ADVISORY COMMITTEE
ON
APPELLATE RULES

Charleston, SC
November 13-14, 2008

Agenda for Fall 2008 Meeting of
Advisory Committee on Appellate Rules
November 13-14, 2008
Charleston, SC

I. Introductions

II. Approval of Minutes of April 2008 Meeting

III. Report on June 2008 Meeting of Standing Committee

IV. Other Information Items

V. Discussion Items

A. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

B. Item No. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007)

C. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

E. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

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

VI. Additional Old Business and New Business

A. Item No. 08-AP-A (proposed FRAP 3(d) amendment concerning service of notices of appeal)

B. Item No. 08-AP-C (possible changes to FRAP 26(c)'s "three-day rule")

C. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

D. Item No. 08-AP-H ("manufactured finality" and appealability)

E. Item No. 08-AP-I (discussion of the uses of postjudgment motions)

F. Item No. 08-AP-J (rules implications of mandatory conflict screening policy)

G. Item No. 08-AP-K (privacy rules and alien registration numbers)

H. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)

I. Item No. 08-AP-L (possible amendment to FRAP 6(b)(2)(A)(ii))

J. Item No. 08-AP-M (interlocutory appeals in tax cases)

K. Discussion of long-range planning issues

L. Discussion of draft Best Practices Guide to Using Subcommittees

VII. Schedule Date and Location of Spring 2009 Meeting

VIII. Adjournment

Advisory Committee on Appellate Rules
Table of Agenda Items — October 2008

FRAP Item	Proposal	Source	Current Status
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	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 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee Discussed and retained on agenda 04/07 Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08
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	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 Discussed and retained on agenda 04/08
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	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 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	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

FRAP Item	Proposal	Source	Current Status
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)	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 Approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	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 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	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 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
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.)	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 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08
06-08	Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc.	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08

FRAP Item	Proposal	Source	Current Status
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	Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08
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	Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 FRAP 22 amendment published for comment 08/07 Revised FRAP 22 draft approved 04/08, contingent on approval of corresponding amendments to the rules for § 2254 and § 2255 proceedings FRAP 22 amendment approved by Standing Committee 06/08 FRAP 22 amendment approved by Judicial Conference 09/08
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Awaiting initial discussion
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Awaiting initial discussion
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Awaiting initial discussion
08-AP-E	Amend FRAP 4(a) so that an original NOA encompasses dispositions of any post-trial motions	Public Citizen Litigation Group	Awaiting initial discussion
08-AP-F	Amend FRAP 4(a) so that an original NOA encompasses any post-appeal amendments of the judgment	Members of Seventh Circuit Bar Association	Awaiting initial discussion
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Awaiting initial discussion
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Awaiting initial discussion
08-AP-I	Consider uses of postjudgment motions	Prof. Daniel Meltzer	Awaiting initial discussion
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Awaiting initial discussion
08-AP-K	Consider privacy issues relating to alien registration numbers	Public.Resource.Org	Awaiting initial discussion
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Awaiting initial discussion
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Awaiting initial discussion

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS
October 1, 2008

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Prof. Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Rd. Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:	**Reporter:**
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Members:	
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard Columbus, OH 43215	Honorable Kermit Edward Bye United States Circuit Judge United States Court of Appeals Quentin N. Burdick United States Courthouse Suite 330 655 First Avenue North Fargo, ND 58102
Honorable T.S. Ellis III United States District Judge United States District Court Albert V. Bryan United States Courthouse 401 Courthouse Square Alexandria, VA 22314-5799	Honorable Randy J. Holland Associate Justice Supreme Court of Delaware 34 The Circle Georgetown, DE 19947
Dean Stephen R. McAllister University of Kansas School of Law 1535 West 15th Street Lawrence, KS 66045	Mark I. Levy, Esquire Kilpatrick Stockton LLP 607 14th Street, N.W., Suite 900 Washington, DC 20005-2018
Maureen E. Mahoney, Esquire Latham & Watkins LLP 555 11th Street, N.W., Suite 1000 Washington, DC 20004-1304	James F. Bennett, Esquire Dowd Bennett LLP 7733 Forsyth, Suite 1410 St. Louis, MO 63105
Acting Solicitor General Honorable Gregory G. Garre (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 5143 Washington, DC 20530	Douglas Letter Appellate Litigation Counsel Civil Division U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 7513 Washington, DC 20530

ADVISORY COMMITTEE ON APPELLATE RULES (CONT'D.)

Advisor:	**Liaison Member:**
Charles R. Fulbruge III Clerk United States Court of Appeals 207 F. Edward Hebert Federal Building 600 South Maestri Place New Orleans, LA 70130	Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Date
Carl E. Stewart Chair	C	Fifth Circuit	Member: 2001 Chair: 2005	---- 2009
James Forrest Bennett	ESQ	Missouri	2005	2011
Kermit Edward Bye	C	Eighth Circuit	2005	2011
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2009
Gregory G. Garre*	DOJ	Washington, DC	----	Open
Randy J. Holland	JUST	Delaware	2004	2010
Mark I. Levy	ESQ	Washington, DC	2003	2009
Maureen E. Mahoney	ESQ	Washington, DC	2005	2011
Stephen R. McAllister	ACAD	Kansas	2004	2010
Jeffrey S. Sutton	C	Sixth Circuit	2005	2011
Catherine T. Struve Reporter	ACAD	Pennsylvania	2006	Open
Principal Staff: John K. Rabiej 202-502-1820				

* Ex-officio

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Jeffery P. Hopkins	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	James N. Ishida Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544	Timothy K. Dole Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Ms. Gale Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	Adriane Reed Program Assistant Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the United States Court Washington, DC 20544	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the United States Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Committee on Rules of Practice and Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB I-II

DRAFT

Minutes of Spring 2008 Meeting of
Advisory Committee on Appellate Rules
April 10 and 11, 2008
Monterey, California

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 10, 2008, at 8:30 a.m. at the Monterey Plaza Hotel in Monterey, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Paul D. Clement attended the meeting on April 10, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present on April 10 and represented the Solicitor General on April 11. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart noted the Committee's appreciation that Solicitor General Clement was attending the meeting. The Reporter observed that congratulations are due to Judge Stewart for his recent receipt of the 2007 Celebrate Leadership Award from the Shreveport Times and the Alliance for Education; the award honors top community leaders. Mr. Levy reported that Justice Alito sent his greetings to the Committee.

II. Approval of Minutes of November 2007 Meeting

The minutes of the November 2007 meeting were approved, subject to some minor edits to the minutes' discussion of model local rules.

III. Report on January 2008 Meeting of Standing Committee

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[1] Dean McAllister attended the meeting on April 10 but was unable to be present on April 11.

Judge Stewart reported that the Standing Committee, at its January 2008 meeting, approved for publication the proposed amendment to Rule 29 concerning amicus brief disclosures. Judge Stewart reminded the Committee that the proposed amendment to Rule 1(b) concerning the definition of the term "state" was not submitted to the Standing Committee in January, because of the need for the Advisory Committee to consider a few refinements to the proposal.

Judge Stewart invited Judge Hartz to update the Committee concerning the January meeting of the Standing Committee subcommittee, which Judge Hartz chairs, on issues relating to the sealing of entire cases. Judge Hartz reported that the subcommittee has decided to limit its focus to cases that are entirely sealed; that decision, though, does not eliminate all questions of scope, since there may in some instances be questions as to what constitutes sealing of the entire case (for example, such issues may arise in connection with bankruptcy proceedings). Timothy Reagan of the Federal Judicial Center is preparing a study to inform the subcommittee's further deliberations. A representative from a district court clerk's office will be assisting the subcommittee, as will Jonathan Wroblewski of the DOJ.

Judge Rosenthal observed that the Standing Committee had a relatively light agenda for its January meeting. This enabled the Committee to engage in a preliminary discussion of the Civil Rules Committee's projects concerning Civil Rules 26 and 56.

As an additional update on events since the Advisory Committee's November 2007 meeting, Judge Stewart reported that he had written to William Thro, the Virginia State Solicitor General, to let him know that the Committee, after careful study, has determined not to take any additional action at this time on the proposal 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.

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

Judge Stewart noted that most circuits have now responded to his letter concerning circuit-specific briefing requirements. The letter has served the goal of drawing each circuit's attention to the issue, and it is to be hoped that the court of appeals' transition to the case management / electronic case filing system will provide an occasion for each circuit to review whether its local briefing requirements are necessary.

V. Action Items

A. For final approval

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

Judge Stewart invited the Reporter to update the Committee on the overall status of the time-computation project. The project's core innovation is to adopt a days-are-days approach to the computation of all time periods, including short time periods; to offset the change in the method of computing short time periods, the project also includes a package of proposals to alter rule-based and statutory deadlines. More than twenty public comments were received concerning the time-computation project. Five commentators, including Chief Judge Frank H. Easterbrook and the Public Citizen Litigation Group, commented favorably on the overall project; these commentators welcome the project's goal of simplifying and clarifying the time-computation rules. Four commentators commented unfavorably: The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York argued against the adoption of the time-computation proposals generally, while three other commentators (including Professor Alan Resnick) argued against adopting a days-are-days approach in the bankruptcy context. Those commenting unfavorably argue that the current system works well; that the transition to the proposed days-are-days counting method will cause great disruption due to the need to alter not only deadlines in the national rules but also deadlines in statutes, local rules and standing orders; and that to the extent that the current time-counting system can pose difficulties, this could be ameliorated by designing software that could be integrated into the CM/ECF system and that could perform the requisite calculations.

A number of commentators have argued strongly that the proposed days-are-days time-computation system should not be adopted unless and until the necessary changes have been made to relevant deadlines, not only in the national rules but also in statutes and local rules. The DOJ has stressed this point, asserting that if the time-counting changes take effect without the necessary changes to statutory time periods, the purposes of some of those statutes could be frustrated. The DOJ has submitted a list of the statutory periods that it considers to be priorities for amendment.

The Time-Computation Subcommittee carefully considered these concerns. Members discussed the arguments leveled against the project, and noted that these concerns were very similar to those that had been fully aired during the advisory committees' earlier consideration of the project. The Subcommittee therefore recommends that the project proceed. The Subcommittee takes very seriously the concerns expressed concerning time periods set by statutes and by local rules. The Subcommittee recommends that the project proceed on the assumption that the amendments will stay on track to take effect December 1, 2009. But to that end, it is essential that each Advisory Committee vote, at its spring 2008 meeting, on a list of the statutory periods (relevant to that Committee's field of expertise) which Congress should be asked to lengthen. Judge Rosenthal observed that, in addition, plans are underway to facilitate

the work that will be necessary to amend each circuit's and district's local rules. Mr. Letter noted that some statutory periods may need to be changed but different groups may not agree on what the nature of the change should be; he asked whether those provisions would be omitted from the list submitted to Congress. Judge Rosenthal stated that so far, the goal in assembling the list has been to identify candidates that (1) are used often enough to make it worthwhile to lengthen them; (2) are currently calculated using the Rules' time-computation method; and (3) are non-controversial. The list of proposed changes compiled by the Criminal Rules Committee will be run past the National Association of Criminal Defense Lawyers for their views. The hope is to work out any differences of opinion in advance, so as to be able to present to Congress a list of non-controversial proposals. Judge Rosenthal noted that discussions have already been held with legislative staffers about the general concept of the time-computation project, and the staffers gave the project a very warm reception; their view is that the proposed legislation makes sense and should not be problematic, particularly if it does not include controversial items. The discussions have included a timetable for taking the time-computation proposals to Congress in order to coordinate with a December 1, 2009 effective date for the project as a whole.

The Reporter noted that the Time-Computation Subcommittee had discussed possible approaches to the compilation of the list of statutory periods for amendment. The majority view on the Subcommittee is that the list should not include all of the possibly affected statutes, but rather should target those statutory periods that are a high priority for amendment given the frequency of their use and the relative importance of adjusting the time periods in question. She noted, however, that one member of the Subcommittee, Mr. Levy, had argued that the approach should instead be to include all the affected statutes – whether or not they are frequently used – unless a change to a particular statute would be so controversial as to threaten the overall viability of the proposal. A Committee member expressed agreement with Mr. Levy's views, stating that it seems unfair to exclude a statute from the list just because that statute does not affect a large number of practitioners. Mr. Clement asked whether there might be some merit to an approach that takes as its default position lengthening every potentially affected time period. The Reporter noted that not all periods listed on the long list of potentially affected statutes are actually in need of lengthening. In compiling that long list, the Reporter erred on the side of inclusivity; thus, some periods on the list may not actually be periods that are currently computed using the Rules' time-computation provisions. The Appellate Rules Deadlines Subcommittee's experience confirms this fact. For example, the Subcommittee examined some statutory periods concerning the publication in the Federal Register of certain Federal Circuit decisions concerning customs-related issues, and concluded that no lengthening of these periods would be appropriate, in part because those who practice in this field do not currently compute the periods using Rule 26(a). Mr. Rabiej noted that it will be a delicate task to synchronize the passage of legislation with the adoption of the package of amendments.

The Reporter also noted that a number of the public comments suggested ways of altering the time-computation template. The Time-Computation Subcommittee considered those suggestions but ultimately decided not to recommend any changes to the template rule or note.

Three suggestions were rejected by Subcommittee consensus. The first was to change

the definition of the end of the last day (for purposes of electronic filing) from “midnight” to “11:59:59"; the Subcommittee does not believe that retaining the reference to “midnight” will be misleading. The second suggestion was to set the end of the last day at midnight for all filers, not just for electronic filers; the Subcommittee believes that this would not be appropriate as a default rule, and that for districts which wish to use a drop-box and opt out of the default rule, this can be accomplished by local rule. The third suggestion was to change the text of the Rule to emphasize that the Rule’s time-computation provisions do not apply to date-certain deadlines; the Subcommittee believes that this fact is already clear from the text and Note.

Two other comments prompted some disagreement within the Subcommittee but did not receive majority support. In response to the comments submitted, the Subcommittee discussed whether it would be advisable to add language to the Note to make it even clearer that the national time-computation rules trump local rules’ time-computation provisions (such as local rule provisions that set time periods in business days). Though there was some support for such an addition, others felt that it would not be desirable to add Note language concerning what is, in essence, a transitional issue concerning the need for conforming changes to the local rules. Instead, the materials that are provided to each local rulemaking body will make clear that if local rules set a time-counting method that differs from the national rules’ approach (for example, by setting time periods in business days) those local rules should be amended. The Subcommittee also discussed the fact that the inclusion of state holidays within the definition of legal holidays may pose a trap for some litigants when a backward-counted deadline is at issue. This is because if a backward-counted deadline ends on a legal holiday, one must continue counting backwards until one reaches a day that is neither a legal holiday nor a weekend day; thus, if a backward-counted deadline ends on a state holiday, that will mean that the deadline actually falls *before* the state holiday – but a litigant who is unfamiliar with the state holiday in question might not recognize this fact. To eliminate this possible trap for the unwary, the Subcommittee discussed whether it would be advisable to redraft subdivision (a)(6) so that state holidays count as legal holidays only for forward-counted deadlines and not for backward-counted ones. Some Subcommittee members, however, felt that such a change would add excessive complexity and confusion, so the change was rejected.

Judge Stewart invited Judge Sutton, who chairs the Appellate Rules Committee’s Deadlines Subcommittee, to introduce that Subcommittee’s report concerning deadlines that should be amended in the light of the proposed new time-computation rules. Judge Sutton noted that the Appellate Rules Committee has already concluded that it should go along with the time-computation project, despite some members’ doubts, because the Appellate Rules should take the same approach as the other sets of Rules. The Deadlines Subcommittee has taken as its goal the lengthening of the Appellate Rules deadlines so as to offset the shift in time-computation approach.

