. Several members of the Court’s bar have checked the lengths of briefs that comply with the current rule, and have found that the word counts for those briefs are often somewhat higher than 300 words per page—320-

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330 words per page seems common, and compliant briefs can at times reach 350 words per page.

Nonetheless, members of the bar vary as to what, if anything, they would submit as a comment in response to this proposed alteration. Given that the briefs for all parties will be held to the same length limits, many believe this proposed alteration is unproblematic. Others would suggest that the Court expand these word-count limitations slightly. Thus, we are merely alerting the Court that these word-count limitations may result in slightly shorter briefs.

6. Revised Rule 33.1(g)(vii): Word-count limitation for reply briefs on the merits.

Rule 33.1(g)(vii) alters the maximum length for merits reply briefs from 20 pages to 6000 words, using the same 300-words-per-page formula that the Court used to determine the new word-count limits for all briefs.

Many members of the Bar believe that the length limitation for reply briefs under the current rules is too short, and thus that the revised rule will continue to require reply briefs to be overly short. Given the number of *amicus* briefs that petitioner's counsel frequently must address on reply, and given how critical many believe merits reply briefs are to the eventual outcome of a case, we would suggest that the Court consider expanding this length limitation. One proposal would be to allow merits reply briefs to be 50% of the length of opening briefs on the merits – that is, 7,500 words if the Court implements the remainder of its proposed alteration to Rule 33.1(g)'s length limitations. This modest expansion, which parallels the ratio of word limits for opening briefs and reply briefs in the Federal Rules of Appellate Procedure, would make it somewhat easier for counsel to respond to the arguments made by respondents and their amici.

7. Rule 33.1: Transition issues.

We are concerned that there may be some unfairness caused if revised Rule 33.1 is simply implemented on August 1, 2007, regardless of the stage of briefing at which a case may be. In particular, because briefs submitted in accordance with the revised rule 33.1 may need to be somewhat shorter than briefs submitted in accordance with the current version of Rule 33.1, respondents may be allotted fewer words than petitioners for briefs in opposition or bottom-side briefs on the merits. Accordingly, we suggest that the Court alter the effective date of these proposed rules as follows:

In any case in which the petition for certiorari has been filed before the effective date of these rules but in which the respondent has not filed its brief in opposition prior to that date, all remaining briefs submitted in that case prior to the Court's decision whether to grant certiorari may comply with the May 2, 2005 version of the *Rules of the Supreme Court of the United States* rather than with these revised rules. Similarly, in any case in which

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the petitioner has filed its brief on the merits prior to the effective date of these rules, all remaining briefs in that case may comply with the May 2, 2005 version of the Rules of the Supreme Court of the United States rather than with these revised rules.

8. Revised Rule 37.2(a) : Notification to parties of intent to file an *amicus* brief.

The proposed modification to this rule would mandate that *amicus* briefs in support of a petition for a writ of certiorari be filed within 30 days of the date the petition is filed (without possibility of extension), and that “[a]n *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief.” There is some disagreement among the signatories to this letter as to the provision precluding extensions of time for the filing of *amicus* briefs in support of a petition for a writ of certiorari; thus, we do not address that provision in these comments. One concern that is shared, however, is that the rule does not account for instances in which more than one *amicus* joins the same *amicus* brief—a situation that occurs with some frequency but that often is not arranged until late in the day, when additional *amici* review and agree to join an *amicus* brief that another *amicus* has largely prepared. The respondent in this instance would not be burdened by such additional *amici* joining an *amicus* brief that respondent already knew was going to be filed. Thus, we suggest adding the following to the proposed revision:

An *amicus curiae* shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief.

9. Revised Rule 37.2(a) and Rule 15.5: Timing issues with respect to the filing of cert-stage *amicus* briefs.

The revision to Rule 37.2(a) addresses one of the cert-stage timing problems that exists under the current rule—the inability of respondents to respond to *amicus* briefs. However, this revision does nothing to address another timing problem that many have experienced: instances in which an *amicus* intends to submit an *amicus* brief in support of a petition for certiorari but in which the respondent either files its brief in opposition long before its due date or waives its right to file a brief in opposition. Although the parties are, of course, the primary participants before the Court, we believe that cert-stage *amicus* briefs are frequently beneficial to the Court. Thus, we would propose modifying Rule 15.5 as follows:

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If the Court receives an express waiver of the right to file a brief in opposition, the Clerk will distribute the petition to the Court for its consideration no less than 5 days thereafter, unless within that 5-day period one or more entities submits written notification to the Clerk of its intent to file an *amicus curiae* brief, at which point the Clerk will distribute the petition to the Court for its consideration upon the expiration of the time allowed for filing such *amicus curiae* briefs. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed, except that if the brief in opposition is filed before the due date for *amicus curiae* briefs in support of the petition, and one or more entities submits written notification to the Clerk of its intent to file an *amicus curiae* brief within five days after the filing of the brief in opposition, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the due date for the filing of such *amicus curiae* briefs. If no waiver or brief in opposition is filed, the Clerk will distribute the petition to the Court upon the expiration of the time allowed for filing a brief in opposition.

10. Revised Rule 37.6: Disclosure requirements for *amicus* briefs.

The proposed revision to Rule 37.6—the addition of the requirement that *amicus* briefs disclose “whether [counsel for a party] or a party is a member of the *amicus curiae*, or made a monetary contribution to the preparation or submission of the [*amicus*] brief” — strikes us as highly problematic. For example, under this rule a potential *amicus* would be required to check its membership logs to determine whether any of the parties, or counsel for any of the parties, is a member—no easy task in many cases. (How many John Smiths belong to the ACLU?) Further, that information might have no bearing on a case, and might be highly personal; we can easily envision instances in which counsel for one party in a case might be a member of an *amicus* that filed on the other side of that same case. The proposal could easily discourage counsel, concerned about potential embarrassment to their clients, from joining or maintaining membership in organizations—to the detriment both of the counsel’s associational interests and of the work of associations. Furthermore, many organizations consider their membership records to be highly confidential.

A separate and more discrete problem we see under the proposed revision is that there is a latent ambiguity in the requirement that an *amicus* disclose whether a party (or counsel for a party) “made a monetary contribution to the preparation or submission of the brief”; although we doubt this is the intent of the proposed revision, argua-

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bly a party's general membership dues in an organization that submitted an *amicus* brief helps fund the preparation or submission of the brief.

Thus, we would propose reworking this revised rule as follows:

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part **and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief**, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made **such** a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

We would also suggest that the Clerk's Comment be amended to add at the end the following sentence:

Such disclosure is limited to monetary contributions that are intended to fund the preparation or submission of the brief; general membership dues in an organization need not be disclosed.

In conclusion, we again thank the Court for its consideration of these comments.

Sincerely,



David M. Gossett

Signatories

The following people have asked to join these comments. Affiliations are included solely for identification purposes.

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FOR IMMEDIATE RELEASE
July 17, 2007

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The Supreme Court of the United States today adopted a revised version of the Rules of the Court. The revised version will take effect on October 1, 2007. Rule 48 clarifies which version of the Rules applies to documents filed prior to the effective date of the revised Rules.

The revisions to the Rules include a change from page limitations to a word count similar to the 1998 Amendment to the Federal Rules of Appellate Procedure. See Rule 33. Changes to Rule 25 revise the briefing schedule and require an electronic version of merits briefs be transmitted to the Clerk. Rule 37 revisions require *amici curiae* to notify counsel of record of intent to file an *amicus curiae* brief at the petition stage, and to electronically transmit every *amicus curiae* brief in a case scheduled for oral argument. Also, *amici curiae* supporting a petitioner at the petition stage will be required to file within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and no extensions will be allowed. The briefs of *amici curiae* at the merits stage will be due 7 days after the brief for the party supported is filed.

Copies of the revisions may be obtained from the Court's Public Information Office. The revisions are also posted on the Court's website under Court Rules, www.supremecourtus.gov/ctrules.

The Clerk's Comments are not part of the Rules, but are furnished to assist readers in understanding the changes.

Revised Rule 37.5

A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed **1,500 words**. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.

[CLERK'S COMMENT: THE CHANGE REFLECTS THE USE OF WORD LIMITS IN RULE 33.1]

Current Rule 37.6

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

Revised Rule 37.6

Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and **whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief**, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made **such** a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

[CLERK'S COMMENT: THE CHANGE WOULD REQUIRE THE DISCLOSURE THAT A PARTY MADE A MONETARY CONTRIBUTION TO THE PREPARATION OR SUBMISSION OF AN *AMICUS CURIAE* BRIEF IN THE CAPACITY AS A MEMBER OF THE ENTITY FILING AS *AMICUS CURIAE*. SUCH DISCLOSURE IS LIMITED TO MONETARY CONTRIBUTIONS THAT ARE INTENDED TO FUND THE PREPARATION OR SUBMISSION OF THE BRIEF; GENERAL MEMBERSHIP DUES IN AN ORGANIZATION NEED NOT BE DISCLOSED.]

Current Rule 40.1 and 40.2

1. A veteran suing to establish reemployment rights under any provision of law exempting veterans from the payment of fees or court costs, may file a motion for leave to proceed on papers prepared as required by Rule 33.2.

MEMORANDUM

DATE: October 2, 2007
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 03-02

Item No. 03-02 is designed to resolve a circuit split over whether Rule 7 authorizes a court that requires a bond for costs on appeal to include attorney fees as part of the costs. As Part I of this memo notes, the proposed amendment was approved by the Committee in 2003 and was held thereafter to await bundling with other FRAP proposals. In the meantime, there have been two developments that merit consideration. First, during the time since the approval of the proposed amendment, the original evenly-divided circuit split has grown lopsided, with the majority of circuits to have addressed the issue now rejecting the approach that would be taken by the proposed amendment. Part II accordingly assesses whether the Committee's initial determination (that Rule 7 should be amended to make clear that Rule 7 "costs" do not include attorney fees) might be reconsidered in the light of this development in the caselaw. Second, as to the implementation of the proposal, Part III discusses questions about the wording approved in 2003 and suggests alternative wording for the proposed amendment.

I. A brief history of the proposed amendment

The Eleventh Circuit's decision in *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), drew the Committee's attention to a circuit split over whether attorney fees are among the costs for which a bond may be required, under Rule 7, "to ensure payment of costs on appeal." At the time of the Advisory Committee's spring 2003 meeting, the four circuits to have reached the question were evenly split: The Second and Eleventh Circuits had held that such costs did include attorney fees, while the D.C. and Third Circuits had reached the opposite conclusion. The March 2003 minutes describe the Committee's discussion:

The Committee discussed this issue at some length and reached two conclusions:

First, Rule 7 should be amended to resolve the circuit split. This issue is important, and appellants in the Second and Eleventh Circuits - who might be required to post a bond to secure costs and attorneys' fees amounting to hundreds of thousands of dollars - are treated much differently than similarly situated appellants in the D.C. and Third Circuits - who cannot be required to post a bond to secure anything more than a few hundred dollars in costs.

Second, the amendment to Rule 7 should make it clear that district courts can require appellants to post bonds to secure only what are typically thought of as "costs" (such as the costs identified in Rule 39(e)) and not attorneys' fees - whether or not those attorneys' fees are defined as "costs" in the relevant fee-shifting statute. Adopting the position of the Second and Eleventh Circuits would expand Rule 7 beyond its intended scope and vastly increase the cost of Rule 7 bonds. It would also attach significant consequences to whether a particular fee-shifting statute defines attorneys' fees as "costs," a matter that likely reflects little conscious thought on the part of Congress. In addition, district courts would confront practical problems in trying to determine the size of bond necessary to secure attorneys' fees that will be incurred for an appeal in its infancy. Finally, requiring appellants to post a bond to secure attorneys' fees is almost always unnecessary. In most cases in which an appellant might be held liable under a fee-shifting statute for the attorneys' fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees.¹

The Committee asked the Reporter to consider how to implement the change. Accordingly, the Reporter presented a proposed amendment at the fall 2003 meeting. The minutes explain the choices that were made in crafting the proposal:

The amendment cannot simply cross-reference the "costs" mentioned in Rule 39, as Rule 39 does not contain a definition of "costs." The amendment also cannot simply cross-reference the "costs" mentioned in 28 U.S.C. § 1920; although the statute does define "costs," it omits the cost of "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal," which cost is specifically mentioned in Rule 39. The Reporter considered drafting an amendment that would provide, in effect, that "costs" do not include attorney's fees, but a rule that defines a word in terms of what it does not include may open the door to litigation about what it does include. The Reporter said that, in the end, he decided that "costs on appeal" should be defined to mean "the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal."²

The Committee unanimously approved the proposed amendment. Due to the practice of "bundling" proposed amendments, the proposed amendment was held to await a time when additional FRAP amendments would be ready to be published for comment.

This spring, the proposal was brought to the Committee's attention along with other

¹ Minutes of Spring 2003 Meeting of Advisory Committee on Appellate Rules.

² Minutes of Fall 2003 Meeting of Advisory Committee on Appellate Rules.

pending items. However, after some discussion, the Committee decided to hold Item 03-02 for further consideration of the amendment's wording.

II. The developing caselaw and the policy arguments for and against the proposed amendment

In the time since the Committee's 2003 vote, two more circuits – the Sixth and the Ninth – have held that Rule 7 “costs” can include attorney fees. Thus, what in 2003 was an even split has become a lopsided one (four to two). It thus may be worthwhile for the Committee to reconsider its decision in order to assure itself that the developing caselaw provides no reason to change its view on the proposed amendment. In addition, when selecting among the available courses of action the Committee may wish to consider questions concerning rulemaking authority under the Rules Enabling Act.

A. Caselaw on the Rule 7 issue

There is no Supreme Court caselaw directly on point, but at the outset it is worth noting the reasoning of *Marek v. Chesny*, 473 U.S. 1 (1985), which has played a key role in the lower courts' discussions of the Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68's reference to “costs”³ includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute “defines ‘costs’ to include attorney’s fees.” *Marek*, 473 U.S. at 9. The Court explained that because neither Rule 68 nor its note defined “costs,” and because the drafters of the original Rules were aware of the existence of fee-shifting statutes, “the most reasonable inference is that the term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority.” *Id.*

Two circuits – the D.C. Circuit and the Third Circuit – have held that Rule 7 costs cannot include attorney fees. In *In re American President Lines, Inc.*, 779 F.2d 714, 719 (D.C. Cir. 1985) (per curiam), the D.C. Circuit ordered a \$10,000 appeal bond requirement to be reduced to \$450. The court rejected the district court's justifications for the larger bond amount, including the district court's prediction that the appeal likely would be found frivolous (occasioning an award of damages and costs under Rule 38). Rule 7 “costs,” the court explained, “are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal.” *Id.* at 716.⁴ Though *American*

³ If a Rule 68 offer of settlement is not accepted, and “[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.” Fed. R. Civ. P. 68.

⁴ However, a later D.C. Circuit opinion held that for purposes of Rule 39(d)'s 14-day time limit on filing the bill of costs, “costs” does include attorney fees. See *Montgomery &*

President Lines was decided some six months after *Marek*, the D.C. Circuit did not discuss *Marek*'s possible relevance to the Rule 7 question. By contrast, when the Third Circuit followed the *American President Lines* approach in *Hirschensohn v. Lawyers Title Insurance Corp.*, 1997 WL 307777 (3d Cir. June 10, 1997) (unreported decision), the court took pains to distinguish *Marek*'s treatment of Civil Rule 68 costs from the question of Appellate Rule 7 costs. The *Hirschensohn* court followed the D.C. Circuit's lead, stating that Rule 7 costs "are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39." *Hirschensohn*, 1997 WL 307777, at *1. The court reasoned that because "[a]ttorneys' fees are not among the expenses that are described as costs for purposes of Rule 39," such fees are likewise not within the scope of Rule 7 costs. *Id.*⁵ The court relied on Rule 39's references to particular types of costs as a means of distinguishing *Marek*: "[U]nlike Rule 68, which does not define costs, Rule 39 does so in some detail. Therefore, *Marek* does not require a different result ..." *Hirschensohn*, 1997 WL 307777, at *2.⁶

Four circuits have taken a very different view of *Marek*, reading it to weigh in favor of including attorney fees among Rule 7 costs. The Second Circuit, affirming an order requiring (under Rule 7) a \$35,000 bond in a copyright case, reasoned as follows:

Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 785 (D.C. Cir. 1987) (concluding that a "motion for attorneys' fees was subject to Rule 39(d)'s 14-day time limit").

⁵ The *Hirschensohn* court relied on its prior holding in *McDonald v. McCarthy*, 966 F.2d 112 (3d Cir. 1992), that Rule 39 "costs" do not include attorney fees:

[A]n order from this court pursuant to Rule 39 that each party bear its own costs does not foreclose the "prevailing party" from recovering attorneys' fees under section 1988. To hold otherwise would unjustifiably superimpose the language of section 1988, that fees may be awarded as part of costs, on Rule 39 which defines costs as only traditional administrative-type costs, thereby converting the permissive language of section 1988 into a mandatory provision requiring an award of costs in order to recover fees. As there is absolutely no evidence that this was Congress's intention nor would such a holding be reasonable, we decline to so hold. Section 1988 attorneys' fees are not a cost of appeal within the meaning of Rule 39.

McDonald, 966 F.2d at 118.

⁶ It may be worth noting that the Rule 7 holding in *Hirschensohn* was an alternative holding; an "additional ground" for the result in that case was the court's holding that "the statutory source cited by defendants for an allowance of counsel fees" – namely, a provision of the Virgin Islands Code – "does not apply to appeals in this Court so as to make attorneys' fees recoverable as Rule 39 costs." *Hirschensohn*, 1997 WL 307777, at *3.

The Copyright Act, first adopted in 1909, contained section 40, the predecessor to section 505, which similarly provided for attorney's fees as part of the costs.... Thus, the drafters of Rule 7 ... – like the drafters of Rule 68, discussed in *Marek* – were equally aware of the Copyright Act's provision for the statutory award of attorney's fees “as part of the costs” when drafting Rule 7 and not defining costs therein. *See* 17 U.S.C. § 505. *Marek* provides very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7.

Adsani v. Miller, 139 F.3d 67, 73 (2d Cir. 1998). The *Adsani* court noted that neither *American President Lines* nor *Hirschensohn* involved a type of case in which a federal statute would authorize an award of attorney fees, *see Adsani*, 139 F.3d at 73-74, but the *Adsani* court's more central point was that it disagreed with those decisions' view of the interaction between Rules 39 and 7:

Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure. Rule 39 is divided into five sections. These provide: (a) against whom costs will be taxed, (b) the taxability of the United States; (c) the maximum rate for costs of briefs, appendices and copies of records, (d) the procedure by which a party desiring “such costs” may claim them, and (e) that costs incurred in the preparation and transmission of the record on appeal will be taxed in the district court. *See* Fed.R.App.P. 39(a)-(e). None of these provisions purports to define costs: each concerns procedures for taxing them. Specific costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.

Adsani, 139 F.3d at 74. Thus, the *Adsani* court concluded that “Rule 7 does not have a pre-existing definition of costs any more than Fed.R.Civ.P. 68, the rule interpreted in *Marek*, had its own definition.” *Id.*

In *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), the Eleventh Circuit agreed with the Second:

Federal Rule of Appellate Procedure 7 does not differ from Federal Rule of Civil Procedure 68 in any way that would lead us to adopt a different interpretive approach in this case than was embraced by the Supreme Court in *Marek*. Quite the contrary, close scrutiny reveals that there are several substantive and linguistic parallels between Rule 68 and Rule 7. Both concern the payment by a party of its opponent's “costs,” yet neither provision defines the term “costs.”... Moreover, just as the drafters of Rule 68 were aware in 1937 of the varying definitions of costs that were contained in various federal statutes, the same certainly can be said for the authors of Rule 7, which bears an effective date of July 1, 1968. As such, the reasoning that guided the *Marek* Court's determination that Rule 68 “costs” are to be defined with reference to the underlying cause of action is equally applicable

in the context of Rule 7.

Pedraza, 313 F.3d at 1332.⁷ The *Pedraza* court held, however, that the attorney fees authorized under the Real Estate Settlement Procedures Act did not qualify for inclusion in a Rule 7 bond, because RESPA’s language – “costs of the action *together with* reasonable attorneys fees” – treated attorney fees as a separate item rather than a subset of costs. *Pedraza*, 313 F.3d at 1334 (quoting 12 U.S.C. § 2607(d)(5); emphasis in case); *see also id.* (“Each and every statute cited in *Marek* as including attorneys’ fees within the definition of allowable costs features either the words ‘as part of the costs’ or similar indicia that attorneys’ fees are encompassed within costs.”). More recently, the Eleventh Circuit refined its Rule 7 doctrine in the context of civil rights cases, holding that “a district court [may] require ... that a losing plaintiff in a civil rights case post a Fed. R.App. P. 7 bond that includes the defendant’s anticipated appellate attorney’s fees” only if the district court makes “a finding ... that the would-be appeal is frivolous, unreasonable, or groundless.” *Young v. New Process Steel, LP*, 419 F.3d 1201, 1202 (11th Cir. 2005).

In 2004, the Sixth Circuit joined the Second and Eleventh Circuits in holding that attorney fees come within “costs” for purposes of Rule 7. *See In re Cardizem CD Antitrust Litigation*, 391 F.3d 812, 815, 818 (6th Cir. 2004) (with respect to class action settlement objector’s appeal, upholding imposition of \$174,429 appeal bond that included “prospective administrative costs and attorneys’ fees”).⁸ Though the *Cardizem* court generally adopted the same reasoning as the *Adsani* and *Pedraza* courts, it did diverge from *Pedraza* in one respect:

⁷ In *Lattimore v. Oman Const.*, 868 F.2d 437, 440 n.6 (11th Cir. 1989), *abrogated on other grounds*, *see McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1186 (11th Cir. 1993), the Eleventh Circuit – citing a decision of the former Fifth Circuit holding that Rule 39 “costs” did not encompass attorney fees – rejected the contention that a mandate requiring that each party bear its own costs precluded an award of attorney fees under 42 U.S.C. § 2000e-5(k). In *Pedraza*, the court decoupled its reading of Rule 39 “costs” from its reading of Rule 7 “costs”: “[T]he exclusion of attorneys’ fees from Rule 39 ‘costs’ in no way informs (or purports to inform) the definition of the term ‘costs’ in Rule 7.” *Pedraza*, 313 F.3d at 1330 n.12.

⁸ The Sixth Circuit, like a number of other circuits, has held that attorney fees do not count as “costs” for purposes of Rule 39: “As appellate Rule 39 specifically delineates the ‘costs’ to which it applies, i.e. the ‘traditional’ costs of printing briefs, appendices, records, etc., the pronouncements of *Marek* render it inappropriate for this court to judicially-amend Rule 39’s cost provisions to include § 1988 attorney’s fees.” *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 682 n.5 (6th Cir. 1985) (holding that a failure to award costs on appeal to a plaintiff does not preclude an award of attorney fees under 42 U.S.C. § 1988). The *Cardizem* court did not explicitly address the possible tension between the view that Rule 39 costs do not include attorney fees and the view that Rule 7 costs can include attorney fees. *Cardizem* cites much of *Pedraza*’s reasoning with approval, so perhaps the *Cardizem* court implicitly adopted the Eleventh Circuit’s view that the definition of “costs” for purposes of Rule 7 can differ from the definition of “costs” for purposes of Rule 39.

The *Cardizem* court rejected the contention that the statutory authority for the attorney fee must define the fee as part of the costs. Although the state statute at issue in *Cardizem* (a diversity case) authorized an award of “any damages incurred, including reasonable attorney’s fees and costs,” the court rejected the appellant’s contention that the linguistic distinction between fees and costs barred inclusion of the fees in the Rule 7 bond: “*Marek* does not require that the underlying statute provide a definition for ‘costs.’ Rather, *Marek* requires a court to determine which sums are ‘properly awardable’ under the underlying statute, and to include those sums as ‘costs’ under the procedural rule. *Marek*, 473 U.S. at 9.” *Cardizem*, 391 F.3d at 817 n.4.

Most recently, the Ninth Circuit adopted what is now the majority view, holding this summer “that a district court may require an appellant to secure appellate attorney’s fees in a Rule 7 bond.” *Azizian v. Federated Dep’t Stores, Inc.*, 2007 WL 2389841, at *1 (9th Cir. Aug. 23, 2007). The *Azizian* court cited four reasons for its holding:

First, Rule 7 does not define “costs on appeal.” At the time of its adoption in 1968, however, a number of federal statutes—including the Clayton Act—had departed from the American rule by defining “costs” to include attorney’s fees. *Marek*, 473 U.S. at 8-9....

Second, Rule 39 does not contain any “expression[] to the contrary.” *See id.* at 9. There is no indication that the rule’s drafters intended Rule 39 to define costs for purposes of Rule 7 or for any other appellate rule. The 1967 Rules Advisory Committee note to Rule 39(e) states that “[t]he costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond.” Fed. R.App. P. 39(e) advisory committee’s note (1967 adoption). We read this language to mean that the costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal. Further, Rule 38 provides that the court of appeals may award “damages and ... costs,” which include, according to that rule’s advisory committee note, “damages, attorney’s fees and other expenses incurred by an appellee.” Fed. R.App. P. 38; *id.* advisory committee’s note (1967 adoption). The discrepancy between the use of the term “costs” in Rule 39 and its use in Rule 38 strongly suggests that the rules’ drafters did not intend for Rule 39 to create a uniform definition of “costs,” exclusive of attorney’s fees....

Third, while some commentators have criticized *Adsani* and *Pedraza* for “attach[ing] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes,” 16A Wright, Miller & Cooper ... § 3953, *Marek* counsels that we must take fee-shifting statutes at their word. 473 U.S. at 9....

Fourth, allowing district courts to include appellate attorney’s fees in estimating and ordering security for statutorily authorized costs under Rule 7 comports with their role in taxing the full range of costs of appeal. In practice, district courts are usually responsible at the conclusion of an appeal for taxing all appellate costs, including attorney’s fees, available to the prevailing party under a

relevant fee-shifting statute.

Azizian, 2007 WL 2389841, at *5 - *6.

The *Azizian* court also addressed a related question, holding that “a district court may not include in a Rule 7 bond appellate attorney's fees that might be awarded by the court of appeals if that court holds that the appeal is frivolous under Federal Rule of Appellate Procedure 38.” *Azizian*, 2007 WL 2389841, at *1. In reaching this conclusion, the *Azizian* court disagreed with the First Circuit, which in a brief per curiam opinion had upheld the imposition of a \$5,000 Rule 7 bond (in a case where the motion for the bond relied on Rules 38 and 39) based on the district court’s implicit finding “that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility.” *Skolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (per curiam). As the *Azizian* court explained:

Award of appellate attorney's fees for frivolousness under Rule 38 is highly exceptional, making it difficult to gauge prospectively, and without the benefit of a fully developed appellate record, whether such an award is likely.... Moreover, a Rule 7 bond including the potentially large and indeterminate amounts awardable under Rule 38 is more likely to chill an appeal than a bond covering the other smaller, and more predictable, costs on appeal. Finally, in contrast to ordinary fee-shifting and cost provisions, Rule 38 authorizes an award of appellate attorney's fees not simply as incident to a party's successful appellate defense or challenge of a judgment below, but rather as a sanction for improper conduct on appeal....

Azizian, 2007 WL 2389841, at *8. Thus, the *Azizian* court agreed with *American President Lines*’ reasoning that “the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38.” *Azizian*, 2007 WL 2389841, at *8 (citing *American President Lines*, 779 F.2d at 717).

B. Reconsidering the merits of the proposed amendment to Rule 7

The changing landscape of the circuit caselaw on the Rule 7 issue provides the Committee with an opportunity to review its decision concerning the proposed amendment. The Committee has a spectrum of options.

One option is to proceed with the amendment as originally conceived (subject to the details of implementation discussed in Part III). Under this model, the amendment would bar the inclusion of any type of attorney fees in a Rule 7 bond for costs on appeal. Such an amendment would remove the disuniformity that has developed among the circuits, and it would eliminate the risk that oversized bond requirements could sometimes chill meritorious appeals. Though

this approach would remove one tool that is currently available (in some circuits) to discourage frivolous appeals and protect appellees from appellants who pose payment risks, other tools would remain to serve those goals. “The traditional countermeasure for an appeal thought to be frivolous is a motion in the appellate court to dismiss, which is available at the outset of the appeal and before expenses thereon begin to mount. Additionally, a monetary remedy is afforded by Federal Appellate Rule 38, which authorizes an assessment of damages and single or double costs, including reasonable attorneys' fees,” if the court of appeals finds the appeal frivolous. *In re American President Lines*, 779 F.2d at 717.

A second option would be to amend Rule 7 to explicitly permit the inclusion of attorney fees in the bond, so long as the appellee could be eligible to recover those fees from the appellant if the appeal fails and so long as there is a showing that inclusion is necessary to serve Rule 7's purposes. Such an approach could deter some frivolous appeals and could protect some appellees from the risk that a losing appellant would default on payment of attorney fees once those fees are ultimately assessed. One could argue, as the Eleventh Circuit did, that “the guaranteed availability of appellate attorneys' fees prior to the taking of an appeal will further the goal of providing incentives to attorneys to file (or defend against) such appeals.” *Pedraza*, 313 F.3d at 1333. Moreover, if one assumes that Rule 7's purpose is “to protect the rights of appellees brought into appeals courts” by appellants who pose payment risks, *Adsani*, 139 F.3d at 75, then one might conclude – as the *Adsani* court did – that including attorney fees among the “costs” for which a Rule 7 bond may be required furthers the Rule’s goal. As noted above, during its 2003 discussion the Advisory Committee reasoned that “[i]n most cases in which an appellant might be held liable under a fee-shifting statute for the attorneys' fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees.” *Adsani* itself illustrates, however, that this will not always be the case. In *Adsani*, the copyright plaintiff was overseas, had no assets in the U.S., and had not posted a supersedeas bond with respect to the underlying award of attorney fees against her. *See Adsani*, 139 F.3d at 70. It is true that civil rights fee-shifting statutes such as Section 1988 are asymmetric, such that most awards of attorney fees in civil rights cases will presumably be against defendants, and thus may often be against public entities that will not pose payment risks.⁹ But in copyright cases, for

⁹ 42 U.S.C. § 1988(b) provides:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such

example, the statutory authorization for attorney fees operates symmetrically.¹⁰ In antitrust cases the fee-shifting statute appears to be asymmetric,¹¹ but there seems less reason (than in the case of civil rights litigation) to assume that defendants will never pose payment risks.

The second option, however, would pose some questions of manageability. It may be difficult for a district court to predict the appropriateness and size of an attorney fee award at the very outset of an appeal – particularly where the law governing the fee award requires a showing that the appeal was frivolous. “It is ... for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case. The District Court's bond order effectively preempts this court's prerogative to determine, should Safir's appeal be

action was clearly in excess of such officer's jurisdiction.

See Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (prevailing plaintiff should ordinarily recover attorney fees under Section 1988 unless special circumstances make such an award unjust); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (“[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation” in order for defendant to recover attorney fees under Section 1988).

42 U.S.C. 2000e-5(k) provides: “In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.” *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 417 (1978) (“[U]nder § 706(k) of Title VII a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances.”); *id.* at 421 (“[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.”).

¹⁰ *See* 17 U.S.C. § 505 (“In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.”); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (“Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion.”).

¹¹ *See* 15 U.S.C. § 15(a) (“Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.”).

found to be frivolous, whether APL is entitled to a Rule 38 recovery.” *American President Lines*, 779 F.2d at 717. *But cf. Young*, 419 F.3d at 1207 (“District courts ... have a great deal of experience weighing the merits of potential appeals. In every one of the thousands of proceedings in which a state prisoner denied 28 U.S.C. § 2254 relief or a federal prisoner denied 28 U.S.C. § 2255 relief seeks to appeal, the district court that denied relief must determine whether there is likely to be enough substance to an appeal for one to be allowed.”).

The second option would also risk burdening some appellants’ right to take a potentially meritorious appeal. If courts were to include attorney fees in the appeal costs to be bonded under Rule 7, and if they did so too frequently and/or set the bond amounts too high, the practice could pose an unfair obstacle to taking an appeal.¹² Though there is generally no constitutional right to take an appeal, Congress has of course conferred that right by statute, and a sufficiently heavy

¹² Some appellants who might otherwise be required to post a Rule 7 bond might be given in forma pauperis status. *See* Appellate Rule 24(a)(2) (“If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise.”); Appellate Rule 24(a)(5) (if district court denies motion, party can move in court of appeals for leave to proceed i.f.p.).

But some litigants that would not qualify for i.f.p. treatment could be deterred from taking an appeal if a Rule 7 bond were set at too high an amount. For one thing, corporations do not qualify for i.f.p. status. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 196 (1993) (“[O]nly a natural person may qualify for treatment *in forma pauperis* under § 1915.”). For another, it is not clear whether every natural person who would be burdened by a large appeal bond requirement could qualify for a reduction of that bond through a request for i.f.p. treatment. In refusing to adopt “a general rule requiring a losing plaintiff in a civil rights case to post a bond that includes the defendant's attorney's fees on appeal,” the Eleventh Circuit reasoned as follows:

We are not persuaded by the defendant's assurance that if a plaintiff in a civil rights case cannot afford to post a bond that includes the defendant's anticipated attorney's fees on appeal, the plaintiff can always move to proceed in forma pauperis. *See* Fed. R.App. P. 24. The plaintiffs insist there is a gap between qualifying for in forma pauperis status and being able to post a large bond, and that they fall in it. We need not decide if there are some plaintiffs who are too poor to post a bond but too affluent to qualify for IFP status. *Cf. Page v. A.H. Robins Co.*, 85 F.R.D. 139, 140 (E.D.Va.1980) (“A logical counterpart to Appellate Rule 7 is Appellate Rule 24, which pertains to appeals in forma pauperis.”). We need not decide that because even for plaintiffs who can afford to post appeal bonds, the larger the bond amount, the higher the cost of appealing; and the higher the cost of appealing, the greater the disincentive for doing so.

Young, 419 F.3d at 1206 n.1.

burden on that right could in some instances raise constitutional concerns. *Cf. Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (“[I]f a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.”). But the *Lindsey* Court noted that it did not “question ... reasonable procedural provisions ... to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied.” *Lindsey*, 405 U.S. at 78; *cf. Adsani*, 139 F.3d at 79 (“[W]here Adsani has no assets in the United States and failed to adduce credible evidence of an inability to pay, the district court did not abuse its discretion nor violate Adsani’s due process rights in imposing an appeal bond of \$35,000.”).

In the light of the risk that excessively high appeal bond requirements would pose, if attorney fees were to be included among the costs that fall within Rule 7’s bond provision, the rule should make clear that attorney fees should be included in a Rule 7 bond only when necessary to fulfil the Rule’s goals, and only in an amount necessary to fulfil those goals. “Requiring security for anticipated appellate attorney’s fees under Rule 7 may be improper, notwithstanding an applicable fee-shifting provision, where other factors, such as financial hardship, indicate that the bond would unduly burden a party’s right to appeal.” *Azizian*, 2007 WL 2389841, at *8; *cf. Pedraza*, 313 F.3d at 1333 (“[I]n appropriate qualifying cases—e.g., where there is a significant risk of insolvency on the appellant’s part—district courts can require that the fees that ultimately would be shiftable be made available *ab initio*.”).

A third option might address some of the concerns noted above by more narrowly targeting particular types of cases where inclusion of projected attorney fees in the Rule 7 bond might be less risky and more manageable. Under this third option, the Committee might choose to amend Rule 7 to permit the inclusion in the bond of some, but not all, types of attorney fees; for example, the amendment could ban inclusion of non-statutory attorney fees and of statutory attorney fees that would be awardable only upon a finding that the appeal had been frivolous or in bad faith, but could permit the inclusion of statutory attorney fees that are presumptively recoverable. This would help to address the question of manageability by barring the inclusion (in the Rule 7 bond) of attorney fees that would be awardable only upon a determination that the appeal was frivolous or otherwise improper. It is worth noting that the Ninth Circuit’s *Azizian* decision adopts a variant of this approach, permitting inclusion of statutory attorney fees but barring inclusion of Rule 38 attorney fees, on the ground that imposition of Rule 38 attorney fees requires a finding of “improper conduct on appeal.”

If the Committee were inclined to adopt either the second or the third option, it should also consider whether the Rule 7 bond can include only those statutory attorney fees authorized by a statute that linguistically treats the attorney fees as part of the “costs” (the Eleventh Circuit’s approach in *Pedraza*), or whether the Rule 7 bond can include all statutory attorney fees – including those authorized by statutory language that treats “attorney fees” and “costs” as separate items (the Sixth Circuit’s approach in *Cardizem*). Though Sixth Circuit’s approach is

simpler, the Eleventh Circuit's approach is more consistent with *Marek's* approach to the analogous question in the Civil Rule 68 context. Moreover, the Eleventh Circuit's approach may be most faithful to what should, perhaps, be regarded as congressional intent: If Congress chooses language such as "costs, including attorney fees," that can be read to evince the intent that attorney fees be treated as costs, including for purposes of Rule 7; conversely, a congressional choice of language such as "costs and attorney fees" could be read to indicate an intent that attorney fees be treated as distinct from costs.

A fourth option would be to do nothing. Not amending Rule 7 would avoid the need to choose among the options discussed above, but it would leave in place the disuniformity that prompted the Committee to consider the amendment in the first place. In the light of the present trend, one might predict that additional circuits may adopt the majority view that at least some types of attorney fees can be included in Rule 7 bonds. The majority approach is arguably more faithful to the approach taken in *Marek*, and thus it is likely to be influential in the absence of further rulemaking activity.

A fifth option would be to try to obtain empirical data that might shed light on the other four choices. It is unclear how often courts have required a sizeable Rule 7 appeal bond that includes attorney fees. Nor is it clear which types of cases are most likely to give rise to the imposition of an appeal bond that includes attorney fees, or which types of litigants are likely to be burdened (or, conversely, protected) by the requirement of such a bond.

C. Questions of rulemaking practice

When considering the options reviewed in the prior section, another relevant concern has to do with questions of rulemaking practice. This subsection reviews that issue.

The notion of requiring security for costs on appeal can be traced back to the First Judiciary Act.¹³ The Revised Statutes carried forward the security requirement,¹⁴ and Civil Rule 73 as initially adopted reflected that statutory backdrop. Original Civil Rule 73(c) provided:

¹³ Section 22 of the Act provided for certain civil appeals and required that "every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 85.

¹⁴ Section 1000 of the Revised Statutes provided: "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." 1 Rev. Stat. 187 (1878).

Bond on Appeal. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

The following decade, Congress enacted the 1948 Judicial Code and repealed the statutory appeal bond requirement, evidently because it was thought that this requirement should instead be implemented through the Rules.¹⁵ Accordingly, the 1948 amendment to Civil Rule 73 altered Rule 73(c)'s first sentence to read as follows: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal."¹⁶ Civil Rule 73(c) – as amended in 1966¹⁷ – formed the basis for Appellate Rule 7, which, as originally adopted, read as follows:

Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent

¹⁵ See, e.g., *Thrift Packing Co. v. Food Machinery & Chemical Corp.*, 191 F.2d 113, 114 n.3 (5th Cir. 1951) ("Title 28 U.S.C. § 869 (1940), which provided that a bond for costs on appeal must be given by an appellant, was repealed by the 1948 revision because its provisions covered a subject more appropriately regulated by rule of court.").

¹⁶ See 1948 Committee Note to Civil Rule 73(c) ("R.S. § 1000, Title 28, U.S.C., § 869 (1946), which provided for cost bonds, is repealed and its provisions are not included in revised Title 28. Since the Revisers thought that this should be controlled by rule of court as in the case of supersedeas bond, see subdivision (d), no amendment to Title 28 will be proposed to restore the omission. The requirement of a cost bond should, therefore, be incorporated in the rule, and the amendment so provides.").

¹⁷ See 1966 Committee Note to Civil Rule 73(c) ("The additions to the first sentence permit the deposit of security other than a bond and eliminate the requirement of security in cases in which the appellant has already given security covering the total cost of litigation at an earlier stage in the proceeding (a common occurrence in admiralty cases) and in cases in which an appellant, though not exempted by law, is nevertheless not subject to costs under the rules of the courts of appeals.").

security shall be in the sum or value of \$ 250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of \$ 250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

The 1979 amendments deleted most of the text of original Rule 7 and substituted the following:

The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

As the 1979 Committee Note explained:

The amendment would eliminate the provision of the present rule that requires the appellant to file a \$ 250 bond for costs on appeal at the time of filing his notice of appeal. The \$ 250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the \$ 250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

The 1998 restyling, which was intended to produce no change in substance, gave Rule 7 its current wording:

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

This history suggests two inferences that are relevant to the present discussion. First, the history of Rule 7 and of its predecessor provision (Civil Rule 73(c)) sheds no direct light on whether attorney fees should be encompassed within the term “costs.” But, second, the history of the rule provisions and their statutory predecessors indicates that the idea of requiring security for costs on appeal dates back to the time of the first Congress under the Constitution. One might thus infer that every Congress since that time – including those that enacted statutes providing for the recovery of attorney fees as part of the “costs” – legislated against that background

assumption. If that were so, then one might infer that Congress's intent – in enacting a statute that provides for the recovery of attorney fees as part of the “costs” of an action – was that such “costs” could be the subject of an appeal bond requirement.

If such an inference is persuasive, then one might question whether the amendment of Rule 7 to exclude attorney fees from the “costs” that can be the subject of a Rule 7 appeal bond might raise questions under the Rules Enabling Act. 28 U.S.C. § 2072(b) provides, of course, that rules adopted pursuant to the Enabling Act process “shall not abridge, enlarge or modify any substantive right.” Though the contours of this limit are somewhat indeterminate, there is an argument that rulemaking that alters the congressional choices in the area of fee shifting steps close to the boundary of the Enabling Act's delegation of authority.¹⁸

The counter-argument, however, would be that it is chimerical to speak of congressional “choices” concerning whether Rule 7 bonds for costs on appeal should include attorney fees. Even if Congress's choice of language (e.g., “costs including attorney fees” instead of “costs and attorney fees”) can be taken to indicate an intent that attorney fees be treated as “costs” for purposes of the Civil Rules,¹⁹ it seems less likely that legislators considered the question of whether the attorney fees in question were to be included among the cost for which a Rule 7 appeal bond could be required. Moreover, one might argue that if, as *Marek* holds, a Civil Rule 68 offer of judgment can cut off a statutory right to attorney fees, the rulemakers would be within their authority to amend Appellate Rule 7 to exclude attorney fees from the costs for which a bond on appeal can be required. After all, the *Marek* majority implicitly rejected a compelling argument (by the dissent) that the majority's interpretation of Civil Rule 68 “would produce absurd results that would turn [fee-shifting] statutes like § 1988 on their heads and plainly violate the restraints imposed on judicial rulemaking by the Rules Enabling Act,” *Marek*, 473 U.S. at 21 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). If *Marek*'s interpretation of Civil Rule 68 causes no Enabling Act problems, one might argue that neither would the proposed amendment to Appellate Rule 7.

One might, on the other hand, counter this *Marek*-based Enabling Act argument by noting a distinction between the two issues: In *Marek* the majority reasoned that it should include attorney fees within Rule 68 “costs” in part in order to give effect to Congress's choice (in certain

¹⁸ See, e.g., Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 Am. J. Comp. L. 675, 694 (1997) (“An important lesson of the [Civil] Rule 68 experience in the 1980's is precisely that, because fee-shifting can consequentially affect substantive social policy decisions even when masquerading as a sanction, it is a matter for Congress.”).

¹⁹ Cf. *Marek*, 473 U.S. at 9 (“Since Congress expressly included attorney's fees as ‘costs’ available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This ‘plain meaning’ interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.”).

statutes such as Section 1988) to use language indicating that attorney fees are a subset of costs. In the Rule 7 context, one might argue that the way to give effect to that congressional choice is likewise to include such attorney fees within the "costs" for which a Rule 7 appeal bond can be required. That indeed is a central element of the reasoning of the circuits on that side of the Rule 7 circuit split. In this view, it's excluding the attorney fees from those Rule 7 costs that would change the landscape in a way that could be seen to run counter to congressional intent. But, of course, the persuasiveness of this argument depends on one's willingness to assume that rather subtle differences in a fee statute's wording reflect a congressional choice with respect to Rule 7 cost bonds on appeal.

Reasonable minds, accordingly, might differ as to whether such an amendment would raise Enabling Act concerns. If the Committee is inclined to amend Rule 7 to exclude attorney fees from the scope of appeal bonds, it might be useful to consider whether to include in the Committee Note language that would draw the attention of other actors in the rulemaking process to this question.²⁰

III. The wording of the proposed amendment

As noted above, the proposed amendment, as approved by the Advisory Committee in 2003, read:

1 **Rule 7. Bond for Costs on Appeal in a Civil Case**

2 In a civil case, the district court may require an appellant to file a bond or provide other
3 security in any form and amount necessary to ensure payment of costs on appeal. As used in this
4 rule, "costs on appeal" means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of

²⁰ One precedent might be the 1993 amendments that added Civil Rule 4(k)(2) (the provision authorizing federal courts to assert territorial jurisdiction with respect to federal claims against defendants who are "not subject to the jurisdiction of the courts of general jurisdiction of any state"). The 1993 Committee Note to Civil Rule 4 opens as follows:

SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).

1 premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Rule 8(b)
2 applies to a surety on a bond given under this rule.

The Committee briefly discussed, at the spring 2007 meeting, whether it makes sense for the proposed language to include a reference to “the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal.” The 2003 minutes quoted in Part I of this memo indicate that this phrase was included so as not to omit a category of costs specifically mentioned in Rule 39²¹ but not listed in 28 U.S.C. § 1920.²²

The question raised at the spring 2007 meeting is whether a party who is required to post a bond or other security under Rule 7 would ever be required to pay, as part of the costs on appeal, the cost of obtaining a supersedeas bond or other bond to preserve rights pending appeal. Ordinarily, the person who would be required to post a Rule 7 bond is the same person who would incur the cost of obtaining a bond to preserve rights pending appeal – namely, the appellant.²³ It would therefore ordinarily make no sense to include the cost of the supersedeas

²¹ Rule 39(e) states: “(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal.”

²² Section 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

²³ Civil Rule 62(d) provides: “Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective

bond among the costs for which a Rule 7 bond is required.

But before concluding that the phrase should be deleted from the proposed amendment, it is necessary to consider whether there might be any conceivable circumstances in which the costs of a supersedeas bond (or other bond to preserve rights pending appeal) might be recoverable by someone who could invoke Rule 7 to require the posting of a bond for costs on appeal. Two possible configurations, each involving cross-appeals, seem potentially relevant.

Suppose, as a first example, that Smith sues Jones for \$ 100,000 and recovers \$ 50,000. Smith appeals, challenging the award as too low. Jones cross-appeals, challenging the decision to hold him liable at all. Jones wishes to obtain a stay of execution pending disposition of the appeal and cross-appeal. Here we should note that there is apparently a circuit split as to whether Jones must obtain a supersedeas bond in order to obtain a stay of execution in this situation.²⁴ Let us assume that *Smith v. Jones* is being litigated in a circuit that requires Jones to obtain a supersedeas bond. The district court sets the amount of the supersedeas bond (which Jones must obtain in order to get a stay of execution) at \$ 60,000. On appeal, Jones wins: The court of appeals reverses, holding that Jones is not liable to Smith. Let us assume that under FRAP 39(a), costs on appeal are to be taxed against Smith.²⁵ Under FRAP 39(e), those costs include the cost that Jones incurred in obtaining a supersedeas bond. Does this mean that—at the time when Smith filed his initial appeal—Jones could have asked the court to require that Smith, as a condition of taking Smith’s appeal, post a Rule 7 bond to ensure payment of the cost of the supersedeas bond that Jones would have to obtain in order to stay the judgment pending Jones’ cross-appeal? I am not aware of caselaw discussing this, and neither the text nor the notes of Rule 7 or its

when the supersedeas bond is approved by the court.”

²⁴ The Fourth Circuit has taken the view that “where the prevailing party is the first to take an appeal, no supersedeas bond can be required of the losing party when it subsequently files its own appeal, because the execution of the judgment has already been superseded by the prevailing party’s appeal.” *Tennessee Valley Authority v. Atlas Mach. & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986). But in the First, Fifth and Seventh Circuits, an appeal by a party who has won in the district court does not prevent enforcement of the judgment unless “the theory of the appeal is inconsistent with enforcement in the interim.” *Trustmark Ins. Co. v. Gallucci*, 193 F.3d 558, 559 (1st Cir. 1999) (quoting *BASF Corp. v. Old World Trading Co.*, 979 F.2d 615, 617 (7th Cir. 1992); see also *Enserch Corp. v. Shand Morahan & Co.*, 918 F.2d 462, 464 (5th Cir. 1990).

²⁵ FRAP 39(a) provides: “(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise: (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise; (2) if a judgment is affirmed, costs are taxed against the appellant; (3) if a judgment is reversed, costs are taxed against the appellee; (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.”

predecessor provision in former Civil Rule 73 shed light on it. But if we presume that the purpose of Rule 7 is to ensure that the appellee will be reimbursed for the costs it incurs in defending against the appellant's appeal, the answer would seem to be no: The cost of the supersedeas bond is not a cost that Jones incurs as a result of Smith's appeal; Jones would incur the cost whether or not Smith appealed, because either way Jones would have to obtain the bond in order to obtain a stay of execution pending Jones' appeal (or cross-appeal, as the case may be). Thus, this first example does not seem to warrant inclusion of the supersedeas bond language in the Rule 7 amendment.

Let us take as a second example the same case, but with the timing of the appeals reversed: Jones appeals (challenging the finding of liability) and Smith cross-appeals (challenging the award as too low). Jones obtains a stay of execution by posting a supersedeas bond, the amount of which is set at \$ 60,000. Can Jones ask the court to require Smith, as a condition of taking the cross-appeal, to post a Rule 7 bond that includes the cost of the supersedeas bond as a cost on appeal? A threshold question is whether Smith, the cross-appellant, counts as an "appellant" of whom a Rule 7 bond can be required. I am not aware of caselaw discussing this question (but I have not performed an exhaustive search).²⁶ Because a cross-appellant can be liable for costs under Rule 39(a), one could argue that the court should have authority to require the cross-appellant to post a bond to secure payment of any costs the appellant-cross-appellee incurs that are attributable to the cross-appeal. But it would not make sense to require the cross-appellant to post a bond to ensure payment of costs attributable solely to the appellant's appeal, since appellees in general are not subject to Rule 7's bond requirement. The supersedeas bond, in our second hypothetical, constitutes a cost attributable to Jones' appeal, not to Smith's cross-appeal; Jones would have to post the supersedeas bond in order to get the stay of execution whether or not Smith cross-appealed. Thus, it would seem illogical to require Smith to post a Rule 7 bond that included the cost of Jones' supersedeas bond.

It would seem, then, unnecessary to mention supersedeas bonds in Rule 7. It remains to ask whether the answer should differ as to "other bonds to preserve rights pending appeal." This category presumably includes bonds that a court might require under Civil Rule 62(c) in order to suspend, change, restore or grant injunctive relief pending appeal.²⁷ Here, again, the party obtaining the bond would presumably be the party taking the appeal. And, again, even if the issue arose in a case involving cross-appeals, the configurations would be similar to those discussed in hypotheticals one and two, above. Thus, it seems that the language concerning

²⁶ Rule 28.1 addresses other aspects of cross-appeal procedure, but does not address this question.

²⁷ Civil Rule 62(c) provides in relevant part: "When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

bonds can be deleted from the proposed amendment, which would now read:

1 **Rule 7. Bond for Costs on Appeal in a Civil Case**

2 In a civil case, the district court may require an appellant to file a bond or provide other
3 security in any form and amount necessary to ensure payment of costs on appeal. As used in this
4 rule, “costs on appeal” means the costs that may be taxed under 28 U.S.C. § 1920. Rule 8(b)
5 applies to a surety on a bond given under this rule.

IV. Conclusion

The developing circuit caselaw on whether attorney fees can be included among the amounts for which a Rule 7 appeal bond can be required indicates that this is an issue that warrants the Committee’s attention. The fact that the circuit split now is four to two in favor of permitting the inclusion of at least some types of attorney fees in Rule 7 bonds suggests that the Committee should re-weigh its 2003 determination concerning the proposed amendment to exclude such fees from Rule 7 bonds. The issues raised by the proposal are complex, and it may be useful to obtain empirical data concerning the contexts in which Rule 7 bonds are currently required, and the frequency with which attorney fees are included when setting the amount of such bonds (in circuits where the inclusion of such fees is permitted).

MEMORANDUM

DATE: April 23, 2007
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Supplemental materials concerning Item No. 06-06

This memo supplements the March 27 memo in the agenda book concerning the proposal by William Thro, the Virginia State Solicitor General, to amend FRAP 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing.

The subcommittee studying this proposal continued its inquiries after the submission of the agenda book materials, and we wanted to share the fruits of those inquiries with the Committee in advance of the meeting.

Enclosed are (1) an email from Steve McAllister detailing his discussion with Richard Ruda of the State and Local Legal Center; and (2) a memo from Doug Letter reporting the results of his research on selected states' provisions concerning time to appeal or seek rehearing.

Doug's inquiry stemmed from a question posed by the Solicitor General, who wanted to know whether state procedural rules provide more time to appeal or seek rehearing when state-government litigants are involved in a case. Doug's quick survey of seven states found only one state (Wisconsin) that differentiates between state-government and other litigants. Admittedly, this survey covers only a small number of states (though it does include some of those with the largest dockets). Moreover, subcommittee members have noted that the absence of a distinction between state-government and other litigants may not be as closely on point (for purposes of our consideration of the proposed FRAP amendments) to the extent that some state systems provide longer appeal times for everyone or otherwise differ in salient ways from the system set by the FRAP. Nonetheless, the enclosed information should provide a helpful basis for discussion.

Encls.

Subject: Subcommittee Update
From: "McAllister, Stephen R" <stever@ku.edu>
Date: Thu, 29 Mar 2007 14:46:15 -0500
To: "Catherine T. Struve" <cstruve@law.upenn.edu>, "Letter, Douglas \\\(CIV\\)"
<Douglas.Letter@usdoj.gov>, "Levy, Mark" <MLevy@kilpatrickstockton.com>

Subcommittee members,

Today I finally had the opportunity to speak with Richard Ruda of the State and Local Legal Center. We spoke for about 20 minutes and he was very helpful, as well as very interested in the proposals.

Several key points from our conversation:

1. Overall, he favors the idea of expanding the time to appeal and to seek rehearing, especially for local governments.
2. He emphasized that, in his experience, local governments often need the additional time even more than states might, typically because their counsel are not appellate specialists and may not even be full-time employees of the municipality they represent. He suggested that the states have come a long way in terms of their appellate staffs and handling of appeals in general, including having their own SGs and State Solicitors now, but that very few cities have any such sophistication or staffing. He mentioned Chicago and New York as exceptions to that, but kept stressing how much the additional time would help the vast majority of local governments litigating cases in federal court.
3. We discussed specifically the concern that providing the extra time may slow down lots of cases if in fact state/local governments generally prevail in federal court (e.g., in habeas cases, which of course involve the states, not local governments). He thought that a reasonable concern, but felt that the cost of any such delays would be outweighed by the beneficial effect for the cases in which the extra time does matter to the state or a local government.
4. He pointed out that the vast majority of local government cases in federal court arise under the rubric of Section 1983, though they of course involve a wide range of constitutional law and sometimes federal statutory claims in terms of subject matter. [Since I teach section 1983, my guess is that, like habeas, governments win far more 1983 cases than they lose, so government may not be the appellant with much frequency and in this respect the situation may be like habeas cases to the states.]
5. Of the two proposed changes, to FRAP 4(a) and to FRAP 40(a), Ruda thought that extension of the time to petition for rehearing would be far more valuable to local governments, though he strongly favors both changes. He stated that the 14-day time period to petition for rehearing is "incredibly short."

6. Lastly, Ruda pointed specifically to Supreme Court Rule 37.4, as recognition that local governments should receive treatment like the states under federal rules. In particular, he read the language indicating that no motion for leave to file an amicus brief is necessary if the brief is presented "on behalf of a city, county, town, or similar entity when submitted by its authorized law officer." He suggested that, in some ways, the Supreme Court rule is broader with respect to local government (allowing an amicus filing without a motion so long as submitted by "its authorized law officer", which he noted could be in-house, could be an outside law firm, or some other arrangement) than for a State (whose amicus brief must be submitted "by its Attorney General").

Overall, it was an interesting discussion, and has caused me to wonder whether local government perhaps should be seriously considered for inclusion in any changes if the committee decides to pursue any changes at all. But my pondering is without any hard data on the number of cases in federal court to which local governments or states are parties. And it may be that we decide to do nothing at all. In any event, after talking with Ruda, I am less inclined to dismiss out of hand the possibility of including local governments in any rule change proposals.

Finally, I sent a follow up e-mail to Barbara Underwood this week, reminding her of our earlier correspondence and indicating that we would love to receive her views within the next couple of weeks so that the committee may consider them at its meeting.

Steve

Memo from Doug Letter:

STATE PROCEDURAL RULES FOR NOTICES OF APPEAL AND REHEARING PETITIONS

Under the Federal Rules of Appellate Procedure, the filing deadlines for a notice of appeal or petition for rehearing are extended in civil cases in which the United States Government (or its agencies or officers) is a party. See FRAP 4(a) (1), 40(a)(1). These timing provisions apply to all parties in such cases. A proposal has been made for an amendment to FRAP to have these extended deadlines apply as well in cases involving state and local governments. In connection with that proposal, the Solicitor General asked whether the various states have similar rules providing additional times for state or local governments to appeal or seek rehearing in cases in state courts. Accordingly, I had a quick survey done of rules in seven states: California, Texas, New York, Virginia, Georgia, Kansas, and Wisconsin (these states were selected simply to be geographically diverse, although I wanted the survey to include at least several states with large court dockets).

Of the seven states selected for review, only Wisconsin's rules appear to contain a special provision for filing appeals by the state. Apparently, none of the other states differentiates among parties with regard to the relevant filing deadlines in their procedural rules. Thus, in those states, state and local governments seem to have the same amount of time as private parties in which to appeal or seek rehearing. (Unlike the FRAP, Wisconsin's rule for notices of appeal does not broadly apply to all civil cases, and it does not include opposing private parties in the exception. Wisconsin's rules do not provide for an extended filing period for rehearing motions for state and local governments.)

The relevant state court rules that we could locate are reprinted on the following pages.

California - California Rules of Court

Rule 8.104. Time to appeal

(a) Normal time

Unless a statute or rule 8.108 provides otherwise, a notice of appeal must be filed on or before the earliest of:

- (1) 60 days after the superior court clerk mails the party filing the notice of appeal a document entitled “Notice of Entry” of judgment or a file-stamped copy of the judgment, showing the date either was mailed;
- (2) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled “Notice of Entry” of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
- (3) 180 days after entry of judgment.

Rule 8.752. Extension of time and cross-appeal

(a) New trial proceeding

When a valid notice of intention to move for a new trial is served and filed by any party within the time in which, under rule 8.751, a notice of appeal may be filed, and the motion is denied, the time for filing the notice of appeal from the judgment is extended for all parties until 15 days after either entry of the order denying the motion or denial thereof by operation of law, but in no event may such notice of appeal be filed later than 90 days after the date of entry of the judgment whether or not the motion for new trial has been determined.

(b) Motion to vacate

When a valid notice of intention to move to vacate a judgment or to vacate a judgment and enter another and different judgment is served and filed by any party on any ground within the time in which, under rule 8.751, a notice of appeal from the judgment may be filed, or such shorter time as may be prescribed by statute, and the motion is denied or not decided by the trial court within 75 days after entry of the judgment, the time for filing the notice of appeal from the judgment is extended for all parties until 15 days after entry of the order denying the motion to vacate or until 90 days after entry of the judgment, whichever shall be less.

(c) Cross-appeal

When a timely notice of appeal is filed under subdivision (a) of rule 8.751 or under subdivision (a) or (b) of this rule, any other party may file a notice of appeal within 10 days after mailing of notification by the trial court clerk of such first appeal or within the time otherwise prescribed by the applicable subdivision,

whichever period last expires. If a timely notice of appeal is filed from an order granting a motion for a new trial or granting, within 75 days after entry of judgment, a motion to vacate the judgment or to vacate judgment and enter another and different judgment, any party other than the appellant, within 10 days after mailing of notification by the trial court clerk of such appeal, may file a notice of appeal from the judgment or from an order denying a motion for judgment notwithstanding the verdict, and on that appeal may present any question which he might have presented on an appeal from the judgment as originally entered or from the order denying a motion for judgment notwithstanding the verdict.

Rule 8.268. Rehearing

(b) Petition and answer

(1) A party may serve and file a petition for rehearing within 15 days after:

(A) The filing of the decision;

(B) A publication order restarting the finality period under rule 8.264(b)(5), if the party has not already filed a petition for rehearing;

(C) A modification order changing the appellate judgment under rule 8.264(c)(2); or

(D) The filing of a consent under rule 8.264(d).

(c) No extension of time

The time for granting or denying a petition for rehearing in the Court of Appeal may not be extended. If the court does not rule on the petition before the decision is final, the petition is deemed denied.

Texas - Texas Rules of Appellate Procedure

Rule 26 Time to Perfect Appeal.

26.1 Civil Cases. --The notice of appeal must be filed within 30 days after the judgment is signed, except as follows:

(a) the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files:

(1) a motion for new trial;

(2) a motion to modify the judgment;

(3) a motion to reinstate under Texas Rule of Civil Procedure 165a; or

(4) a request for findings of fact and conclusions of law if findings and conclusions either are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court;

(b) in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed;

(c) in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed; and

(d) if any party timely files a notice of appeal, another party may file a notice of appeal within the applicable period stated above or 14 days after the first filed notice of appeal, whichever is later.

26.3 Extension of Time. --The appellate court may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party:

(a) files in the trial court the notice of appeal; and

(b) files in the appellate court a motion complying with Rule 10.5(b).

Rule 49 Motion and Further Motion for Rehearing.

49.1 Motion for Rehearing. --A motion for rehearing may be filed within 15 days after the court of appeals'

judgment or order is rendered. The motion must clearly state the points relied on for the rehearing.

49.2 Response. --No response to a motion for rehearing need be filed unless the court so requests. A motion will not be granted unless a response has been filed or requested by the court.

49.3 Decision on Motion. --A motion for rehearing may be granted by a majority of the justices who participated in the decision of the case. Otherwise, it must be denied. If rehearing is granted, the court or panel may dispose of the case with or without rebriefing and oral argument.

49.4 Accelerated Appeals. --In an accelerated appeal, the appellate court may deny the right to file a motion for rehearing or shorten the time to file such a motion.

49.5 Further Motion for Rehearing. --After a motion for rehearing is decided, a further motion for rehearing may be filed within 15 days of the court's action if the court:

- (a) modifies its judgment;
- (b) vacates its judgment and renders a new judgment; or
- (c) issues an opinion in overruling a motion for rehearing.

49.8 Extensions of Time. --A court of appeals may extend the time for filing a motion or a further motion for rehearing if a party files a motion complying with Rule 10.5(b) no later than 15 days after the last date for filing the motion for rehearing.

New York - Rules of Practice

500.9 Preliminary Appeal Statement.

(a) Within 10 days after an appeal is taken by (1) filing a notice of appeal in the place and manner required by CPLR 5515, (2) entry of an order granting a motion for leave to appeal in a civil case, or (3) issuance of a certificate granting leave to appeal in a noncapital criminal case, appellant shall file with the clerk of the Court an original and one copy of a preliminary appeal statement on the form prescribed by the Court, with the required attachments and proof of service of one copy on each other party. No fee is required at the time of filing the preliminary appeal statement.

500.24 Motions for Reargument of Appeals, Motions and Decisions on Certified Questions.

(a) Filing and notice. Movant shall file an original and six copies of its papers, with proof of service of two copies on each other party. An original and one copy of a motion for reargument of a motion may be served and filed if filing of an original and one copy of papers was allowed on the underlying motion pursuant to section 500.21(d)(3).

(b) Timeliness. Movant shall serve the notice of motion not later than 30 days after the appeal or motion sought to be reargued has been decided, unless otherwise permitted by the Court.

(c) Content. The motion shall state briefly the ground upon which reargument is sought and the points claimed to have been overlooked or misapprehended by the Court, with proper reference to the particular portions of the record and to the authorities relied upon.

(d) New matters. The motion shall not be based on the assertion for the first time of new arguments or points of law, except for extraordinary and compelling reasons.

(e) Limitation on motions. The Court shall entertain only one motion per party for reargument of a specific appeal, motion or certified question decision.

(f) Opposing papers. Except on those motions described in section 500.21(d)(3), respondent may file an original and six copies of papers in opposition to the motion, with proof of service of two copies on each other party. The opposing papers shall briefly state respondent's argument for dismissal or denial of the motion.

Virginia - Virginia Supreme Court Rules

Rule 5A:6. Notice of Appeal.

(a) Timeliness. No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree, counsel files with the clerk of the trial court a notice of appeal, and at the same time mails or delivers a copy of such notice to all opposing counsel and the clerk of the Court of Appeals. A party filing a notice of an appeal of right to the Court of Appeals shall simultaneously file in the trial court an appeal bond in compliance with Code ? 8.01-676.1.

Rule 5A:33. Rehearing -- On Motion of a Party.

(a) Petition for Rehearing. Pro se prisoners and those with leave of Court to proceed under this Rule desiring a rehearing of a decision or order of the Court of Appeals finally disposing of a case shall, within 14 days following such decision or order, file seven copies of a petition for rehearing with the clerk of the Court of Appeals. Carbon copies are permitted. The petition for rehearing shall not exceed 15 typed or printed pages in length. All petitioners other than pro se prisoners and those with leave of Court to proceed under this Rule must follow the provisions of Rule 5A:33A when filing a petition for rehearing.

(b) Response. No response to a petition for rehearing will be received unless requested by the Court of Appeals.

(c) No Oral Argument. No oral argument on the petition will be permitted.

(d) Grounds. No petition for rehearing will be allowed unless one of the judges who decided the case adversely to the petitioner certified that there is good cause for such rehearing.

Georgia - Official Code of Georgia

§ 5-3-20. Time for filing appeals

(a) Appeals to the superior court shall be filed within 30 days of the date the judgment, order, or decision complained of was entered.

(b) The date of entry of an order, judgment, or other decision shall be the date upon which it was filed in the court, agency, or other tribunal rendering same, duly signed by the judge or other official thereof.

(c) This Code section shall apply to all appeals to the superior court, any other law to the contrary notwithstanding.

§ 5-6-39. Extensions of time for filing notice of appeal, notice of cross appeal, transcript of evidence, designation of record and other similar motions

(a) Any judge of the trial court or any justice or judge of the appellate court to which the appeal is to be taken may, in his discretion, and without motion or notice to the other party, grant extensions of time for the filing of:

(1) Notice of appeal;

(2) Notice of cross appeal;

(3) Transcript of the evidence and proceedings on appeal or in any other instance where filing of the transcript is required or permitted by law;

(4) Designation of record referred to under Code Section 5-6-42; and

(5) Any other similar motion, proceeding, or paper for which a filing time is prescribed.

(b) No extension of time shall be granted for the filing of motions for new trial or for judgment notwithstanding the verdict.

(c) Only one extension of time shall be granted for filing of a notice of appeal and a notice of cross appeal, and the extension shall not exceed the time otherwise allowed for the filing of the notices initially.

(d) Any application to any court, justice, or judge for an extension must be made before expiration of the period for filing as originally prescribed or as extended by a permissible previous order. The order granting

an extension of time shall be promptly filed with the clerk of the trial court, and the party securing it shall serve copies thereof on all other parties in the manner prescribed by Code Section 5-6-32.

Kansas - Kansas Supreme Court Rules

Rule 2.02 FORM OF NOTICE OF APPEAL, COURT OF APPEALS

In all cases in which a direct appeal to the Supreme Court is not permitted, the notice of appeal shall be filed in the district court, shall be under the caption of the case in the district court and in substantially the following form

Rule 7.05 REHEARING OR MODIFICATION IN COURT OF APPEALS

(a) A motion for rehearing or modification in a case decided by the Court of Appeals may be served and filed within ten (10) days of the decision. A copy of the Court's opinion shall be attached to the motion. The issuance of the mandate shall be stayed pending the determination of the issues raised by such a motion. If a rehearing is granted, such order suspends the effect of the original decision until the matter is decided on rehearing. A motion for rehearing or modification is not a prerequisite for review, nor shall such a motion extend the time for the filing of a petition for review by the Supreme Court.

(b) If no motion for rehearing is filed, or a motion for rehearing is denied, and no motion for review is pending under Rule 8.03 and the time for filing the same has expired, the clerk of the appellate courts shall, unless the court otherwise orders, issue a mandate on the decision of the Court of Appeals to the district court together with a copy of the opinion.

808.04. Time for appeal to the court of appeals.

(1) INITIATING AN APPEAL.

An appeal to the court of appeals must be initiated within 45 days of entry of a final judgment or order appealed from if written notice of the entry of a final judgment or order is given within 21 days of the final judgment or order as provided in s. 806.06 (5), or within 90 days of entry if notice is not given, except as provided in this section or otherwise expressly provided by law. Time limits for seeking review of a nonfinal judgment or order are established in s. 809.50

(1m) An appeal by a record subject under s. 19.356 shall be initiated within 20 days after the date of entry of the judgment or order appealed from.

(2) An appeal under s. 227.60 or 799.445 shall be initiated within 15 days after entry of judgment or order appealed from.

(3) Except as provided in subs. (4) and (7), an appeal in a criminal case or a case under ch. 48, 51, 55, 938, or 980 shall be initiated within the time period specified in s. 809.30

(4) Except as provided in sub. (7m), an appeal by the state in either a criminal case under s. 974.05 or a case under ch. 48, 938, or 980 shall be initiated within 45 days of entry of the judgment or order appealed from.

(6) When a party to an action or special proceeding dies during the period allowed for appeal, the time to appeal is the time permitted by law or 120 days after the party's death, whichever is later. If no personal representative qualifies within 60 days after the party's death, any appellant may have a personal representative appointed under s. 856.07 (2)

(7) An appeal by a party other than the state from a judgment or order granting adoption shall be initiated by filing the notice required by s. 809.30 (2) (b) within 40 days after the date of entry of the judgment or order appealed from. Notwithstanding s. 809.82 (2) (a), this time period may not be enlarged.

(7m) An appeal from a judgment or order terminating parental rights or denying termination of parental rights shall be initiated by filing the notice required by s. 809.107 (2) within 30 days after the date of entry of the judgment or order appealed from. Notwithstanding s. 809.82 (2) (a), this time

period may not be enlarged unless the judgment or order was entered as a result of a petition under s. 48.415 that was filed by a representative of the public under s. 48.09

(8) If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.

Judicial Council Note, 1983: Sub. (2) requires expedited initiation of appeals in recall and eviction cases as well as cases in which the validity of a state law is attacked in federal district court. Sub. (3) references the appeal deadline for criminal, juvenile, mental commitment and protective placement appeals. Sub. (4) references the appeal deadline for appeals by the state in criminal and childrens code cases. [Bill 151-S]Judicial Council Note, 1986: The amendment to sub. (1) clarifies the time limit for notice of entry by cross-referencing s. 806.06 (5). [Re Order eff. 7-1-86]Judicial Council Note, 1986: Subs. (3) and (4) are amended by removing references to a repealed statute. Sub. (7) requires a party other than the state to commence an appeal from a judgment or order terminating parental rights or granting an adoption by filing notice of intent to pursue relief in the trial court within 40 days after entry. It also prohibits enlargement of this time by the court of appeals. [Re Order eff. 7-1-87]Judicial Council Note, 1992: Subsection (8) is analogous to Rule (4) (a) (2) of the Federal Rules of Appellate Procedure. It is intended to avoid the delay, confusion and prejudice which can result from dismissing appeals solely because they are filed before the judgment or order appealed from is entered. Appeals from judgments or orders which have not been entered are still dismissable. [Re Order effective July 1, 1992]Judicial Council Note, 2001: The word "final" has been inserted before "judgment or order" in sub. (1). The amendment specifies that the 45- or 90-day time limit applies in appeals from final orders and the 14-day time limit in s. 809.50 applies to appeals from nonfinal orders. [Re Order No. 00-02 effective July 1, 2001]

809.64. Rule (Reconsideration).

A party may seek reconsideration of the judgment or opinion of the supreme court by filing a motion under s. 809.14 for reconsideration within 20 days after the date of the decision of the supreme court.

Judicial Council Committees Note, 1978: Rule 809.64 replaces former Rules 251.65, 251.67 to 251.69, which provided for motions for rehearing. The necessity for the filing of briefs on a motion for reconsideration as required by former Rule 251.67 is eliminated. The matter will be considered on the motion and supporting and opposing memoranda as with any other motion. The term "reconsideration" is used rather than rehearing because in a case decided without oral argument there has been no initial hearing. [Re Order effective July 1, 1978]Judicial Council Note, 2001:#0103 This section has been changed to specify that the time limit for filing motions for reconsideration of supreme court opinions is calculated from the date, not the filing, of the decision. [Re Order No. 00-02 effective July 1, 2001]

809.14. Rule (Motions).

(1) A party seeking an order or other relief in a case shall file a motion for the order or other relief. The motion must state the order or relief sought and the grounds on which the motion is based and may include a statement of the position of other parties as to the granting of the motion. A motion may be supported by a memorandum. Except as provided in sub. (1m), any other party may file a response to the motion within 11 days after service of the motion.

(1m) If a motion is filed in an appeal under s. 809.107, any other party may file a response to the motion within 5 days after service of the motion.

(2) A motion for a procedural order may be acted upon without a response to the motion. A party adversely affected by a procedural order entered without having had the opportunity to respond to the motion may move for reconsideration of the order within 11 days after service of the order.

(3) (a) The filing of a motion seeking an order or other relief which may affect the disposition of an appeal or the content of a brief, or a motion seeking consolidation of appeals, automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order.

(b) The filing of a motion to supplement or correct the record automatically tolls the time for performing an act required by these rules from the date the motion was filed until the date the motion is disposed of by order. If a motion to correct or supplement the record is granted, time limits for performing an act required by these rules shall be tolled from the date on which the motion was filed until the date on which the supplemental or corrected record return is filed, except that the time for preparation of supplemental or corrected transcripts is governed by s. 809.11 (7) (a)

(c) The moving party shall serve the clerk of circuit court with any motion filed in the court of appeals under this subsection.

(4) Subsection (3) does not apply in an appeal under s. 809.105

Judicial Council Committees Note, 1978: The motion procedure under former Rule 251.71 is continued except that the time for replying to a motion is reduced from 10 to 7 days. A response is not required before action can be taken on a procedural motion because these motions include matters previously handled by letter request or which usually do not adversely affect the opposing party. If an opposing party is adversely affected by a procedural order, he has the right to request the court to reconsider it. Procedural orders include the granting of requests for enlargement of time, to file an amicus brief, or to file a brief in excess of the maximum established by the rules. This section

is based on Federal Rules of Appellate Procedure, Rule 27. Sub. (3) modifies the prior practice under which the filing of any motion stayed any due date until 20 days after the motion was decided. This could result in an unintentional shortening of the time in which a brief had to be filed. It could also result in an unnecessary delay if a ruling on the motion would not affect the outcome of the case, the issues to be presented to the court, or a brief or the record. [Re Order effective July 1, 1978]Judicial Council Committees Note, 1979: Sub. (1) is amended by deleting a provision that required only an original and one copy of a motion be filed with an appellate court. With the amendment, the number of copies of a motion to be filed is now governed by 809.81 on the form of papers to be filed with an appellate court, which requires in sub. (2) that 4 copies of a paper be filed with the Court of Appeals and 8 copies with the Supreme Court. [Re Order effective Jan. 1, 1979]Judicial Council Note, 2001:#0103The 7-day time limits in subs. (1) and (2) have been changed to 11 days. Please see the comment to s. 808.07 (6) concerning time limits. Subsection (3) (a) was revised to include consolidation motions within the tolling provision. Subsection (3) (b) creates a tolling provision when a motion to supplement or correct the record is filed. Subsection (3) (c) creates a service requirement for motions affecting the time limits for transmittal of the record. [Re Order No. 00-02 effective July 1, 2001]Judicial Council Note, 2006: The amendment to s. 809.14 (1) and the creation of s. 809.14 (1m) to establish a shorter response time to appellate motions should advance the ultimate resolution of TPR appeals.

MEMORANDUM

DATE: March 27, 2007
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 06-06

At its November meeting, the Committee discussed the proposal by William Thro, the Virginia State Solicitor General, to amend FRAP 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. Participants observed that the proposal raises a number of questions concerning scope. It was noted that the New York and Illinois solicitors general were not among the thirty-five supporters of Mr. Thro's proposal, and members wondered what their views would be. The consensus was that it would be useful to take additional time to study the proposal. Judge Stewart appointed an informal subcommittee to consider the proposal. The subcommittee is chaired by Steve McAllister and includes Doug Letter and Mark Levy.

This memo summarizes the information gathered by Steve, Doug and Mark, and also discusses possibilities for implementing Mr. Thro's proposal (should the Committee favor doing so). We have asked Bill Thro for his views on some of the questions identified in this memo, and he has passed our inquiry on to Dan Schweitzer at the National Association of Attorneys General, so more information may become available after the agenda book is put together.

I. Further information concerning the proposal

Steve, Doug and Mark performed considerable investigations and the results of their inquiries are attached. (I also attach Bill Thro's recent response to my follow-up inquiry.) Highlights of the responses include the following:

- We have now heard from three states that did not sign on to Bill Thro's original letter to the Committee:
 - Illinois supports the proposal. Gary Feinerman, the Illinois Solicitor General, views the extension of time to seek rehearing as the more important change, but he supports both changes.
 - New York Solicitor General Barbara Underwood was unable to respond at length,

by the time of this writing, because she was preparing for a March 26 Supreme Court oral argument. She would support a rule change that extended only the state litigants' deadlines. She noted, however, that there might be considerations that weigh against a rule that extends deadlines for other parties as well as for the state litigants. We are hoping to hear more from her before the Committee meets.

- Vermont has a distinctive view. Bridget Asay notes that she works in “what may be the smallest” attorney general office in the country; for them, decisions whether to appeal do not take a lot of time. Thus, in Ms. Asay’s view the primary beneficiaries of the proposal would be the State’s opponents.
- We have also heard in more detail from three states that did sign on to Bill Thro’s original letter to the Committee:
 - Arkansas supports the proposal. Justin Allen, Chief Deputy Attorney General, stresses federalism and comity as reasons to treat states the same as the federal government. He notes the time-consuming consultations that precede a decision to appeal or seek rehearing. He also argues that lengthening the appeal time would provide more opportunity for settlement.
 - New Jersey supports the proposal. Carol Henderson, the AAG who responded to the inquiry, highlights the time-consuming review process necessary for decisions to appeal or seek rehearing.
 - Pennsylvania supports the proposal. Amy Zapp, the Chief Deputy AG who responded, stresses that often it is time-consuming just to become familiar with the case.
- Doug consulted the Deputy Solicitor General at DOJ who handles cases involving Native American tribes; he does not think there is a reason to include tribes within the scope of the proposal. Doug also contacted the DOJ’s Office of Tribal Justice, but has not yet heard back from them.

* * *

These findings add to our understanding of the proposal and highlight a couple of questions. As Bridget Asay of Vermont points out, a state with a small office which takes relatively few appeals may not need the additional time that would be provided by these amendments; if that is the case, then the amendments would primarily benefit other parties to the litigation, not the state. Barbara Underwood of New York suggests that she would support an asymmetric provision that lengthens the periods applicable to the states but does not lengthen the periods applicable to other parties to the litigation. Such an asymmetric proposal, however, is unlikely to be adopted. Thus, the question is whether to proceed with a symmetric proposal that

lengthens the time periods for all parties in litigation involving the states. As Fritz Fulbruge has pointed out, because the states win the overwhelming majority of habeas and Section 1983 cases, the great majority of appeals in such cases will be taken by the non-state party. Perhaps the states may feel that it is nonetheless in their interest to obtain the proposed amendment; indeed, Gary Feinerman of Illinois so stated, and the widespread state support for the proposal is also suggestive in this regard. But Asay's response indicates that such a sentiment might not be universal. One might think that if the longer periods are helpful for the federal government, they would likewise benefit the states; but that is only true if the costs and benefits balance out the same way for the states as for the federal government. Relevant questions would include whether the yearly volume of cases that any given state must review approaches the yearly volume of cases that the United States Solicitor General must review; if the number for any given state is appreciably less than for the federal government, perhaps the benefit to the state would not be as great as it is to the United States. Another cost to consider, of course, is the general cost to the system and to litigants when a longer appeal period means a longer period of uncertainty, or when a longer time to seek rehearing delays the issuance of the mandate.

II. Drafting a proposed amendment

Mr. Thro proposed the following language for Rule 4(a)(1)(B): “When the United States, a State, or its an officer or agency of the United States or a State 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.” He proposed the following language for Rule 40(a)(1): “Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States, a State, or its an officer or agency of the United States or a State is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.”

If the Committee is inclined to adopt Mr. Thro's proposals, it must make some choices concerning implementation. In November 2004, the Advisory Committee approved proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the rules' application to individual-capacity suits against federal officers or employees. (A copy of those amendments, as approved in November 2004, is enclosed.) Thus, it is necessary to consider how the two sets of proposed amendments fit together. Moreover, Mr. Thro's proposed amendment intersects with an issue that has arisen in connection with the Time-Computation Project. In that project it has become apparent that the definition of legal holiday, which includes state holidays, should also include holidays in the District of Columbia, Puerto Rico & the Territories. One way to achieve this would be to add a FRAP provision defining "State" to include the Territories, the District of Columbia and the Commonwealth of Puerto Rico. If such a provision were added, it obviously would affect the drafting of the Rule 4 and Rule 40 proposals. The definition of “state” is discussed in a separate memo; in this memo, bracketed alternatives show how a proposal for Rules 4 and 40 might look in the event that a FRAP-wide definition for “state” is or is not adopted.

Here is an illustration of the way in which the two sets of Rule 4 / Rule 40 proposals might be consolidated. This is redlined to show the difference between this version and the version approved by the Committee in November 2004:

1 **Rule 4. Appeal as of Right — When Taken**

2 **(a) Appeal in a Civil Case.**

3 **(1) Time for Filing a Notice of Appeal.**

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

7 (B) ~~When the United States or its officer or agency is a party, t~~For purposes
8 of this subdivision, “State” includes the Territories, the Commonwealths,
9 and the District of Columbia.] The notice of appeal may be filed by any
10 party within 60 days after entry of the judgment or order appealed from is
11 entered: if one of the parties is:

12 (i) the United States;

13 ~~(ii) a United States agency;~~

14 ~~(iii) a United States~~

15 (ii) a State;

16 (iii) a United States or State agency;

17 (iv) a United States or State officer or employee sued in an official
18 capacity; or

19 ~~(iv)(v) a United States or State officer or employee sued in an individual~~
20 capacity for an act or omission occurring in connection with duties

1 performed on behalf of the United States or the State.

2 * * * * *

3 **Committee Note**

4
5 **Subdivision (a)(1)(B).** Rule 4(a)(1)(B) has been amended to make clear that the 60-day
6 appeal period applies in cases in which an officer or employee of the United States is sued in an
7 individual capacity for acts or omissions occurring in connection with duties performed on behalf
8 of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day
9 period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule
10 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an
11 extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000
12 amendment explained: “Time is needed for the United States to determine whether to provide
13 representation to the defendant officer or employee. If the United States provides representation,
14 the need for an extended answer period is the same as in actions against the United States, a
15 United States agency, or a United States officer sued in an official capacity.” The same reasons
16 justify providing additional time to the Solicitor General to decide whether to file an appeal.
17

18 Rule 4(a)(1)(B) is also amended to accord state government litigants the same treatment
19 afforded to federal government litigants. States, like the federal government, need time to review
20 the merits prior to deciding whether to appeal. For states, as for the federal government, these
21 decisions may involve complex legal, policy and strategic choices. Multiple decisionmakers
22 within state government will often be involved. Extra time would assist states in conducting
23 those deliberations. Extra time should also reduce or eliminate some states’ practice of filing a
24 notice of appeal merely to protect the right to appeal pending a closer review of the case.
25

26
27
28
29 **Rule 40. Petition for Panel Rehearing**

30 **(a) Time to File; Contents; Answer; Action by the Court if Granted.**

31 **(1) Time.**

32 (A) Except as provided in Rule 40(a)(1)(B), and unless the time is shortened or
33 extended by order or local rule, a petition for panel rehearing may be filed within
34 14 days after entry of judgment. But in

35 (B) [For purposes of this subdivision, “State” includes the Territories, the

1 Commonwealths, and the District of Columbia.] In a civil case, if the United
2 States or its officer or agency is a party, the time within which any party may seek
3 rehearing is 45 days after entry of judgment, unless an order shortens or extends
4 the time, a petition for panel rehearing may be filed by any party within 45 days
5 after entry of judgment if one of the parties is:

6 (A*i*) the United States;

7 (i*i*) a State;

8 (B*iii*) a United States or State agency;

9 (C*iv*) a United States or State officer or employee sued in an official
10 capacity; or

11 (D*v*) a United States or State officer or employee sued in an individual
12 capacity for an act or omission occurring in connection with duties
13 performed on behalf of the United States.

14 * * * * *

15 **Committee Note**

16
17 **Subdivision (a)(1).** Rule 40(a)(1) has been amended to make clear that the 45-day period
18 to file a petition for panel rehearing applies in cases in which an officer or employee of the
19 United States is sued in an individual capacity for acts or omissions occurring in connection with
20 duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B)
21 makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the
22 Solicitor General needs adequate time to review the merits of the panel decision and decide
23 whether to seek rehearing, just as the Solicitor General does when an appeal involves the United
24 States, a United States agency, or a United States officer or employee sued in an official capacity.
25

26 Rule 40(a)(1) is also amended to accord state government litigants the same treatment
27 afforded to federal government litigants. States, like the federal government, need time to review
28 the merits prior to deciding whether to seek rehearing. For states, as for the federal government,
29 these decisions may involve complex legal, policy and strategic choices. Multiple

1 decisionmakers within state government will often be involved. Extra time would assist states in
2 conducting those deliberations. Extra time should also reduce or eliminate some states' practice
3 of filing submissions merely in order to preserve the ability to seek rehearing pending a closer
4 review of the case.

* * * * *

Obviously, the considerations above show that opinions may vary concerning the relative costs and benefits of Virginia's proposal. Moreover, integrating the existing proposals for amendments to Rules 4 and 40 with Virginia's proposed amendments is not a straightforward task. A number of drafting and policy determinations remain to be made. The illustration provided above is meant to serve as a basis for the Committee's discussion of those issues.

Encls.

Proposed amendments approved by the Advisory Committee in November 2004:

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, t~~
The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from is entered. if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000 amendment explained: “Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.” The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

- (1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. ~~But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.~~ a petition for panel rehearing may be filed by any party within 45 days after entry of judgment if one of the parties is:

- (A) the United States;
- (B) a United States agency;

- (C) a United States officer or employee sued in an official capacity; or
- (D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

MEMORANDUM

DATE: October 16, 2006
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 06-06

William Thro, the State Solicitor General of the Commonwealth of Virginia – writing on his own behalf and on that of his counterparts in thirty-three other states and Puerto Rico – has proposed that FRAP 4(a)(1)(B) and FRAP 40(a)(1) be amended to accord to states the same treatment accorded to the federal government.¹ In brief, Mr. Thro argues that the same considerations that support lengthening the time to file a notice of appeal or to file a petition for panel rehearing or rehearing en banc,² when a federal entity is a party, also support such lengthening when a state entity is a party.

Part I of this memo summarizes the history of Rules 4(a)(1)(B) and 40(a)(1), and compares the treatment of federal and state government litigants in the Appellate, Civil and Supreme Court Rules. Part II considers the costs and benefits of the proposed amendments. Part III considers how best to implement the proposal if the Committee considers the proposal worth pursuing. Among other issues, Part III notes the existence of pending amendments to Rules 4(a)(1) and 40(a)(1) to clarify their application to individual-capacity suits. I attach a copy of those amendments, which the Advisory Committee approved in November 2004 but which has not yet been submitted to the Standing Committee.

I. Federal and state government litigants – overview of treatment in FRAP and elsewhere

This section first summarizes the history of the two provisions to which the proposal is directed. The relevant aspects of the provisions date from a 1948 amendment to Civil Rule 73 (in the case of Rule 4) and a 1994 amendment to the FRAP (in the case of Rule 40). The disparate appeal time for cases involving federal government litigants is also reflected in 28

¹ Mr. Thro's proposal is attached.

² Altering the FRAP 40(a)(1) time period for seeking rehearing will also alter the period for seeking rehearing en banc. See FRAP 35(c) (“A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.”).

U.S.C. § 2107, adopted as part of the Judicial Code of 1948.

Next, this section surveys the landscape of provisions in the Appellate Rules, the Civil Rules, and the Supreme Court Rules, and considers the extent to which federal and state litigants are treated differently. This survey discloses a number of instances in which federal and state litigants are treated the same. In a number of other instances, federal litigants are singled out for favorable treatment; some of these instances reflect statutory mandates, and some likely reflect conditions placed by the United States on its submission to suit. A few other instances show differences between the treatment of federal and state litigants, but in ways that do not clearly favor federal litigants.

A. A brief history of Rules 4(a)(1)(B) and 40(a)

1. Rule 4(a)(1)(B)

Rule 4(a)(1)(A) sets a presumptive 30-day time limit for filing a notice of appeal in a civil case. However, “[w]hen 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.” Rule 4(a)(1)(B). The 60-day provision for cases involving U.S. parties has existed in substantially the same form ever since the adoption of the original Appellate Rules in 1968.³ The 1967 Advisory Committee Note explained that FRAP 4(a) was derived from Civil Rule 73(a) “without any change of substance.” The Civil Rule 73(a) to which the 1967 Note referred is no longer extant. The relevant Civil Rule 73(a) provision was adopted in 1948, three months before the enactment of the 1948 Judicial Code, and the Code included a similar provision, 28 U.S.C. § 2107, that exists to this day.

Acting at the suggestion of the Judicial Conference of Senior Circuit Judges, the Civil Rules Advisory Committee took up, in the mid-1940s, the question of appeal time. The Advisory Committee explained the resulting proposal to amend Civil Rule 73(a) as follows:

Subdivision (a) as amended will fix the time for appeal in all cases, including those from the District of Columbia, at thirty days from the date of the entry of the judgment, unless a shorter period is provided by Act of Congress, but in any case in which the United States, or an officer or agency thereof, is a party, sixty days is allowed from the date of entry of the judgment. The three-months period now allowed by the statute in most cases is too long. . . . The shortened appeal time is in line with developments in state appellate practice; indeed, some states prescribe even shorter periods. . . .

³ See Federal Rules of Appellate Procedure with Conforming Amendments to Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, effective July 1, 1968, 43 F.R.D. 61, 69.

In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties.

Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 485. The Supreme Court acted favorably upon the amendments in 1946, and the amendments were reported to Congress in 1947. See Amendments to Federal Rules of Civil Procedure, 6 F.R.D. 229. The amendments evidently took effect in March 1948.⁴

Three months later, the Judicial Code of 1948 was enacted. Section 2107 of the newly adopted Code mirrored Civil Rule 73(a)'s treatment of appeal time:

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

Act of June 25, 1948, c. 646, 62 Stat. 869, 963. A review of the provisions cited as precursors of this section of the Judicial Code⁵ discloses no precedent for the 1948 Act's distinctive treatment

⁴ Though this is difficult to determine as to Civil Rule 73 because the relevant Civil Rule 73 no longer exists, the effective date of the amendments to other rules amended in the same package is March 19, 1948.