Judge Sutton noted that a number of comments had been submitted on the Appellate Rules deadlines proposals, but that, for the reasons outlined in the Reporter’s memo on behalf of the Subcommittee, the Subcommittee had decided to recommend only one change in the proposals as published. The Subcommittee does recommend altering the proposals in response

to a concern raised by Howard Bashman with respect to the timing for motions that toll the time for taking a civil appeal. The Civil Rules Committee had published proposed amendments that would extend the deadline for such motions to 30 days – i.e., the same time period as that for taking a civil appeal (when the United States and its officers or agencies are not parties). Mr. Bashman points out that if the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed; such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

Judge Rosenthal reported that the Civil Rules Committee discussed this issue at its April 7-8 meeting and determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem raised by Mr. Bashman. The Civil Rules Committee, however, wishes to defer to the Appellate Rules Committee's view on this issue, and so if the Appellate Rules Committee feels that 28 days is too close to 30 days, then the Civil Rules Committee's second choice would be to set the tolling motions' deadlines at 21 days.

A number of Committee members observed that 28 days is very close to 30 days, that the timing would be very tight if the tolling-motion deadline is set at 28, and that in that event it would be likely that appellants would still end up filing protective notices of appeal because they would be unsure whether or not another party would file a tolling motion. Responding to a member's observation that a 28-day deadline could permit a party to ascertain via the CM/ECF system whether another party has filed a tolling motion before the 30-day deadline for filing a notice of appeal is reached, Mr. Fulbruge pointed out that a large number of litigants are pro se litigants who will not be participating in CM/ECF.

An attorney member stated that based on his experience with the amount of work involved in preparing postjudgment motions, he favors extending the deadline for such motions to 28 days; he asked whether a possible way to resolve Mr. Bashman's concern might be to ask Congress to extend the 30-day deadline for civil appeals to 35 days and to make a corresponding change to the same deadline in Rule 4. Two other members expressed support for such a possibility. However, another attorney member countered that the 30-day time limit for civil notices of appeal is deeply ingrained in practitioners' minds and it would be unwise to tamper with that familiar deadline. Solicitor General Clement noted that he can see the benefits of extending the tolling-motion deadline to 28 days; that the proximity of the 28-day and 30-day deadlines is unlikely to be a big problem, especially since counsel will often coordinate with one another and will thus know whether a tolling motion will be made; and that he is not sure there is enough reason to alter the 30-day appeal time limit. The members who favor consideration of extending the appeal-time deadline responded that counsel do not always coordinate well with one another, and that since the time-computation project will result in the alteration of other deadlines there should not be a downside to altering the 30-day deadline as well. It was pointed out, however, that altering the 30-day deadline would be a significant change, and one that was

not mentioned when the Appellate Rules deadlines proposals were published for comment. A member noted that if the Committee agrees to the 28-day time period for the tolling motions, it can continue to review the matter to see whether the 28-day and 30-day deadlines pose a problem in practice once the time-computation amendments go into effect.

A motion was made and seconded to approve the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days as well. The motion passed by a vote of 7 to 1.

Judge Sutton noted that the Advisory Committee has been asked to finalize its list of statutory periods that should be amended in the light of the proposed change in time-computation method. The statutory provisions that warrant particular attention are the 7-day deadline in 28 U.S.C. § 2107(c); the "not less than 7 days" period in 28 U.S.C. § 1453(c); the 72-hour, 5-day and 7-day time periods in 18 U.S.C. § 3771(d); the 4-day and 10-day periods in the Classified Information Procedures Act ("CIPA") § 7(b); and the 4-day and 10-day periods in 18 U.S.C. § 2339B(f)(5)(B).

The Reporter noted that the Committee had already approved the proposal with respect to the 7-day period in Section 2107(c). This period, which constitutes one of the time limits on making a motion to reopen the time to appeal, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(b). Section 1453's "not less than 7" day period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a drafting error. Section 1453 should be amended to set the time limit at "not more than 10 days" to correct the drafting error and offset the shift in time-computation method. 18 U.S.C. § 3771(d) involves the procedures for appellate review of district court determinations concerning rights provided by the Crime Victims' Rights Act (CVRA). 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. 18 U.S.C. § 3771(d)(3) sets a 72-hour deadline for the court of appeals to decide a victim's mandamus petition and a 5-day limit on continuances in the district court. The DOJ and the Criminal Rules Committee's deadlines subcommittee recommend extending the 10-day mandamus petition deadline, but do not recommend extending the other CVRA deadlines. CIPA § 7 sets a 10-day deadline for pretrial appeals relating to orders concerning disclosure of classified information, and sets 4-day deadlines for the court of appeals to hear argument and render decision with respect to appeals taken during trial. 18 U.S.C. § 2339B(f)(5)(B) sets 10-day and 4-day deadlines (similar to CIPA § 7) relating to certain appeals of orders concerning classified information in civil actions brought by the United States concerning the provision of material support to foreign terrorist organizations. The DOJ has recommended extending the CIPA deadlines and the material-support 4-day deadlines. The Criminal Rules Committee's deadlines subcommittee has recommended amending the 4-day deadlines to state that they should be computed by excluding intermediate weekends and holidays; the subcommittee has asked the DOJ to consider further its recommendation concerning CIPA's 10-day deadline.

The Committee discussed the CVRA's 72-hour deadline for decisionmaking by the court

of appeals. Mr. Fulbruge noted that the brevity of this deadline imposes a significant burden on the court. A judge noted, however, that in practice the attorneys involved might not object if the court takes longer than 72 hours. A member questioned the wisdom of including this deadline among the list of statutory provisions that should be amended.

Judge Stewart asked the Committee to vote on each statutory deadline separately. The Committee by voice vote approved the following requests concerning the statutory deadlines. The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days. The "not less than 7" day period in 28 U.S.C. § 1453(c) should be changed to "not more than 10" days. The four-day deadlines in CIPA and the material-support statute should be amended to specify that intermediate weekends and holidays are excluded. Concerning the 10-day deadlines in CIPA and the material-support statute, the Committee voted to defer to the views of the Criminal Rules Committee. By consensus, the Committee decided not to recommend any changes to the 72-hour or 5-day periods in the CVRA; but the Committee voted to recommend changing the CVRA's 10-day mandamus petition deadline to 14 days.

By voice vote, the Committee approved the amendment to Rule 26(a) as published; later in the meeting, the Committee voted to delete from proposed Rule 26(a)(6)(B) the definition of the term "state" (because the Committee voted to approve for publication a FRAP-wide definition of that term). The Committee voted to approve the package of Rule deadlines changes as published with one alteration. The one alteration, as discussed above, is that instead of changing the cutoff time in Rule 4(a)(4)(A)(vi) to 30 days, the Committee voted to change that time period to 28 days.

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

Judge Stewart invited Judge Sutton to introduce the Appellate Rules Deadlines Subcommittee's recommendation concerning the proposed amendment to Rule 26(c)'s three-day rule. The amendment would clarify the interaction between the three-day rule and Rule 26(a)'s time-computation provisions, and would bring Rule 26(c)'s version of the three-day rule into conformity with the three-day rules in Civil Rule 6 and Criminal Rule 45. Two comments can be taken to express support for this amendment. On the other hand, Chief Judge Easterbrook commented that Rule 26(c)'s three-day rule should be abolished altogether. Judge Sutton noted that Chief Judge Easterbrook's criticisms of the three-day rule are forceful, especially as they apply to circuits that have made the transition to electronic filing; he suggested that this issue should be placed on the Committee's study agenda.

By voice vote, the Committee approved the amendment to Rule 26(c) as published (subject to style changes which had been suggested by Professor Kimble) and placed on its study agenda the proposal to eliminate the three-day rule.

3. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative

rulings)

Judge Stewart invited the Reporter to introduce the published amendment adding new Rule 12.1. The proposal grows out of a suggestion by the Solicitor General in 2000 and 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.

Proposed Appellate Rule 12.1 corresponds with proposed Civil Rule 62.1, which was approved at the Civil Rules Committee's April 7-8 meeting. The Civil Rules Committee made a change to the Note of Rule 62.1 as published: Instead of stating that the district court "can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue," the Note now states that the district court "can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue."

A number of comments were received concerning the proposals. The Public Citizen Litigation Group suggests altering the proposal to bar the court of appeals from dismissing an appeal unless the movant expressly requests dismissal. Public Citizen also suggests that when the Note discusses the need for a separate notice of appeal with respect to the court's disposition of a motion, the Note should refer to the possibility that an amended notice of appeal may be used. The DOJ has expressed support for the indicative-ruling proposal in the civil context. However, the Solicitor General's letter voices concern over the possibility that new Rule 12.1 might be misused in the criminal context. The Solicitor General suggests that the second paragraph of Rule 12.1's Note be revised to read: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in United States v. Cronic, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)." Members of the Seventh Circuit Bar Association's Rules and Practice Committee have suggested that if the new rules are aimed primarily at Civil Rule 60 motions, then the comments should mention that fact so as to avoid other motions being made under the new rules. Professor Bradley Shannon has questioned the propriety of the indicative-ruling procedure in the light of principles of American procedure, if not principles of justiciability.

The Reporter did not recommend adopting Public Citizen's suggestion that the court of appeals be barred from dismissing an appeal unless the movant expressly requests dismissal. Public Citizen's concern about unwarranted dismissals of appeals is understandable, but on the other hand there may be reasons to preserve some flexibility for the court of appeals. No change was warranted in response to the suggestion by members of the Seventh Circuit Bar Association committee; the Notes to Rules 62.1 and 12.1 already focus on the use of the indicative-ruling mechanism in the Civil Rule 60(b) context, but a deliberate choice has been made not to limit the Rules to that context. The Reporter also disagreed with Professor Shannon's critique of the appropriateness of the indicative-ruling practice; she noted that the practice is well established and does not raise justiciability problems.

The Reporter did recommend that the Committee adopt changes to Rule 12.1's Note to respond to suggestions by Public Citizen and by the Solicitor General. Specifically, she recommended altering the Note as suggested by Public Citizen, so that the first sentence of the last paragraph would read: "When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion." She also recommended replacing the existing second paragraph of the Note with the following language: "The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c)." This language differs from that suggested by the Solicitor General because rather than stating that the Rule "is limited" to those three categories of application in the criminal context, it states the Committee's expectation, leaving room for the possibility that other uses may arise.

The Solicitor General stated that the DOJ would prefer its suggested Note language to that proffered by the Reporter; in the DOJ's view, "anticipates" – the term used in the Reporter's suggested formulation – weakens the language undesirably. A member asked how the DOJ could be sure that the three situations listed in its suggested language are the only criminal contexts in which the indicative-ruling practice might prove useful. A judge member questioned how likely the indicative-ruling practice is to be used in the criminal context. Another judge observed that in a recent Tenth Circuit decision, the court abated an appeal in order to permit the appellant to file a Section 2255 motion in the district court; he observed that it would be undesirable for the Note to state that such a procedure is foreclosed. Another judge member asked the DOJ to explain the reason for its concern about the Reporter's suggested Note language. Mr. Letter responded that the DOJ is concerned that without limiting language in the Note, the indicative-ruling mechanism might be misused by jailhouse litigants. The judge member responded that his instinct is to avoid defining or limiting the uses to which the mechanism can be put. The Solicitor General asked whether the Committee would be willing to say "envisions" rather than "anticipates." A member wondered whether, given the DOJ's concerns, it might be better to remove the Note's reference to the criminal context. It was noted, however, that the Criminal Rules Committee is planning to consider whether to adopt an indicative-ruling provision for the Criminal Rules; the Criminal Rules Committee might benefit from the opportunity to observe how the practice develops under new Appellate Rule 12.1. A member expressed support for the term "anticipates." By voice vote, the Committee decided to adopt the Reporter's suggested changes to the Note language for the Note's second paragraph and for the first sentence of the Note's last paragraph.

A member questioned the Note's statement that "[a]fter an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand." She observed that if a timely tolling motion is filed – or a Rule 60(b) motion is filed within the current 10-day time limit – then the effectiveness of the notice of

appeal is suspended until the district court rules on the last such remaining motion. The Committee determined, subject to later consultation with the Civil Rules Committee, that the Note language should say "while it [the appeal] remains pending and effective" – so as to flag the fact that a notice of appeal is not effective while a timely tolling motion remains pending. After the meeting, the Committee, in consultation with the Civil Rules Committee, reconsidered this change. By email circulation, the Committee deleted "and effective" and added a new parenthetical at the end of the Note's first paragraph. That parenthetical reads: "(The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)"

Another member provided some stylistic edits to paragraphs one and three of the Note. The Committee also approved changes to paragraphs one and five of the Note that correspond to the changes made by the Civil Rules Committee with respect to proposed Civil Rule 62.1.

4. 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 published amendment to Appellate Rule 4(a)(4)(B)(ii). The proposed amendment is designed to fix a problem (which dates from the 1998 restyling) by replacing the Rule's current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "a judgment's alteration or amendment upon" such a motion.

Three comments were submitted on this proposal. Peder K. Batalden notes that amended Rule 4(a)(4)(B)(ii) "[t]ether[s] the time to appeal from the *amended judgment* to the entry of the *order*" disposing of the last remaining tolling motion, and he argues that this can create hardship when a long period elapses between the entry of the order and the entry of the amended judgment. Mr. Batalden suggests "delet[ing] entirely the language 'or a judgment's alteration or amendment upon such a motion' from the amended rule." Public Citizen suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion." Likewise, participants in a Seventh Circuit Bar Association committee lunch suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

The Reporter recommended that the Committee approve the proposal as published. The commentators' further suggestions for amending Rule 4(a) are separable from the current proposal and would go well beyond it. They can be added to the Committee's agenda for further study.

By voice vote, the Committee approved the proposal as published. By consensus, the

commentators' suggestions were placed on the Committee's study agenda.

5. Item No. 07-AP-C (FRAP 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 published amendment to Rule 22. The amendment deletes from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability (COA) or state why a certificate should not issue. The relevant requirement will be delineated in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255. The proposed amendment to Rule 22 was published in tandem with the proposed amendments to Rule 11(a) of the habeas and Section 2255 rules.

Professor Kimble provided some suggestions on the style of the Rule 22 proposal. The other comments submitted on the proposals were uniformly negative; their criticisms focused on the fact that the proposed amendments to Rule 11(a) would require the district judge to rule on the COA issue at the same time that he or she decides the merits. The Massachusetts Attorney General fears that these proposed amendments "would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal." Also, she suggests that the rules should give petitioners an opportunity to narrow the claims on which they seek a COA. Other commentators argued strongly that it is important for the petitioner to have a chance to read the district court's merits decision and brief the COA issue before the district court decides whether to grant a COA.

The Reporter noted that the Criminal Rules Committee's writs subcommittee has decided to recommend republication in order to seek comment on a different proposal; the new proposal will still direct the district judge to rule on the COA issue at the time of the merits decision, except that it will give the judge the option of directing the parties to submit arguments on whether or not a COA should issue. The new proposal will also permit a party to move for reconsideration within 14 days if a COA is issued or denied at the same time as the merits decision is announced. The published Rule 22 amendment would be compatible with this proposal.

The Committee by voice vote approved Rule 22 as published, subject to Professor Kimble's style changes.

B. For publication

1. Item No. 07-AP-D (FRAP 1 – definition of "state")

Judge Stewart invited the Reporter to introduce the proposed amendments concerning the

definition of the term "state." The proposal to define the term "state" grew out of the time-computation project's discussion of the definition of "legal holiday"; that definition includes state holidays, and it was thought useful to define "state," for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions. As published for comment, the proposed amendment to Rule 26 includes such a definition for purposes of the time-computation rule. At its November 2007 meeting, the Committee approved a new Appellate Rule 1(b) that would adopt such a definition for the Appellate Rules in general. However, because it seemed advisable for the Committee to consider a few additional matters in connection with the Appellate Rule 1(b) proposal, that proposal was not presented to the Standing Committee at its January 2008 meeting.

Proposed Appellate Rule 1(b) is similar to the proposed amendment to Civil Rule 81 that was published for comment in summer 2007. The Civil Rules Committee invited comment on whether the term "possession" should be included in the definition. The DOJ, in its comment on the Civil Rule 81 amendment, opposed the inclusion of the term "possession." The DOJ argues that possession might be incorrectly interpreted to include U.S. military bases overseas. The Civil Rules Committee, at its April 7-8 meeting, deleted the term "possession" from the Civil Rule 81 amendment, and, with that deletion, approved the proposal. Deleting the term "possession" from the Appellate Rule 1(b) definition seems harmless, since it appears that "possession" is no longer a commonly used term and is equivalent to "territory."

In light of proposed Rule 1(b), the Committee should also consider amending Rule 29(a) to remove the current reference to "a ... Territory, Commonwealth, or the District of Columbia," since that will be redundant once the term "state" is defined in Rule 1(b). When publishing the proposed amendments for comment, the Committee should highlight the fact that the term "state" is used in Rules 22, 44, and 46, so that those who comment can take those provisions into account. New Rule 1(b) should not cause any problem concerning the application of Rule 22; if an entity that is encompassed within Rule 1(b)'s definition of "state" is not subject to the federal habeas framework, the question of Rule 22's applicability to that entity will simply never arise. There is no reason to think that Rule 1(b)'s definition would cause problems in the application of Rule 29(a) (concerning amicus filings), Rule 44 (concerning constitutional challenges to state statutes), or Rule 46 (concerning admission to the bar). In any event, comment can be solicited on these questions.

The Committee by voice vote approved proposed Rule 1(b) for publication, subject to the deletion of the term "possession," and likewise approved the proposed amendment to Rule 29(a) for publication. The Committee also voted to delete from proposed Rule 26(a)(6)(B) the definition of the term "state."

VI. Discussion Items

A. 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 her memo concerning the proposal to amend Appellate Rules 4(a)(1)(B) and 40(a)(1).

The Reporter stated that as a policy matter, the proposed amendments seem like a very good idea. It would be useful to make clear that the longer periods for taking civil appeals or seeking rehearing apply to suits involving federal employees as well as federal officers, and apply to certain types of individual-capacity suits as well as to official-capacity suits. (As highlighted by Public Citizen's comments, it would be desirable to clarify whose view of the facts should control for purposes of determining whether an individual-capacity suit qualifies for the longer periods.) But though the proposals make good sense as a policy matter, it is also necessary to consider the implications of the fact that the 30-day and 60-day appeal periods are set by statute as well as by rule. Under the Supreme Court's decision in *Bowles v. Russell*, that raises the question whether the proposed amendment to Rule 4(a)(1)(B) would enlarge the availability of the 60-day period beyond what is permitted by the relevant statute – 28 U.S.C. § 2107. Analysis of the statute's text and history suggests that the statutory term "officer" may not include all federal "employees." The evidence is less conclusive on the question of individual-capacity suits, and here there is a circuit split, with the Second Circuit taking a narrow view and the Fourth, Fifth and Ninth Circuits taking a broader view.

The Solicitor General reiterated the DOJ's view that the proposals are desirable as a policy matter. He stated that the DOJ will continue to study the issues raised by the Reporter, and to determine whether it wishes to advocate adoption of some portion of the proposals (such as the proposed amendment to Rule 40 concerning rehearing).

Members discussed various aspects of the proposed formulation. A judge asked whether there might be an alternative to referring to individual-capacity suits for acts or omissions occurring in connection with duties performed on the United States' behalf. Would a more functional approach be better – for example, to draw the line at whether the United States is representing the defendant? It was suggested, though, that such a formulation might not capture all the instances in which the extra time might be useful to the government. A member suggested that when revising the proposal, one should also think about mentioning *former* officers and employees. That member also stated that the Reporter's suggested formulation for determining whether an individual-capacity suit qualifies for the longer periods is flawed because it specifies that the allegations in question must be "colorable"; such an invitation to the court to second-guess the factual validity of the allegations would give rise to uncertainty concerning the applicability of the longer period. A member suggested that a better formulation would be to ask whether a defendant claims that the act occurred in connection with federal duties. A member suggested that where there is ambiguity concerning the scope of the statute's 60-day period, it might be appropriate for the rulemakers to amend Rule 4 to clarify that ambiguity.

By consensus, the proposed amendments to Rules 4 and 40 were retained on the Committee's study agenda.

B. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to update the Committee on developments relating to *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

Bowles' implications continue to play out in the Supreme Court and in the lower federal courts. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), did not directly concern appeal times; rather, it concerned the statute of limitations for suits filed against the United States in the Court of Federal Claims. But because the question was whether that statute of limitations is jurisdictional and thus non-waivable, both the argument and the Court's opinion touched upon *Bowles*. The *John R. Sand & Gravel* Court held that the Court of Federal Claims limitation statute does set a jurisdictional time limit which must therefore be raised by the court *sua sponte*. In the process of distinguishing between limitations periods that are waivable and those that are non-waivable, the Court stated that "Some statutes of limitations ... seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as ... promoting judicial efficiency, see, e.g., *Bowles v. Russell*." This description of *Bowles* is interesting since it seems to depart from the *Bowles* Court's stress on the statutory nature of the deadline that was at issue in that case.

Jurisdictional issues are also implicated in *Greenlaw v. United States*. Greenlaw appealed, and the United States did not cross-appeal. On appeal, not only did the court of appeals reject Greenlaw's challenge to his sentence, it held that the district court had erred in failing to apply a statutory mandatory minimum. It vacated the sentence and remanded for the imposition of a longer sentence. When Greenlaw sought Supreme Court review, the United States agreed that the court of appeals erred in increasing Greenlaw's sentence in the absence of a cross-appeal. The U.S. argued, though, that the Court should vacate and remand rather than addressing the question of the nature of the cross-appeal requirement. But the Court granted certiorari and invited separate counsel to brief and argue the case in support of the judgment below. The case will be argued April 15, 2008.

Meanwhile, the courts of appeals are working out *Bowles*' implications in a variety of contexts. Under the developing caselaw, statutorily-backed appeal deadlines are likely to be held jurisdictional. Some courts have now held certain entirely rule-based appeal deadlines to be non-jurisdictional. And there is a nascent circuit split concerning rule-based provisions that fill gaps in statutory appeal deadline schemes; some courts hold such provisions non-jurisdictional because they are rule-based, while other courts, focusing on the fact that the provisions fill gaps in a statutory scheme, hold even the rule-based gap-filling provisions to be jurisdictional requirements. Finally, a recent Tenth Circuit decision thoughtfully addresses whether a court can raise a non-jurisdictional deadline *sua sponte*.

C. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

Judge Stewart invited the Reporter to introduce the topic of the proposed amendment to

Appellate Rule 7; that amendment would address the question of whether a Rule 7 bond for costs on appeal can include attorney fees. At its November 2007 meeting, the Committee concluded that it needed additional data before deciding whether and how to proceed with such an amendment. Since that time, Andrea Thomson (Judge Rosenthal's rules law clerk) worked with the Reporter to review Rule 7 decisions that were available on Westlaw. James Ishida and Jeffrey Barr conducted research in the PACER system to supplement the information gained through the Westlaw search. Input was also obtained from Daniel Girard (a member of the Civil Rules Committee) concerning Rule 7 bonds in the class-action context. Mr. Girard notes that appeals from class settlement approvals have become routine, and that, as a practical matter, an appeal from a class settlement approval effectively stays the order. He observes that some of the leading cases on the question of attorney fees and Rule 7 bonds arose in the class action context. He concludes, however, that seems to be no reason to treat class suits differently from non-class suits with respect to whether and when attorney fees can and should be included in Rule 7 bonds. Meanwhile, Marie Leary performed a pilot study looking at CM/ECF information from three districts – the Southern District of New York, the Central District of California, and the Eastern District of Michigan – for a period from 1996 to 2006. The Reporter turned to Ms. Leary for a summary of her findings.

Ms. Leary reported that her work thus far yields two conclusions. First, requests for, and orders requiring, Rule 7 bonds are infrequent. Second, the Committee has a choice with respect to further research by the FJC. The Committee could select a small number of districts for an in-depth study (which would include an examination of court filings that are not available on PACER); to further narrow the study, it might be advisable to cut the time period to five rather than ten years. Alternatively, the Committee could select a larger number of districts which could be examined in less depth – i.e., just using the documents that are available from PACER.

Judge Stewart suggested that the option of an in-depth study seems more useful. A member questioned whether there really is a circuit split concerning the propriety of including attorney fees in Rule 7 bonds; he noted that in the two cases on the minority side of the split, the courts were not confronted with statutes that authorize the award of attorney fees. The Reporter agreed that those two cases did not involve such statutes, but observed that the rationale of the D.C. Circuit's decision in *American President Lines* would seem to foreclose the inclusion of attorney fees in Rule 7 bonds whether or not such fees are authorized by statute. Another member questioned whether the research into this agenda item is worth continuing. Members asked whether the Rule 7 issues differ in the class action context, and whether in that context attorney fees are the only concern – what about the inclusion in a Rule 7 bond of administrative costs attributable to the delay in implementation of a class settlement? A member suggested that Ms. Leary should not proceed with further research at the moment; instead, he suggested, the Committee should seek input from the Civil Rules Committee concerning the role of appeal bonds in class suits. It was also suggested that selected practitioners could help the Committee understand how these questions play out in class litigation.

By consensus, the Committee retained the matter on the study agenda and directed the Reporter to consult Professor Cooper and selected practitioners for their views on the role of

appeal bonds in class suits.

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

Judge Stewart noted that Mr. Levy had done great work in developing for the Committee's consideration the proposed amendments concerning amicus briefs with respect to rehearing. He invited Mr. Levy to present his proposal.

Mr. Levy noted that he was motivated to make this proposal because he periodically receives inquiries concerning whether amicus briefs can be filed in the rehearing context and, if so, what the requirements are. There are two reasons why courts ought to permit amicus filings in the rehearing context. Such filings can broaden the court's perspective and thus can usefully inform its decision. Moreover, permitting amicus filings can lead would-be amici to feel that the process is fair because they were allowed to be heard. From a practitioner's viewpoint, it does not seem as though permitting such filings would burden the court; those filings would be short and would be filed on a tight time frame. Mr. Levy argued that this issue is appropriate for a nationally uniform rule, and that in comparison to other possible topics for rulemaking, this one does not seem as central to judges' day-to-day work.

The Reporter noted that Fritz Fulbruge had obtained useful feedback from the appellate clerks on the circuits' current practices. Mr. Fulbruge observed that there is a valid reason to have a national rule, in the sense that there is currently disuniformity among the circuits. The proposal could provide helpful clarification.

Mr. Letter questioned whether the proposal should cover amicus filings prior to a court's grant of rehearing. He noted that the United States has in the past made amicus filings in support of rehearing, but his recollection is that these occurred only in unique areas involving the government, such as supporting rehearing on behalf of a qui tam relator under the False Claims Act. He suggested that an important consideration is what the judges think of the proposal. He asserted that if the court grants rehearing but orders no new briefing by the parties, it would be odd to let amici file briefs at that stage. He raised the broader point that it might be useful to consider whether it would be appropriate to adopt a rule providing that the *parties* will be permitted to submit new briefs once rehearing en banc is granted. Mr. Letter also noted that the DOJ had done an internal study concerning practices with respect to rehearing, and found enormous circuit-to-circuit variations in the likelihood that rehearing en banc will be granted. He questioned whether that variation might weigh against the adoption of a national rule.

A judge observed that amicus filings in the rehearing context could be useful if they help the court to understand whether and why a particular case poses an important issue; but he noted that other judges may well disagree. Another judge remarked that the Eighth Circuit does not encourage amicus filings on rehearing petitions; he noted the concern that having a rule on the subject could encourage more such filings, and he suggested that a national rule would not be

helpful.

An attorney member stated that she did not feel strongly about the proposal, but that amicus filings do occur in the rehearing context and that there are always questions as to the permitted length and the time limits for filing. She suggested that it would be useful to provide clarification on such points. She observed, though, that it seems problematic to permit new amici to file at the en banc stage if the court does not permit the parties to file new briefs. A judge noted that the Fifth Circuit always orders new briefing at the en banc stage; he observed that many en bancs in the Fifth Circuit are generated by the judges rather than by the parties. He noted that for judges who were not on the panel that initially heard the appeal, new briefs are helpful. A practitioner observed that the likelihood of rehearing en banc often seems more closely tied to the court's internal dynamics than to the lawyers' arguments.

A judge member stated that the practitioners' discussion of this issue had convinced him that there is a need for clarification of the practices governing amicus filings in the rehearing context. He therefore believes that each circuit should adopt a local rule on the topic. But he would be troubled by the adoption of a national rule because there is so much room for differing views, especially in a circuit that does not often decide to en banc cases. He suggested that the Committee wait and see how the local rules on this point develop. He agreed with a member's earlier observation that amicus briefs in the rehearing context are more useful when they spell out why the decision is an important one. An attorney member agreed that the circuit practices regarding en banc grants vary widely; she asked whether the Committee could encourage the circuits to adopt local rules on point.

A judge observed that the circuits are more likely to adopt such local rules if they hear from attorney groups that the lack of such rules is causing hardship. Mr. Levy suggested that groups such as the American Academy of Appellate Lawyers might be able to help; he stated that he would still prefer a national rule, but that local rules would be better than nothing.

A judge member observed that the Supreme Court's Rule 44.5 prohibits amicus briefs in connection with petitions for rehearing. Mr. Levy responded that the proper analogy, in Supreme Court practice, is not to petitions for rehearing but to petitions for certiorari; and there, amicus briefs are permitted. Another lawyer member observed that one reason why the Supreme Court bars amicus filings in connection with rehearing petitions is that the Court knows it almost never grants petitions for rehearing. Another member observed that the D.C. Circuit – which has a reputation of not granting petitions for rehearing en banc – has now begun to grant such petitions occasionally.

That member stated that he would like to think seriously about adopting a national rule stating that when rehearing en banc is granted, the court will permit further briefing by the parties. A judge responded, though, with a counter-example. In the Tenth Circuit, there is a practice of pre-circulation of panel opinions before they are filed. If the judges who are not on the panel disagree with the panel opinion, the court might decide to en banc the appeal initially. In such a sua sponte grant of en banc consideration, the parties would not have had an

opportunity to learn anything from the panel opinion. Another judge expressed reluctance to tie the court's hands; he suggested that there might be instances where the court needs to go en banc (for example, because there is a clearly undesirable circuit precedent) but does not need further input from the parties. An attorney member responded that these concerns could be addressed if the rule requires the court in most instances to permit additional briefing, but allows exceptions to that requirement.