⁵ The Revision Notes to the 1948 Act state that Section 2107 was "[b]ased on Title 28, U.S.C., 1940 ed., §§ 227a, 230, and section 1142 of Title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1891, c. 517, § 11, 26 Stat. 829; Mar. 3, 1911, c. 231, § 129, 36 Stat. 1134; Feb.

of U.S. litigants – suggesting that the provision made its way into the Code through the example provided by (or as part of the same process that led to the adoption of) Civil Rule 73(a).

The relevant version of Civil Rule 73(a) no longer exists, but the cognate provisions persist in both FRAP 4(a) and 28 U.S.C. § 2107. The latter currently provides in relevant part:

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

2. Rule 40(a)(1)

FRAP 40(a)(1) provides: “Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.”

The 45-day period for cases involving federal government litigants was added in 1994. The 1994 Advisory Committee Note explained: “This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing.” The amendment was modeled on a D.C. Circuit Rule and a Tenth Circuit Rule. See 1994 Advisory Committee Note. The minutes of the Advisory Committee’s April 1993 meeting contain a brief discussion of the two comments received after publication of the proposed amendment to Rule 40. As far as can be gleaned from that discussion and from the description in the ensuing Advisory Committee Report, neither commentator raised the question of whether the extended time period should also be available in cases involving state government litigants, and it appears that the Advisory Committee did not discuss that question. See April 1993 Advisory Committee Minutes, at 3-4; May 1993 Advisory Committee Report at 53.

13, 1925, c. 229, § 8(c), 43 Stat. 940; Feb. 28, 1927, c. 228, 44 Stat. 1261; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; Feb. 10, 1939, c. 2, § 1142, 53 Stat. 165; Oct. 21, 1942, c. 619, Title V, § 504(a), (c), 56 Stat. 957.”

B. Treatment of federal and state litigants elsewhere in the Appellate Rules

Apart from Rules 4 and 40, I found only one other instance – Rule 39(b) – in which the Appellate Rules single out federal litigants for treatment different than that accorded to state litigants. In other Appellate Rules – Rules 22(b)(3), 29, and 44 – state and federal litigants share favorable treatment.

1. Rule 39(b)

Rule 39(b) provides that “[c]osts for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.” This provision has existed in substantially the same form since the adoption of the FRAP.⁶ The 1967 Advisory Committee Notes explained the special treatment of the United States by reference to then-prevailing practice in the courts of appeals and to 28 U.S.C. § 2412:

The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.

The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966 . . . , which amended 28 U.S.C. § 2412, the former general bar to the award of costs against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended § 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are "otherwise specifically provided (for) by statute."

2. Rule 22(b)(3)

Rule 22(b) concerns the requirement that a habeas petitioner obtain a certificate of appealability. Rule 22(b)(3) provides that “[a] certificate of appealability is not required when a state or its representative or the United States or its representative appeals.”

⁶ See FRAP 39(b), 43 F.R.D. 61, 102.

3. Rule 29(a)

Rule 29(a) requires would-be amici to obtain consent of the parties or leave of court, but exempts from this requirement briefs filed by “[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia.” The exemption for those entities has existed in substantially the same form since the adoption of the FRAP,⁷ except that the District of Columbia was added to the list of exempt entities in 1998.

4. Rule 44

Rule 44 provides a procedure for notifying government authorities when the constitutionality of a statute is challenged. As initially adopted in 1968, Rule 44 applied only to appeals in which “the constitutionality of any Act of Congress” was questioned and “to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, [was] not a party.” 43 F.R.D. 61, 106. The 1967 Advisory Committee Note explained that Rule 44 was adopted “in response to” 28 U.S.C. § 2403, “which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.”

In 1976, Congress amended Section 2403, adding a new subsection (b) that provides a notification and intervention procedure (for state attorneys general) in cases in which a state statute’s constitutionality is questioned. See P.L. 94-381, §§ 5 & 6, August 12, 1976, 90 Stat. 1119, 1120. Roughly a quarter-century later, the rulemakers conformed FRAP 44 to this change by adding FRAP 44(b). See FRAP 44, 2002 Advisory Committee Note.

C. Treatment of federal and state litigants in the Civil Rules

The Civil Rules, like the Appellate Rules, currently place states and the federal government on the same footing with respect to suits involving challenges to the constitutionality of a statute. New Civil Rule 5.1 (which will take effect December 1 absent congressional action to the contrary) provides for notice to the federal government or to the appropriate state government, and for intervention by that government, in litigation challenging the constitutionality of a federal or state statute.⁸

⁷ As originally adopted in 1968, Rule 29 required would-be amici to obtain written consent of all parties or leave of 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.” 43 F.R.D. 61, 94.

⁸ New Civil Rule 5.1 incorporates and broadens similar provisions that were formerly part of Civil Rule 24(c).

In other instances, however, the Civil Rules accord advantages to federal government litigants but not to state government litigants.⁹ In some instances, the provisions were designed to track existing statutory provisions.¹⁰ Though I have not traced the roots of all the provisions, it seems likely that a number of them implemented conditions that the federal government placed upon suits brought against itself.¹¹ A view of these provisions as reflections of a sovereign's ability to impose conditions on a suit against itself in its own courts may help to explain why they operate only to the advantage of federal government entities. A few other provisions exempt federal government litigants from posting various sorts of security required of other litigants.¹²

⁹ A couple of rules – Civil Rules 4(i) & (j) and Civil Rule 15(c)(3) – single out the U.S. for different treatment but do not appear to confer a particular advantage on the U.S.

¹⁰ Civil Rule 12(a)(1)(A) and 12(a)(2) set 20-day time limits for responding to a complaint or a cross-claim. But for federal government defendants, Civil Rule 12(a)(3) sets a time limit of 60 days. State government defendants do not get the benefit of this extended deadline. The 1937 Advisory Committee Note explains that the 60-day limit for federal government defendants was designed to track similar provisions in certain federal statutes.

¹¹ Examples in this category include the following:

- ◆ Civil Rule 13(d) states that “[t]hese rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.”
- ◆ Civil Rule 39(c)’s authorization of the use of juries by consent excepts “actions against the United States when a statute of the United States provides for trial without a jury.”
- ◆ Civil Rule 54(d)(1) provides in relevant part: “Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys’ fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.”
- ◆ Civil Rule 55(e) provides that “[n]o judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.”

¹² Examples of this are found in Civil Rules 45, 62 and 65:

- ◆ Civil Rule 45(b)(1) provides that “[w]hen [a] subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.”
- ◆ Civil Rule 62(e) provides that “[w]hen an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.”
- ◆ Civil Rule 65(c) provides in relevant part: “No restraining order or preliminary injunction

D. Treatment of federal and state litigants in the Supreme Court Rules

Like both the Appellate Rules and the Civil Rules, the Supreme Court Rules include similar provisions concerning challenges to state and federal statutes.¹³ And like the Appellate Rules, the Supreme Court Rules equate state and federal litigants by permitting either to file amicus briefs without a motion for leave.¹⁴ Parity is also accorded to state and federal litigants with respect to timing: Supreme Court Rule 13.1 sets a 90-day time limit for certiorari petitions, and does not provide an extended time limit for cases involving the U.S. or other governmental litigants.¹⁵

II. Should state and federal litigants be treated the same for purposes of determining appeal time and time to move for panel rehearing or rehearing en banc?

Mr. Thro's letter helpfully sets forth the major arguments in favor of treating states the same as the federal government. States, like the federal government, need time to review the merits prior to deciding whether to appeal, or to request a rehearing. For states, as for the federal government, these decisions may involve complex legal, policy and strategic choices. Multiple decisionmakers within state government will often be involved. Extra time would assist states in conducting those deliberations.

It might also be argued that states should enjoy parity with the federal government, and that this consideration weighs in favor of extending to states the treatment accorded the federal government in Rules 4(a) and 40(a). This argument, however, seems weaker than the practical

shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

¹³ See Supreme Court Rules 29.4(b) & (c).

¹⁴ See Supreme Court Rule 37.4. Interestingly, this rule includes not only federal and state governments, and commonwealths, territories or possessions, but also municipal governments.

¹⁵ The one distinction the Supreme Court Rules draw between federal and state litigants can be traced to the question, discussed above, of costs in cases involving the United States: Supreme Court Rule 43.5 provides: "To the extent permitted by 28 U.S.C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders."

arguments pressed by Mr. Thro.¹⁶ Nor does an argument for parallelism with other sets of Rules seem relevant here: The treatment of federal and state litigants in the Civil Rules and the Supreme Court Rules provides room to argue for equal treatment, but also provides examples of differing treatment.

Adoption of the proposal would impose two types of costs. One set of costs concerns implementation. As discussed below, a legislative amendment would be necessary to conform Section 2107 to the amended Rule 4(a). And the bench and bar would incur the usual cost of adjusting to a new amendment. The other cost would be that of the delays imposed by doubling the time for filing a notice of appeal, and more than doubling the time before the court's mandate issues once an appeal is decided. Though I do not have figures with which to illustrate this point, it is clear that the universe of cases to which the amendments would apply is large. It includes all habeas cases concerning state prisoners,¹⁷ all Section 1983 cases involving at least one state official sued in his or her official capacity, and – assuming that the Committee applies the approach taken in the pending amendments discussed in Part III.C. below – all Section 1983 cases involving at least one state official sued in his or her individual capacity for actions taken in connection with official duties.

III. Crafting the proposed amendments

Assuming that Mr. Thro's similar-treatment proposal is desirable, three issues present themselves. First, because Rule 4(a)(1)'s time periods are intertwined with a statute (Section 2107), it would be advisable to seek a conforming amendment to Section 2107 if the proposed amendment to Rule 4(a)(1) goes forward. Second, there is a question of scope: Should governments other than states be included? If so, which other governments? Third, another scope question concerns the meaning of the term "officer"; there currently exists diversity of opinion in the caselaw as to whether that term encompasses officials sued in their individual capacities, but this question would be settled by proposed amendments that the Advisory

¹⁶ In considering the proposal that states be treated with parity for the sake of parity, it may be relevant to note that foreign states are often not treated the same as the United States. See, e.g., *Dadesho v. Government of Iraq*, 139 F.3d 766, 767 (9th Cir. 1998) (noting that the Foreign Sovereign Immunities Act "gives a foreign state sixty days to file an answer to a complaint, in contrast to the twenty days given most civil defendants under Fed. R. Civ. P. 12(a)," but observing that foreign states do not get extra time to file a notice of appeal under Appellate Rule 4(a)).

¹⁷ FRAP 4(a)(1)'s 30-day deadline applies to appeals in habeas cases involving state prisoners. See *Houston v. Lack*, 487 U.S. 266, 269 (1988). In federal prisoners' Section 2255 proceedings, the 60-day period set in FRAP 4(a)(1)(B) applies. See Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules.').

Committee approved in November 2004.

A. If Rule 4(a)(1) is amended, Section 2107 should be amended as well

As noted above, FRAP 4(a)(1)'s dichotomous treatment of U.S. litigants and other litigants is mirrored in the distinction drawn in 28 U.S.C. § 2107. If the proposed amendment to FRAP 4(a)(1) is adopted, the rulemakers should suggest, at the time that the proposed amendment is forwarded to Congress, that Congress enact conforming changes to Section 2107.

B. Entities to be covered by the proposed amendments

Mr. Thro writes on behalf of thirty-four states and the Commonwealth of Puerto Rico. He obviously intends Puerto Rico to be included among the entities that would get the benefit of the amendment. He does not discuss, however, whether other entities should also be included. Presumably, the District of Columbia would appropriately be grouped with the states. Though I have not had a chance to research the question, the same might be said of the Northern Mariana Islands, American Samoa, Guam, and the Virgin Islands.¹⁸ Foreign nations, by contrast, might appropriately be excluded from this proposal: They presumably litigate far less frequently in federal court than do the states.

Some Native American tribes may be frequent litigants, and at least a few tribes may face caseloads and decisional challenges that are somewhat similar to those shouldered by a state litigant. But Native American tribes vary widely in their population and resources, and tribal governments vary in their size and complexity. The Navajo Nation, for example, will resemble a state government litigant much more closely than a smaller tribal government would. The great variation among tribal governments might thus lead to the conclusion that tribes should be excluded from the provision. On the other hand, it might be argued that a small tribal government might need the extra time even more, because its lack of resources would render it a less nimble decisionmaker.

Once the Committee reaches a view on the proper scope of the amendments, it will need to decide how to make that scope clear. It seems doubtful that the proposed amendments drafted by Mr. Thro would cover entities other than the fifty states unless a definition is added to make

¹⁸ It is interesting to note that the members of the National Association of Attorneys General include not only the attorneys general of the fifty states but also "the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands." http://www.naag.org/naag/about_naag.php, last visited September 28, 2006.

that clear.¹⁹ Or – perhaps more straightforwardly – the amendments could be redrafted to refer to all the intended beneficiaries. Thus, for example, FRAP 29(a) refers not merely to a “State” but also to a “Territory, Commonwealth, or the District of Columbia.”

C. Individual-capacity suits

It is currently unclear whether the existing federal-litigant provisions in FRAP 4(a) and 40(a) apply to cases involving federal officials sued in their individual capacities. Cf. 16A Wright, Miller, Cooper & Schiltz, *Federal Practice & Procedure* § 3950.2, fn. 42 (noting “[t]he problem of the ambiguous role often played by United States officers as defendants”).

The Second Circuit has taken a relatively narrow view. As the court explained in a case arising out of a car accident involving a federal employee driving a government-owned vehicle on government business:

The action was brought against him in his individual capacity and the judgment against him was entered against him as an individual. Although the United States Attorney appeared in his behalf, Smith could have chosen private counsel. Moreover, [i]f Smith had decided to appeal from the judgment against him he would not have needed the approval of any government department. Therefore, the reasons for which the usual 30 day time limit for filing an appeal was extended to 60 days in cases in which the 'United States or an officer or agency thereof' is a party are not applicable to Smith.

Hare v. Hurwitz, 248 F.2d 458, 462 (2d Cir. 1957) (construing Civil Rule 73(a)).

¹⁹ Some procedural provisions expressly define “State” to include the Commonwealth of Puerto Rico, the District of Columbia, and/or U.S. territories and possessions. See, e.g., 28 U.S.C. § 1332(e) (“The word ‘States’, as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.”); 28 U.S.C. § 1367(e) (“As used in this section, the term ‘State’ includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.”); 28 U.S.C. § 1369(c)(5) (definition similar to Section 1367(e)); 28 U.S.C. § 1738A(b)(8) (same); 28 U.S.C. § 3002(14) (“‘State’ means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, or any territory or possession of the United States.”); 28 U.S.C. § 3701(5) (“[T]he term ‘State’ means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States”).

Some procedural provisions define state to encompass, in addition, Native American tribes. See 28 U.S.C. § 1738B(b) (“‘State’ means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).”).

Some other circuits have given the provisions a broader application. The Ninth Circuit has explained that

Congress intended the reference to officers of the United States to be read in context with their activities, authority, and duties. A workable rule would be one that looks at who represents the parties and the relationship of the parties to each other and to the government during the course of the conduct that gave rise to the action. Whenever the alleged grievance arises out of a government activity, the 60-day filing period of Rule 4(a) applies if: (a) the defendant officers were acting under color of office, or (b) the defendant officers were acting under color of law or lawful authority, or (c) any party in the case is represented by a government attorney.

Wallace v. Chappell, 637 F.2d 1345, 1347-48 (9th Cir. 1981) (en banc, per curiam decision); *Buonocore v. Harris*, 65 F.3d 347, 352 (4th Cir. 1995) (applying *Wallace* and concluding that 60-day period applied in case involving *Bivens* claims against officers sued in personal capacities, because officers were acting under color of law, one officer had been represented by government counsel, and the U.S. had been for some period of time a named party to the proceedings below); *Williams v. Collins*, 728 F.2d 721, 723-24 (5th Cir. 1984) (following *Wallace*).

Provisions setting the time within which to appeal should be clear, and in the case of individual-capacity suits, current Rule 4(a)(1)(B) seems to fall short of that goal. In fact, as you know, the Advisory Committee has already approved proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the rules' application to individual-capacity suits. The proposed amendments are attached to this memo.

IV. Conclusion

As Mr. Thro notes, the decisional challenges faced by state government litigants provide an argument for treating those litigants the same as federal government litigants, with respect to the time for filing the notice of appeal or seeking rehearing. The Committee should weigh that argument against the likely costs of the proposal: the costs of transition to the new rule, and the delays imposed by making the extended deadlines available in a greater range of cases. If the Committee decides to adopt the proposal, it should consider how to incorporate the requisite changes into the currently pending proposals to amend Rules 4(a) and 40(a). It should also consider what entities (e.g. commonwealths, territories, possessions) should be encompassed in addition to states, and it should consider asking Congress to adopt a conforming amendment to 28 U.S.C. § 2107.

Encls.

Proposed amendments approved by the Advisory Committee in November 2004:

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, t~~
The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from is entered. if one of the parties is:

(a) the United States;

(b) a United States agency;

(c) a United States officer or employee sued in an official capacity; or

(d) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000 amendment explained: “Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.” The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

- (1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. ~~But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time., a petition for panel rehearing may be filed by any party within 45 days after entry of judgment if one of the parties is:~~

- (A) the United States;
(B) a United States agency;

- (C) a United States officer or employee sued in an official capacity; or
- (D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2007
San Francisco, California
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Monday and Tuesday, June 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

RULE 11 OF THE RULES GOVERNING §§ 2254 AND 2255 PROCEEDINGS

Professor Beale explained that the proposed companion amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Proceedings (certificate of appealability and motion for reconsideration) would provide the procedure for a litigant to seek reconsideration of a district court's ruling in a habeas corpus case. They would specify that a petitioner may not seek review through FED. R. CIV. P. 60(b) (relief from judgment or order).

She reported that the advisory committee had considered a much broader proposal by the Department of Justice to eliminate coram nobis and other ancient writs, but it had decided on fundamental policy grounds against the change. Instead, the committee's proposal specifies that the only procedure for obtaining relief in the district court from a final order will be through a motion for reconsideration filed within 30 days after the district court's order is entered.

A member observed that the proposed amendment may narrow the scope of reconsideration in a way that the advisory committee did not intend. He noted that proposed Rule 11(b) may preclude the use of FED. R. CIV. P. 60(a) to seek reconsideration based on a clerical error – relief most often sought by the government. He suggested that the proposed rule may not be needed, and the stated justification for it was confusing. He also questioned whether the proposed rule did what it was intended to do, namely codify the Supreme Court's decision in *Gonzalez v. Crosby*. And he objected to the proposed 30-day time limit on the grounds that an unrepresented pro se litigant should not face a shorter time-limit than others.

Judge Levi asked whether, given these concerns, the advisory committee would be willing to hold the proposal for possible publication at a later time. Judge Bucklew agreed to recommend that only the proposed amendment to Rule 11(a) be published for public comment, and that the remainder of the rule be deferred for further consideration by the advisory committee.

The committee voted unanimously by voice vote to approve the proposed amendments to Rule 11(a) of both sets of rules for publication and to defer consideration publishing the proposed amendments to Rule 11(b) of both sets of rules.

Professor Struve noted that if the proposed amendment to Rule 11(b) did not go forward for publication, the Standing Committee should also not publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A), which makes reference to the proposed new Rule 11(b). **Accordingly, the committee voted unanimously by voice vote not to publish the proposed amendment to FED. R. APP. P. 4(a)(4)(A).**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 25, 2007

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 26 and 27, in Santa Fe, New Mexico. The Committee approved for publication a number of proposed amendments and a proposed new Rule.

Part II.A. of this report describes the Committee's proposed amendments relating to the Time-Computation Project. Part II.B. sets forth proposed new Rule 12.1 concerning indicative rulings; this Rule is designed to dovetail with the Civil Rules Committee's proposed new Civil Rule 62.1. Part II.C. presents proposed amendments to Rules 4(a)(4) and 22 in the light of the Criminal Rules Committee's proposed new Rules 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255. Parts II.D. through II.G. present a proposed amendment to Rule 4(a)(4)(B)(ii) regarding notices of appeal; proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the treatment of U.S. officers or employees sued in an individual capacity; a proposed amendment to Rule 26(c) to clarify operation of the three-day rule; and a proposed amendment to Rule 29 requiring disclosures concerning drafting and funding of amicus briefs.

Part III covers other matters. The Committee discussed and retained three additional items on the study agenda, and removed two other items. The Committee also discussed correspondence relating to circuit-specific briefing requirements.

The Committee has tentatively scheduled its next meeting for November 2007.

FEDERAL RULES OF APPELLATE PROCEDURE

12

* * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254 and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-D: Defining the term “state”

As explained in the materials concerning the Time-Computation Project, the Chair of the Time-Computation Subcommittee has asked the Advisory Committees (other than the Criminal Rules Committee) to consider whether they wish to adopt a general definition of the term “state” such as that in Criminal Rule 1(b)(9). That Rule provides: “‘State’ includes the District of Columbia, and any commonwealth, territory, or possession of the United States.”

The reason for the request is that the time-computation rules’ definition of legal holidays includes state holidays. Because some litigation occurs not within states but rather in D.C. or in a commonwealth or territory, state holidays should include commonwealth and territorial holidays. If each set of Rules is amended to contain a definition like that in Criminal Rule 1(b)(9), then no change to the template’s definition of legal holiday would be required. If such a definition is not adopted for the Appellate Rules generally, then it would be necessary to consider adding a definition to proposed Rule 26(a)(6) (concerning legal holidays).

I. Should the Committee propose to define “state” for purposes of the Appellate Rules?

If the Committee were to adopt a general definition of the term “state,” it would affect all Appellate Rules that currently use that term, and would also affect the proposed amendments to Rules 4(a)(1)(B) and 40(a)(1). This Part first considers which entities might be included in the definition. It then reviews each of the relevant Appellate Rules provisions to consider the possible effect of a general definition.

A. Definitions

The first task is to define the relevant terms. No global statutory definition of territories, possessions or commonwealths appears to exist. The following information from the website of the Department of Interior’s Office of Insular Affairs seems helpful in defining the terms (see http://www.doi.gov/oia/Islandpages/political_types.htm):

commonwealth	An organized United States insular area, which has established with the Federal Government, a more highly developed relationship, usually embodied in a written mutual agreement. Currently, two United States insular areas are commonwealths, the Northern Mariana Islands and Puerto Rico....
Territory	An incorporated United States insular area, of which only one exists currently, Palmyra Atoll. With an area of 1.56 square miles, Palmyra consists of about fifty small islands and lies approximately one thousand miles south of Honolulu.
incorporated territory	Equivalent to <i>Territory</i> , a United States insular area, of which only one territory exists currently, Palmyra Atoll, in which the United States Congress has applied the full corpus of the United States Constitution as it applies in the several States. Incorporation is interpreted as a perpetual state. Once incorporated, the Territory can no longer be de-incorporated.
territory	An unincorporated United States insular area, of which there are currently thirteen, three in the Caribbean (Navassa Island, Puerto Rico and the United States Virgin Islands) and ten in the Pacific (American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, the Northern Mariana Islands and Wake Atoll).
possession	Equivalent to <i>territory</i> . Although it still appears in Federal statutes and regulations, <i>possession</i> is no longer current colloquial usage.
unincorporated territory	A United States insular area in which the United States Congress has determined that only selected parts of the United States Constitution apply.
organized territory	A United States insular area for which the United States Congress has enacted an organic act.
unorganized territory	An unincorporated United States insular area for which the United States Congress has not enacted an organic act.

Assuming that the Office of Insular Affairs' definitions are accurate, a provision that defines states to include any "commonwealth, territory, or possession of the United States"

would include the Northern Mariana Islands,¹ Puerto Rico,² American Samoa,³ Guam,⁴ and the

¹ “In 1976, Congress approved the mutually negotiated Covenant to Establish a Commonwealth of the Northern Mariana Islands (CNMI) in Political Union with the United States. The CNMI Government adopted its own constitution in 1977, and the constitutional government took office in January 1978. The Covenant was fully implemented on November 3, 1986, pursuant to Presidential Proclamation no. 5564, which conferred United States citizenship on legally qualified CNMI residents.” U.S. Dep’t of Interior, Office of Insular Affairs, Commonwealth of the Northern Mariana Islands, available at <http://www.doi.gov/oia/Islandpages/cnmipage.htm> (last visited March 24, 2007). See also 48 U.S.C. § 1801 (approving “Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America”); *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717, 720 (9th Cir. 1998) (“The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ... established the Commonwealth as an unincorporated territory of the United States.”).

² “Puerto Rico, a U.S. possession since 1898, became a commonwealth in 1952. Since then, Puerto Ricans have been considering three significantly different political status options --statehood, enhanced commonwealth, and independence -- as an alternative to the present relationship with the United States. The political status debate continues, in part, because the last plebiscite, held on December 13, 1998, failed to yield a majority vote on any of the five options: 0.29% enhanced commonwealth, 46.4% statehood; 2.5% independence, 0.06% free association, 50.3% none of the above.” U.S. Dep’t of Interior, Office of Insular Affairs, Puerto Rico, available at <http://www.doi.gov/oia/Islandpages/prpage.htm> (last visited March 24, 2007). See also 48 U.S.C. § 731 et seq. (provisions relating to Puerto Rico); Puerto Rico Const. Art. I, § 1 (constituting the Commonwealth of Puerto Rico).

³ “American Samoa, an unincorporated and unorganized territory of the United States, is administered by the U.S. Department of the Interior. It is ‘unincorporated’ because not all provisions of the U.S. Constitution apply to the territory. The Congress has not provided the territory with an organic act, which organizes the government much like a constitution would. Instead, the Congress gave plenary authority over the territory to the Secretary of the Interior, who in turn allowed American Samoans to draft their own constitution under which their government functions.” U.S. Dep’t of Interior Office of Insular Affairs, American Samoa, available at <http://www.doi.gov/oia/Islandpages/asgpage.htm> (last visited March 24, 2007); see also *U.S. v. Standard Oil Co.*, 404 U.S. 558, 558-59 (1972) (per curiam) (“American Samoa is a group of seven small islands in the South Pacific.... By Act of Congress, 45 Stat. 1253, 48 U.S.C. s 1661, powers to govern the islands are vested in the President, who has delegated the authority to the Secretary of the Interior”); *U.S. v. Lee*, 472 F.3d 638, 639 (9th Cir. 2006) (terming American Samoa “an unincorporated territory of the United States located in the South Pacific”); 8 U.S.C. § 1101(a)(29) (“As used in this chapter [concerning immigration and nationality] ... [t]he term ‘outlying possessions of the United States’ means American Samoa and

Virgin Islands.⁵

Technically, such a definition would also include Palmyra Atoll; Navassa Island; Baker Island; Howland Island; Jarvis Island; Johnston Atoll; Kingman Reef; Midway Atoll; and Wake Atoll. But with few or no inhabitants and no local government, these small islands, atolls and reefs seem irrelevant in the contexts covered by the Appellate Rules' references to "states."

B. Effect on Appellate Rule 22(b)

Appellate Rule 22(b) concerns the certificate-of-appealability requirement imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Rule 22(b) currently⁶

Swains Island.").

⁴ "Currently, Guam is an unincorporated, organized territory of the United States. It is 'unincorporated' because not all provisions of the U.S. Constitution apply to the territory. Guam is an 'organized' territory because the Congress provided the territory with an Organic Act in 1950 which organized the government much as a constitution would. The Guam Organic Act currently provides a republican form of government with locally-elected executive and legislative branches and an appointed judicial branch.... Seeking to improve its current political status, the Guam Commission on Self-Determination has drafted a proposed Guam Commonwealth Act, which was approved in two 1987 plebiscites. In February 1988, the document was submitted to the Congress for its consideration and was introduced in four consecutive Congresses--the 100th through the 104th." Dep't of Interior, Office of Insular Affairs, Guam, available at <http://www.doi.gov/oia/Islandpages/gumpage.htm> (last visited March 24, 2007). See also 48 U.S.C. § 1421a ("Guam is declared to be an unincorporated territory of the United States....").

⁵ "The U.S. Virgin Islands, an unincorporated territory of the United States, was placed under the administration of the Secretary of the Interior pursuant to Executive Order 5566 in 1931. These islands are under the sovereignty of the United States. The Organic Act of 1936 established local government under the control of the Secretary of Interior. The Revised Organic Act of 1954 is the Virgin Islands analogue of a state constitution, replacing the makeshift Organic Act of 1936. Under the territory's 1954 Revised Organic Act, the Governor of the Virgin Islands was appointed by the President of the United States and reported to the Secretary of the Interior. Under legislation passed in 1968, the Virgin Islands has had a democratically elected form of government since 1970." U.S. Dep't of Interior, Office of Insular Affairs, U.S. Virgin Islands, available at <http://www.doi.gov/oia/Islandpages/vipage.htm> (last visited March 24, 2007). See also 48 U.S.C. § 1541(a) ("The Virgin Islands as above described are declared an unincorporated territory of the United States of America.").

⁶ A separate memo (on Item 07-AP-C) discusses the proposal to amend FRAP 4(a)(4)(A) and 22 in the light of proposed amendments to the Rules governing 2254 and 2255 proceedings.

provides:

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

To determine how a FRAP-wide definition of “state” would affect Rule 22(b), it is necessary to determine how courts currently interpret that term as it is used in Rule 22 and in the habeas statutes. Neither the Rule nor the habeas statutes define the term. *See* Rule 22; 28 U.S.C. §§ 2241 - 2254. Caselaw indicates the following:

- District of Columbia: Included
 - The D.C. Circuit Court of Appeals has held that the District of Columbia counts as a state for purposes of 28 U.S.C. § 2253's certificate-of-appealability requirement. *See Madley v. U.S. Parole Com'n*, 278 F.3d 1306, 1309 (D.C. Cir. 2002). The *Madley* court reasoned that it had previously held the pre-AEDPA certificate-of-probable-cause requirement applicable to District of Columbia prisoners, and that Congress had not disapproved that caselaw when it enacted AEDPA. *See id.*
- American Samoa: Unclear
 - Federal caselaw on habeas relief for prisoners convicted in Samoan courts is sparse to nonexistent. In *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), a dissenting opinion referred in passing to the possibility of a habeas claim by King,

who was prosecuted in Samoan court. *See King*, 520 F.2d at 1151 n.6 (Tamm, J., dissenting). But since King's claim (for a declaration that he had a federal constitutional right to a jury trial) was brought against the Secretary of the Interior, Judge Tamm's reference to the possibility of habeas relief says nothing about whether American Samoa would be treated as a state for purposes of the habeas statutes.

- Guam: Included
 - The Ninth Circuit has held that “Guam prisoners may seek federal habeas relief under 28 U.S.C. § 2254 to the same extent as state prisoners.” *White v. Klitzkie*, 281 F.3d 920, 923 n.3 (9th Cir. 2002).
- Northern Mariana Islands: Apparently included
 - Section 403(a) of the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America provides: “The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus and other matters or proceedings will be governed by the laws of the United States pertaining to the relations between the courts of the United States and the courts of the several States in such matters and proceedings, except as otherwise provided in this Article....” Pub. L. No. 94-241, March 24, 1976, 90 Stat. 263.
 - This provision is codified at 48 U.S.C. § 1824: “The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings, except as otherwise provided in article IV of the covenant....”
 - In one recent case, the Supreme Court of the Northern Mariana Islands relied on the availability of habeas corpus review to support its conclusion that the defendant was not entitled to a new trial. *See Commonwealth of Northern Mariana Islands v. Diaz*, 2003 WL 24270039, at *3 & n.14 (N. Mariana Islands Sept. 4, 2003) (stating that despite AEDPA's one-year statute of limitations “ample time is still available to remedy errors made at trial with a writ of habeas corpus”).