Judge Stewart observed that the proposals concerning further briefing by the parties when en banc rehearing is granted were distinct from the current agenda item concerning amicus filings. On the latter topic, Mr. Levy suggested that as a fallback position he would favor encouraging the adoption of local circuit rules. A judge suggested that this goal might be furthered by inducing an attorney organization to advocate the adoption of such local rules; he also observed that the Committee might gain useful information if judge members called some colleagues in circuits that do not have a local rule on point and asked why not. A member questioned whether the circuits would pay attention to such requests; he wondered whether the Committee might wish to consider circulating a proposal to place a default provision in Rule 29 in order to prompt circuits to take action to opt out; circulating such a proposal to judges on the various courts of appeals might be more likely to focus attention on the need for local rules.

By consensus, the matter was retained on the study agenda. Judge Sutton volunteered to contact selected judges for their views on the local rule question, and Mr. Levy, Mr. Letter and Ms. Mahoney agreed that they would work with the Reporter to contact attorney organizations to encourage them to seek the adoption of local rules.

E. 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)

Judge Stewart invited the Reporter to introduce Judge Smith's proposal to amend Rule 35(e) so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing. The Reporter noted that during the Committee's November 2007 meeting some members voiced support for the proposal; they argued that permitting a response to the petition before court grants en banc consideration would show that the process is fair. Moreover, those members noted that sometimes the court will not permit additional briefing once rehearing en banc is granted; in those instances, the party would find it particularly important to be able to submit a response to the petition for rehearing en banc. Other members, however, questioned the need for an amendment; they observed that in practice, courts generally seem to request a response, so they wondered whether there is a need for the Rules to require courts to permit a response. The Committee also raised the question of whether the proposed change should extend to sua sponte grants of rehearing en banc. Requiring a response before a sua sponte grant of en banc rehearing might be seen as a change from current practice in some circuits, and would

cause Rule 35 to work differently than Rule 40 currently does. The Reporter noted that one would also need to decide whether the proposed amendment should cover initial hearings en banc as well as rehearing en banc; if one is going to cover rehearing en banc, it probably makes sense to cover initial hearing en banc also. The agenda materials provide two options for the Committee's consideration – one that would apply only where there is a petition for en banc consideration, and another that would also cover sua sponte en banc consideration.

An attorney member stated that in his experience the court has always asked for a response before granting en banc consideration. Another attorney member agreed that he has not observed a practical problem; he stated, though, that he had been surprised to learn that Rules 35 and 40 do not work the same way on this point, and he suggested that there seems to be no reason not to amend Rule 35 to track Rule 40's approach. He noted, however, that whether to cover sua sponte grants is a harder question. Another attorney member queried whether Judge Smith had reported observing a practical problem in this area. Judge Stewart responded that his impression was that Judge Smith had suggested the change in order to eliminate a lack of parallelism between the two Rules. Mr. Letter observed that the DOJ had not found the current Rule to be problematic. A judge member noted that the proposed amendment would contain an out for the court – because it would merely state that "ordinarily" the court will permit a response – and he questioned the amendment's value. He also noted that each court's en banc traditions vary.

Judge Stewart noted that Judge Smith had not proposed extending the requirement of a response to sua sponte grants of en banc consideration. Rather, Judge Smith's proposal would only apply to petitions for en banc consideration; that approach was reflected in the first of the two options proffered by the Reporter. A motion was made and seconded to adopt the first option as an amendment to Rule 35. The motion was defeated by a vote of 5 to 2. Judge Stewart stated that he would write to Judge Smith to apprise him of the Committee's decision not to proceed with the proposed amendment.

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

Judge Stewart invited the Reporter to present the proposed amendment to Form 4. The privacy rules which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). At its November 2007 meeting, the Committee discussed the fact that the privacy rules would require immediate changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Committee also discussed other possible changes that might be made in Form 4.

Since that time, the Administrative Office made interim changes to the version of Form 4

that is posted on the AO's website, and Mr. Fulbruge updated his colleagues on the new privacy requirements. But those interim measures do not remove the need to amend the official version of Form 4 to conform to the privacy requirements. The Reporter therefore recommended that the Committee publish for comment a proposed amendment to Form 4 that will make the necessary changes. She also suggested that the Committee retain on its study agenda the question of additional possible changes to Form 4.

The proposed amendment would alter Questions 7 and 13 so that they will no longer request the names of minor dependents or the applicant's full home address and social security number. Question 7 in the interim version posted by the AO reads in part "Name [or, if a minor (i.e., underage), initials only]". That is the approach taken in the proposed amendment provided in the agenda materials. However, Professor Kimble suggests deleting "(i.e., underage)." The Reporter questioned whether such a change would be a style matter; if one believes that "underage" would be easier for i.f.p. applicants to understand than "minor," then one might view this question as one of substance. However, this question can be avoided if the Committee is willing to select a particular age, such as "under 21." Specifying an age would make the form much more user-friendly. There is some question as to what age one should specify. It is unclear what law should define minority for purposes of the privacy rules. The statute which the rules implement does not shed light on this question. It seems that in most states the age of majority is 18; but in a few states the relevant age is higher.

Mr. Fulbruge stated that it would be helpful for the Form to specify an age rather than referring to "minors." Mr. Letter inquired whether the Reporter had looked to federal law for a definition of the age of majority. For example, the Federal Juvenile Delinquency Act uses 18 as the age of majority. The Reporter stated that she had not surveyed the definitions under federal law; it is unclear what law should govern for the purposes of the privacy rules as they apply to Form 4. State law usually governs the question of parental support obligations.

A member suggested that the Form should read "Name [or, if under 18, initials only]." By consensus, the Committee decided to approve for publication the amendment shown in the agenda materials, subject to the change described in the preceding sentence.

VII. Additional Old Business and New Business

A. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007))

Judge Stewart invited the Reporter to discuss the Tenth Circuit's recent decision in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007).

Mr. Warren was injured in a car accident and sued American Bankers in federal court in diversity. On June 23, the district court dismissed the complaint but did not set out the judgment in a separate document as required by Civil Rule 58(a). Warren filed a notice of appeal on

Monday, July 24; then, on July 28, he filed a motion to reconsider in the district court. The defendant moved to strike the motion for lack of jurisdiction (due to the pending appeal). The district court held that no separate document was required with respect to the dismissal of the complaint, because that dismissal was for lack of subject matter jurisdiction; that the notice of appeal was effective to take the appeal, and that the notice deprived the district court of jurisdiction to consider the motion to reconsider. Warren then amended his notice of appeal to encompass the denial of the motion to reconsider.

On appeal, the Tenth Circuit held that the district court erred in failing to apply Rule 58(a)'s separate document requirement. It reasoned, however, that despite the failure to comply with the separate document requirement, there was jurisdiction over the appeal from the original judgment because 150 days had passed since the entry of the dismissal order. Next, it held that the "motion to reconsider" was in reality a timely Rule 59(e) motion to alter or amend the judgment. The court suggested that the July 24, 2006 notice of appeal had not yet become effective at the time that the Rule 59(e) motion was filed, and reasoned that in any event the timely Rule 59(e) motion "further suspended" the effectiveness of the previously-filed notice of appeal. Thus, the court of appeals concluded that the district court was wrong to conclude that it lacked jurisdiction to consider the Rule 59(e) motion. The court accordingly vacated and remanded for the district court to address the Rule 59(e) motion.

The Reporter suggested that the Tenth Circuit was clearly correct in rejecting the district court's view that the separate document requirement does not apply to dismissals for lack of subject matter jurisdiction. The Tenth Circuit also noted an "exception" to the separate document requirement where an order contains no analysis; the Reporter was not sure that such an exception comports with the separate document rules, but she noted that the Tenth Circuit caselaw on this predated 2002 and she observed that the rulemakers had not seen fit to address that issue in the 2002 amendments. The Tenth Circuit also suggested in *Warren* that the 2002 amendments superseded the teaching of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), that a party could waive the separate document requirement. On this point, the Tenth Circuit erred. Rule 4(a)(7)(B) provides: "A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order." As the 2002 Committee Note to Rule 4 explains, the 2002 amendments were intended to codify *Mallis*'s holding. Under Rule 4(a)(7)(B), Warren's appeal was "valid[]" despite the court's failure to provide a separate document. However, the *Warren* court provided an additional, and sounder, rationale for its conclusion that the district court had jurisdiction to rule on the Rule 59(e) motion: It also reasoned that the filing of the timely Rule 59(e) motion suspended the previously-taken appeal, thus re-vesting the district court with jurisdiction to determine the motion.

The interesting question in this context is whether the Rule 59(e) motion was indeed timely. If Warren had never filed a notice of appeal, it would be indisputable that his July 28 motion was timely because the dismissal was never entered on a separate document and 150 days had not yet run from the entry of the dismissal order in the civil docket. The question is whether, by filing the notice of appeal and thus waiving the separate document requirement, Warren

should be viewed as having triggered a conclusion that his deadline for postjudgment motions ran from the June 23 dismissal. The Reporter suggested that such a conclusion would be flawed; the 2002 Committee Note to Rule 4 expressly rejects an analogous line of reasoning with respect to appeal deadlines.

Based on this discussion, Judge Hartz raised a concern that where a separate document is required and the district court fails to provide one, an appellant might make a very belated (but still technically timely) postjudgment motion that, under Rule 4(a)(4), suspends the effectiveness of the appeal pending the disposition of the motion. To address this problem, Judge Hartz proposed that the Committee consider adopting a time limit – perhaps 10 days after the filing of a notice of appeal, or perhaps some number greater than 10 days – within which tolling motions must be filed even when there has been no provision of a separate document. He explained that in the Tenth Circuit there are many violations of the separate document rule and there are also many pro se litigants. In many cases a district court dismisses a pro se complaint before the government defendant responds. In such instances, a violation of the separate document requirement may go unremarked and a late-filed motion by the pro se litigant may operate to suspend the effectiveness of the appeal – even at a very late stage in the appeal process.

An attorney member responded that in some instances the separate document provides information to the litigant that is relevant to the litigant's calculations – for example, the separate document might state whether a dismissal is with or without prejudice. Another attorney member asked whether the problem Judge Hartz identified could be addressed by encouraging better district court compliance with the requirements of Civil Rule 58. Judge Rosenthal suggested that violations of the separate document requirement are most likely to arise when a law clerk is just starting out and has not yet learned about the requirement.

Judge Hartz noted, however, that the 2002 amendments themselves arose in part from a recognition that noncompliance with the separate document requirement will occur. He stated that in many of the pro se cases in the Tenth Circuit in which the problem arises, it is unlikely that the government defendant will alert the court to the lack of the separate document.

An attorney member noted that the problem for litigants is what to do when judges fail to comply with the requirement; he suggested that 10 days is probably too short a deadline, and that 21 days might be better. Another attorney member suggested that 28 days might be better still; but she also noted that imposing such a cutoff could effectively limit the district court's ability to delay the due date for postjudgment motions (by delaying the provision of a separate document).

Judge Hartz suggested that it would be helpful for him to discuss these issues with the Tenth Circuit Clerk. The Reporter noted that it would also be advisable to consult the Civil Rules Committee. A judge member suggested that it would be useful for Mr. Fulbruge to survey the circuit clerks for their views. Mr. Fulbruge predicted that the survey will disclose variations in how the circuits handle these issues; he noted that the Fifth Circuit's staff attorney office does a lot of work on pro se appeals.

Judge Stewart stated that the issue raised by Judge Hartz warrants further study. Mr. Fulbruge will survey the circuit clerks. Also, the Committee should check with the FJC to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. Judge Bye noted that the Eighth and Tenth Circuits would be meeting together in summer 2008, and he observed that it would be useful to raise the topic at that meeting. By consensus, the matter was retained on the study agenda.

B. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to discuss the questions raised by Judge Diane Wood concerning Rule 4(c)'s inmate-filing provision. Judge Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007).

As discussed in the agenda materials, questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The origins of the current Rule can be traced to the Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), in which the Court held that Houston filed his notice of appeal when he delivered the notice to the prison authorities for forwarding to the district clerk. After deciding *Houston*, the Supreme Court revised its Rule 29.2 to take a similar approach. In 1993, the Appellate Rules were amended to add Rule 4(c). In 1998, Rule 4(c) was amended to provide that if the institution has a system designed for legal mail, the inmate must use that system in order to get the benefit of Rule 4(c). In 2004, the Committee discussed a suggestion by Professor Philip Pucillo that the Rules be amended to clarify what happens when there is a dispute over timeliness and the inmate has not filed the affidavit mentioned in Rule 4(c)(1). The Committee decided to take no action on that suggestion. Shortly thereafter, a Tenth Circuit decision illustrated the problem identified by Professor Pucillo: in *United States v. Ceballos-Martinez*, 371 F.3d 713, 717 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

Turning to the questions raised by Judge Wood's suggestion, the Reporter observed that the rule could be read to require postage prepayment when the institution has no legal mail system; that was, indeed, the Seventh Circuit's view in *Craig*. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the

litigant's appeal will be time-barred unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause. On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand.

When the institution has a legal mail system and the inmate uses that system, it may be the case that prepayment of postage is not required. This was the view adopted by the Seventh Circuit in *Ingram*, and the Tenth Circuit's *Ceballos-Martinez* opinion accords with such a view. But a later Tenth Circuit case has questioned this aspect of the *Ceballos-Martinez* court's reasoning. And it could be risky for an inmate to rely on such a view, even in the Seventh Circuit: what if the inmate's assumption that his or her institution's system qualifies as a legal mail system turns out to be incorrect?

As indicated by the Committee's earlier discussion of *Bowles v. Russell*, it is unclear whether courts will consider any postage-prepayment requirements in Rule 4(c)(1) to be jurisdictional. Rule 4(c)(1) itself is not mirrored in any statute. On the other hand, that provision fills a gap in the statutory scheme for civil appeals, by defining timely filing for purposes of 28 U.S.C. § 2107. As noted previously, some Ninth Circuit decisions have viewed similar gap-filling provisions in Rule 4 to be jurisdictional. Thus, it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But the rulemakers have authority to alter those requirements through a rule amendment; as the *Houston* court explained, Section 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

An attorney member stated that Judge Wood has identified an ambiguity in the Rule, and that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. A judge member agreed that this issue warrants study by the Committee. An attorney member wondered whether prison regulations require the inmate to affix postage to outgoing legal mail. Another attorney member observed that policies vary by institution. Judge Rosenthal observed that the Committee should include in its consideration any rules that may apply to incarcerated aliens. Judge Stewart reported that at the March 2008 Judicial Conference meeting, he attended a session dealing with issues relating to pro se prisoners. He noted that there are a great many pro se prisoner appeals, and that the Committee should also consider immigration appeals. By consensus, the matter was retained on the Committee's study agenda.

C. 08-AP-B (FRAP 28.1 – word limits in connection with cross-appeals)

Judge Stewart invited the Reporter to discuss Judge Alan Lourie's proposal concerning word limits on cross-appeals. Judge Lourie has expressed concern that litigants are abusing the

cross-appeal briefing length limits set by Appellate Rule 28.1(e), and he asks the Committee to consider amending the Rule to eliminate such abuses.

Appellate Rule 28.1, which took effect December 1, 2005, governs briefing in situations involving cross-appeals. Rule 28.1(e) sets page limits and (alternatively) type-volume limits for the appellant's principal brief, the appellee's principal and response brief, the appellant's response and reply brief, and the appellee's reply brief. The Rule enlarges the permitted length of the principal-and-response brief and the response-and-reply brief to account for the fact that such briefs serve a double function, but the Rule does not allocate the permitted length as between the two components. This forms the root of Judge Lourie's concern. He describes instances in which the combined briefs devote almost all of the permitted length to a discussion of the appeal, and use a relatively tiny amount of space to discuss the cross-appeal. He argues that this allows litigants improperly to expand their discussion of issues relating to the appeal. He also suggests that some cross-appeals might be filed in order to obtain additional space in which to discuss the issues relating to the main appeal. Judge Lourie proposes that Rule 28.1 be amended to limit the number of words, in a principal-and-response brief and a response-and-reply brief, that can discuss matters unrelated to the cross-appeal.

Judge Lourie raises a valid concern: The extra length provided for the principal-and-response and response-and-reply briefs ought to be used to discuss the cross-appeal. Moreover, it certainly would be improper to file a cross-appeal solely to obtain extra length for discussing issues relating only to the main appeal. However, the latter concern seems speculative, because it seems unlikely that a litigant would file a cross-appeal in order to enlarge the briefing limits. By filing a cross-appeal, the cross-appellant would gain an extra five pages, but would give the appellant an extra 15 pages. Theoretically, a crafty litigant could try to secure the status of appellant (thus getting the 15 extra pages) by filing a notice of appeal earlier than its opponent, or – if the litigant is the plaintiff – by filing the notice of appeal on the same day as the opponent. But since the Rule only sets default designations, subject to change by the court, a litigant would not be assured that such strategies would secure it the status of appellant (rather than cross-appellant). In addition, other mechanisms exist to control frivolous appeals, including frivolous cross-appeals.

In any event, the feasibility of Judge Lourie's proposal is unclear. The Committee considered that question in 2002, when it was discussing the proposal that led to the adoption of Rule 28.1; at that time, concerns were raised that enforcing separate word limits with respect to the appeal and cross-appeal would be impracticable. More recently, Judge Stewart asked Mr. Fulbruge to survey the appellate clerks for their views concerning Judge Lourie's proposal. The clerks' responses indicate that they feel that such a provision would be difficult to enforce.

Mr. Fulbruge underscored the clerks' view that the proposed length limits would be impossible to police. Mr. Letter recalled that the DOJ was very involved in the drafting of Rule 28.1; at the time, the DOJ considered the problem identified by Judge Lourie, but concluded that the problem could not readily be addressed in the rule. Moreover, the DOJ's view was that such abuses were likely to be infrequent, because most lawyers would realize that abuses of the cross-

appeal briefing length limits would hurt the lawyers' cause by annoying the judges on the panel.

By consensus, the Committee decided not to proceed with the proposed amendment. Judge Stewart stated that he would write to Judge Lourie to let him know of the Committee's decision.

* * *

One final issue discussed by the Committee was when to seek publication of the amendments that it had just approved. Mr. Rabiej reminded the Committee that the preferred practice is to hold proposed amendments so that they can be published in groups rather than one-by-one. The Committee noted, however, that there is a need to amend Form 4 as soon as possible to comply with the privacy rules. Given that Form 4 should be published for comment in summer 2008, the Committee decided by consensus to seek permission to publish the proposed amendments to Rules 1 and 29 at that time as well.

VIII. Schedule Date and Location of Fall 2008 Meeting

A tentative decision was made to hold the Committee's fall 2008 meeting on November 13 and 14, 2008. The meeting will likely be held on the east coast. More details concerning the meeting's date and location will follow.

IX. Adjournment

The Committee adjourned at 10:20 a.m. on April 11, 2008.

Respectfully submitted,

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Catherine T. Struve
Reporter

TAB III

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2008
Washington, DC
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 Washington, DC, on Monday and Tuesday, June 9 and 10, 2008. All the members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General Mark R. Filip attended part of the meeting as the representative of the Department of Justice. In addition, the Department was represented throughout the meeting by Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division.

Also participating in the meeting were committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.

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	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

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 Laura Taylor Swain, Chair
Professor Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that Professor Morris was completing his service as reporter to the Advisory Committee on Bankruptcy Rules, noting that he would be honored formally at the January 2009 committee meeting. She pointed out that Professor Morris had made extraordinary contributions to the rules process during the hectic periods preceding and following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The far-reaching legislation, she noted, had required him to devote an enormous amount of time and effort to researching, analyzing, and drafting a great many new rules and forms. She said that Professor Morris truly had accomplished the work of several people, and the committee would greatly miss him.

Judge Rosenthal presented a resolution signed by the Chief Justice to Judge Kravitz recognizing his service as a member of the committee from 2001 to 2007. She noted that he had been at the center of several important projects during that time, had coordinated development of the time-computation amendments now before the committee for final approval, and had served as the committee's liaison to the Advisory Committee on Criminal Rules. And she was delighted that Chief Justice Roberts had appointed him as the new chair of the civil rules committee.

Judge Kravitz, in turn, presented Judge Rosenthal with a resolution from the Chief Justice recognizing her service as chair of the civil advisory committee from 2003 to 2007. During her tenure, she had shepherded many landmark rules changes dealing with such important matters as class actions, electronic discovery, and restyling of the civil rules.

Judge Rosenthal asked the committee to recognize the many contributions of the late Judge Sam Pointer, who had served as chair of the Advisory Committee on Civil Rules from 1990 to 1993. Among other things, he had coordinated the major package of amendments to the civil rules needed to implement the Civil Justice Reform Act of 1990. She noted that Judge Pointer had also led the committee's initial efforts to restyle the Federal Rules of Civil Procedure. He consistently had set high standards in everything he did and had been a very influential leader of the federal judiciary.

Judge Rosenthal noted that Chief Judge Anthony Scirica, former chair of the standing committee, had just been elevated by the Chief Justice to the position of chair of the Executive Committee of the Judicial Conference. She said that the appointment would serve the rules process and the entire federal judiciary very well.

Judge Rosenthal reported that the March 2008 session of the Judicial Conference had been uneventful for the rules process, as no rules matters had been placed on the discussion calender. She noted that she and Professor Coquillette had had very productive meetings with both Chief Justice Roberts and Administrative Office Director

James Duff. Both are very appreciative of the work of the rules committees. The Chief Justice, she said, was supportive of the effort to restyle the evidence rules and was keenly aware of the need for the rules committees to address problems regarding cost and delay in civil cases, victims' rights in criminal cases, and privacy and security concerns in court records.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 14-15, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on two pieces of legislation affecting the rules process, both of which have been opposed consistently by the Judicial Conference. First, legislation had been introduced in the last several congresses, at the behest of the bail bond industry, to limit the authority of a judge to revoke a bond for any condition other than failure of the defendant to appear in court as directed. The legislation had not moved in the past, but had now passed the House of Representatives and been introduced in the Senate.

Second, protective-order legislation had been reintroduced by Senator Kohl. It would require a judge, before issuing a protective order under FED. R. CIV. P. 26(c), to make findings of fact that the discovery sought: (1) is not relevant to protect public health or safety; or (2) if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a substantial interest in keeping the information confidential, and the protective order is narrowly drawn to protect only the privacy interest asserted. Mr. Rabiej noted that the Senate Judiciary Committee had reported out the bill, but it had not been taken up by the full Senate. It has also been introduced in the House.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a detailed written report on the various activities of the Federal Judicial Center (Agenda Item 4). He also reported on the Center's extensive research on local summary judgment practices in the district courts as part of the committee's discussion of the proposed revision of FED. R. CIV. P. 56 (summary judgment).

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Amendments for Final Approval by the Judicial Conference

Judge Rosenthal and Judge Huff, chair of the time-computation subcommittee, explained that the committee was being asked to approve:

(1) a uniform method for computing time throughout the federal rules and statutes, as prescribed in the proposed revisions to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a);
(2) conforming amendments to the time provisions set forth in 95 individual rules identified by the respective advisory committees; and
(3) a proposed legislative package to amend 29 key statutes that prescribe time periods.

Judge Rosenthal explained that the time-computation project had proven to be more complicated than anticipated, and the subcommittee and advisory committees had worked very well together in resolving a number of difficult problems. In the end, she said, the package that the committees had produced is very practical and elegant.

Judge Huff stated that the purpose of the amendments is to simplify and make uniform throughout all rules and statutes the method of calculating deadlines and other time periods. She noted that the public comments had been generally positive and had helped the committees to refine the final product. She noted that the subcommittee and the advisory committees had identified the 29 most relevant and significant statutory deadlines that should be adjusted to conform to the proposed new rules. She pointed out, too, that local rules of court will also have to be amended to conform to the new national rules. The rules committees will work with the courts to accomplish this objective.

Professor Struve reported that there had not been a great deal of public reaction to the published amendments. The comments, she said, had been mixed but mostly positive and very useful. She noted that a few changes had been made following the comment period. For example, the definition of the term "state" had been deleted from proposed FED. R. APP. P. 26(a) and FED. R. CIV. P. 6(a) because it would be added elsewhere.

She reported that the principal issues discussed by the subcommittee following the public comment period concerned the interaction between the backward time-counting provision in the proposed rules and the definition of a "legal holiday," which includes all official state holidays. For example, in counting backwards to ascertain a filing deadline, the proposed rule specifies that when the last day falls on a weekend or holiday, one must continue to count backwards to the day before that weekend or holiday. The problem, as the public comments pointed out, is that the definition of a "legal holiday" may cause a trap for the unwary because some state holidays are obscure

and not generally observed either by courts or law firms. A filer unaware of an obscure state holiday, for example, might file a paper on the holiday itself only to learn at that time that the filing is untimely.

Professor Struve explained that the subcommittee had considered potential fixes for the problem. One would be to provide that a state holiday is a "legal holiday" for forward-counting purposes, but not for backward-counting purposes. She said, though, that the subcommittee had rejected the fix because a majority of members believed that it would make the rule too complex. On the other hand, the Advisory Committee on Bankruptcy Rules has complained that the rule will cause serious problems in bankruptcy practice and that state holidays must be excluded from the backwards-counting provision – either across-the-board for all the rules, or at least in the bankruptcy rules.

Professor Struve emphasized that the advisory committees were recommending changes in the specific deadlines contained in many individual rules to make the net result of time-computation changes essentially neutral as to the actual amount of time allotted for parties to take particular actions.

Professor Struve noted, for example, that the 10-day appeal deadline in FED. R. BANKR. P. 8002 would be revised to 14 days. In addition, she said, the civil and appellate advisory committees had worked together to address post-judgment tolling motions filed under FED. R. CIV. P. 50, 52, or 59. They decided to lengthen the deadline for filing such motions from 10 days to 28 days.

CIVIL RULES TIME COMPUTATION

Judge Kravitz stated that, as published, the Advisory Committee on Civil Rules had recommended extending the deadline to file a post-judgment motion under FED. R. CIV. P. 50 (judgment as a matter of law), 52 (amended or additional findings), or 59 (new trial) from 10 days to 30 days. But the Advisory Committee on Appellate Rules pointed out that extending the deadline to 30 days could cause problems because FED. R. APP. P. 4 (appeal as of right – when taken) imposes the same 30-day deadline to file an appeal in a civil case not involving the federal government. Accordingly, as the deadline to file a notice of appeal looms, an appellant may not know until the last minute whether a post-judgment tolling motion will be filed.

As a result, he said, the civil rules advisory committee considered scaling back the proposed deadline for filing a post-trial motion from 30 days to 21 days or 28 days. The committee concluded that 21 days was simply not a sufficient increase from 10 days, and that a substantial increase is in fact needed to help the bar. Therefore, the committee decided upon 28 days, even though that might seem like an odd time period. Yet it would give the appellant at least two days before a notice of appeal must be filed to learn

whether any other party has filed a post-judgment motion tolling the time to file a notice of appeal. The appellate rules committee found this change acceptable.

Judge Kravitz reported that the Advisory Committee on Civil Rules had found only one statute that needs to be amended to conform with the proposed rule changes.

CRIMINAL RULES TIME COMPUTATION

Judge Tallman reported that the Advisory Committee on Criminal Rules was recommending several changes in individual rules to extend deadlines from 10 days to 14, a change that is essentially merits-neutral. He noted that Congress had deliberately established very tight deadlines in some statutes, some as short as 72 hours, and he suggested that it might be difficult to persuade Congress to change these statutes.

APPELLATE RULES TIME COMPUTATION

Professor Struve stated that some public comments had suggested eliminating or revising the "three-day rule," which gives a party additional time to file a paper after service. She said that the advisory committee thinks the suggestion is well worth considering and had placed it on its agenda. But it had decided not to recommend elimination as part of the current time-computation package.

BANKRUPTCY RULES TIME COMPUTATION

Judge Swain stated that the proposed amendments to the bankruptcy rules include a recommendation to extend from 10 days to 14 days the deadline in FED. R. BANKR. P. 8002 (time for filing notice of appeal) to file an appeal from a bankruptcy judgment. She noted that the proposal had been controversial because it would change a century-old tradition of a 10-day appeal period in bankruptcy. She noted that the advisory committee had made special efforts to reach out to the bar on the issue.

Judge Swain pointed out that the proposed rules pose special challenges for the bankruptcy system in dealing with backward-counting deadlines because the Federal Rules of Bankruptcy Procedure rely heavily on a notice and hearing process and use a good deal of backwards counting. Moreover, because of the national nature of bankruptcy practice, it is not expected that bankruptcy practitioners would be aware of all state legal holidays.

The advisory committee, she said, was strongly of the view that state holidays should not be included in backwards counting. She recognized the importance of having uniformity among all the rules, and urged that state holidays be excluded from backwards counting in all the rules. If this approach is not possible, an exception to uniformity should be made in this particular instance for the bankruptcy rules.

Professor Morris explained that the Bankruptcy Code specifies more than 80 statutory deadlines. Another 230 time limits are set forth in the Federal Rules of Bankruptcy Procedure, including 18 that require counting backwards. Accordingly, he said, backward-counting deadlines are dramatically more common in bankruptcy than in the other rules. State holidays, he explained, pose no problem in counting forward because they give parties an extra day. But in counting backwards, a filing party is given less time to file a document if a deadline falls on any state holiday. Judges, he said, can usually deal with inadvertent mistakes made in backwards counting. But when a deadline is statutory, a court is less likely to be generous.

He suggested adopting the approach set forth in Judge Swain's memorandum of June 4, 2008, to the standing committee recommending that FED. R. BANKR. P. 9006(a)(6)(C) be added to define a state holiday as a "legal holiday" only in counting forward. The advisory committee would also state in the committee note to the rule that this limiting provision would apply only in the bankruptcy rules.

A member emphasized the importance of uniformity among all the rules and stated that he was concerned about having different standards in the different sets of rules. Nonetheless, he said, the bankruptcy advisory committee had made persuasive points. He wondered whether there might be another solution, such as to make distinctions among different types of state holidays. Some, he said, are important, with government offices, courts, and law firms closed throughout the state. Others, however, are hardly known at all. He suggested that the rule might be revised to provide that only those state holidays that are listed in local court rules be included in the definition of "legal holidays."

Another member agreed that the rule would clearly create a trap for the unwary. He argued that the proposal to exclude state holidays from backward counting is not too complicated, and it should be implemented across the board in all the rules, not just in the bankruptcy rules. Several other participants concurred.

A member argued, though, that the proposed rule is clear, and states do in fact announce all their official holidays. The main problem appears to be that state officials cannot act on days when their offices are closed. If they file a paper on the following day, it will be untimely under the rule. As a practical matter, they will have to file a day early.