- Puerto Rico: Included
 - The First Circuit has applied the habeas statutes to habeas petitions by prisoners convicted in the courts of the Commonwealth of Puerto Rico. *See, e.g., Maldonado-Pagan v. Malave*, 145 Fed.Appx. 375, 376 (1st Cir. 2005) (unpublished opinion) (reviewing district court’s denial of habeas petition filed by Puerto Rico prisoner under 28 U.S.C. § 2254).

- Virgin Islands: Included
 - The Third Circuit has held that Section 2254 “applies to the District Court of the Virgin Islands so as to confer jurisdiction upon it to entertain habeas corpus petitions from those in custody pursuant to a judgment of the Territorial Court.” *Walker v. Government of Virgin Islands*, 230 F.3d 82, 87 (3d Cir. 2000). The *Walker* court held that Section 2253(c)’s certificate-of-appealability requirement applies to petitioners in custody pursuant to a Virgin Islands judgment. *See id.* at 89.

In sum, courts have held that the District of Columbia, Guam, Puerto Rico and the Virgin Islands count as states for purposes of the habeas statutes. The status of American Samoa and the Northern Mariana Islands is less clear. In any event, defining “state,” for FRAP purposes, to include all these entities should not cause a problem in the application of Appellate Rule 22(b): If, for example, American Samoa is not subject to the federal habeas framework, the question of Rule 22(b)’s applicability to American Samoa will simply never arise.

C. Effect on Appellate Rule 29(a)

Rule 29(a) provides that

[t]he 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. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

I found no caselaw and no local rules explaining the scope of this provision. It explicitly extends to the District of Columbia. It also seems clearly to extend to Puerto Rico and the Northern Mariana Islands, which are commonwealths. If the Rule’s reference to “Territory” with a capital “T” were read to invoke the technical definition provided by the Office of Insular Affairs – an “incorporated United States insular area” – that reference would make no current sense, since it would encompass only the unpopulated Palmyra Atoll. It makes more sense, instead, to interpret the Rule’s reference to “Territory” to encompass “territories” with a small “t” – in which case the

term would encompass American Samoa, Guam and the Virgin Islands.⁷ Such an interpretation technically would also encompass the other U.S. territories, but – since those territories have few or no inhabitants and no local governments – there would be no occasion for Rule 29 to apply to them.

If a FRAP-wide definition of “state” were adopted, FRAP 29(a) could be amended to refer simply to “the United States or its officer or agency or a state.”

D. Effect on Appellate Rule 44(b)

Rule 44(b) provides:

(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.

This provision was added in 2002. The 2002 committee note does not define “State.” The note explains that the amendment is designed to implement 28 U.S.C. § 2403(b).

Section 2403(b) provides:

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

There is no statutory definition of “state” for purposes of Section 2403(b). The statute has been

⁷ The National Association of Attorneys General lists among its members not only the attorneys general of the fifty states but also “the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands.” http://www.naag.org/naag/about_naag.php, last visited March 24, 2007.

applied to intervention by the Puerto Rico Attorney General, *see Cruz v. Melecio*, 204 F.3d 14, 18 (1st Cir. 2000); *see also In re Casal*, 998 F.2d 28, 30 (1st Cir. 1993), but I found no caselaw applying the statute to intervention by the other entities discussed in this memo.⁸

It thus seems that adopting a general definition of “state” that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 44(b). One question is whether such an expansion would be appropriate in the light of the fact that Rule 44(b) was designed to implement a statutory provision. There would, at any rate, be no problem with rulemaking power, in that the change would not seem to modify substantive rights. Another question is whether Rule 44(b) would make sense as applied to the other entities. It seems that constitutional challenges could arise with respect to statutes enacted by any of the political entities discussed in this memo; though some of the entities are not subject to all federal constitutional provisions, all the entities are subject to some constitutional constraints. And each entity presumably has a chief legal officer – whether or not termed the “attorney general” – who could receive the Rule 44(b) certification.

E. Effect on Appellate Rule 46

Rule 46(a)(1) provides:

(a) Admission to the Bar.

(1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

I was unable to find caselaw that addresses whether “state,” as used in Rule 46, includes the entities discussed in this memo. The Ninth Circuit held in *In re Rothstein* that

[t]he Trust Territory of the Pacific Islands is not a territory nor an insular possession of the United States, but was only held under a trusteeship agreement with the Security Council of the United Nations. Admission to the High Court of the Trust Territory of the Pacific Islands does not qualify counsel to practice in the United States District Court for the Northern District of California or in the United States Court of Appeal for the Ninth Circuit.

⁸ We could seek information on this question – and the question, discussed below, concerning Rule 46 – by asking Fritz Fulbruge to make inquiries among the circuit clerks.

In re Rothstein, 884 F.2d 490, 492 (9th Cir. 1989). But the *Rothstein* court’s mention of territories and possessions is less probative than it might be, because the court was also interpreting a Northern District of California local rule which authorized admission of “attorneys of good moral character who are active members in good standing of the bar and who are eligible to practice before any United States Court or the highest court of any State, Territory or Insular Possession of the United States.” *Rothstein*, 884 F.2d at 491.

Thus, as with Rule 44, adopting a general definition of “state” that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 46. With respect to Rule 46, the policy question for the Committee is whether admission to the highest court of each relevant political entity (Guam, the Northern Mariana Islands, etc.) serves as an appropriate qualification for practice before the federal courts of appeals.

F. Effect on Item No. 06-06

A pending agenda item – Item No. 06-06 – concerns Virginia’s proposal to amend 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. If that proposal is adopted, then those Rules would, of course, be among the Rules that refer to states. If the Committee decides to proceed with Virginia’s proposal, and if the Committee feels that the proposal should extend to D.C., the commonwealths, and the territories, then these proposed amendments would mesh comfortably with a FRAP-wide definition of the term “state.”

II. Crafting the proposed amendment

If the Committee is inclined to propose a general definition of the term “state,” the next questions concern placement and drafting. Adding a new Rule 49 might be a cumbersome way to accomplish the change. An alternative would be to place the definition in Rule 1; that would parallel the placement of the corresponding definition in Criminal Rule 1.

When drafting the definition, it may make sense to follow the wording employed in the Criminal Rules. The Office of Insular Affairs’ commentary suggests that including “possession” may be unnecessary because “possession” is equivalent to “territory” and is no longer commonly used; on the other hand, including the term probably cannot hurt and might help to avoid confusion stemming from the use of the term in older caselaw.

1 **Rule 1. Scope of Rules; Definition; Title**

2 **(a) Scope of Rules.**

3 (1) These rules govern procedure in the United States courts of appeals.

4 (2) When these rules provide for filing a motion or other document in the district
5 court, the procedure must comply with the practice of the district court.

6 **(b) ~~[Abrogated]~~ Definition. In these rules, “state” includes the District of Columbia and
7 any commonwealth, territory, or possession of the United States.**

8 **(c) Title.** These rules are to be known as the Federal Rules of Appellate Procedure.
9

10 **Committee Note**

11 **Subdivision (b).** New subdivision (b) defines the term “state” to include the District of
12 Columbia and any commonwealth, territory or possession of the United States. Thus, as used in
13 these Rules, “state” includes the District of Columbia, Guam, American Samoa, the U.S. Virgin
14 Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana
15 Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana
16 Islands.
17

MEMORANDUM

DATE: October 2, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

As you know, the Court's decision this spring in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines.

Mark Levy has suggested that the Committee review the *Bowles* decision and consider what, if any, changes to the Appellate Rules might be warranted to respond to the decision. This memo summarizes some relevant issues.¹ Parts I and II review and critique the *Bowles* decision. Part III analyzes the decision's implications, focusing particularly on whether all Rule 4 deadlines are now to be considered jurisdictional. Even if some of the Rule 4 deadlines need not be viewed as jurisdictional, many must be so viewed. Part III closes by noting the implications of the "jurisdictional" categorization; among other things, if a deadline is jurisdictional then courts can no longer apply the "unique circumstances" doctrine, under which a party's reasonable reliance on a court's erroneous representation (relating to timing) could operate to salvage an untimely appeal. Part IV examines whether it would be possible and desirable to reinstate the unique circumstances doctrine as to Rule 4 deadlines that, under *Bowles*, are deemed jurisdictional.

I. The *Bowles* decision

The facts of *Bowles* are straightforward. After the district court denied Bowles' habeas petition, Bowles failed to file a notice of appeal within the 30 days prescribed by Rule 4(a)(1)(A) and 28 U.S.C. § 2107(a). Bowles' counsel subsequently moved for an order reopening the time to file an appeal under Rule 4(a)(6), and the district court granted the motion. Both Rule 4(a)(6) and 28 U.S.C. § 2107(c) limited the allowable extension to 14 days after the date of entry of the order reopening the time, but the district court erroneously set a date (February 27, 2004) which extended the time by 17 days after the entry date. Bowles' counsel filed the notice of appeal on

¹ Portions of this memo are adapted from the discussion of *Bowles* in the draft of the forthcoming new edition of Federal Practice & Procedure, Vol. 16A.

February 26 – within the time set by the order but outside the limits set by rule and statute. See *Bowles*, 127 S. Ct. at 2362.

The Sixth Circuit dismissed the appeal for lack of jurisdiction, and a closely divided Supreme Court affirmed. The majority, per Justice Thomas, focused on the fact that the 14-day time limit is set not only in Rule 4(a)(6) but also in Section 2107(c). The Court cited a string of cases stating that appeal time limits are “mandatory and jurisdictional,”² as well as a couple of 19th-century cases viewing statutory appeal time limits as jurisdictional.³ The majority acknowledged that a number of the cases that characterized appeal time limits as “mandatory and jurisdictional” had relied on *United States v. Robinson*, and that it had in recent decisions “questioned *Robinson*’s use of the term ‘jurisdictional’”; but the majority maintained that even those recent cases “noted the jurisdictional significance of the fact that a time limit is set forth in a statute,” and it stated that “[r]egardless of this Court’s past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.”⁴ The majority thus concluded that “[j]urisdictional treatment of statutory time limits makes good sense.... Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.”⁵

The majority also rejected *Bowles*’ argument that he should be forgiven for relying on the district court’s assurance that a notice filed by February 27 would be timely. This argument rested on the “unique circumstances” doctrine set forth in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*,⁶ and *Thompson v. INS.*⁷ The majority characterized this doctrine as moribund, and it “overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to

² *Bowles*, 127 S. Ct. at 2363-64 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam); *Hohn v. United States*, 524 U.S. 236, 247 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); and *Browder v. Director, Dep’t of Corrs.*, 434 U.S. 257, 264 (1978)).

³ *Bowles*, 127 S. Ct. at 2364 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883), and *United States v. Curry*, 6 How. 106, 113 (1848)).

⁴ See *Bowles*, 127 S. Ct. at 2364 & n.2 (discussing *United States v. Robinson*, 361 U.S. 220, 229 (1960); *Kontrick v. Ryan*, 540 U.S. 443 (2004); and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

⁵ *Bowles*, 127 S. Ct. at 2365.

⁶ 371 U.S. 215 (1962) (per curiam).

⁷ 375 U.S. 384 (1964) (per curiam).

authorize an exception to a jurisdictional rule.”⁸ In the light of the majority’s view of the 14-day limit as jurisdictional, this meant that Bowles’ reliance on the district court’s assurance provided no basis to excuse the untimely filing. The majority closed by noting that “[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits.”⁹

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, filed a vigorous dissent. They noted the draconian consequences of characterizing appeal time limits as jurisdictional: Jurisdictional limits cannot be waived, cannot be excused (except as explicitly authorized), and must be raised *sua sponte* by the court.¹⁰ The dissenting Justices questioned the majority’s view that all statutory time limits must be jurisdictional, and highlighted the Court’s recent decisions in *Kontrick v. Ryan* and *Eberhart v. United States*, which had criticized *Robinson* and its progeny for “the basic error of confusing mandatory time limits with jurisdictional limitations.”¹¹ The dissenters would have applied the unique circumstances doctrine to forgive Bowles’ late filing based on his counsel’s reliance on the district court’s order setting the February 27 date.

II. A critique of *Bowles*

The Bowles decision’s reliance on the statutory nature of the 14-day time limit leaves the strength of its reasoning open to question.¹² Section 2107 has long been entwined with the

⁸ *Bowles*, 127 S.Ct. at 2366.

⁹ *Id.* at 2367.

¹⁰ *Id.* at 2368 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

¹¹ *Id.* at 2368 n.3 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) (citing *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

¹² As the *Bowles* majority noted, though, the Court’s treatment of the deadlines for seeking Supreme Court review provides support for the distinction drawn in *Bowles* between statutory and rule-based deadlines.

The Supreme Court in 1970 made it clear that a filing-time requirement established by court rule, as distinguished from a requirement promulgated by statute, is not necessarily jurisdictional. In *Schacht v. United States*, the Supreme Court held that its own rule (which has since been changed) establishing a 30-day time limitation for filing a petition for writ of certiorari in a federal criminal case is not jurisdictional and “can be relaxed by the Court in the exercise of its discretion when the ends of justice so require.” 398 U.S. 58, 64 (1970). In holding that compliance with this time requirement was not inherently jurisdictional, the Court

relevant rule, and the history gives little reason to think that Congress acted independently to limit the appeal times when enacting or amending Section 2107. Section 2107 was first enacted in 1948, some three months after the effective date of the 1946 amendment to Civil Rule 73, and the statutory provision reflected the 30-day and 60-day appeal time limits that had already been inserted into Rule 73 by the 1946 amendments. When, in 1966, the rulemakers amended Civil Rule 73 to broaden its excusable-neglect provision and to set a 14-day period for appeals by other parties, no similar change was made to Section 2107. Likewise, in 1979 the rulemakers amended Appellate Rule 4(a) to permit extensions of appeal time based on good cause (as an alternative to excusable neglect), and they also capped the extension at the later of 30 days after the original appeal time or 10 days from the entry of the order granting the extension. As with the 1966 amendment to Civil Rule 73, the 1979 change to Rule 4(a)'s excusable-neglect provision took effect without any corresponding change in Section 2107.

In 1991, the rulemakers added Rule 4(a)(6), which authorizes the district court to reopen the time for appeal in civil cases if a party failed to receive notice of the entry of judgment. The rulemakers' transmittal note recommended "that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule."¹³ Days after new Rule 4(a)(6) took effect, Congress amended Section 2107.¹⁴ As a result of that amendment, the first sentence of Section 2107(c) mirrors Rule 4(a)'s excusable-neglect and good-cause provision as it stood in 1991, and the remainder of Section 2107(c) mirrors Rule 4(a)(6)'s provision for reopening the time to take an appeal.

In the light of this sequence of events, the *Bowles* majority was perhaps imprecise in stating (with respect to the provision for reopening the time period) that "Rule 4 of the Federal

emphasized that the requirement "was not enacted by Congress but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases." *Id.* Prior to the *Schacht* decision, the Supreme Court on several occasions had entertained petitions for certiorari filed out of time in federal criminal cases, noting that "no jurisdictional statute is involved" in such cases. *Heflin v. U.S.*, 358 U.S. 415, 418 n.7 (1959); *Taglianetti v. U.S.*, 394 U.S. 316, 316 n.1 (1969) (per curiam). On the other hand, in civil cases where the time limitations for taking appeals and applying for certiorari are enunciated by Congress rather than by judicial rule, *see* 28 U.S.C. § 2101(c), the Supreme Court has consistently viewed compliance with the limitations as jurisdictional; a waiver is not permitted however excusable the default may be. *See* *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942); *Teague v. Commissioner of Customs*, 394 U.S. 977 (1969).

¹³ See 1991 Committee Note to Rule-4.

¹⁴ Act of Dec. 9, 1991, Pub. L. No. 102-198, § 12, 105 Stat. 1627.

Rules of Appellate Procedure carries § 2107 into practice.”¹⁵ To the contrary, the history shows that the rulemakers have taken the lead in developing Rule 4(a)’s time limits, with Congress acting afterwards to conform the statute to the rule. This trend has continued in the 1998 and 2005 amendments, which altered Rule 4(a)(6) without any conforming change by Congress. It is notable, as well, that from the adoption of the Appellate Rules until the 2002 amendments, Rule 1 provided – in the words of the restyled version – that the Appellate Rules “do not extend or limit the jurisdiction of the courts of appeals” – a principle that casts some doubt on the notion that time limits first adopted through Appellate Rules amendments should be seen as jurisdictional.¹⁶

It is true that, as the *Bowles* majority noted, there are cases of long standing which indicate that an appeal time set by statute is jurisdictional. But the case law on this question does not speak with one voice. For example, in *Reconstruction Finance Corp. v. Prudence Securities Advisory Group* the Court interpreted the relevant statutory scheme to require a would-be appellant to file an application for leave to appeal in the circuit court of appeals, rather than filing a notice of appeal in the district court as the Reconstruction Finance Corporation had done. But the Court held that the court of appeals should have exercised its discretion to forgive the RFC’s failure to file in the proper court, noting that “[t]he failure to comply with statutory requirements ... is not necessarily a jurisdictional defect.”¹⁷

In any event, *Bowles* leaves uncertain the status of a number of Rule 4 deadlines. The next section examines *Bowles*’ likely impact on the classification of those deadlines.

III. After *Bowles*, are all Rule 4 deadlines jurisdictional?

Bowles, of course, concerned Rule 4(a)(6)’s 14-day time limit on reopening the time to

¹⁵ See *Bowles*, 127 S. Ct. at 2363.

¹⁶ Criminal Rule 37(a)(2) (the precursor of some parts of current Appellate Rule 4(b)), was promulgated under the authority of 18 U.S.C. § 3772, which expressly authorized the promulgation of rules “prescrib[ing] the times for and manner of taking appeals” in criminal cases. See Act of June 25, 1948, ch. 645, 62 Stat. 846, 846-47. Section 3772 likewise provided the authority for the promulgation of the original Appellate Rules relating to criminal appeals.

Writing when Appellate Rule 1(b) still existed, Professor Hall observed: “No one has offered an explanation of how a jurisdictional limitation can emanate from the court’s rulemaking power in light of this proviso.” Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 Ga. L. Rev. 399, 413 (1986).

¹⁷ *Reconstruction Fin. Corp. v. Prudence Sec. Advisory Group*, 311 U.S. 579, 583 (1941).

take a civil appeal. The *Bowles* Court's reasoning leaves uncertain the status of other appeal time limits set by Rule 4. Rule 4(a)(1)(A)'s 30-day time limit, Rule 4(a)(1)(B)'s 60-day time limit, Rule 4(a)(5)(A)'s 30-day limit, and Rule 4(a)(6)'s 7-day, 14-day, 21-day and 180-day limits are reflected in Section 2107, and thus it seems likely that under *Bowles*' reasoning these limits are to be regarded as jurisdictional.¹⁸ Rule 4(b)(1)(B)'s 30-day time limit for government appeals mirrors a statutory limit that is now codified at 18 U.S.C. § 3731, and thus the same 'jurisdictional' label may apply to that limit as well. But Rule 4(a)(3)'s 14-day time limit,¹⁹ Rule 4(a)(5)(C)'s 30-day and 10-day limits, Rule 4(b)(1)(A)'s 10-day time limit,²⁰ Rule 4(b)(3)(A)'s 10-day limits, and Rule 4(b)(4)'s 30-day limit have no corresponding statutory provision. Moreover, though the time limits in Rules 4(a)(1), 4(a)(3), 4(a)(5) and 4(a)(6) apply to appeals to the court of appeals in bankruptcy proceedings, Section 2107 does not "apply to bankruptcy matters or other proceedings under Title 11,"²¹ which presumably means that the analysis, under *Bowles*, of the Rule 4(a)(1), 4(a)(5)(A), and 4(a)(6) time limits could differ in the context of an appeal in a bankruptcy proceeding.²²

The *Bowles* Court's emphasis on the statutorily-prescribed nature of the Rule 4(a)(6) time limits suggests that *Bowles*' holding should be limited to those time limits reflected not only in a rule but also in a statute. Admittedly, *Bowles* does contain a few instances of broader language. The Court opened its analysis by stating that it "has long held that the taking of an appeal within

¹⁸ A number of court of appeals decisions prior to *Kontrick*, *Eberhart* and *Bowles* held such deadlines to be jurisdictional, as did a number of cases decided after *Kontrick*.

¹⁹ In lines of case law developed prior to *Kontrick* and *Eberhart*, the courts of appeals have split on the question of whether Rule 4(a)(3)'s 14-day deadline is jurisdictional.

²⁰ A number of cases decided prior to *Kontrick* and *Eberhart* have indicated that Rule 4(b)'s ten-day deadline for a criminal defendant's notice of appeal is jurisdictional. So have some cases decided post-*Kontrick*.

²¹ 28 U.S.C. § 2107(d).

²² However, some courts – prior to *Kontrick*, *Eberhart* and *Bowles* – held that Rule 4(a)'s time limits are jurisdictional in bankruptcy appeals. See *In re Perry Hollow Mgmt. Co.*, 297 F.3d 34, 38 (1st Cir. 2002) (where appellant sought review of district court's judgment affirming bankruptcy court decision, court of appeals held that Rule 4(a)(1)'s time limits were mandatory and jurisdictional); *Matter of Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (court dismissed appeal from judgment of district court exercising bankruptcy appellate jurisdiction, holding that "[r]ule 4(a)'s provisions are mandatory and jurisdictional"); *In re Loretto Winery Ltd.*, 898 F.2d 715, 717 (9th Cir. 1990) ("Saslow filed his notice of appeal 31 days after the bankruptcy appellate panel entered judgment. A prospective appellant must file notice of appeal within 30 days of the entry of judgment. 28 U.S.C. § 2107; Fed.R.App.P. 4(a)... We therefore do not have jurisdiction to hear Saslow's appeal.").

the prescribed time is ‘mandatory and jurisdictional,’” and it found it “indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.”²³ But it acknowledged its recent cases – such as *Eberhart* and *Kontrick* – criticizing *Robinson*, and distinguished those recent cases by stating that “none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional.”²⁴ Likewise, the Court cited with apparent approval a case stating that “[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute.”²⁵

Where does this leave the Rule 4 time limits that are not reflected in statutory provisions? The answer to this question requires a review of the prior authorities to which the *Bowles* Court adverted. The original Committee Note to Rule 3 characterized the combined requirements of Rules 3 and 4 as jurisdictional, but also stressed that rigid formalism should be avoided in applying those rules:

Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules . . . , and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.²⁶

The Supreme Court, in the *Robinson* decision, traced the history and interpretation of Criminal Rule 37(a)(2). Stressing Criminal Rule 45(b)’s admonition that “the court may not enlarge . . . the period for taking an appeal,” the Court concluded that Rule 37(a)(2)’s requirement that the notice of appeal in a criminal case be filed within 10 days after entry of judgment was

²³ *Bowles*, 127 S. Ct. at 2363 & n.2.

²⁴ *Id.* at 2364.

²⁵ *Id.* at 2365 n.3 (quoting *U.S. v. Sadler*, 480 F.3d 932, 936 (9th Cir. 2007)).

²⁶ See also *Coppedge v. U.S.*, 369 U.S. 438, 442 n.5 (1962) (“Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, *United States v. Robinson*, 361 U.S. 220 . . . , a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals.”).

“mandatory and jurisdictional” and could not be waived on a finding of excusable neglect.²⁷ The rulemakers in 1966 addressed the particular problem raised by *Robinson* when they amended Criminal Rule 37 to permit extension of the appeal time based on excusable neglect,²⁸ but the general principle that the rules’ appeal time limits were not only mandatory but jurisdictional lived on.

Thus, almost two decades later, the Court quoted *Robinson* when it held in *Browder v. Director, Department of Corrections of Illinois* that “[u]nder Fed.Rule App.Proc. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is ‘mandatory and jurisdictional.’”²⁹ In its early-1980s decision in *Griggs v. Provident Consumer Discount Co.*, the Court addressed the plight of litigants trapped by the then-extant provision in Rule 4 that nullified a notice of appeal filed during the pendency of certain timely post-judgment motions: “Under the plain language of the current rule, a premature notice of appeal ‘shall have no effect’; a new notice of appeal ‘must be filed.’ In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is ‘mandatory and jurisdictional.’”³⁰

In *Budinich v. Becton Dickinson & Co.*, the Court resolved a circuit split by ruling “that an unresolved issue of attorney’s fees for the litigation in question does not prevent judgment on the merits from being final.”³¹ The petitioner argued for a prospective application of this rule, contending that it was a significant change. The Court rejected this request, ruling that even if true, the petitioner’s contention could not save the appeal, because “the taking of an appeal within the prescribed time is mandatory and jurisdictional, see Fed. Rules App.Proc. 2, 3(a), 4(a)(1), 26(b).”³² In another severe decision, the Court held in *Torres v. Oakland Scavenger Company* that a lawyer representing multiple parties who filed a notice of appeal naming only some of those parties, followed by the term “et al.,” had failed to effect an appeal on behalf of his

²⁷ *Robinson*, 361 U.S. at 224.

²⁸ See Fed. R. Crim. P. 37 advisory committee note (1966), reprinted in 39 F.R.D. 69, 197-200 (1966) (“The final sentence effects a major change in the rule, under which courts have been held powerless to extend the time fixed by rule for taking an appeal. *United States v. Robinson*, 361 U.S. 220 (1960).”).

²⁹ *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 264 (1978).

³⁰ *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982).

³¹ *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988).

³² *Id.* at 203.

unnamed client.³³ The *Torres* Court reasoned that Rule 4's time limits were mandatory, Rule 26(b) forbade any extensions of those limits except as provided in Rule 4, and "[p]ermitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." The Court relied on the 1967 Committee Note to Rule 3 to support its view that the Rule 3 and Rule 4 requirements should be treated "as a single jurisdictional threshold."³⁴

Even the more forgiving decisions continued to repeat the "mandatory and jurisdictional" language. Thus, when the Court held in *Smith v. Barry* that an informal brief could serve as the functional equivalent of a notice of appeal, it opened its discussion by stating that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.... Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal."³⁵ Likewise, when the Court held in *Becker v. Montgomery* that the failure to sign the notice of appeal does not require dismissal of the appeal so long as the omission is remedied once it is called to the appellant's attention, the Court asserted that "Appellate Rules 3 and 4 ... are indeed linked jurisdictional provisions."³⁶

Within the past few years, however, the Court questioned its prior use of the term "jurisdictional." In *Kontrick v. Ryan*, "a creditor, in an untimely pleading, objected to the debtor's discharge. The debtor, however, did not promptly move to dismiss the creditor's plea as impermissibly late."³⁷ The Court held that Bankruptcy Rule 4004's time limit for filing such objections "is not 'jurisdictional,'" and thus that "a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge."³⁸ In explaining this holding, the unanimous Court observed:

Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court.... For example, we have described Federal Rule of Civil Procedure 6(b), on time enlargement, and correspondingly, Federal Rule of Criminal Procedure 45(b), on extending time, as "mandatory and

³³ *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

³⁴ *Id.* at 315.

³⁵ 502 U.S. 244, 248 (1992).

³⁶ 532 U.S. 757, 765 (2001).

³⁷ 540 U.S. 443, 446 (2004).

³⁸ *Id.* at 447.

jurisdictional.” *United States v. Robinson*, 361 U.S. 220, 228-229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960)... Clarity would be facilitated if courts and litigants used the label “jurisdictional” not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.³⁹

The following year, a unanimous Court in *Eberhart v. United States* held that Criminal Rule 33's 7-day time limit for filing most new trial motions was a non-jurisdictional claim-processing rule, and thus that an objection based upon failure to comply with the time limit could not be raised for the first time on appeal.⁴⁰ This was so, the Court held, despite the fact that the then-applicable version of Criminal Rule 45(b) barred a court from extending Rule 33's time limits except as stated in that Rule 33 itself. The *Eberhart* Court stated that it was reinterpreting, rather than overruling, *Robinson*:

Robinson is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked. This does not mean that limits like those in Rule 33 are not forfeitable when they are *not* properly invoked... *Robinson* has created some confusion because of its observation that “courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional*.”... As we recognized in *Kontrick*, courts “have more than occasionally used the term ‘jurisdictional’ to describe emphatic time prescriptions in rules of court.”... The resulting imprecision has obscured the central point of the *Robinson* case—that when the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory. The net effect of *Robinson*, viewed through the clarifying lens of *Kontrick*, is to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often.⁴¹

³⁹ *Id.* at 454-55. The *Kontrick* Court noted that some statutory provisions “contain built-in time constraints,” and it observed that one such provision was 28 U.S.C. § 2107(a). *Id.* at 453 & n.8.

Justice Ginsburg, who authored the Court's unanimous opinion in *Kontrick*, had made similar points in prior opinions. See *Center for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n*, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (Ginsburg, J., dissenting); see also *Carlisle v. U.S.*, 517 U.S. 416, 434–35 (1996) (Ginsburg, J., joined by Souter & Breyer, JJ., concurring).

⁴⁰ 546 U.S. 12, 19 (2005) (per curiam).

⁴¹ *Id.* at 17-18.

In the view of the unanimous *Eberhart* Court, then, the 10-day appeal deadline for criminal defendants formerly set in Criminal Rule 37(a)(2) – and now contained in Appellate Rule 4(b)(1)(A) – is an emphatic but nonjurisdictional deadline. Because it is emphatic, defendants must be sure to comply with it. But because it is nonjurisdictional, if the failure to comply is not timely raised then noncompliance should not affect the validity of the appeal. Moreover, if this period is nonjurisdictional then it should be subject in appropriate cases to the “unique circumstances” doctrine. *Bowles* need not be read to change any of these observations.⁴² *Bowles* rested centrally on the fact that the relevant 14-day limit is imposed by statute as well as by rule; and no statute sets the criminal defendant’s 10-day time limit for taking the appeal.⁴³ Likewise, though *Bowles* overruled the unique circumstances doctrine “to the extent [it] purport[s] to authorize an exception to a jurisdictional rule,” under *Eberhart*’s view the 10-day time limit for criminal defendants would not be such a rule.