A member noted that the committee simply cannot achieve national uniformity in this area and suggested that state holidays be dealt with by local rules. Another responded, though, that reliance on local rules would not address the concerns of the Advisory Committee on Bankruptcy Rules that many bankruptcy lawyers have a national practice and represent far-flung creditors. Lawyers and creditors are largely unaware of

state holidays and state issues. Judge Swain added that many creditors in bankruptcy cases do not have counsel. Their involvement is often limited to filing a proof of claim. It would be unreasonable to expect them to be aware of local court rules referring to state holidays.

Several participants recommended extending the bankruptcy committee's proposed exclusion of state holidays in backwards counting to all the rules. Judge Huff and Professor Struve pointed out that the agenda book contained the text of an alternate rule that would accomplish that objective by including state holidays only in counting forwards. They said that it would be an excellent starting point for revising the rule.

The committee without objection by voice vote approved the proposed amendments to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a) for approval by the Judicial Conference, using the alternate rule language set forth in the agenda book, together with a committee note incorporating language from the bankruptcy committee's memorandum of June 4, 2008, except for its last sentence, and some improved language by Professor Cooper regarding the inaccessibility of the clerk's office. Judge Rosenthal added that the text would be subject to final review by the style subcommittee and recirculation to the standing committee.

Following approval of the uniform time-computation rule, Judge Rosenthal turned the discussion to the specific time adjustments in individual rules proposed by the advisory committees to account for the changes in the time-computation method.

One member argued that the proposed amendments to FED. R. CIV. P. 50 (motion for judgment as a matter of law), 52 (motion for amended or additional findings), and 59 (motion for a new trial) go well beyond conforming the three rules to the new time-computation methodology. Rather, they would substantially expand the time for filing post-judgment motions and add cost and delay to civil litigation. She suggested that trial judges may not support extending the time because they want to resolve their cases promptly and have post-trial motions made without delay. In addition, if a lawyer does not have enough time to fully prepare a polished post-trial motion, the matter can be fixed later, and the parties will still enjoy their full appellate rights. Extending the time to file motions from 10 days to 28 days will slow down the whole litigation process.

Judge Kravitz pointed out, though, that trial judges often bend the rules to give lawyers more time to file post-trial motions, especially after a long trial when the lawyers are exhausted and a transcript is not yet available. Judges, for example, may hold up the entry of judgment. Or they may let lawyers file a skeletal post-judgment motion to meet the deadline and then have them supplement it later. The problem, he said, is that 10 or 14 days is simply not enough time in many cases for a lawyer to prepare an adequate motion. Under the rules, moreover, the court cannot extend the deadline, even though

some judges routinely do so by procedural maneuvers. In addition, there is case law holding that issues not raised in the original filing cannot be raised later. All in all, Judge Kravitz concluded, it is unreasonable to require lawyers to file quick post-trial motions, especially in large cases. Extending the deadline to 28 days may result in some delays, but on balance, the advisory committee believes that it is the right thing to do.

A member asked whether trial judges could impose a deadline shorter than the 28 days specified in the proposed rule. Professor Cooper responded that the matter had not been considered by the advisory committee. But it had considered amending FED. R. CIV. P. 6(b) (extending time) to allow judges to extend the time for filing post-trial motions. It was concerned, though, about the interplay between the civil and appellate rules and the jurisdictional nature of the deadline for filing a notice of appeal. Therefore, it declined to take any steps that might be applied ineptly in practice and lead to a loss of rights.

Judge Kravitz explained that scholars are concerned that permitting a judge to extend the time to file post-motion judgments would not fully protect the parties, given the jurisdictional and statutory nature of the time to appeal. A party might still lose its right to appeal if it fails to meet the jurisdictional deadline, even though the trial judge has extended the time to file a post-judgment motion.

A member suggested that 10 or 14 days to file a post-trial motion should be sufficient for lawyers in most cases. He asked how often the short deadline actually presents problems for lawyers. If not frequent, the procedural devices that trial judges now use to give lawyers more time may be sufficient to address the problems.

Judge Kravitz responded that the advisory committee had concluded that it was common for lawyers to need additional time, especially in circuits where the case law holds that claims are waived if not raised in the original motion. He said that he had presided over a number of cases in which the parties needed a transcript to file a motion. He pointed out that there had been no negative public comments on extending the deadline from 10 days to 28 days, either from judges or the bar. Professor Struve added that the E.D.N.Y. Committee on Civil Litigation had been critical of the time-computation project in general, but had come out strongly in favor of this particular extension.

A member added that lawyers are uncomfortable with the devices that trial judges now use, such as deferring entry of judgment or allowing a bare-bones post-judgment motion. The 10-day deadline, he said, is notoriously inadequate because many issues require careful briefing, even after a relatively short trial. Moreover, there may be a change in counsel after the trial, making the current deadline virtually impossible to meet. The proposed extension to 28 days, he said, is badly needed and will not cause unreasonable delays.

The lawyer members of the committee all agreed that the current 10-day deadline is much too short. They said that it is not safe for lawyers to rely on procedural maneuvering, such as delaying the entry of judgment. Lawyers, moreover, are bound by what they write in the original filing, and they may need a transcript to prepare a proper motion. One added that it is not uncommon for appellate counsel to be brought in after the trial and have to be brought up to speed by exhausted trial counsel.

A member pointed out that notices of appeal are normally filed only after disposition of a post-judgment motion, usually a Rule 59 motion for a new trial. Under the proposed extension, more parties may file prophylactic notices of appeal before any post-judgment motions are filed. This practice may impose some administrative burdens on the court of appeals, but Professor Struve suggested that it would likely arise only in multi-party cases. Judge Kravitz added that even 28 days may not be sufficient for lawyers to prepare post-judgment motions in some cases. Therefore, the proposed change may not altogether end the procedural devices that are now being used.

A member suggested that the committee consider the fundamental purpose of post-trial motions. As originally conceived, they were designed to allow a trial judge to promptly fix errors in the trial record. But they have evolved into full-blown motions to reconsider a whole host of issues raised at pretrial, by motion, and at trial and to relitigate all the decisions made by the trial judge in the case. In all, post-trial motions lead to a misuse of judicial time.

Judge Rosenthal stated that the advisory committees, and district judges generally, are troubled by the procedural subterfuges now used to circumvent the current rule. They are not worried about waiting a few more days if the result is better-prepared motions.

A motion was made to adopt all the proposed rule changes in the time-computation package.

Judge Tallman pointed out that FED. R. CRIM. P. 5.1 (preliminary hearing) and 18 U.S.C. § 3060(b) both specify that a preliminary hearing must be held within 10 days of the defendant's first appearance if the defendant is in custody. He explained that the proposed amendment to Rule 5.1 would extend the deadline to 14 days, but the statute will also have to be amended to keep the two consistent. If Congress does not extend the statutory deadline to 14 days, it would make no sense to amend the rule.

A member asked whether the committee should approve the rule contingent upon Congress amending the statute. Judge Rosenthal reported that representatives of the rules committees had already discussed a timetable with congressional staff to synchronize the effective date of the new rules with the needed statutory changes. She said that staff had been very sympathetic to the objective, and it did not appear that there would be

significant obstacles to accomplishing this objective. There is certainly no guarantee of success, but the committees are hopeful. Professor Coquillette added that the problem of synchronization could also be addressed by delaying the effective date of all the rules, or selected rules, to coincide with the statutory changes.

A member noted that under the Rules Enabling Act, rule changes supersede inconsistent statutes (except for changes to the bankruptcy rules). So even if Congress were not to act, the revised rules would override the inconsistent statutes. Judge Rosenthal responded that the committee, as a matter of comity with the legislative branch, tries to avoid reliance on the supersession clause of the Act. It also seeks to avoid the confusion that results when a rule and a statute are in conflict. The member agreed, but noted that if Congress simply does not act in time, as opposed to refuses to act, the extended deadlines in the new rules would govern in the interim until Congress acts.

The committee without objection by voice vote approved all the proposed time-computation amendments for approval by the Judicial Conference.

The committee without objection by voice vote approved the advisory committees' recommendations that the Judicial Conference seek legislation to adjust the time periods in 29 statutes affecting court proceedings to conform them to the proposed changes in the time-computation rules.

Judge Rosenthal asked the committee to concur in her view that the changes made in the time-computation amendments following publication were not so extensive as to require republication of the proposals.

The committee without objection by voice vote agreed that there was no need to republish any of the proposed time-computation amendments.

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 attachments of May 13, 2008 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

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 pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

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

Professor Struve reported that the proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would resolve an inadvertent ambiguity that resulted from the 1998 restyling of the Appellate Rules. The current rule might be read to require an appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. She reported that the public comments on the proposed amendment had raised some additional issues, which had been placed on the future agenda of the advisory committee.

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

FED. R. APP. P. 12.1

Judge Stewart explained that the proposed new Rule 12.1 (remand after an indicative ruling by the district court) was designed to accompany new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal). It had been coordinated closely with the Advisory Committee on Civil Rules.

Judge Stewart reported that the Department of Justice had expressed concern about potential abuse of the indicative ruling procedure in criminal cases. As a result, the advisory committee modified the committee note after publication by editing the note's discussion of the scope of the rule's application in criminal cases. Professor Struve added that the Advisory Committee on Criminal Rules might wish to consider a change in the criminal rules to authorize indicative rulings explicitly. Accordingly, the appellate

advisory committee had included language in the committee note to anticipate that possible development.

A member questioned the language that had been added to the second paragraph of the committee note stating that the advisory committee anticipates that use of indicative rulings "will be limited to" three categories of criminal matters – newly discovered evidence motions under FED. R. CRIM. P. 33(b)(1), reduced sentence motions under FED. R. CRIM. P. 35(b), and motions under 18 U.S.C. § 3582(c). He worried that the language might be too restrictive and recommended that it be revised to state that "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for [those matters]."

Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.

A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

Judge Stewart and Professor Struve agreed that the recommended substitute language for the committee note, "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for . . ., " would be acceptable. A motion was made to approve the proposed new rule, with the revised note language.

The committee without objection by voice vote approved the proposed new Rule 12.1 for approval by the Judicial Conference.

FED. R. APP. P. 22(b)(1)

Judge Stewart explained that the proposed amendment to FED. R. APP. P. 22(b)(1) (certificate of appealability) would conform the rule to changes being proposed by the Advisory Committee on Criminal Rules in Rule 11 of the Rules Governing § 2254 Cases and § 2255 Proceedings. The amendment would delete from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue, because the matter is more appropriately

handled in Rule 11. Professor Struve added that approval of the amendment would be contingent on approving the tandem amendments proposed by the criminal rules committee.

A member questioned the language of the proposed amendment stating that "(t)he district clerk must send the certificate and the statement . . . to the court of appeals," suggesting that the district clerk should be required to send the certificate only when it has been issued by a district judge. The certificate may be also issued by the court of appeals or a circuit justice, but a district clerk should bear no noticing obligation in those situations. The limitation on the clerk's obligation may be implicit in the rule, but it would be preferable to substitute language such as, "If the district court issues the certificate, the district clerk must send . . . ."

Professor Struve explained that the principal concern of the advisory committee had been to make sure that the certificate is included in the case file. She noted, though, that under CM/ECF, the courts' comprehensive electronic records system, there should be few problems with filing and transmitting documents. Nevertheless, the district clerk should have no obligation to handle a certificate issued by a circuit judge.

Judge Rosenthal suggested that the committee defer further consideration of the proposed amendment to FED. R. APP. P. 22(b)(1) until after the committee considers the parallel rule amendments proposed by the Advisory Committee on Criminal Rules.

Later in the meeting, the committee approved the parallel rule amendments proposed by the Advisory Committee on Criminal Rules. At that time, it approved without objection by voice vote the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference. (See page 46.)

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

Judge Stewart explained that the proposed amendments to FED. R. APP. P. 26(c) (additional time allowed after mail and certain other service) would clarify the method of computing the additional three days that a party is given to respond after service. The amendment would make the language of the rule parallel to that of FED. R. CIV. P. 6(d). He also pointed out that the advisory committee had received a comment from Chief Judge Frank Easterbrook recommending that the "three-day rule" be eliminated entirely, and the committee would place the matter on its agenda for a full discussion.

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

Amendments for Publication

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

Professor Struve explained that proposed new FED. R. APP. P. 1 (definition) would define the term "state" throughout the Federal Rules of Appellate Procedure to include the District of Columbia and any U.S. commonwealth or territory. The definition, she explained, is consistent with a proposed amendment to FED. R. CIV. P. 81(d).

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

The proposed amendments to FED. R. APP. P. 29(a) (when an amicus curiae brief is permitted) would eliminate the current language referring to a state, territory, commonwealth, or the District of Columbia because new FED. R. APP. P. 1(b) would make it unnecessary.

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

FORM 4

Professor Struve reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) had already been updated informally to conform to the new privacy rules that took effect on December 1, 2007, and had been posted by the Administrative Office on the Judiciary's web-site. The proposed revisions to the form would delete the full names of minor children and the home address and full social security number of the applicant. She explained that the advisory committee had also concluded that the term "minor" could be ambiguous because the definition varies from state to state, and pro se petitioners who normally fill out Form 4 should not be placed in the position of worrying about who is a "minor." Instead, the committee decided to substitute the language "under 18."

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

Informational Item

Judge Stewart reported that the advisory committee was continuing to monitor case law developments following *Bowles v, Russell,* 551 U.S. ___ (2007), regarding the jurisdictional and statutory dimensions of the time limits to appeal.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professors Morris and Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of May 14, 2008 (Agenda Item 10).

Amendments for Final Approval by the Judicial Conference

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 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Bankruptcy Procedure.

FED. R. BANKR. P. 1017.1

Judge Swain noted that proposed new FED. R. BANKR. P. 1017.1 (individual debtor's exemption from the pre-petition credit counseling requirement) would have revised the process for granting an extension of time for the debtor to complete the credit-counseling required by the 2005 amendments to the Bankruptcy Code. It had been published for public comment in August 2007, but the comments had shown that a rule is unnecessary because very few cases arise in which there is a request for an extension. Therefore, the advisory committee decided to withdraw it from further consideration.

FED. R. BANKR. P. 4008

Judge Swain noted that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would require that a new official form cover sheet be filed with a reaffirmation agreement. (See OFFICIAL FORM 27 below.)

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

Judge Swain explained that the new rule and the proposed rule amendments deal with clarifying the requirement that a judgment be set forth in a separate document. New FED. R. BANKR. P. 7058 (entry of judgment) would make FED. R. CIV. P. 58 (entering judgment) applicable in adversary proceedings. FED. R. BANKR. P. 7052 (findings by the court) and 9021 (entry of judgment) are conforming amendments to accompany new Rule 7058.

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

OFFICIAL FORMS 1, 8, and 27

Professor Morris reported that the amendments to Exhibit D of OFFICIAL FORM 1 (individual debtor's statement of compliance with the credit counseling requirement) and OFFICIAL FORM 8 (individual Chapter 7 debtor's statement of intention) would become effective on December 1, 2008. New OFFICIAL FORM 27 (reaffirmation agreement cover sheet) would take effect on December 1, 2009, to coordinate it with the proposed revision to Rule 4008 that would require the form to be filed with a reaffirmation agreement. The form will give the court basic information about what is contained in the agreement. He noted that the advisory committee had received comments on the form and had made minor changes after publication.

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

TECHNICAL CHANGES

FED. R. BANKR. P. 2016, 7052, 9006(f), 9015, and 9023

Professor Morris reported that the advisory committee recommended that the proposed amendments to the five rules be approved and sent to the Judicial Conference for final approval without publication because they involve only technical changes, such as correcting cross-references or implementing provisions in the other sets of rules.