Similar arguments could be made, post-*Bowles*, for other Rule 4 deadlines that are not mirrored in statutory provisions. But even though such arguments can be made, the prudent appellant will act as though all the Rule 4 time limits are jurisdictional. First, as the *Eberhart* Court observed, it will be rare for one’s opponent to fail to raise a valid timeliness objection. Second, even if some Rule 4 time limits are not jurisdictional, they are all mandatory: Rule 26(b)(1) provides that “the court may not extend the time to file ... a notice of appeal (except as authorized in Rule 4).” Thus, once raised, a non-jurisdictional time limit will be strictly enforced unless the appellant successfully invokes the unique circumstances doctrine – a doctrine that has always been narrow and that survives *Bowles*, if at all, only with respect to non-jurisdictional time limits. Third, the *Bowles* Court simply did not address explicitly the question of non-statutory appeal time limits, and the Court could in a later case depart from *Kontrick* and *Eberhart* and hold such limits jurisdictional as well. Indeed, prior to *Kontrick* and *Eberhart*

⁴² The *Bowles* majority cited *U.S. v. Sadler*, 480 F.3d 932 (9th Cir. 2007), as support for its view that the key question (for purposes of distinguishing jurisdictional from non-jurisdictional deadlines) is whether the time limit is set by statute. See *Bowles*, 127 S. Ct. at 2365 n.3. The court in *Sadler* held that “FRAP 4(b), unlike FRAP 4(a), is a nonjurisdictional claim-processing rule subject to forfeiture.” *Sadler*, 480 F.3d at 942. (The *Sadler* case involved Rule 4(b)’s 10-day time limit for defendants’ appeals; the court did not discuss the 30-day time limit for the government’s appeals, which is set by statute as well as by rule.)

⁴³ Indeed, at least one court has concluded that *Bowles* supports the conclusion reached in the text. See *U.S. v. Martinez*, 2007 WL 2285324, at *1 (5th Cir. Aug. 9, 2007) (per curiam) (“[T]he analysis in *Bowles* establishes that the time limit specified in Rule 4(b)(1)(A) is mandatory, but not jurisdictional, because it does not derive from a statute.”). But see *U.S. v. Smith*, 2007 WL 1810095, at *2 (10th Cir. June 25, 2007) (citing *Bowles* for the proposition that Rule 4(b)(1)(A)’s 10-day limit is mandatory and jurisdictional).

many courts of appeals had held non-statutory appeal times to be jurisdictional.⁴⁴

What, then, are the implications of the conclusion that a particular Rule 4 time limit is jurisdictional? As the *Bowles* opinions make clear, violations of such a limit are non-waivable, must be raised by the court sua sponte, and require the dismissal of the appeal.⁴⁵ Such a limit cannot be nuanced by the “unique circumstances” doctrine. The appellant will bear the burden of demonstrating compliance with the limit.

As illustrated by *Bowles* itself, the unavailability of the unique circumstances doctrine is one of the more troubling results of the determination that a Rule 4 deadline is jurisdictional. The next section explores that issue in detail.

IV. Possible rulemaking responses to *Bowles*

The *Bowles* majority closed its opinion by noting the possibility that the rules might be amended in response to its holding:

If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization.⁴⁶

This quotation highlights three relevant questions: What responses are possible through the rulemaking process? Do the rulemakers currently have power to undertake those responses? And are those responses desirable as a policy matter?

⁴⁴ See also, e.g., *Sueiro Vazquez v. Torregrosa de la Rosa*, 2007 WL 2068331, at *4 (1st Cir. July 19, 2007) (with respect to a cross-appeal, citing *Bowles* for the proposition that “[t]he filing of a notice of appeal is a jurisdictional requirement”).

⁴⁵ Though an occasional case can be found in which the court of appeals addresses the merits despite finding a lack of jurisdiction, they are instances where the court does so only to state why the appeal lacks merit.

⁴⁶ *Bowles*, 127 S. Ct. at 2367.

A. Possible responses

Though a range of possible responses to *Bowles* can be imagined,⁴⁷ perhaps the most obvious way to respond to the decision would be to attempt to reinstate the “unique circumstances” doctrine with respect to all Rule 4 deadlines. This subsection first discusses the doctrine and then considers how the doctrine might be expressed in a rule.

The unique circumstances doctrine derives its name from *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, in which trial counsel for the losing side sought an extension of Civil Rule 73(a)’s 30-day appeal deadline based on the fact that the client’s general counsel was out of the country. The district court granted an extension and counsel relied on it, filing the notice of appeal on the last day of the extended period. The court of appeals dismissed the appeal for lack of jurisdiction, holding that the litigant had failed to make the showing – then required under Civil Rule 73(a) for an extension – of “excusable neglect based on a failure of a party to learn of the entry of the judgment.” The Supreme Court vacated and remanded for determination of the case on the merits:

⁴⁷ In addition to the response highlighted in the text, another possibility might be to attempt to alter the Court’s classification of statutorily-backed Rule 4 deadlines as jurisdictional.

One can envision policy arguments on both sides of such a question. On the one hand, there are advantages to considering appeal deadlines to be mandatory but not jurisdictional. Writing two decades prior to *Bowles*, Professor Hall presaged the *Bowles* dissenters’ concerns, arguing that “[p]roperly conceived, appeal periods are like original jurisdiction limitation periods: they involve primarily the interests of the immediate parties, not fundamental societal interests. They should therefore be subject to waiver by the parties.” Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 Ga. L. Rev. 399, 399-400 (1986). Professor Hall asserts that “the filing and service requirements for notices of appeal are more analogous to the notice concerns implicated by personal jurisdiction” than to the concerns traditionally thought to underpin subject matter limits. *Id.* at 408. “Because the primary interests at stake are those of the immediate parties, it causes more harm than good and produces a less efficient and less fair judicial system to allow delayed consideration of timing defects on appeal.” *Id.* at 427. Compare E. King Poor, *Jurisdictional Deadlines in the Wake of Kontrick and Eberhart: Harmonizing 160 Years of Precedent*, 40 Creighton L. Rev. 181, 185 (2007) (arguing that if courts cannot raise sua sponte objections to the timeliness of an appeal, they will lose control of their dockets).

In addition to these policy questions, there is the obvious question of power. For reasons similar to those stated in Part IV.B. of this memo, it seems unclear under the Supreme Court’s approach that the rulemakers – without further authorization from Congress – could act to alter the *Bowles* opinion’s view concerning the jurisdictional nature of statutorily-backed Rule 4 deadlines.

In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.⁴⁸

The Court applied this doctrine in *Thompson v. INS*, where a litigant made an untimely new trial motion to which the government did not raise a timeliness objection and which the district court stated "was made 'in ample time.'"⁴⁹ The new trial motion – being in reality untimely – did not extend the time to file a notice of appeal, but the litigant – thinking the new trial motion was timely – filed the notice of appeal within 60 days⁵⁰ after the posttrial motions' denial but long after the actual appeal deadline had run. Citing *Harris*, the Court ruled that the appeal should be heard on the merits:

The instant cause fits squarely within the letter and spirit of *Harris*. Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline.⁵¹

More recently, however, the Court in *Osterneck v. Ernst & Whinney* refused to apply the unique circumstances doctrine, and, in so doing, arguably narrowed its application. In *Osterneck*, a motion for prejudgment interest was filed within ten days⁵² after the entry of judgment. While that motion was still pending, the Osternecks filed a notice of appeal from the judgment in favor of, inter alia, Ernst & Whinney. The problem for the Osternecks was that – as the Supreme Court held – the prejudgment interest motion counted as a Rule 59(e) motion that terminated the running of the time to take an appeal. And, under the then-applicable version of Rule 4, that rendered the Osternecks' notice of appeal ineffective.⁵³ The Osternecks sought to invoke the

⁴⁸ *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962).

⁴⁹ *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 385 (1964).

⁵⁰ The appeal deadline under Civil Rule 73(a) was 60 days because the U.S. was a party.

⁵¹ *Thompson*, 375 U.S. at 387.

⁵² Calculated by skipping intermediate weekends. See Civil Rule 6(a).

⁵³ The Osternecks had filed a later notice of cross-appeal, but it was held not to encompass their challenge to the judgment in favor of Ernst & Whinney.

unique circumstances doctrine, arguing that “certain statements made by the District Court, as well as certain actions taken by the District Court, the District Court Clerk, and the Court of Appeals, led them to believe that their notice of appeal was timely.”⁵⁴ The Court rejected this argument, stating tersely: “[b]y its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done. That is not the case here.”⁵⁵

The *Osterneck* Court’s formulation of the unique circumstances doctrine has been subject to criticism. For example, Professor Pucillo has argued that *Osterneck* led the courts of appeals to take an unduly stingy approach to the doctrine’s application, and he has suggested that a better formulation would be the following: “[I]n determining whether an appeal is timely, a court of appeals is bound to accept as true any representation of a district court upon which a litigant reasonably relies in forgoing an opportunity to initiate an indisputably timely appeal.”⁵⁶

This memo will adapt Professor Pucillo’s formulation slightly and use it as an example of a provision that might be considered as a means of reinstating the unique circumstances doctrine. The provision could read: “In determining whether an appeal is timely, a court shall accept as true any representation (a) made by a federal judge, (b) relevant to the timing of an appeal deadline under Rule 4, and (c) upon which a litigant reasonably relied in forgoing an opportunity to initiate an indisputably timely appeal.”

B. Power to reinstate the unique circumstances doctrine

Part IV.C. of this memo examines the policy arguments for and against reinstating the unique circumstances doctrine. First, however, it is useful to examine whether the rulemakers currently possess the authority to do so. By stating that “Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits,” the *Bowles* Court suggested that such authority does not currently exist. One can argue that this conclusion flows logically from *Bowles*’ premise that statutorily-backed Rule 4 deadlines are jurisdictional.

The rulemakers are not ordinarily in the business of directly altering the subject matter jurisdiction of the federal courts.⁵⁷ Appellate Rule 1(b) used to state that the Appellate Rules did

⁵⁴ *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178 (1989).

⁵⁵ *Id.* at 179.

⁵⁶ See Philip Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the ‘Unique Circumstances’ Doctrine*, 82 Tul. L. Rev. (forthcoming 2007).

⁵⁷ The Rules can and do affect matters of personal jurisdiction. See Civil Rule 4.

not “extend or limit the jurisdiction of the courts of appeals.” That provision was abrogated in 2002 out of a recognition that Congress had authorized the rulemakers to affect subject matter jurisdiction by adopting provisions that define the finality of a ruling for purposes of 28 U.S.C. § 1291⁵⁸ and that provide for interlocutory appeals not otherwise mentioned in 28 U.S.C. § 1292.⁵⁹ But neither of those provisions authorizes the adoption of a rule reinstating the unique circumstances doctrine as a means of excusing noncompliance with a statutorily-backed jurisdictional deadline. So it might be concluded that an additional statutory grant of rulemaking authority would be necessary before the rulemakers could adopt a rule excusing compliance with such a deadline.

That conclusion might come as a surprise to those involved in the rulemaking processes that produced the 1966, 1979 and 1991 amendments to Rule 4: Each of those amendments forgave untimeliness that would otherwise (under the then-extant version of 28 U.S.C. § 2107) have proven fatal to an affected appeal – yet all of those amendments were adopted under the then-existing rulemaking authority, which said nothing about whether the rulemaking authority extended to matters of subject matter jurisdiction.⁶⁰ (The *Bowles* decision cannot prompt a belated argument that the aspects of Rule 4 introduced by the 1966, 1979 and 1991 amendments are invalid: Congress – acting at the rulemakers’ suggestion – in 1991 incorporated the relevant aspects of Rule 4’s provisions into Section 2107.)

But despite the incongruity of the *Bowles* approach, and its departure from decades of rulemaking practice, it remains the case that *Bowles* – by holding the statutorily-backed Rule 4 deadlines to be jurisdictional – casts significant doubt on the rulemakers’ ability to reinstate the unique circumstances doctrine. If the Committee were to propose such a reinstatement, it would presumably wish to consider either requesting an additional delegation of rulemaking authority or asking Congress to adopt a unique-circumstances provision directly by statute.

C. Advisability of reinstating the unique circumstances doctrine

The *Bowles* majority warned against adopting a rule excusing compliance with statutory time limits: “Even narrow rules to this effect would give rise to litigation testing their reach and

⁵⁸ See 28 U.S.C. § 2072(c).

⁵⁹ See 28 U.S.C. § 1292(e).

⁶⁰ The Supreme Court had periodically noted its understanding that court rules could not alter the lower courts’ statutorily-conferred jurisdiction. See, e.g., *U.S. v. Sherwood*, 312 U.S. 584, 589-90 (1941). Presumably reflecting that understanding, Civil Rule 82 has always provided that the Civil Rules do not “extend or limit” district court jurisdiction.

would no doubt detract from the clarity of the rule.”⁶¹ This argument, of course, invokes the perennial debate over rules versus standards. Particularly in the context of appeal time limits, the rules must be clear. And if the unique-circumstances doctrine were reinstated, clarity would suffer to a degree because, in those cases to which the doctrine arguably applied, the would-be appellant would seek its application.

But where so much rides on the timeliness determination, there is a strong argument for introducing a degree of flexibility to deal with the most compelling instances where, through judicial error, a litigant forgoes a chance to take a timely appeal. It is true that by introducing flexibility one introduces uncertainty and – to an extent – multiplies the opportunity for litigation. But it is worth noting that the same objection could have been levied against the 1966, 1979, and 1991 amendments to Rule 4, all of which similarly introduced the possibility of litigation over the circumstances justifying relief from Rule 4 deadlines that would otherwise apply.

It seems unlikely that many cases would present a colorable basis for the application of the unique circumstances doctrine. Indeed, a search in Westlaw’s “CTA” database for the phrase “unique circumstances doctrine” pulls up only 149 hits – a small number considering that the *Harris Truck Lines* decision was handed down some 45 years prior to *Bowles*. Keyciting *Harris* pulls up 163 cases, while keyciting *Thompson* pulls up 278 cases.⁶² Thus, one might conclude that reinstating the unique circumstances doctrine would affect only a relatively small subset of the cases in which the timeliness of an appeal is contested. And that small subset would include cases in which one might argue that the equities weigh particularly heavily in favor of introducing a degree of flexibility: It could be argued that litigants should not be penalized for reasonably relying on a timing-related representation by a federal judge.

V. Conclusion

The *Bowles* Court’s view – that statutorily-backed Rule 4 appeal deadlines are jurisdictional – will cause hardship in cases where a litigant loses the chance to take a timely appeal through reliance on a judge’s erroneous statement. Reinstating the unique circumstances doctrine could thus be desirable. But under *Bowles*’ reasoning it is unclear that the rulemakers currently possess the authority to reinstate the doctrine with regard to jurisdictional deadlines. Thus, if the Committee wishes to act, it should consider the possibility of seeking additional rulemaking authority or of recommending adoption of a statutory fix.

⁶¹ *Bowles*, 127 S. Ct. at 2367.

⁶² I performed these searches in early September 2007. I limited the keycite display to cases (and excluded secondary sources and briefs).



Bowles v. Russell
U.S., 2007.

Supreme Court of the United States
Keith BOWLES, Petitioner,
v.
Harry RUSSELL, Warden.
No. 06-5306.

Argued March 26, 2007.
Decided June 14, 2007.

Background: State prisoner whose petition for habeas corpus, and subsequent motion for new trial or to amend judgment, had been denied moved to reopen appeal period. The United States District Court for the Northern District of Ohio, Donald C. Nugent, J., granted motion, and prisoner appealed. After initially issuing show-cause order questioning timeliness of appeal, the Court of Appeals granted in part and denied in part a certificate of appealability (COA). The United States Court of Appeals for the Sixth Circuit, 432 F.3d 668, dismissed. Petition for certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

(1) Court of Appeals lacked jurisdiction over appeal, and

(2) Court would no longer recognize the unique circumstances exception to excuse an untimely filing of a notice of appeal, overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

Affirmed.

Justice Souter, filed dissenting opinion, with which Justices Stevens, Ginsburg, and Breyer joined.
West Headnotes

[1] Habeas Corpus 197 ↪ 819

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(D) Review

197III(D)1 In General

197k817 Requisites and Proceedings
for Transfer of Cause

197k819 k. Time for Proceeding.

Most Cited Cases

Court of Appeals lacked jurisdiction over state prisoner's appeal from order denying his motion for new trial or to amend judgment denying his habeas corpus petition, which was filed outside of 14-day extension period for filing appeal authorized by federal rule of appellate procedure after period for appeal has been reopened, but within 17-day period granted by District Court for filing notice of appeal; the 14-day rule was authorized by statute, so it was mandatory and jurisdictional, and District Court could not authorize a longer time period. 28 U.S.C.A. § 2107(c); F.R.A.P. Rule 4(a)(6), 28 U.S.C.A.

[2] Federal Courts 170B ↪ 5

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk3 Jurisdiction in General; Nature
and Source

170Bk5 k. Limited Jurisdiction; Dependent on Constitution or Statutes. Most Cited Cases

Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.

[3] Federal Courts 170B ↪ 652.1

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of
Case

170Bk652 Time of Taking Proceeding

170Bk652.1 k. In General. Most Cited

(Cite as: 127 S.Ct. 2360)

Cases

When an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.

[4] Limitation of Actions 241 ↪ 175

241 Limitation of Actions

241IV Operation and Effect of Bar by Limitation

241k175 k. Waiver of Bar. Most Cited Cases
A litigant may not rely on forfeiture or waiver to excuse his lack of compliance with a statute's jurisdictional time limitations.

[5] Habeas Corpus 197 ↪ 819

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(D) Review

197III(D)1 In General

197k817 Requisites and Proceedings for Transfer of Cause

197k819 k. Time for Proceeding.

Most Cited Cases

Habeas petitioner could not rely on the unique circumstances exception to excuse an untimely filing of a notice of appeal, outside a statutory time limit, as such time limits were jurisdictional; overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

[6] Federal Courts 170B ↪ 7

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk7 k. Equity Jurisdiction. Most Cited Cases

A federal court has no authority to create equitable exceptions to jurisdictional requirements.

[7] Federal Courts 170B ↪ 670

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(E) Proceedings for Transfer of Case

170Bk665 Notice, Writ of Error or Citation

170Bk670 k. Effect of Delay. Most Cited Cases

The timely filing of a notice of appeal in a civil case is a jurisdictional requirement.

***2361 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.

Having failed to file a timely notice of appeal from the Federal District Court's denial of habeas relief, petitioner Bowles moved to reopen the filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6), which allows a district court to grant a 14-day extension under certain conditions, see 28 U.S.C. § 2107(c). The District Court granted Bowles' motion but inexplicably gave him 17 days to file his notice of appeal. He filed within the 17 days allowed by the District Court, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c). The Sixth Circuit held that the notice was untimely and that it therefore lacked jurisdiction to hear the case under this Court's precedent.

Held: Bowles' untimely notice of appeal—though filed in reliance upon the District Court's order—deprived the Sixth Circuit of jurisdiction. Pp. 2362–2367.

(a) The taking of an appeal in a civil case within the time prescribed by statute is “mandatory and jurisdictional.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (*per curiam*). There is a significant distinction between time limitations set forth in a statute such as § 2107, which limit a court's jurisdiction, see, e.g., *Kontrick v. Ryan*, 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867, and those based on court

(Cite as: 127 S.Ct. 2360)

rules, which do not, see, *e.g., id.*, at 454, 124 S.Ct. 906. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 505, 126 S.Ct. 1235, 163 L.Ed.2d 1097, and *Scarborough v. Principi*, 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674, distinguished. Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *United States v. Curry*, 6 How. 106, 113, 12 L.Ed. 363. And when an “appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.” *Id.*, at 113. The resolution of this case follows naturally from this reasoning. Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), Bowles' failure to file in accordance with the statute deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance. Pp. 2363 - 2366.

(b) Bowles' reliance on the “unique circumstances” doctrine, rooted in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261(*per curiam*) and applied in *Thompson v. INS.* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404(*per curiam*), is rejected. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the doctrine is illegitimate. *Harris Truck Lines* and *Thompson* are overruled to the extent they purport to authorize an exception to a jurisdictional rule. Pp. 2366 - 2367.

432 F.3d 668, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SOUTER, J., filed a dissenting *2362 opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined.

Paul Mancino, Jr., Cleveland, Ohio, for Petitioner.
William P. Marshall, Chapel Hill, NC, for Re-

spondent.

Malcolm L. Stewart, for United States as amicus curiae, by special leave of the Court, supporting the Respondent.

William P. Marshall, Chapel Hill, NC, Marc Dann, Attorney General of Ohio, Elise W. Porter, Acting Solicitor General, Stephen P. Carney, Robert J. Krummen, Elizabeth T. Scavo, Columbus, OH, for Respondent Harry Russell, Warden.

Paul Mancino, Jr., Paul Mancino, III, Brett Mancino, Cleveland, Ohio, for Petitioner. For U.S. Supreme Court briefs, see:2007 WL 215255 (Pet.Brief)2007 WL 626901 (Resp.Brief)

Justice THOMAS delivered the opinion of the Court.

In this case, a District Court purported to extend a party's time for filing an appeal beyond the period allowed by statute. We must decide whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order. We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature. Accordingly, we hold that petitioner's untimely notice—even though filed in reliance upon a District Court's order—deprived the Court of Appeals of jurisdiction.

I

In 1999, an Ohio jury convicted petitioner Keith Bowles of murder for his involvement in the beating death of Ollie Gipson. The jury sentenced Bowles to 15 years to life imprisonment. Bowles unsuccessfully challenged his conviction and sentence on direct appeal.

Bowles then filed a federal habeas corpus application on September 5, 2002. On September 9, 2003, the District Court denied Bowles habeas relief. After the entry of final judgment, Bowles had 30 days to file a notice of appeal. Fed. Rule App. Proc. 4(a)(1)(A); 28 U.S.C. § 2107(a). He failed to do so. On December 12, 2003, Bowles moved to reopen the period during which he could file his notice of appeal pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days

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from the day the district court grants the order to reopen, provided certain conditions are met. See § 2107(c).

On February 10, 2004, the District Court granted Bowles' motion. But rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the District Court inexplicably gave Bowles 17 days-until February 27-to file his notice of appeal. Bowles filed his notice on February 26-within the 17 days allowed by the District Court's order, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c).

On appeal, respondent Russell argued that Bowles' notice was untimely and that the Court of Appeals therefore lacked jurisdiction to hear the case. The Court of Appeals agreed. It first recognized that this Court has consistently held the requirement of filing a timely notice of appeal is "mandatory and jurisdictional." 432 F.3d 668, 673 (C.A.6 2005) (citing *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)). The court also noted that courts of appeals have uniformly held that Rule 4(a)(6)'s 180-day period for filing *2363 a motion to reopen is also mandatory and not susceptible to equitable modification. 432 F.3d, at 673 (collecting cases). Concluding that "the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180-day period in that same Rule," *id.*, at 676, the Court of Appeals held that it was without jurisdiction. We granted certiorari, 549 U.S. ----, 127 S.Ct. 763, 166 L.Ed.2d 590 (2006), and now affirm.

II

[1] According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30-day time period. Relevant to this case, if certain conditions are met, district courts have the statutory authority to grant motions to reopen the time for filing an appeal for 14 additional days. § 2107(c). Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with §

2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days:

"(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." (Emphasis added.)^{FN1}

FN1. The Rule was amended, effective December 1, 2005, to require that notice be pursuant to Fed. Rule Civ. Proc. 77(d). The substance is otherwise unchanged.

It is undisputed that the District Court's order in this case purported to reopen the filing period for more than 14 days. Thus, the question before us is whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by § 2107(c) but within the longer period granted by the District Court.

A

This Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (*per curiam*) (internal quotation marks omitted);^{FN2} accord, *2364 *Hohn v. United States*, 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Browder, supra*, at 264, 98 S.Ct. 556. Indeed, even prior to the creation of the circuit courts of appeals, this Court regarded stat-

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utory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough v. Pargoud*, 108 U.S. 567, 568, 2 S.Ct. 877, 27 L.Ed. 824 (1883) (“[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction”); *United States v. Curry*, 6 How. 106, 113, 12 L.Ed. 363 (1848) (“[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction”). Reflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction. See, e.g., *Atkins v. Medical Dept. of Augusta Cty. Jail*, No. 06-7792, 2007 WL 1048810 (C.A.4, Apr.4, 2007)(*per curiam*) (unpublished); see also 15A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3901, p. 6 (2d ed. 1992) (“The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals”). In fact, the author of today's dissent recently reiterated that “[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, see, e.g.,...§ 2107 (providing that notice of appeal in civil cases must be filed ‘within thirty days after the entry of such judgment’).” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (majority opinion of SOUTER, J., joined by STEVENS, GINSBURG, and BREYER, JJ., *inter alios*) (citation omitted).

FN2. *Griggs* and several other of this Court's decisions ultimately rely on *United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), for the proposition that the timely filing of a notice of appeal is jurisdictional. As the dissent notes, we have recently questioned *Robinson's* use of the term “jurisdictional.” *Post*, at 2367 (opinion of SOUTER, J.) Even in our cases criticizing *Robinson*, however, we have noted the jurisdictional significance of the fact that a time limit is set forth in a statute, see *infra*, at 2364 - 2365, and have even pointed to § 2107 as a

statute deserving of jurisdictional treatment. *Infra*, at 2364 - 2365. Additionally, because we rely on those cases in reaching today's holding, the dissent's rhetoric claiming that we are ignoring their reasoning is unfounded.

Regardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century. Consequently, the dissent's approach would require the repudiation of a century's worth of precedent and practice in American courts. Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course.

Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute. In *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), we held that failure to comply with the time requirement in Federal Rule of Bankruptcy Procedure 4004 did not affect a court's subject-matter jurisdiction. Critical to our analysis was the fact that “[n]o statute ... specifies a time limit for filing a complaint objecting to the debtor's discharge.” 540 U.S., at 448, 124 S.Ct. 906. Rather, the filing deadlines in the Bankruptcy Rules are “ ‘procedural rules adopted by the Court for the orderly transaction of its business’ ” that are “ ‘not jurisdictional.’ ” *Id.*, at 454, 124 S.Ct. 906 (quoting *Schacht v. United States*, 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970)). Because “[o]nly Congress may determine a lower federal court's subject-matter jurisdiction,” 540 U.S., at 452, 124 S.Ct. 906 (citing U.S. Const., Art. III, § 1), it was improper for courts to use “the term ‘jurisdictional’ to describe emphatic time prescriptions in rules of court,” 540

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U.S., at 454, 124 S.Ct. 906. See also *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)(*per curiam*). As a point of contrast, we noted that § 2107*2365 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906.^{FN3} Nor do *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), or *Scarborough v. Principi*, 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004), aid petitioner. In *Arbaugh*, the statutory limitation was an employee-numerosity requirement, not a time limit. 546 U.S., at 505, 126 S.Ct. 1235. *Scarborough*, which addressed the availability of attorney's fees under the Equal Access to Justice Act, concerned "a mode of relief ... ancillary to the judgment of a court" that already had plenary jurisdiction. 541 U.S., at 413, 124 S.Ct. 1856.

FN3. At least one federal court of appeals has noted that *Kontrick* and *Eberhart* "called ... into question" the "longstanding assumption" that the timely filing of a notice of appeal is a jurisdictional requirement. *United States v. Sadler*, 480 F.3d 932, 935 (C.A.9 2007). That court nonetheless found that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute." *Id.*, at 936.

This Court's treatment of its certiorari jurisdiction also demonstrates the jurisdictional distinction between court-promulgated rules and limits enacted by Congress. According to our Rules, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed. See this Court's Rule 13.1. That 90-day period applies to both civil and criminal cases. But the 90-day period for civil cases derives from both this Court's Rule 13.1 and 28 U.S.C. § 2101(c). We have repeatedly held that this statute-based filing period for civil cases is jurisdictional. See, e.g., *Federal Election Comm'n v. NRA Political Victory*

Fund, 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994). Indeed, this Court's Rule 13.2 cites § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (Emphasis added.) On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion" *Schacht, supra*, at 64, 90 S.Ct. 1555.^{FN4}

FN4. The dissent minimizes this argument, stating that the Court understood § 2101(c) as jurisdictional "in the days when we used the term imprecisely." *Post*, at 2369, n. 4. The dissent's apathy is surprising because if our treatment of our own jurisdiction is simply a relic of the old days, it is a relic with severe consequences. Just a few months ago, the Clerk, pursuant to this Court's Rule 13.2, refused to accept a petition for certiorari submitted by Ryan Heath Dickson because it had been filed one day late. In the letter sent to Dickson's counsel, the Clerk explained that "[w]hen the time to file a petition for a writ of certiorari in a civil case ... has expired, the Court no longer has the power to review the petition." Letter from William K. Suter, Clerk of Court, to Ronald T. Spriggs (Dec. 28, 2006). Dickson was executed on April 26, 2007, without any Member of this Court having even seen his petition for certiorari. The rejected certiorari petition was Dickson's first in this Court, and one can only speculate as to whether denial of that petition would have been a foregone conclusion.

[2] Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *Curry*, 6 How., at

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113, 12 L.Ed. 363. Put another way, the notion of “ ‘subject-matter’ ” jurisdiction obviously extends to “ ‘classes of cases ... falling within a court’s adjudicatory authority,’ ”*2366 *Eberhart, supra*, at 16, 126 S.Ct. 403 (quoting *Kontrick, supra*, at 455, 124 S.Ct. 906), but it is no less “jurisdictional” when Congress forbids federal courts from adjudicating an otherwise legitimate “class of cases” after a certain period has elapsed from final judgment.

[3][4] The resolution of this case follows naturally from this reasoning. Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple “claim-processing rule.” As we have long held, when an “appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.” *Curry, supra*, at 113. Bowles’ failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles’ error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute’s time limitations. See *Arbaugh, supra*, at 513-514, 126 S.Ct. 1235.

B

[5] Bowles contends that we should excuse his untimely filing because he satisfies the “unique circumstances” doctrine, which has its roots in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962)(*per curiam*). There, pursuant to then-Rule 73(a) of the Federal Rules of Civil Procedure, a District Court entertained a timely motion to extend the time for filing a notice of appeal. The District Court found the moving party had established a showing of “excusable neglect,” as required by the Rule, and granted the motion. The Court of Appeals reversed the finding of excusable neglect and, accordingly, held that the District Court lacked jurisdiction to

grant the extension. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609, 611-612 (C.A.7 1962). This Court reversed, noting “the obvious great hardship to a party who relies upon the trial judge’s finding of ‘excusable neglect.’ ” 371 U.S., at 217, 83 S.Ct. 283.

[6][7] Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the “unique circumstances” doctrine is illegitimate. Given that this Court has applied *Harris Truck Lines* only once in the last half century, *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964)(*per curiam*), several courts have rightly questioned its continuing validity. See, e.g., *Panhorst v. United States*, 241 F.3d 367, 371 (C.A.4 2001) (doubting “the continued viability of the unique circumstances doctrine”). See also *Houston v. Lack*, 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting) (“Our later cases ... effectively repudiate the *Harris Truck Lines* approach ...”). See also *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 170, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) (referring to “the so-called ‘unique circumstances’ exception” to the timely appeal requirement). We see no compelling reason to resurrect the doctrine from its 40-year slumber. Accordingly, we reject Bowles’ reliance on the doctrine, and we overrule *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule.

C

If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization. And in all events, for the reasons discussed above, we lack present authority to make the exception peti-

tioner seeks.

III

The Court of Appeals correctly held that it lacked jurisdiction to consider Bowles' appeal. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I

“ ‘Jurisdiction,’ ” we have warned several times in the last decade, “ ‘is a word of many, too many, meanings.’ ” *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663, n. 2 (C.A.D.C.1996)); *Kontrick v. Ryan*, 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (quoting *Steel Co.*); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (quoting *Steel Co.*); *Rockwell Int'l Corp. v. United States*, 549 U.S. ----, ----, 127 S.Ct. 1397, 1405, 167 L.Ed.2d 190 (2007) (quoting *Steel Co.*). This variety of meaning has insidiously tempted courts, this one included, to engage in “less than meticulous,” *Kontrick, supra*, at 454, 124 S.Ct. 906, sometimes even “profligate ... use of the term,” *Arbaugh, supra*, at 510, 126 S.Ct. 1235.

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of

time limit at issue here “mandatory and jurisdictional,” *United States v. Robinson*, 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), we have recently and repeatedly corrected that designation as a misuse of the “jurisdiction” label. *Arbaugh, supra*, at 510, 126 S.Ct. 1235 (citing *Robinson* as an example of improper use of the term “jurisdiction”); *Eberhart v. United States*, 546 U.S. 12, 17-18, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)(*per curiam*) (same); *Kontrick, supra*, at 454, 124 S.Ct. 906 (same).

But one would never guess this from reading the Court's opinion in this case, which suddenly restores *Robinson's* indiscriminate use of the “mandatory and jurisdictional” label to good law in the face of three unanimous repudiations of *Robinson's* error. See *ante*, at 2363 - 2364. This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were obviously sound, and the majority makes no attempt to show they were not.^{FN1}

FN1. The Court thinks my fellow dissenters and I are forgetful of an opinion I wrote and the others joined in 2003, which referred to the 30-day rule of 28 U.S.C. § 2107(a) as a jurisdictional time limit. See *ante*, at 2364 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003)). But that reference in *Barnhart* was a perfect example of the confusion of the mandatory and the jurisdictional that the entire Court has spent the past four years repudiating in *Arbaugh, Eberhart*, and *Kontrick*. My fellow dissenters and I believe that the Court was right to correct its course; the majority, however, will not even admit that we deliberately changed course, let alone explain why it is now changing course again.

*2368 The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a

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party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory, see *Arbaugh, supra*, at 514, 126 S.Ct. 1235.^{FN2} As the Court recognizes, *ante*, at 2364 - 2365, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick, supra*, at 452, 124 S.Ct. 906 (“Only Congress may determine a lower federal court’s subject-matter jurisdiction”). But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as non-jurisdictional in character.” *Arbaugh*, 546 U.S., at 516, 126 S.Ct. 1235. Thus, we have held “that time prescriptions, however emphatic, ‘are not properly typed ‘jurisdictional,’ ” *id.*, at 510, 126 S.Ct. 1235 (quoting *Scarborough v. Principi*, 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here.^{FN3}

FN2. The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today’s decision. Under § 2107(c), “[t]he district court may ... extend the time for appeal upon a showing of excusable neglect or good cause.” By the Court’s logic, if a district court grants such an extension, the extension’s propriety is subject to mandatory *sua sponte* review in the court of appeals, even if the extension was unopposed throughout, and upon finding error the court of appeals must dismiss the appeal. I see no more justification for such a rule than reason to suspect Congress meant to create it.

FN3. The majority answers that a footnote of our unanimous opinion in *Kontrick v. Ryan*, 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), used § 2107(a) as an illustration of a jurisdictional time limit. *Ante*, at 2364 - 2365 (“[W]e noted that § 2107 contains the type of statutory time constraints that would limit a court’s jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906”). What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit. The jurisdictional character of the 30-(or 60)-day time limit for filing notices of appeal under the present § 2107(a) was first pronounced by this Court in *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). But in that respect *Browder* was undercut by *Eberhart v. United States*, 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005) (*per curiam*), decided after *Kontrick*. *Eberhart* cited *Browder* (along with several of the other cases on which the Court now relies) as an example of the basic error of confusing mandatory time limits with jurisdictional limitations, a confusion for which *United States v. Robinson*, 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), was responsible. Compare *ante*, at 2363 - 2364 (citing *Browder, Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (*per curiam*), and *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)), with *Eberhart, supra*, at 17-18, 126 S.Ct. 403 (citing those cases as examples of the confusion caused by *Robinson’s* imprecise language). *Eberhart* was followed four months later by *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), which summarized the body of recent decisions in which the Court “clarified that time prescriptions, however emphatic, are

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not properly typed jurisdictional,”*id.*, at 510, 126 S.Ct. 1235 (internal quotation marks omitted). This unanimous statement of all Members of the Court participating in the case eliminated the option of continuing to accept § 2107(a) as jurisdictional and it precludes treating the 14-day period of § 2107(c) as a limit on jurisdiction.

***2369** The doctrinal underpinning of this recently repeated view was set out in *Kontrick*: “the label ‘jurisdictional’ [is appropriate] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.” 540 U.S., at 455, 124 S.Ct. 906. A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject matter jurisdiction unless Congress says otherwise.^{FN4}

FN4. The Court points out that we have affixed a “jurisdiction” label to the time limit contained in § 2101(c) for petitions for writ of certiorari in civil cases. *Ante*, at 2364 - 2366 (citing *Federal Election Comm’n v. NRA Political Victory Fund*, 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994); this Court’s Rule 13.2). Of course, we initially did so in the days when we used the term imprecisely. The status of § 2101(c) is not before the Court in this case, so I express no opinion on whether there are sufficient reasons to treat it as jurisdictional. The Court’s observation that jurisdictional treatment has had severe consequences in that context, *ante*, at 2365, n. 4, does nothing to support an argument that jurisdictional treatment is sound, but instead merely shows that the certiorari rule, too, should be reconsidered in light of our recent clarifications of what sorts of rules should be treated as jurisdictional.

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day v. McDonough*, 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). Statutes of limitations may thus be waived, *id.*, at 207-208, 126 S.Ct. 1675, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh*, *Eberhart*, and *Kontrick*, an exception to the time limit in 28 U.S.C. § 2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962)(*per curiam*), and *Thompson v. INS*, 375 U.S. 384, 387, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964)(*per curiam*), we found that “unique circumstances” excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved district court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge’s official word back in the days when we ***2370** uncritically had a jurisdictional reason to be unfair, it is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14-day time limit of § 2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their “slumber,” *ante*, at 2366, and inconsistency with a time-limit-as-jurisdictional rule.^{FN5} But eliminating those precedents underscores what has

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become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years, culminating in *Arbaugh*'s summary a year ago? The majority begs this question by refusing to confront what we have said: "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional." ' " *Arbaugh*, 546 U.S., at 510, 126 S.Ct. 1235 (quoting *Scarborough*, 541 U.S., at 414, 124 S.Ct. 1856). This statement of the Court, and those preceding it for which it stands as a summation, cannot be dismissed as "some dicta," *ante*, at 2363 - 2364, n. 2, and cannot be ignored on the ground that some of them were made in cases where the challenged restriction was not a time limit, see *ante*, at 2364 - 2365. By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent.

FN5. With no apparent sense of irony, the Court finds that "[o]ur later cases ... effectively repudiate the *Harris Truck Lines* approach." *Ante*, at 2366 (quoting *Houston v. Lack*, 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting); omission in original). Of course, those "later cases" were *Browder* and *Griggs*, see *Houston, supra*, at 282, 108 S.Ct. 2379, which have themselves been repudiated, not just "effectively" but explicitly, in *Eberhart*. See n. 3, *supra*.

In ruling that Bowles cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases,^{FN6} are jettisoned in a ruling for which the leading justification is *stare decisis*, see *ante*, at 2363 - 2364 ("This Court has long held ...").

FN6. Three, if we include *Wolfsohn v. Hankin*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964) (*per curiam*).

II

We have the authority to recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge.^{FN7} Bowles, though, does not have to convince us as a matter of first impression that his reliance was justified, for we only have to look as far as *Thompson* to know that he ought to prevail. There, the would-be appellant, Thompson, had filed post-trial motions 12 days after the District Court's final order. Although the rules said they should have been filed within 10, Fed. Rules Civ. Proc. 52(b) and 59(b) (1964), the trial court nonetheless had "specifically declared that the 'motion for a new trial' was made 'in ample time.'" *Thompson*, 375 U.S., at 385, 84 S.Ct. 397. Thompson relied on that statement in filing a notice of appeal within 60 days of the denial of the post-trial motions but not within 60 days of entry of the original judgment. Only timely post-trial motions affected the 60-day time limit for filing a *2371 notice of appeal, Rule 73(a) (1964), so the Court of Appeals held the appeal untimely. We vacated because Thompson "relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Id.*, at 387, 84 S.Ct. 397.

FN7. As a member of the Federal Judiciary, I cannot help but think that reliance on our orders is reasonable. See O. Holmes, *Natural Law*, in *Collected Legal Papers* 311 (1920). I would also rest better knowing that my innocent errors will not jeopardize anyone's rights unless absolutely necessary.

Thompson should control. In that case, and this one, the untimely filing of a notice of appeal resulted from reliance on an error by a district court, an error that caused no evident prejudice to the other party. Actually, there is one difference between *Thompson* and this case: Thompson filed his post-trial motions late and the District Court was mistaken when it said they were timely; here, the District Court made the error out of the blue, not on top

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of any mistake by Bowles, who then filed his notice of appeal by the specific date the District Court had declared timely. If anything, this distinction ought to work in Bowles's favor. Why should we have rewarded Thompson, who introduced the error, but now punish Bowles, who merely trusted the District Court's statement?^{FN8}

FN8. Nothing in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989), requires such a strange rule. In *Osterneck*, we described the "unique circumstances" doctrine as applicable "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id.*, at 179, 109 S.Ct. 987. But the point we were making was that *Thompson* could not excuse a lawyer's original mistake in a case in which a judge had not assured him that his act had been timely; the Court of Appeals in *Osterneck* had found that no court provided a specific assurance, and we agreed. I see no reason to take *Osterneck's* language out of context to buttress a fundamentally unfair resolution of an issue the *Osterneck* Court did not have in front of it. Cf. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

Under *Thompson*, it would be no answer to say that Bowles's trust was unreasonable because the 14-day limit was clear and counsel should have checked the judge's arithmetic. The 10-day limit on post-trial motions was no less pellucid in *Thompson*, which came out the other way. And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a

party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." See also 28 U.S.C. § 2107(c)(2) (allowing reopening for "14 days from the date of entry"). The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles's lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. See App. 11 (District Court docket). According to Bowles's lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. See Tr. of Oral Arg. 56-57. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's lawyer had no obligation to go behind the terms of the order he received.

I have to admit that Bowles's counsel probably did not think the order might have been entered on a different day from *2372 the day it was signed. He probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the federal rules and then off to the courthouse to check the docket.^{FN9} This would be a different case if the year were wrong on the District Court's order, or if opposing counsel had flagged the error. But on the actual facts, it was reasonable to rely on a facially plausible date provided by a federal judge.

FN9. At first glance it may seem unreasonable for counsel to wait until the penultimate day under the judge's order, filing a notice of appeal being so easy that counsel should not have needed the extra time. But

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as Bowles's lawyer pointed out at oral argument, filing the notice of appeal starts the clock for filing the record, see Fed. Rule App. Proc. 6(b)(2)(B), which in turn starts the clock for filing a brief, see Rule 31(a)(1), for which counsel might reasonably want as much time as possible. See Tr. of Oral Arg. 6. A good lawyer plans ahead, and Bowles had a good lawyer.

I would vacate the decision of the Court of Appeals and remand for consideration of the merits.

U.S.,2007.

Bowles v. Russell

127 S.Ct. 2360, 168 L.Ed.2d 96, 75 USLW 4428,
07 Cal. Daily Op. Serv. 6807, 2007 Daily Journal
D.A.R. 8736, 20 Fla. L. Weekly Fed. S 352

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MEMORANDUM

DATE: October 2, 2007
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 06-08

Mark Levy has suggested that the Committee consider amending the Appellate Rules to address the procedures for amicus filings in connection with petitions for panel rehearing or rehearing en banc. Mark raises a number of good questions which the Appellate Rules do not explicitly address: Can such amicus briefs be filed at all? Can they be filed with the consent of the parties, or is permission of the court by motion required? What is the maximum length for such briefs? And when are they due -- at the same time as the petition or 7 days later? Part I of this memo considers the light shed on this issue by Rule 29 and its history. Part II reviews the practice in each circuit. Part III analyzes questions of practice under the current Rule 29 and local circuit rules, and Part IV concludes by considering arguments for and against a FRAP amendment that would address some or all of these questions.

I. Rule 29 and issues relating to rehearing

Rule 29's text does not specifically address the question of amicus briefs in connection with a petition for rehearing or with briefing en banc, but the Note and history of the 1998 amendments do contain some relevant information. Prior to the 1998 amendments, Rule 29 presumptively set the due date for amicus briefs on the same date as the deadline for the brief of the party supported by the amicus.¹ The 1998 amendments adopted the current 7-day stagger, such that Rule 29(e) now provides: "An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer." The 1998 Committee Note states in part: "A court may grant permission to file an amicus brief in a context in which the party does not file a 'principal brief'; for example, an amicus may be permitted to

¹ The pre-1998 Rule 29 read in relevant part: "Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer."

file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus.”

In 1993, the Committee was considering various aspects of Rule 29 in response to a suggestion that grew out of the Fifth Circuit’s Local Rules Project.² At the fall 1993 meeting, the Committee’s discussion covered proposals concerning the timing, standards, page limits, and content of amicus briefs, as well as specifically whether Rule 29 should address amicus filings with respect to petitions for rehearing.

With respect to timing, the Committee had before it two alternative proposals – one, roughly similar to the provision ultimately adopted in 1998, that set a staggered deadline, and another which retained the notion that the amicus’s deadline should be the same as that for the party supported. In the discussion of a motion by Judge Logan concerning the second option, the following dialogue occurred:

Mr. Munford also asked about the time for filing an amicus brief in support of a petition for rehearing. He pointed out that the current rule does not tie the time for filing to the principal brief, rather it requires an amicus brief to be filed within the time allowed the party whose position the amicus supports. Judge Logan responded that he intended to require filing within the time allowed for filing the principal brief of the party supported. He said that he has never seen an amicus brief in support of a petition for rehearing and if one were submitted it should be accompanied by a motion for leave to file it.³

Later, the discussion turned to amicus filings in support of petitions for rehearing:

The last issue discussed with respect to amicus briefs was whether a court should accept an amicus brief offered in support of a petition for rehearing. Judge Ripple indicated that his circuit receives such briefs. Little attention may be paid to a case until the court enters its judgment. Thereafter, an amicus may join the party in trying to explain the error of the decision.

Judge Hall asked whether the question should be limited to petitions for rehearing or also should include requests for an in banc hearing or rehearing. Judge Ripple responded that he hoped the Committee would address all such issues.

Mr. Munford suggested amending the draft rule so that it uses the language in the

² See Minutes of the Advisory Committee on Federal Rules of Appellate Procedure, September 22 & 23, 1993, 1993 WL 761146, at *14.

³ Minutes of the Advisory Committee on Federal Rules of Appellate Procedure, September 22 & 23, 1993, 1993 WL 761146, at *18.

current rule requiring an amicus to file within the time allowed the party supported. There would be no express reference to the party's principal brief or to petitions for rehearing, etc. but the language would be broad enough to encompass all such instances. He further suggested that it is unnecessary to discuss instances in which an amicus supports neither party. Several judges responded, however, that there many instances in which an amicus takes no position as to affirmance. Mr. Munford therefore suggested that the sentence be amended to state that in such instances the amicus must file within the time allowed the appellant -- dropping the reference to the appellant's principal brief.

Judge Logan expressed hesitation to specifically mention that an amicus brief may be filed in support of a petition for rehearing. He feared that any such statement would encourage the filing of such briefs. On the other hand, he expressed support for Mr. Munford's language changes that would make the rule broad enough to cover the timing of such briefs. Judge Ripple suggested that a vote be taken on whether specific mention should be made of the possibility of filing an amicus brief in support of a petition for rehearing, etc. Five members supported that approach and two members opposed it.⁴

The fall 1993 minutes thus seem to indicate majority support for explicitly mentioning petitions for rehearing in Rule 29. But Rule 29, as ultimately amended in 1998, does not include such language.

II. Current circuit practices

The chart that follows summarizes the existing circuit provisions relating to amicus filings in connection with petitions for panel rehearing or rehearing en banc.

Circuit	Provisions regarding amicus briefs with respect to rehearing?
First	No local rule or other provision.
Second	No local rule or other provision. Interim Local Rule 29 addresses one related concern by providing: "The court ordinarily will deny leave to file brief for an amicus curiae where, by reason of a relationship between a judge who would hear the proceeding and the amicus or counsel for the amicus, the filing of the brief would cause the recusal of the judge."

⁴ Minutes of the Advisory Committee on Federal Rules of Appellate Procedure, September 22 & 23, 1993, 1993 WL 761146, at *21.

Third	<p>Third Circuit Local Appellate Rule 29.1 provides: “29.1 Time for Filing Amici Curiae Briefs on Rehearing. In a case ordered for rehearing before the court en banc or before the original panel, if the court permits the parties to file additional briefs, any amicus curiae shall file its brief in accordance with Rule 29(e) of the Federal Rules of Appellate Procedure. In a case ordered for rehearing in which no additional briefing is directed, unless the court directs otherwise any amicus brief must be filed within 28 days after the date of the order granting rehearing, and any party may file a response to such an amicus brief within 21 days after the amicus brief is served. Before completing the preparation of an amicus brief, counsel for an amicus curiae shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the amicus brief.”</p>
Fourth	<p>No local rule or other provision. But the Fourth Circuit – construing current Appellate Rule 29 – stated in 2006 that it would “henceforth ... disfavor[]” requests to file an amicus brief in the first instance at the stage of a request for rehearing:</p> <p>“Federal Rule of Appellate Procedure 29(e) directs the filing of an amicus brief “no later than 7 days after the principal brief of the party being supported is filed.” Fed. R.App. P. 29(e) (emphasis added). The term “principal brief” would appear to refer to the lead brief filed by a party in anticipation of argument (either before a panel or the en banc court) and not to something such as a reply brief or petition for rehearing. The language of that rule sets forth no exceptions. While a court is not precluded from granting leave to file an amicus brief in other circumstances, see <i>id.</i> advisory committee's note, waiting until a petition for rehearing has been filed is a disfavored litigation tactic and fails to serve the litigants' interest in having all views considered thoroughly at the initial briefing and argument stage. While it may suit the agency's convenience to troll for panel results to which it takes exception, such a practice is not consistent with the orderly and conscientious disposition of claims in an appellate court. See Sup.Ct. R. 44(5) (“The Clerk will not file any brief for an amicus curiae in support of, or in opposition to, a petition for rehearing.”); D.C.Cir. R. 35(f) (“No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.”).”</p> <p><i>LaRue v. DeWolff, Boberg & Associates, Inc.</i>, 458 F.3d 359, 361 (4th Cir. 2006).</p>

Fifth	Fifth Circuit Rule 29.4 provides: “Denial of Amicus Curiae Status. 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.”
Sixth	No local rule or other provision. ⁵
Seventh	Seventh Circuit Rule 35 provides: “Every petition for rehearing en banc, and every brief of an amicus curiae supporting or opposing a petition for rehearing en banc, must include a statement providing the information required by Fed. R. App. P. 26.1 and Circuit Rule 26.1 as of the date the petition is filed.”
Eighth	No local rule or other provision.
Ninth	New Ninth Circuit Rule 29-2 (effective July 1, 2007) provides the most detailed local-rule treatment to date (see enclosure).
Tenth	Tenth Circuit Rule 29.1 provides: “The court will receive but not file proposed amicus briefs on rehearing. Filing will be considered shortly before the oral argument on rehearing en banc if granted, or before the grant or denial of panel rehearing.”

⁵ In a recent weblog posting, Professor Orin Kerr complained that the Sixth Circuit rejected his amicus brief and two others submitted for or against rehearing in *Warshak v. United States*, 490 F.3d 455 (6th Cir. June 18, 2007). Professor Kerr speculates that the court may have read Appellate Rule 40(a)(3) “to disallow amicus briefs at the rehearing stage. That Rule states that ‘[u]nless the court requests, no answer to a petition for panel rehearing is permitted.’ In this case, the court requested an answer to the petition for rehearing: Warshak was ordered to respond. However, there’s some reason to think that the court is interpreting amicus briefs as ‘answers’ and reading the Rule to mean that no amicus briefs are permitted with respect to any rehearing issues unless the court specifically invites that particular brief.”

Eleventh	<p>Eleventh Circuit Rule 35-6 provides: “Motion for Leave to File Amicus Brief in Support of Petition for Rehearing En Banc. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus brief in support of a petition for rehearing en banc without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for rehearing en banc. The request must be made by motion accompanied by the proposed brief in conformance with 11th Cir. R. 35-5, except that subsections (f) and (k) may be omitted. The proposed amicus brief must not exceed 15 pages, exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), and (j). The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition for rehearing en banc being supported is filed.”</p> <p>Eleventh Circuit Rule 35-9 provides: “En Banc Amicus Briefs. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an en banc amicus brief without the consent of the parties or leave of court. Any other amicus curiae must request leave of court by filing a motion accompanied by the proposed brief in conformance with FRAP 29(b) through (d) and the corresponding circuit rules. An amicus curiae must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the appellant's or petitioner's principal en banc brief. An amicus curiae must also comply with 11th Cir. R. 35-7.”</p> <p>Eleventh Circuit Rule 40-6 provides: “The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus brief in support of a petition for panel rehearing without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for panel rehearing. The request must be made by motion accompanied by the proposed brief in conformance with FRAP 29(b) and (c) and the corresponding circuit rules. The proposed amicus brief must not exceed 15 pages, exclusive of items that do not count towards page limitations as described in 11th Cir. R. 32-4. The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition for panel rehearing being supported is filed.”</p>
D.C.	D.C. Circuit Rule 35(f) provides: “No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.”

Federal	<p>Federal Circuit Rule 35(g) provides:</p> <p>“Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for hearing en banc, a petition for rehearing en banc, or a combined petition for panel rehearing and rehearing en banc, must be accompanied by a motion for leave and must not exceed 10 pages.”</p> <p>Federal Circuit Rule 40(g) provides:</p> <p>“Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for panel rehearing must be accompanied by a motion for leave to file and must not exceed 10 pages.”</p>
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III. Specific questions of practice

This section reviews various circuits’ approaches to a number of practice issues. Two conclusions can be drawn from this review. First, each of the questions reviewed here is answered by local rule in only a few circuits. Second, among the circuits that do answer any given question, the answers may vary widely.

A. Can such amicus briefs be filed at all?

As the 1998 Committee Note to Rule 29 recognizes, the courts of appeals have authority to permit the filing of amicus briefs in connection with a petition for rehearing. (As a point of comparison, Supreme Court Rule 44.5 provides: “The Clerk will not file any brief for an amicus curiae in support of, or in opposition to, a petition for rehearing.”)

Ninth Circuit Rule 29-2(a) specifies that “[a]n amicus curiae may be permitted to file when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing.” The Circuit Advisory Committee Note warns, however, that “[t]he court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to [be] appropriate only when the post-disposition deliberations involve novel or particularly complex issues.”

Some circuits have indicated that they will limit such filings. D.C. Circuit Rule 35(f) provides: “No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.” The Fourth Circuit has stated that it disfavors amicus submissions in connection with petitions for rehearing (at least when the amicus has not attempted to submit a brief earlier in the proceeding). Some circuits will restrict amicus filings in order to avoid disqualifying a member of the original panel (or of the en banc

court) from sitting.⁶ Since the opposing party itself may not (unless the court requests) submit a response to a petition for panel rehearing or rehearing en banc,⁷ amicus filings in *opposition* to a petition for rehearing may – by analogy – be even less welcomed than amicus filings in *support* of such a petition.⁸

Other circuits' rules, though they do not explicitly set standards for when the court will permit amicus filings relating to rehearing, do contain provisions that presume that some such filings will occur.⁹

B. Can they be filed with the consent of the parties, or is permission of the court by motion required?

Ninth Circuit Rule 29-2(a) explicitly addresses this question, and tracks the answer provided by Appellate Rule 29(a).¹⁰

⁶ Fifth Circuit Rule 29.4 provides that “[a]fter 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 Circuit Advisory Committee Note to Ninth Circuit Rule 29-2 states: “The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus brief.” Cf. Second Circuit Interim Local Rule 29.

⁷ See Appellate Rules 35(e) and 40(a)(3).

⁸ Thus, for instance, Eleventh Circuit Rule 35-9 specifies that “[a]n amicus curiae must ... comply with 11th Cir. R. 35-7.” Eleventh Circuit Rule 35-7 provides: “A response to a petition for en banc consideration may not be filed unless requested by the court.”

⁹ See Third Circuit Local Appellate Rule 29.1; Fifth Circuit Rule 29.4; Seventh Circuit Rule 35; Tenth Circuit Rule 29.1; Federal Circuit Rules 35(g) and 40(g).

¹⁰ Ninth Circuit Rule 29-2(a) provides in relevant part: “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. Subject to the provisions of subsection (f) of this rule, any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.” Ninth Circuit Rule 29-2(f) specifies to which judges the motion for leave to file the amicus brief will be circulated.

Eleventh Circuit Rules 35-6,¹¹ 35-9,¹² and 40-6¹³ permit amicus filings by the United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia, without consent of the parties or leave of court. However, these Eleventh Circuit rules require any other would-be amicus to obtain court permission.

Federal Circuit Rules 35(g) and 40(g) indicate that court permission is always required: Both these rules state that “[e]xcept by the court’s permission or direction, an amicus curiae brief ... must be accompanied by a motion for leave”

C. What is the maximum length for such briefs?

Ninth Circuit Rule 29-2(c) sets two different length limits: a shorter one for amicus filings while a petition for rehearing is pending and a longer one for amicus filings after the grant of rehearing en banc.

Eleventh Circuit Rules 35-6 and 40-6 set a 15-page limit for amicus filings with respect to a petition for en banc or panel rehearing. Eleventh Circuit Rule 35-9 incorporates – for amicus filings once en banc rehearing has been granted – Appellate Rule 29(d)’s length limitation.

Federal Circuit Rules 35(g) and 40(g) each set a 10-page limit.

D. When are they due -- at the same time as the petition or 7 days later?

The 1998 Committee Note to Rule 29, by stating that “the court will establish the filing time for the amicus” when permitting an amicus filing in support of a petition for rehearing, suggests that Rule 29(e)’s timing provisions do not directly govern. There are at least two timing questions that could arise in connection with petitions for rehearing.

First, there is the question as to amicus briefs in support of (or opposition to) a petition for rehearing. Ninth Circuit Rule 29-2(e)(1) addresses this question, and adopts an approach similar (though not identical) to that taken by Appellate Rule 29(e).¹⁴ Eleventh Circuit Rules 35-

¹¹ This rule concerns amicus filings with respect to a petition for rehearing en banc.

¹² This rule concerns amicus filings once rehearing en banc has been granted.

¹³ This rule concerns amicus filings with respect to a petition for panel rehearing.

¹⁴ Ninth Circuit Rule 29-2(e)(1) provides: “Brief Submitted to Support or Oppose a Petition for Rehearing. An amicus curiae must serve its brief along with any necessary motion no later than ten (10) calendar days after the petition or response of the party the amicus wishes

6 and 40-6 adopt – for amicus filings at the petition stage – an approach similar to that taken by Appellate Rule 29(e).¹⁵

Second, there is the question as to amicus briefs submitted once rehearing is granted. Third Circuit Local Appellate Rule 29.1 addresses this question, as does Ninth Circuit Rule 29-2(e)(2).¹⁶ Though, as noted above, the Eleventh Circuit Rules track Rule 29(e)'s staggered approach for amicus filings in connection with a rehearing petition, for amicus filings once rehearing en banc has been granted, Eleventh Circuit Rule 35-9 diverges from Appellate Rule 29(e)'s staggered approach.¹⁷

E. Other requirements

Seventh Circuit Rule 35 specifies that amicus filings in support of or opposition to a petition for rehearing en banc must include the disclosures required by Appellate Rule 26.1 and Circuit Rule 26.1.

Ninth Circuit Rule 29-2(b) incorporates the requirements set by Appellate Rule 29(b). Ninth Circuit Rule 29-2(d) sets the number of copies that must be submitted.

to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than ten (10) calendar days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.”

¹⁵ These Eleventh Circuit rules provide that the proposed brief (and motion if needed) must be filed “no later than 7 days after the petition ... being supported is filed.”

¹⁶ Ninth Circuit Rule 29-2(e)(1) provides: “Briefs Submitted During the Pendency of Rehearing. Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than twenty-one (21) days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than thirty-five (35) days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.”

¹⁷ Eleventh Circuit Rule 35-9 provides: “An amicus curiae must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the appellant's or petitioner's principal en banc brief.”

Eleventh Circuit Rules 35-9 and 40-6 incorporate by reference Appellate Rules 29(b) and (c) concerning the contents and form of the brief and the contents of the motion for leave to file.

IV. Conclusion

A number of arguments can be made in favor of adopting a national rule governing amicus filings in connection with rehearing petitions. Rule 29 does not provide direct guidance on all the questions discussed in Part III. In many circuits, no local provision speaks to those questions either. And the fact that some circuits do address those questions may be seen as a mixed blessing: The existence of local rules on these questions may provide certainty to the practitioner who knows of the local provisions – but the diversity of local rule approaches from circuit to circuit may cause difficulties for lawyers who practice in more than one circuit.

Arguments against adopting a national rule could take a number of forms. Here, the diversity of approaches among the circuits may be seen as double-edged: Though this diversity may be confusing (weighing in favor of a national rule) it may also signal strong preferences on the part of a circuit's judges (suggesting that there might be judicial resistance to a national rule). For example, a national rule permitting government amici to file (in connection with a rehearing petition) without party consent or leave of court would likely be disfavored by a number of judges in the D.C. Circuit and the Fourth Circuit. Another argument might be that there is little need for a national rule, since one who wishes to make an amicus filing in connection with a rehearing petition can simply move for leave to make the filing (and, in connection with that motion, obtain guidance on questions of timing, content, form and length).

Perhaps it might be possible to adopt a national rule that addresses some, but not all, of the matters treated in Part III of this memo. The Committee may wish to consider, as to each question, the competing values of certainty and national uniformity, versus permissible local variation.