He said that the proposed amendment to FED. R. BANKR. P. 2016 (compensation for services rendered and reimbursement of expenses) merely corrects a cross-reference to a subsection of the Bankruptcy Code changed by the 2005 omnibus bankruptcy legislation.

The amendment to FED. R. BANKR. P. 9006(f) (additional time allowed after service by mail or certain other means) would correct a cross-reference to subparagraphs in FED. R. CIV. P. 5 (service), which had been renumbered as part of the civil rules restyling project.

The other three amendments would implement the proposed new 14-day deadline to file a notice of appeal from a bankruptcy judgment. Professor Morris explained that the proposed 28-day time to file a post-judgment motion in civil cases would not work in bankruptcy cases because the deadline to file a notice of appeal, currently 10 days, will be 14 days once the time-computation amendments take effect.

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

OFFICIAL FORMS 9F, 10, and 23

Professor Morris reported that the proposed amendments to the forms were technical in nature and did not merit publication. He explained that the advisory committee inadvertently had retained a requirement in OFFICIAL FORM 9F (initial notice in a Chapter 11 corporation or partnership case) that debtors provide their telephone numbers. That item of personal information has been removed from the other forms.

The change in OFFICIAL FORM 10 (proof of claim) would remind persons filing claims based on health-care debts that they should limit the disclosure of personal information. Two changes in the definition section of the forms would tie the words "creditor" and "claims" more closely to the definitions set forth the Bankruptcy Code.

The proposed amendment to OFFICIAL FORM 23 (debtor's certification of completing the required post-petition financial-management course) would add a reference to § 1141(d)(5)(B) of the Bankruptcy Code.

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

Amendments for Publication

Professor Morris explained that the proposed amendments and new rule would implement new Chapter 15 of the Bankruptcy Code, added by the 2005 legislation.

FED. R. BANKR. P. 1004.2

Under proposed new FED. R. BANKR. P. 1004.2 (Petition in Chapter 15 cases), an entity must state on the face of the petition the country of the debtor's main interests.

FED. R. BANKR. P. 1014 and 1015

FED. R. BANKR. P. 1014 (dismissal and change of venue) and 1015 (consolidation or joint administration of cases) both deal with multiple cases involving the same debtor. A question had been raised as to whether these rules are applicable in Chapter 15 cases. The advisory committee would resolve the ambiguity by making the two rules specifically applicable.

FED. R. BANKR. P. 1018

The amendments to FED. R. BANKR. P. 1018 (contested involuntary and chapter 15 petitions, etc.) would clarify the scope of Rule 1018 to the extent it governs proceedings contesting an involuntary petition or Chapter 15 petition for recognition. There is some confusion now as to the applicable procedures in injunctive actions. The amendments clarify that the rule applies to contests over the involuntary petition itself, and not to matters that arise in or are merely related to a Chapter 15 case or an involuntary petition. Such other matters are governed by other provisions of the Rules, as explained in the proposed committee note.

FED. R. BANKR. P. 5009

FED. R. BANKR. P. 5009 (case closing) would require a foreign representative to file and notice a final report in a Chapter 15 case describing the nature and results of the representative's activities in the United States court. In the absence of timely objection, a presumption will arise that the case has been fully administered and may be closed. Another amendment would require the clerk to send a notice to individual debtors in Chapter 7 and Chapter 13 cases that their case will be closed without a discharge if they have not timely filed the required statement that they have completed a financial-management course.

FED. R. BANKR. P. 5012

New FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in Chapter 15 cases) would establish a motion procedure in Chapter 15 cases for obtaining approval of an agreement or "protocol" under § 1527(4) of the Code for the coordination of Chapter 15 proceedings with foreign proceedings.

FED. R. BANKR. P. 9001

The amendment to FED. R. BANKR. P. 9001 (general definitions) would incorporate into the rule the definitions set forth in § 1502 of the Code, added by the 2005 bankruptcy legislation.

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of May 9, 2008 (Agenda Item 6).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52,
53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G
FORMS 3, 4, and 60

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Civil Procedure, the Supplemental Rules, and the illustrative Civil Forms.

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee had published a proposed amendment to FED. R. CIV. P. 8(c) (affirmative defenses) that would remove a "discharge in bankruptcy" from the list of defenses that a party must affirmatively state in responding to a pleading. The Bankruptcy Code makes the exception unnecessary as a matter of law because a discharge voids a judgment to the extent that it determines the debtor's personal liability on the discharged debt. He said, though, that the Department of Justice had voiced opposition to the change. As a result, the advisory committee decided to postpone seeking final approval of the change in order to discuss the matter further with the Department.

FED. R. CIV. P. 13(f)

Judge Kravitz reported that FED. R. CIV. P. 13(f) (omitted counterclaim) would be deleted from the rules as largely redundant and misleading. Instead, an amendment to a counterclaim would be governed exclusively by FED. R. CIV. P. 15 (amended and supplemental pleadings).

FED. R. CIV. P. 15(a)

The amendments to FED. R. CIV. P. 15 (amended and supplemental pleadings) would revise the time when a party's right to amend its pleading once as a matter of course ends.

FED. R. CIV. P. 48(c)

Judge Kravitz said that new FED. R. CIV. P. 48(c) (polling the jury) is based on FED. R. CRIM. P. 31(d), but has minor revisions in wording to reflect that the parties in a civil case may stipulate to a non-unanimous verdict.

A member noted that the proposed amendment referred to "a lack of unanimity or assent" on the part of the jury and asked whether "unanimity" and "assent" are different requirements. Professor Cooper responded that they are, in fact, different concepts. If the parties in a civil case stipulate to accepting a less-than-unanimous verdict, only the "assent" of the jury is required, not "unanimity." Professor Cooper added that Professor Kimble had suggested restyling the language to read: "a lack of unanimity or a lack of assent."

FED. R. CIV. P. 62.1

Judge Kravitz reported that proposed new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal) was the most important rule in the package being forwarded to the Judicial Conference for approval. He noted that the language had been refined following the public comment period to emphasize that the remand from the court of appeals to the district court is for the limited purpose of deciding a motion.

A member suggested that the rule's language was awkward in referring to "relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." He suggested rephrasing the rule to read: "because an appeal has been docketed and is pending." Professor Cooper responded that there are several situations in which docketing of an appeal does not oust the district court's jurisdiction. The advisory committee, moreover, had tried to avoid getting into the morass over whether docketing an appeal is jurisdictional.

FED. R. CIV. P. 81(d)

Judge Kravitz pointed out that the proposed amendment to FED. R. CIV. P. 81(d) (law applicable) would define a "state" for purposes of the Federal Rules of Civil Procedure, where appropriate, as the District of Columbia and any U.S. commonwealth or territory.

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

Amendments for Publication

FED. R. CIV. P. 56

Judge Kravitz reported that the advisory committee had made additional refinements in the proposed amendments to FED. R. CIV. P. 56 (summary judgment) as a result of the comments made by standing committee members at the January 2008 meeting. In addition, the committee note had been shortened significantly.

Judge Kravitz explained that the project to revise FED. R. CIV. P. 56 had been challenging and, understandably, it had taken a great deal of time to complete. He extended special thanks to Judge Michael Baylson for his excellent leadership and insight in chairing the subcommittee that had developed the summary judgment proposal. He also thanked Professor Cooper, Andrea Kuperman, Joe Cecil, James Ishida, and Jeffrey Barr for their significant research efforts in support of the project.

Judge Kravitz explained that actual summary judgment practice has grown apart from the current text of Rule 56. The deficiencies of the current national rule have left space that has been filled by experimentation at the local level. Accordingly, he said, in fashioning a new national rule, the advisory committee had enjoyed the unique opportunity of drawing upon the best practices contained in local court rules.

Judge Kravitz reported that the bar is largely supportive of moving towards a more uniform national summary judgment practice under Rule 56. He noted that the advisory committee had conducted two mini-conferences on the proposed amendments with lawyers, law professors, and judges, and he had spoken personally to several bar groups. At the same time, however, he said that there may be resistance to the proposed rule from courts that do not presently use the three-step process embodied in the new rule.

He explained that the proposed rule would provide a uniform framework for handling summary judgment motions throughout the federal courts, but it would also give judges flexibility to prescribe different procedures in individual cases. The procedure that the new rule lays out will work well in most cases, he said, but trial judges will be free to depart from it when warranted in a particular case.

Judge Kravitz emphasized that there is nothing radical about the three-step, point-counterpoint procedure prescribed in the proposed rule. Clearly, a party should be required to give citations to the record to support its assertion that an issue is disputed or not. That, he said, is precisely what the amendments are designed to accomplish.

Judge Kravitz emphasized that the advisory committee had adhered to two basic principles in drafting the rule. First, it decided not to change the substantive standards governing summary judgment motions. Second, it decided that the revised rule must be neutral – not favoring either plaintiffs or defendants. He pointed out that the last time the advisory committee had proposed making changes to Rule 56, in the early 1990s, it had attempted to make substantive changes, and the effort had failed.

Judge Kravitz reported that the advisory committee had also worked with the Federal Judicial Center to verify empirically that the proposed rule would not run afoul of either of the two fundamental principles.

Mr. Cecil explained that 20 districts now require the point-counterpoint procedure in their local rules. The Center had compared summary judgment practice in those districts with practice in two other categories of districts: (1) the 34 districts that require movants to specify all the undisputed facts in a structured manner, but do not require any particular form of response from opponents; and (2) the remaining districts that have no local rule requiring either party to specify undisputed facts.

The Center's research, he said, had uncovered little meaningful difference among the three categories of districts, except in two respects. First, in districts having a point-counterpoint process, judges take somewhat longer to decide summary judgment motions. Those districts, however, generally have lengthier disposition times. Therefore, the longer times cannot be ascribed to the point-counterpoint procedure. Second, in districts that do require a structured procedure, motions for summary judgment are more likely to be decided. But there appears to be no difference as to the outcome of the motions – whether they are granted or denied. Mr. Cecil cautioned, however, that the current court data concerning termination by summary judgment may not be sufficiently reliable.

Judge Kravitz proceeded to highlight those provisions of the proposed rule that either have prompted comment from bench and bar or have been changed by the advisory committee since the January 2008 standing committee meeting.

RULE 56(a)

Judge Kravitz pointed out that proposed Rule 56(a) specifies that a court "should" grant summary judgment if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. He said that the advisory committee had heard a great deal about whether the appropriate verb should be "should," "must," or "shall." He noted that the rule had used the term "shall" until it was changed to "should" as part of the 2007 general restyling of the civil rules.

He said that the advisory committee, after lengthy consideration, had decided that it would be best to retain the language of the rule currently in effect, *i.e.*, "should." Professor Cooper added that there continues to be some nostalgic support for returning to "shall," but that usage would violate fundamental rules of good style. Therefore, he said, the choice lies between "should" and "must." Earlier drafts of the committee note, he said, had undertaken to elaborate on the contours of "should," but the advisory committee decided that it would be improper to risk changing the meaning of a rule through a note. Thus, the 2007 committee note to the restyled Rule 56 remains the final word on the subject.

Professor Cooper added that the verb "should" is clearly appropriate when a motion for summary judgment addresses only part of a case. Under certain circumstances, he explained, it is wise as a practical matter for a judge to let the whole case proceed to trial, rather than grant partial summary judgment. He suggested that one possible approach might be to use "must" with regard to granting summary judgment on a whole case, but "should" for granting a partial summary judgment. That formulation, however, appears unnecessarily complicated.

Judge Kravitz noted a Seventh Circuit case suggesting that summary judgment must be granted when warranted on qualified immunity grounds, although the decision appears to have more to do with qualified immunity than summary judgment. He explained that the advisory committee tries to avoid providing legal advice in the committee notes. The committee, moreover, did not want to mention qualified immunity in the note as an example of a particular substantive area in which summary judgment may come to be indeed mandatory when the proper showing is made, for fear that it might miss other substantive areas.

Judge Kravitz noted that, at the January 2008 standing committee meeting, a member had pointed out a discrepancy between proposed Rule 56(a), which specifies that summary judgment "should" be granted in whole or in part, and Rule 56(g), specifying that partial summary judgment "may" be granted. He reported that the discrepancy had been fixed and the two provisions now work well together.

A member expressed concern that using the word "should" in Rule 56(a) would signal to the bar that the committee is retrenching from the substantive standard that had prevailed before the restyling of the civil rules, thereby making summary judgment less readily available. For decades, he said, Rule 56 had specified that a judge "shall" grant summary judgment if a party is entitled to it. In the restyling effort, though, the verb "shall" was changed to "should" as part of the policy of eliminating the use of "shall" throughout the rules. At the time, the committee specified that no substantive change had been intended.

He recommended that the committee signal to the bar once again that no substantive change had been intended by the change to "should." Accordingly, a judge

should have no discretion to deny summary judgment when a party is entitled to it as a matter of law.

Another member suggested that the relevant sentence in proposed Rule 56(a) is incoherent because it specifies that a court "should" grant summary judgment if a party is "entitled" to it. If a party is "entitled" to summary judgment, by definition the grant of summary judgment is mandatory. Other members endorsed this view.

A member argued that the appropriate verb to use in the rule is "must." In his state, for example, the state court trial judges are concerned that the intermediate appellate courts frequently reverse their grants of summary judgment. The consequence is that they are chilled from granting summary judgment, believing that it is safer to just let a case proceed to trial. Another member noted that some trial judges in his federal circuit grant summary judgment even when there is clearly a credibility dispute between the parties because they believe that they know how a case will turn out in the end.

Judge Kravitz explained that the advisory committee believes that the substance of the proposed rule is identical to the way it was before December 1, 2007, when "should" replaced "shall." There was no intention to make any substantive change. He pointed out that the committee note, for example, states that discretion should seldom be exercised. That point, he said, would continue to be emphasized in the materials that are published. A judge would exercise discretion to deny summary judgment only in a rare case.

He added that under prevailing summary judgment standards, a trial judge who decides a summary judgment motion must resolve all reasonable inferences in favor of the non-moving party. That, he said, leaves a good deal of latitude to the judge, even before deciding whether the moving party is "entitled" to summary judgment as a matter of law. He suggested that even if the rule were to specify that summary judgment "must" be granted if the moving party is "entitled" to it, the trial judge would have some flexibility in determining whether the moving party is "entitled."

A member complained that a number of trial judges avoid granting summary judgment, no matter how strong the moving party's entitlement to it. But there is no empirical evidence on the point because the cases go to trial, and there is no way to appeal the denial of summary judgment. To avoid the stark choice between "should" and "must," he suggested that the language might be revised to specify that "summary judgment is required if . . .," or "summary judgment is necessary if . . . ."

Judge Kravitz responded that the advisory committee had indeed considered an alternative formulation along these lines, but had abandoned the effort because it would change the substantive standard for granting summary judgment. He added that while the civil defense bar is nervous about the 2007 change from "shall" to "should," the

plaintiffs' bar is concerned about other aspects of the proposed rule and would be strongly opposed to changing "should" to "must."

A member suggested that the committee publish the rule for comment as currently drafted and solicit comments from the bar. She also observed that the proposed rule would explicitly authorize a court to grant partial summary judgment, and it would not make sense to specify that a judge "must" grant partial summary judgment.

Judge Kravitz pointed out that it was clear from the discussion that several committee members believe that a substantive change had been made inadvertently during the course of the restyling process. But he pointed out that the term "shall" had been interpreted in the pertinent Rule 56 case law as not requiring a judge to grant summary judgment in every case even though a party may be "entitled" to it.