To the extent that the Committee wishes to adopt a national rule, differences between routine merits briefing and briefing in connection with rehearing may weigh in favor of departures from Rule 29's approach. For example, it is unclear that amici would require staggered timing for their filings in connection with en banc briefing, since (as with Supreme Court briefing) the parties will already have filed a complete set of briefs which the amicus can review prior to the parties' en banc filing deadlines.

Encl.



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(415) 355-8000

**Amendments to Ninth Circuit Rules
 and Advisory Committee Notes**

*effective, **July 1, 2007***

New or revised language is highlighted in yellow.

RULE	TITLE	New or Revised	PURPOSE OF AMENDMENT
Circuit Rules 17-1.6 & 30-1.6 ACN to Rule 30-1.6	Format of the Excerpts of Record	New & Revised	To require the mandatory contents of the excerpts of record to be contained in the first volume for ease of use by judicial officers
Circuit Rule 28-2.7	Addendum to Briefs	New 2 nd paragraph	To provide the bench with a ready access to documents that are central to review of an immigration case.
New Advisory Committee Note to CR 28-6	Citation of Supplemental Authorities	Revised	To provide guidance to the bar about when to file FRAP 28(j) letters.
Circuit Rule 29-2 & ACN to CR 29-2	Brief of Amicus Curiae (during en banc considerations)	New	To provide guidance to the bar concerning the filing of amicus curiae briefs with respect to petitions for rehearing or rehearing en banc.
Circuit Rule 35-3	Limited En Banc Court	Revised	To return to 11-member en banc court.
Circuit Rule 39-1 & ACN to CR 39-1.6	Request for Attorneys' Fees	Revised	To reflect the filing deadline set forth in EAJA, and to improve the clarity of the rule.
Circuit Rule 39-2	Attorneys' Fees and Expenses under the Equal Access to Justice Act	Abrogated	

CIRCUIT RULE 28-2

CONTENTS OF BRIEFS

28-2.7 Addendum to Briefs

If determination of the issues presented requires the study of statutes, regulations or rules, relevant parts thereof shall be reproduced in an addendum at the end of a party's brief. The addendum shall be separated from the brief by a distinctively colored page.

All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be separated from the brief by a distinctively colored page. (*New 7-1-07*)

CIRCUIT RULE 28-6

CITATION OF SUPPLEMENTAL AUTHORITIES

The body of letters filed pursuant to Federal Rule of Appellate Procedure 28(j) shall not exceed two (2) pages, unless it complies with the alternative length limitations of 350 words or 39 lines of text. Litigants shall submit an original and four (4) copies of a Fed. R. App. P. 28(j) letter. (*New, 12-1-02*)

CIRCUIT ADVISORY COMMITTEE NOTE TO CIRCUIT RULE 28-6

In the interests of promoting full consideration by the court and fairness to all sides, the parties should file all Fed. R. App. P. 28(j) letters as soon as possible. When practical, the parties are particularly urged to file Rule 28(j) letters at least seven (7) calendar days in advance of any scheduled oral argument or within seven (7) calendar days after notification that the appeal will be submitted on the briefs. (New 7-1-07)

CIRCUIT RULE 29-2

BRIEF OF AMICUS CURIAE SUBMITTED TO SUPPORT OR OPPOSE A PETITION FOR PANEL OR EN BANC REHEARING OR DURING THE PENDENCY OF REHEARING

- (a) When Permitted. An amicus curiae may be permitted to file when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing. 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. Subject to the provisions of subsection (f) of this rule, any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

- (b) Motion for Leave to File: The motion must be accompanied by the proposed brief and include the recitals set forth at Fed. R. App. P. 29(b).
- (c) Format/Length:
- (1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.
 - (2) A brief submitted while a petition for rehearing is pending brief shall not exceed 15 pages unless it complies with the alternative length limits of 4,200 words of 390 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.
 - (3) Unless otherwise ordered by the court, a brief submitted after the court has voted to rehear a case en banc shall not exceed 25 pages unless it complies with the alternative length limits of 7,000 words or 650 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.
- (d) Number of Copies:
If the brief pertains to a petition for panel rehearing, an original and four (4) copies shall be submitted. If the brief pertains to a pending petition for rehearing en banc, an original and fifty (50) copies shall be submitted. If a petition for rehearing en banc has been granted, an original and thirty (30) copies of the brief shall be submitted.
- (e) Time for Filing:
- (1) Brief Submitted to Support or Oppose a Petition for Rehearing
An amicus curiae must serve its brief along with any necessary motion no later than ten (10) calendar days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than ten (10) calendar days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.
 - (2) Briefs Submitted During the Pendency of Rehearing
Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than twenty-one (21) days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than thirty-five (35) days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

- (f) Circulation: Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court.

(New, 7-1-07)

Cross-reference: Fed. R. App. P. 29; Circuit Rule 25-4

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-2

Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae brief submitted during the pendency or rehearing. The court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to appropriate only when the post-disposition deliberations involve novel or particularly complex issues.

The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief.

(New, 7-1-07)

CIRCUIT RULE 35-3

LIMITED EN BANC COURT

The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, a 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside. [rev. 1-1-06, 7-1-07]

The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one judge and shall take place on the first working day following the date of the order taking the case or group of related cases en banc.

If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot. [rev. 1-1-06]

In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.

MEMORANDUM

DATE: October 2, 2007
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 07-AP-F

Judge Jerry Smith has suggested that the Committee consider amending Appellate Rule 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by Appellate Rule 40(a)(3) with respect to responses to requests for panel rehearing. Rule 40(a)(3) provides: “Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.”¹ Rule 35(e) parallels the first of these principles, providing that “[n]o response may be filed to a petition for an en banc consideration unless the court orders a response.” But Rule 35(e) fails to state whether the court may or should grant en banc consideration without first ordering a response to the petition. Judge Smith suggests that Rule 35(e) should be amended “to state that ordinarily the court will not rehear without allowing a response.”

Part I of this memo reviews the history of Rules 35 and 40. Part II notes that five circuits have local provisions assuring that a response will ordinarily be requested prior to the grant of rehearing en banc, while seven other circuits have no pertinent provision (and one circuit has a provision that likely assures that answers are requested fairly often if the court is leaning toward granting rehearing en banc). Part III concludes by considering arguments for and against amending Rule 35 to track Rule 40's approach.

I. A brief history of Rules 35 and 40

The difference between Rules 35 and 40 (on the subject of responses) apparently stemmed from the fact that the original Rule 35 contemplated “suggestions” for rehearing en banc which – because they were often ancillary to petitions for panel rehearing – frequently required no response. The Advisory Committee – during the work that produced the restyling of the Appellate Rules – considered and specifically rejected the idea that Rule 35 should be revised

¹ A related concept can be seen in Rule 21(b)(1), which provides – with respect to mandamus petitions – that “[t]he court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.” Rule 21's requirement that the court order an answer to a mandamus petition (if it does not deny the petition) dates back to that Rule's adoption.

to eliminate the difference.

Language similar to current Rule 40(a)(3) was included in Rule 40 as originally adopted.² The Note explained that the principle reflected practice in some circuits and in the Supreme Court:

This [i.e., the general approach taken by Rule 40] is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3) It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

Rule 35, as initially adopted, “authorize[d] a suggestion [for en banc consideration], impose[d] a time limit on suggestions for rehearings in banc, and provide[d] that suggestions w[ould] be directed to the judges of the court in regular active service.”³ The text of original Rule 35 said nothing about responses to a suggestion for rehearing en banc, but the Note explained:

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled "petition for rehearing in banc." Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

In 1979, Rule 35(b) was amended to provide that “[n]o response shall be filed [to a suggestion for hearing or rehearing en banc] unless the court shall so order.” The 1979 Committee Note explained: “Under the present rule there is no specific provision for a response to a suggestion that an appeal be heard in banc. This has led to some uncertainty as to whether such a response may be filed. The proposed amendment would resolve this uncertainty.” Neither the text of the amendment nor the Note, however, addressed the question of whether the court should grant en banc consideration without ordering a response to the suggestion.

² Original Rule 40(a) read in part: “No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request.”

³ 1967 Committee Note to Rule 35.

The 1998 amendments to Rule 35 made substantive changes in addition to the restyling. Those substantive changes did not directly address the issue of grants in the absence of responses. But one goal of the 1998 amendments was to make the procedures for seeking rehearing en banc parallel those for seeking panel rehearing: “One of the purposes of the substantive amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.”⁴ Thus, for example, the Note explained that the substitution of the term “petition” for the term “suggestion” “reflects the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc.”⁵

During the deliberations over the restyling of the Appellate Rules, the Committee discussed the difference between Rules 35(e) and 40(a)(3), and specifically determined not to eliminate that difference:

The difference between 35(e) and 40(a)(3) was discussed. Rule 35(e) says that a response to a petition may not be filed unless the court orders a response. Rule 40(a)(3) also says that an answer may not be filed absent court permission, but that a panel rehearing ordinarily will not be granted in the absence of the court's request for an answer. The consensus was that the distinctions are appropriate. When an en banc rehearing is granted, it is not as important that the winning party have an opportunity to speak before the court grants the rehearing. In those instances the winner will be heard during the rehearing. If a panel rehearing is granted, however, the court usually enters a new dispositive judgment and the winning party should have an opportunity to be heard before the new judgment is entered.⁶

II. Current circuit practices

A slight majority of the circuits – namely, the First,⁷ Second, Fourth, Fifth,⁸ Tenth,

⁴ 1998 Committee Note to Rule 35.

⁵ *Id.*

⁶ Minutes of the Advisory Committee on Appellate Rules, April 3 & 4, 1997, 1997 WL 1056234, at *13.

⁷ First Circuit IOP X.B. provides simply: “Unless the court requests, no response to a petition is permitted.”

⁸ Fifth Circuit Rule 35.3 provides that “[n]o response to a petition for en banc consideration will be received unless requested by the court.”

Eleventh⁹ and Federal Circuits – have no local provision assuring that a response will be requested before rehearing en banc is granted. Five circuits – the D.C.,¹⁰ Sixth,¹¹ Seventh,¹²

⁹ Eleventh Circuit Rule 35-7 provides: “A response to a petition for en banc consideration may not be filed unless requested by the court.”

¹⁰ D.C. Circuit Rule 35 covers petitions for panel rehearing and rehearing en banc; subdivision (d) provides in part: “A petition for rehearing ordinarily will not be granted, nor will an opinion or judgment be modified in any significant respect in response to a petition for rehearing, in the absence of a request by the court for a response to the petition.” The D.C. Circuit Handbook provides:

As in the case of petitions for panel rehearing, the rules do not provide for a response to a petition for rehearing en banc, except by request of the Court. If any member of the Court wishes a response, the Clerk will enter an order to that effect. There is no oral argument on the question whether rehearing en banc should be granted.

.... If a judge calls for a vote on the petition for rehearing en banc, the Clerk's Office transmits electronically to the full Court a new vote sheet, along with any response to the petition ordered by the Court. The question now is whether there should be a rehearing en banc. On this question only active judges of the Court may vote, and a majority of all active judges who are not recused must approve rehearing en banc in order for it to be granted.

¹¹ Sixth Circuit IOP 35(d) provides: “When a poll is requested, the clerk will ask for a response to the petition if none has been previously requested.”

¹² Seventh Circuit IOP 5 provides in part:

(a) Request for Answer and Subsequent Request for Vote. If a petition for rehearing en banc is filed, a request for an answer (which may be made by any Seventh Circuit judge in regular active service or by any member of the panel that rendered the decision sought to be reheard) must be made within 10 days after the distribution of the en banc petition. If an answer is requested, the clerk shall notify the prevailing party that an answer be filed within 14 days from the date of the court's request. Within 10 days of the distribution of the answer, any judge entitled to request an answer, may request a vote on the petition for rehearing en banc.

(b) Request for Vote When No Answer Requested. Ordinarily an answer will be requested prior to a request for a vote. A request for a vote on the petition (which may be made by any judge entitled to request an answer) must be made within 10 days from the distribution of the petition. If a vote is so requested, the clerk shall notify the prevailing party that an answer to the petition is due within 14 days.

Eighth,¹³ and Ninth¹⁴ Circuits – currently have local provisions indicating that the court will not (or ordinarily will not) grant rehearing en banc without ordering a response to the petition. In addition, the Third Circuit IOPs take an approach that probably leads the court to invite a response, in many instances, before granting a petition for rehearing en banc.¹⁵ As a point of comparison, Supreme Court Rule 44.3 provides: “The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.”

¹³ Eighth Circuit IOP IV.D. provides in part:

The judges have two weeks to review the petition and request a poll or a response. Unless a judge requests a poll or otherwise indicates the petition for rehearing en banc deserves more consideration, the clerk automatically enters an order denying petitions for rehearing 21 days after circulation to the court. If a poll is requested on a petition for rehearing en banc, each active judge casts a vote. When a poll is requested, the clerk's office will request the opposing party file a response to the petition for rehearing. No response is permitted absent the court's request. A rehearing en banc is granted if a majority of judges in regular active service vote affirmatively.

¹⁴ Ninth Circuit Rule 35-2 provides:

Where a party petitions for hearing or rehearing en banc, the Court will not order a hearing or rehearing without giving the other parties an opportunity to express their views whether hearing or rehearing en banc is appropriate. Where no petition for en banc review is filed, the Court will not ordinarily order a hearing or rehearing en banc without giving counsel an opportunity to respond on the appropriateness of such a hearing.

¹⁵ Third Circuit IOP 9.5 concerns “Rehearing En Banc on Petition by Party”; IOP 9.5.6 provides:

If four active judges vote to request an answer to the petition or if there are a total of four votes for an answer or for rehearing, provided that there is at least one vote for an answer, the authoring judge enters an order directing such an answer within fourteen (14) days from the date of the order. The Clerk forwards the answer to the active judges with the request that they notify the authoring judge within ten (10) days if they vote to grant the petition. A judge who does not desire rehearing is not expected to respond. Copies of the answer are sent as a courtesy to any senior judge or visiting judge who was a member of the panel which heard and decided the case. In death penalty cases, the times set forth herein may be reduced pursuant to Local Appellate Rule Misc. 111.7(b).

III. Discussion

As five circuits have already recognized, there is a good argument to be made for assuring the parties that the court ordinarily will not order rehearing en banc without ordering a response. This assures the party opposing rehearing that – though it is not allowed to submit a response unless asked – it will be asked to respond if the court is inclined to grant rehearing en banc. Such an assurance could help parties to feel that they are being treated fairly; and requesting a response could help to inform the court’s consideration of whether to grant rehearing en banc. A response may help to illuminate whether the standards for granting rehearing en banc are met.¹⁶ From the court’s point of view, it is difficult to imagine a downside to the proposed provision. It is true that the court would presumably feel obliged to review the response, but in a case significant enough to warrant a grant of rehearing en banc, that would not seem to be objectionable. Requesting a response would occasion some delay prior to the grant of rehearing en banc, but that delay presumably would not be great.

On the other hand, it is possible to distinguish rehearing en banc from panel rehearing, and to argue that requesting a response prior to the grant of rehearing is more important in the latter than in the former context. As Committee members observed during the 1990s discussion noted in Part I, the grant of rehearing en banc will offer the party favored by the panel decision a chance to defend the panel decision in its en banc brief. By contrast, the court may grant panel rehearing and alter the disposition of the appeal without requesting further briefing (subsequent to the petition and response);¹⁷ thus, it is particularly important to provide an opportunity to respond to a petition for panel rehearing prior to a grant of such rehearing. Also, because the grounds for panel rehearing are considerably broader than those for rehearing en banc, and can

¹⁶ Rule 35(a) provides: “An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.” Rule 35(b)(b) provides: “The petition must begin with a statement that either: (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.”

¹⁷ Rule 40(a)(4) provides: “(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order.”

include a contention that the panel erred in its treatment of the relevant facts and/or law,¹⁸ a response may be particularly helpful because of counsel's familiarity with the record and the doctrinal issues in the case.

¹⁸ Rule 40(a)(2) provides: "The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended"

MEMORANDUM

DATE: October 2, 2007
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 07-AP-G

An AO working group, headed by Tim Dole, has been reviewing the Rules' illustrative forms to check for consistency with the new privacy requirements. The group has determined that FRAP Form 4 requires amendment. As John Rabiej explains:

The new privacy rules require redaction of certain "personal identifiers," including social security numbers and home addresses -- though the latter protection applies only in criminal cases. The working group discovered that Appellate Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, asks for the social security number and address of legal residence.

The form needs to be adjusted to comply with the new privacy rules. Though any change to the form must go through the rulemaking process, we need not publish it for public comment because any changes would be technical and conforming. The changes would be minor, either eliminating the references altogether to social security number and address (at least in criminal cases regarding the latter), or modifying the form to require listing only the "Last four digits of your social-security number" and "State the city and state of your legal residence," references now being used in other forms. (Though it might sound better to merely say "City and state of your legal residence" to eliminate the redundancy.)

The privacy rules (which will take effect December 1, 2007, absent contrary action by Congress) all require redaction of social security numbers (except for the last four digits). Though the rules exempt pro se filings in habeas or Section 2255 proceedings, *see, e.g.*, new Civil Rule 5.2(b)(6), there is no reason to think that Form 4 should function differently in such cases than in those subject to the new redaction requirements. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown).¹

¹ This requirement evidently arises from concern with respect to the privacy needs of witnesses and victims in criminal cases; one might thus ask whether the requirement should lead to the elimination of the home address from Form 4 with respect to all appeals in criminal cases

Neither FRAP 24 nor 28 U.S.C. § 1915 sets any requirement that the full home address and social security number be provided. The home-address and SSN requirements came into Form 4 in the 1998 amendments. Those amendments apparently were “initiated at the request of the clerk of the Supreme Court, who had commented that the current form did not contain sufficient financial information to meet the needs of the Court”; the amendments were “based in large part on the form used in the in forma pauperis pilot program in the bankruptcy courts.”² I have not found any discussion that focused explicitly on either the home-address or SSN requirements.

One other issue bears mention: FRAP Form 4's requirements are employed not only in the lower federal courts (where FRAP 24 states that the party's affidavit must, inter alia, “show[] in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs”) but also in the Supreme Court (where Supreme Court Rule 39.1 requires that “[a] party seeking to proceed in forma pauperis shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U.S.C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4”). Before selecting among the possible options for revising Form 4, it may be advisable to seek input from the Supreme Court Clerk.

Encls.

(given that most appeals will be by defendants). However, Criminal Rule 49.1's wording contains no indication that there should be an exception for appeals by defendants, so it seems that the redaction requirement should apply to those appeals as well.

² Standing Committee Minutes, June 19-20, 1997 (reporting remarks of Judge Logan). *See also* Standing Committee Minutes, January 9-10, 1997 (reporting that Judge Logan explained that “[t]he impetus to change Form 4 ... had come from: (1) a request by the clerk of the Supreme Court to include additional financial information, and (2) recent legislation affecting appeals in forma pauperis by prisoners.”).

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the _____ District of _____

A.B., Plaintiff

v.

Case No. _____

C.D., Defendant

Affidavit in Support of Motion	Instructions
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ _____	\$ _____	\$ _____	\$ _____
Self-employment	\$ _____	\$ _____	\$ _____	\$ _____
Income from real property (such as rental income)	\$ _____	\$ _____	\$ _____	\$ _____
Interest and dividends	\$ _____	\$ _____	\$ _____	\$ _____
Gifts	\$ _____	\$ _____	\$ _____	\$ _____
Alimony	\$ _____	\$ _____	\$ _____	\$ _____
Child support	\$ _____	\$ _____	\$ _____	\$ _____
Retirement (such as social security, pensions, annuities, insurance)	\$ _____	\$ _____	\$ _____	\$ _____
Disability (such as social security, insurance payments)	\$ _____	\$ _____	\$ _____	\$ _____
Unemployment payments	\$ _____	\$ _____	\$ _____	\$ _____
Public-assistance (such as welfare)	\$ _____	\$ _____	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____	\$ _____	\$ _____
Total monthly income:	\$ _____	\$ _____	\$ _____	\$ _____

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. How much cash do you and your spouse have? \$_____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	\$_____	\$_____
_____	_____	\$_____	\$_____
_____	_____	\$_____	\$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home	(Value)	Other real estate	(Value)	Motor vehicle #1	(Value)
_____	_____	_____	_____	Make & year: _____	_____
_____	_____	_____	_____	Model: _____	_____
_____	_____	_____	_____	Registration #: _____	_____
Motor vehicle #2	(Value)	Other assets	(Value)	Other assets	(Value)
Make & year: _____	_____	_____	_____	_____	_____
Model: _____	_____	_____	_____	_____	_____
Registration #: _____	_____	_____	_____	_____	_____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ _____	\$ _____
Are real-estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ _____	\$ _____
Home maintenance (repairs and upkeep)	\$ _____	\$ _____
Food	\$ _____	\$ _____
Clothing	\$ _____	\$ _____
Laundry and dry-cleaning	\$ _____	\$ _____
Medical and dental expenses	\$ _____	\$ _____
Transportation (not including motor vehicle payments)	\$ _____	\$ _____
Recreation, entertainment, newspapers, magazines, etc.	\$ _____	\$ _____
Insurance (not deducted from wages or included in mortgage payments)	\$ _____	\$ _____
Homeowner's or renter's	\$ _____	\$ _____
Life	\$ _____	\$ _____
Health	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	\$ _____	\$ _____
Installment payments	\$ _____	\$ _____
Motor Vehicle	\$ _____	\$ _____
Credit card (name): _____	\$ _____	\$ _____
Department store (name): _____	\$ _____	\$ _____
Other: _____	\$ _____	\$ _____
Alimony, maintenance, and support paid to others	\$ _____	\$ _____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ _____	\$ _____
Other (specify): _____	\$ _____	\$ _____
Total monthly expenses:	\$ _____	\$ _____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? \$ _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? \$ _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

13. State the address of your legal residence.

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Your social-security number: _____

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

UNITED STATES PUBLIC LAWS
108th Congress - Second Session
Convening January 7, 2004

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Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 108-281 (HR 1303)

August 2, 2004

RULEMAKING AUTHORITY OF JUDICIAL CONFERENCE

An Act To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.

Be it enacted by the Senate and House of Representatives of the United States
of America in Congress assembled,

<< 44 USCA § 3501 NOTE >>

SECTION 1. RULEMAKING AUTHORITY OF JUDICIAL CONFERENCE.

Section 205(c) of the E-Government Act of 2002 (Public Law 107-347; 44 U.S.C. 3501 note) is amended by striking paragraph (3) and inserting the following:

"(3) PRIVACY AND SECURITY CONCERNS.--

"(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form.

"(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

"(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

"(iv) Except as provided in clause (v), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.

"(v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in clause (iv) in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response--

"(I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that--

*890 "(aa) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case; and

"(bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and

"(II) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

"(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

"(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing or electronic conversion shall comply with, and be construed in conformity with, subparagraph (A)(iv).

"(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security."

Approved August 2, 2004.

LEGISLATIVE HISTORY--H.R. 1303:

HOUSE REPORTS: No. 108-239 (Comm. on the Judiciary).

CONGRESSIONAL RECORD:

Vol. 149 (2003): Oct. 7, considered and passed House.

Vol. 150 (2004): July 9, considered and passed Senate.

July 13, Senate vitiated passage.

July 15, considered and passed Senate.

PL 108-281, 2004 HR 1303

END OF DOCUMENT

**AMENDMENT TO THE FEDERAL
RULES OF APPELLATE PROCEDURE**

Rule 25. Filing and Service

(a) Filing.

* * * * *

- (5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

* * * * *

**Rule 9005.1. Constitutional Challenge to a Statute
— Notice, Certification, and Intervention**

Rule 5.1 F. R. Civ. P. applies in cases under the Code.

**Rule 9037. Privacy Protection For Filings Made
with the Court**

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) EXEMPTIONS FROM THE REDACTION REQUIREMENT. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding unless filed with a proof of claim;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by subdivision (c) of this rule;

and

(6) a filing that is subject to § 110 of the Code.

(c) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction.

The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

(d) PROTECTIVE ORDERS. For cause, the court may by order in a case under the Code:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(e) OPTION FOR ADDITIONAL UNREDACTED FILING UNDER SEAL. An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(f) OPTION FOR FILING A REFERENCE LIST. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate

identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(g) WAIVER OF PROTECTION OF IDENTIFIERS.

An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.

challenge, but may not enter a final judgment holding the statute unconstitutional.

- (d) **No Forfeiture.** A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Rule 5.2. Privacy Protection For Filings Made with the Court

- (a) **Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;

- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration

Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
- (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
 - (A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction.

The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file

an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

6 FEDERAL RULES OF CRIMINAL PROCEDURE

Procedure 5(b)(2)(B), (C), or (D), 3 days are added after the period would otherwise expire under subdivision (a).

Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials;

(4) the last four digits of the financial-account number; and

(5) the city and state of the home address.

(b) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

8 FEDERAL RULES OF CRIMINAL PROCEDURE

- (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;
- (7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal charge or is not filed as part of any docketed criminal case;
- (8) an arrest or search warrant; and
- (9) a charging document and an affidavit filed in support of any charging document.

(c) **Immigration Cases.** A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) **Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the

person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

- (1) require redaction of additional information; or
- (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be

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amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 49.1(a) as to the person's own information by filing it without redaction and not under seal.

**[Model Form for Use in 28 U.S.C. § 2254 Cases
Involving a Rule 9 Issue under Section 2254 of Title
28, United States Code]**

(Abrogated.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

12613 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1766
(215) 597-5579

JAN E. DuBOIS
JUDGE

May 3, 2007

Catherine Struve, Professor of Law
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

RE: Appellate Rules Advisory Committee
Filing of Statement of Issues on Appeal by Appellant

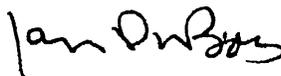
Dear Cathie:

Mike Baylson just sent me a copy of his June 13, 2006 letter to you regarding consideration of an amendment to the Federal Rules of Appellate Procedure which would require the filing of a statement of issues on appeal within a certain period of time after the filing of a notice of appeal. An extra copy of the letter is enclosed.

I have no idea what the Appellate Rules Advisory Committee has done on that issue, but I decided nevertheless to write to you as Reporter for the Appellate Rules Advisory Committee because, in my judgment, it is an excellent suggestion. It is only with a statement of issues on appeal that a district judge knows whether it is necessary or advisable to write an opinion on any issues that will be presented on appeal that have not been decided by opinion. I should add that I suggested such a rule to the Third Circuit a number of years ago, and it was turned down. The Third Circuit never issued anything in writing so I have no idea why the proposal was rejected.

Several years ago, Judge Van Antwerpen and two of his former law clerks authored an article in the *Cardozo Law Review* on the issue - "Plugging Leaks in the Dike: A Proposal for the Use of Supplemental Opinions in Federal Appeals. A copy of that *Law Review* article is enclosed for your information.

Very truly yours,



JED/jfc

Enclosures

cc: Honorable Michael M. Baylson - w/enc. - (via facsimile transmission)
Honorable Franklin S. Van Antwerpen - w/enc. - (via facsimile transmission)



3400 Chestnut Street
Philadelphia, PA 19104-6204

Catherine T. Struve
Professor of Law
(215) 898-7068
cstruve@law.upenn.edu

May 21, 2007

The Honorable Jan E. DuBois
United States District Court
Eastern District of Pennsylvania
12613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1766

Dear Judge DuBois,

Thank you very much for your thoughtful letter concerning the proposed amendment to the Federal Rules of Appellate Procedure. (Please forgive my delay in responding – I have been out of the office and am only now catching up.)

The Appellate Rules Advisory Committee discussed Judge Baylson's proposal at its November 2006 meeting. After considering the benefits and costs of the proposed rule, the Committee decided not to proceed further with the proposal. Among other considerations, concerns were expressed that the proposed rule would create more work for district judges. In preparation for the meeting, the Committee had before it a memo detailing both the possible advantages and the potential costs of the proposal; and many of the insights in that memo were drawn from Judge Van Antwerpen's seminal article on the subject.

I will be sure to share your letter with the Committee, and I know that they will appreciate the fact that you took the time to share your thoughts with us.

Sincerely,

Catherine T. Struve

Via fax and U.S. mail

cc: Honorable Michael M. Baylson (via email)
Honorable Carl E. Stewart (via email)
Honorable Franklin S. Van Antwerpen (via fax)
Peter G. McCabe (via email)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

12613 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1766
(215) 597-5579

JAN E. DuBOIS
JUDGE

May 23, 2007

VIA FACSIMILE TRANSMISSION

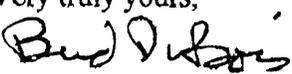
Catherine Struve, Professor of Law
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

RE: Appellate Rules Advisory Committee
Filing of Statement of Issues on Appeal by Appellant

Dear Cathie:

Thank you for your letter of May 21, 2007, regarding a proposed Rule of Appellate Procedure requiring an appellant to file a statement of issues on appeal. I noted with interest the statement in your letter that the Appellate Rules Advisory Committee was concerned about, among other things, a rule that creates more work for district judges. I can assure you that is not what I had in mind. Under the proposed rule which I recommended years ago, and again in my letter to you, I was focused only on the filing of a statement of issues by the appellant. That would enable a district judge to write on the case if he decided it was necessary. To the extent that is deemed to be creating more work for district judges, I suggest that it is work which would result in more complete analysis and understanding of the issues on appeal, a goal to be desired.

This letter is not intended to be the equivalent of an application for reconsideration (can I do that under the present Rules?). I simply wanted you to be aware of the position of one judge who has a deep rooted interest in making the judicial system work well.

Very truly yours,


JED/jfc

cc: Honorable Michael M. Baylson - w/enc. - (via facsimile transmission)
Honorable Franklin S. Van Antwerpen - w/enc. - (via facsimile transmission)



3400 Chestnut Street
Philadelphia, PA 19104-6204

Catherine T. Struve
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(215) 898-7068
cstruve@law.upenn.edu

May 31, 2007

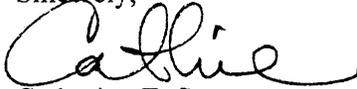
The Honorable Jan E. DuBois
United States District Court
Eastern District of Pennsylvania
12613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1766

Dear Judge DuBois,

Thank you for your letter of May 23 concerning the proposed Federal Rule of Appellate Procedure regarding a statement of issues on appeal. In response, I did want to assure you that the Committee had before it a proposal materially similar to yours, in the sense that Judge Baylson's proposal, like yours, would permit but not require the judge to issue a supplemental opinion.

I see that the Pennsylvania Supreme Court this month adopted amendments designed to address some of the criticisms that practitioners have leveled at Pennsylvania Rule of Appellate Procedure 1925(b). It will be interesting to see how practice under that Rule continues to develop.

In the meantime, I will share our correspondence with the Committee, and I am grateful to have the benefit of your insights concerning this proposal.

Sincerely,

Catherine T. Struve

Via fax and U.S. mail

cc: Honorable Michael M. Baylson (via email)
Honorable Carl E. Stewart (via email)
Honorable Franklin S. Van Antwerpen (via fax)
Peter G. McCabe (via email)