He also noted that the committee would have to republish the rule for further public comment if it were to: (1) publish the proposal using "should"; (2) receive many negative public comments on the choice; and (3) then decide to revert to "must." He suggested that it might make more sense – although he did not specifically advocate the idea – to publish the rule using "should" and "must" as alternatives and specifically invite comment on the two.

A member observed that the bar had been informed that the change from "shall" to "should" during the restyling process was merely a style change. Therefore, the change from "should" back to "shall" would also be a mere style change.

Judge Kravitz noted that a change from "should" to "must" would clearly be more than a style change. He explained that the style subcommittee had made clear that "shall" is an inherently ambiguous word that should be changed wherever it appears. Therefore, in drafting the proposed revisions to Rule 56, the advisory committee had carefully researched how courts had interpreted the word "shall" in Rule 56. It concluded that "shall" had largely been read to mean "should" within the context of Rule 56.

Professor Kimble added that "shall" is so ambiguous that it can mean just about anything. It has been interpreted to mean "must," "should," and "may" in different circumstances. A cardinal principle of sound drafting, he said, is that ambiguous terms must be avoided. He said that "shall" should indeed normally mean "must," but in actual usage it often does not.

A member stated that she had always assumed that "shall" meant "must" and had been surprised to learn about the inherent ambiguity of "shall." She said that if the committee wants to solicit public comment on the choice between "should" and "must," it should make clear in the publication exactly what the committee intends for the rule to

mean as a matter of substance, describe the underlying issues, and ask for specific advice on those issues.

Judge Kravitz stated that the advisory committee will certainly highlight the issue for public comment. He reiterated that there are sound reasons for giving a trial judge discretion regarding partial summary judgment. One common problem, he noted, is that parties often move for summary judgment on the whole action, but may only be entitled to it on one count. In some cases, granting partial summary judgment may be warranted, but it may make more sense for the judge to go ahead and try the whole case.

A participant observed that these issues are critically important because few civil cases now go to trial. Summary judgment today lies at the very heart of civil litigation and is key as to how counsel perceive and evaluate a case. He recommended publishing the proposed rule using the alternative formulations of "should" and "must" and inviting specific comments on the alternatives. Judge Kravitz noted, by way of example, that the recent electronic discovery amendments had also been published with alternative formulations.

A member stated that, on initial reading, the change from "shall" to "should" did not appear to be substantive. But, on further reflection, the matter is not so clear. He pointed out that the 2007 change from "shall" to "should" is perceived by some as a substantive change, even though the committee is convinced that it is not. For that reason the proposal should be published with "should" and "must" in the alternative to solicit thoughtful comments. Several other members concurred.

A member suggested that some judges may refuse to grant summary judgment, even when warranted, because they are overworked. They can simply deny summary judgment with a one-line order and proceed to trial. But under the committee's proposal, the trial judge "should" give reasons for denying summary judgment. The requirement to give reasons may impact the willingness of some judges to grant summary judgment. Judge Kravitz added that the Federal Judicial Center's research shows that a disturbing number of summary judgment motions are still undecided when cases go to trial.

Judge Kravitz observed that it would be complicated to draft a provision specifying that a trial judge "must" grant complete summary judgment, but "should" grant partial summary judgment. It may be that some other formulation could avoid the drafting problems, but he suggested that it would be better just to tackle the issue head on and use either "should" or "must." He also noted that the choice of words could affect appellate review of summary judgment determinations because the word "must" conjures up the prospect of mandamus.

A member stated that if the committee were to change the verb to "must," it would clearly be a substantive change. Judge Kravitz responded that the committee

would have to conclude that "shall" had meant "must" all along, that it would not be a substantive change, and that the committee had made a mistake in the restyling process.

A member argued, however, that most lawyers and judges believed that "shall," formerly used in Rule 56, had meant "must." Therefore, the 2007 restyling change to "should" was substantive. Judge Kravitz responded, though, that research had revealed cases where courts of appeals had held that district courts had discretion not to grant summary judgment, even though the operative language of the rule was "shall."

A motion was made to publish the Rule 56(a) amendments for comment in a form that sets out and highlights "should" and "must" as alternatives and also solicits comment on the concept of treating complete summary judgment differently from partial judgment in this regard.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(a) for publication, subject to further refinement in language.

RULE 56(b) and (c)(1)-(2)

A member observed that the term "response" appears in several places in proposed Rule 56(b) and (c), but it is confusing because Rule 56(c) intends it to include only a factual statement, and not the response in full. He recommended that the language be modified to make it clear that a "response" does not include a brief.

A member noted that proposed Rule 56(c)(2)(A) specifies that a party must file a motion, response, and reply. Then Rule 56(c)(2)(B) refers to a response that includes a statement of facts. He suggested that the language state that the party must file a response and a separate statement of facts, rather than have the statement included in the response.

A participant noted that proposed Rule 56(b)(2) states that "a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later." But the filing of the summary judgment motion means that an answer is not due. Thus, there will never be a responsive pleading "21 days after . . . a responsive pleading is due."

Professor Cooper explained that the impetus for the provision had come from the Department of Justice. The Department pointed out that a plaintiff may serve a summary judgment motion together with the complaint. This is common, for example, in collection actions. The Department has 60 days to answer a complaint. Under the proposed rule, however, it would have to respond to a plaintiff's summary judgment motion before its deadline for filing an answer to the complaint. For that reason, the

advisory committee added the language "or a responsive pleading is due, whichever is later." What the committee meant to say was something like: "or if the party opposing summary judgment has a longer time to file an answer to the complaint." Mr. Tenpas concurred, noting that the Department did not want to be required to respond to a motion for summary judgment before even being required to answer the complaint. He suggested that perhaps the provision could be fixed by saying, "or a responsive pleading is due from that party."

A participant pointed out that the problem is that the provision was intended to cover summary judgment motions filed by plaintiffs, but as written it covers all parties. Several participants suggested improvements in language, including breaking out the provision into parts to specify how it will operate in each situation. Judge Rosenthal recommended that Professor Cooper and Judge Kravitz consider the suggestions and return to the committee with substitute language.

Judge Kravitz explained that Rule 56(c) spells out the primary feature of the revised rule – its three-step, point-counterpoint procedure. He reported that the advisory committee had made a number of improvements since the last standing committee meeting, and he thanked Professor Steven Gensler, a member of the advisory committee, for devising a more logical, clearer format for the rule.

Judge Kravitz pointed out that one of the criticisms of the three-step process comes from lawyers who have had to defend complex cases where a moving party may list 500 or so facts in a summary judgment motion. It is just too difficult, he said, for the opposing party to go through them all and respond to each. Most local rules, moreover, do not give a party the right to admit a fact solely for purposes of the summary judgment motion. Accordingly, the proposed rule specifies that a party need not admit or deny every allegation of an undisputed fact, but may admit a fact solely for purposes of the motion. This, he said, was an important improvement.

He also noted that the words "without argument" had been deleted from proposed Rule 56(c)(5) because they were confusing and unnecessary. The committee note, moreover, explains that argument belongs in a party's brief, not in its response or reply to a statement of fact.

A member reported that, in his experience, the procedure contemplated in proposed Rule 56(c) is essentially standard practice in many districts already. He pointed out, though, that the proposed language of Rule 56(c)(2)(B) was confusing in part because it specifies that a party opposing a motion "must file a response that includes a statement." The "response" and the "statement" accepting or disputing specified facts are two separate things. Another member agreed and pointed out that the confusion results in part because the rule requires a moving party to file three documents and the opposing party to file two.

Another explained that a party opposing a motion must actually file four things: (1) a statement opposing the motion for summary judgment; (2) a "counterpoint" response, *i.e.*, a response to each of the undisputed facts enumerated by the moving party; (3) a statement pointing out any other facts that the opposing party contends are disputed; and (4) a brief. It is not intended, though, that the opposing party actually file four separate documents. But it would be useful for the rule to flag for opposing parties that the second and third items are separate concepts.

Another member agreed that the current formulation needs to be refined and suggested devising a new term that would denominate the whole package that the moving party must file and the whole package that the responding party must file. Lawyers should be given clear directions as to exactly what they are expected to provide.

A motion was made to approve proposed Rule 56(b) and 56(c)(1-2) for publication, subject to Judge Kravitz, Professor Cooper, and the Rule 56 Subcommittee making further improvements in the language consistent with the committee's discussion.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(b) and (c)(1-2) for publication, subject to further refinement in language.

RULE 56 (c)(3)-(6)

A member noted that proposed Rule 56(c)(3) specifies that "a party may accept or dispute a fact" for purposes of the motion only. It makes perfect sense for a party to accept a fact for purposes of the motion only, but for what purpose would a party ever dispute a fact for purposes of the motion only? Judge Kravitz responded that the advisory committee had focused only on "accepting" a fact for purposes of the motion, and had not considered "disputing" a fact for purposes of the motion.

A member noted that, under proposed Rule 56(c)(4), the court may consider other materials in the record to grant summary judgment "if it gives notice under Rule 56(f)." He suggested that the reference to Rule 56(f) is unnecessary because that rule itself covers the notice that the court must give.

In addition, he noted that proposed Rule 56(c)(6) states that an affidavit or declaration must "set out facts that would be admissible in evidence." The affidavit itself, though, would be admissible in evidence only if the affiant were testifying at trial. The language may cause some confusion because an affidavit submitted in support of or in opposition to summary judgment need not itself be admissible in evidence, but the facts do have to be admissible. Courts often receive affidavits that set out hearsay, but hearsay evidence is not enough to defeat summary judgment.

A participant noted that "facts" are not admissible in evidence and suggested that it would be better to say "facts that can be proven by admissible evidence." Another pointed out, though, that the language had been taken directly from the current Rule 56(e)(1), even though the terminology is not accurate. No court will be misled, and it does not appear to present a serious problem in practice that needs to be fixed. Another member recommended that no change be made because it might appear to signal a substantive change.

A member suggested that proposed Rule 56(c)(5), specifying that "a response or reply . . . may state without argument," should be revised to refer explicitly to a party's brief, where "argument" should be made. Another member suggested, though, that the rule should not go into detail as to how parties should combine their papers. It is an area where trial judges will want flexibility to prescribe procedures.

A motion was made to approve the rest of proposed Rule 56(c) for publication, with appropriate revisions in language to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(c)(3)-(6) for publication, subject to further refinement in language.

RULE 56(e)

Judge Kravitz explained that proposed Rule 56(e) enumerates the actions that a trial judge may take if the party opposing a summary judgment motion does not properly respond to the motion. He pointed out that if a party does not cite support to show that a particular fact is disputed, the court may deem the fact undisputed for purposes of the motion. But that by itself does not automatically entitle the moving party to summary judgment.

He noted that the advisory committee had decided not to spell out in detail what a judge should do with defective motions. There is a good deal of case law on the subject, and judges have experience in dealing with them. A member added that the committee note should explain that giving the opposing party notice and a further opportunity to respond will often be all that a court needs to do.

RULE 56(f)

A member asked whether the language of proposed Rule 56(f)(2), allowing a judge to "grant or deny the motion on grounds not raised by the motion or response," refers only to legal grounds not raised, or also to other facts not raised. Judge Kravitz responded that the language is intended to be broad and cover both.

RULE 56(g)

Judge Kravitz reported that proposed Rule 56(g) had been revised substantially since the last standing committee meeting. It would give a court substantial discretion when it does not grant all the relief requested by a motion for summary judgment.

A member pointed out that the committee note sets out several reasons why a trial court might not want to grant partial summary judgment. He suggested that the note would be more balanced if it also stated the reasons why a court should grant partial summary judgment, as set forth in Judge Kravitz's memorandum accompanying the proposed rule.

A member pointed out that the committee note refers to the trial of facts and issues at "little cost," and suggested that the words be deleted because there are always substantial costs to a trial.

Judge Kravitz observed that if the committee were to decide that there should be a revised section addressing partial summary judgment – in response to the suggestions that judges should have discretion to deny a worthy partial summary judgment motion but not a worthy summary judgment on the whole case – proposed Rule 56(g) would need to be folded into that section.

A participant suggested that the language of proposed Rule 56(g) that "any material fact – including an item of damages or other relief – that is not genuinely in dispute" is confusing. An item of damages is not a material fact. He suggested that the provision would be clearer if it referred to "any material fact, item of damages, or other relief." Judge Kravitz pointed out that the advisory committee had merely retained the language of the current rule, though it might be improved.

A member noted that proposed Rule 56(c)(3) permits a party to accept a fact for purposes of the motion only. But then proposed Rule 56(g) allows a court to treat the fact as established in the case. Would the party have to be given notice if the court is considering treating the fact as established in the case?

Judge Kravitz responded that this should not happen because the party has accepted the fact for purposes of the motion only. The judge should not be able to use the party's limited admission for any other purpose. The member speculated, though, that a party might try to prevent a trial judge from finding a fact established in the case under Rule 56(g) precisely by using the stratagem of admitting the fact for purposes of the motion only. Another member agreed, suggesting that the rule seemed to present a paradox. Judge Kravitz noted, though, that judges rarely enter a Rule 56(g) order anyway.

A member stated that it might be advisable to delete proposed Rule 56(g). Under the current proposal, if a party admits a fact for purposes of the motion only, some further procedure should be required before the judge may enter an order under Rule 56(g) finding the fact established in the case. Judge Kravitz noted that the proposed Rule 56(g) material is in the current rule, and he suggested that it remain in the rule for publication and that public comment might be solicited on whether it is still needed.

RULE 56(h)

Judge Kravitz reported that defense counsel had urged that the rule specify that sanctions be imposed when a summary judgment motion is made or opposed in bad faith. But, he said, the advisory committee had decided to avoid the inevitably controversial issue of sanctions.

A motion was made to approve for publication the remainder of proposed Rule 56, with drafting improvements to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to the remainder of FED. R. CIV. P. 56 for publication, subject to further refinement in language.

FED. R. CIV. P. 26

Judge Kravitz reported that both plaintiffs' and defendants' lawyers have voiced strong support for the proposed amendments to FED. R. CIV. P. 26(a)(2) (disclosure of expert testimony) and FED. R. CIV. P. 26(b)(4)(A) (trial preparation protection for experts' draft reports, disclosures, and communications with attorneys). He pointed out that lawyers commonly opt out of the current rule by stipulation. The proposed amendments, he said, do not go as far as some may want in shielding all expert materials from discovery. For example, they do not place an expert's work papers totally out of bounds for discovery.

Under the current regime, he explained, lawyers engage in all kinds of devices to make sure that little or no preparatory material involving experts is created that could be discovered. Among other things, lawyers may hire two experts – one to analyze and one to testify. They may also direct experts to take no notes, prepare no drafts, or work through staff whenever possible.

Judge Kravitz noted that lawyers expend a great deal of time and expense in examining experts about their communications with lawyers and the extent to which lawyers may have contributed to their reports. But the outcome of cases rarely turns on these matters. Although some benefit may accrue to the truth-seeking function by having

more information available about lawyer-expert communications, the benefits are far outweighed by the high costs of the current system.

He emphasized that it is very important for the proposed amendments to Rule 26 to be clearly written. If the rule is vague, it will not succeed in reducing the high costs of the current rule because lawyers will not feel secure about the extent of the rule's protections. It would lead to unnecessary litigation over the meaning of the text, and lawyers will continue to engage in the kinds of artificial behavior regarding their experts that the advisory committee is trying to avoid.

RULE 26(a)(2)

Judge Kravitz explained that the proposed amendments to Rule 26(a)(2)(C) would require lawyers to provide a summary of a non-retained expert's testimony. The advisory committee, he said, had deliberately used the word "summary," rather than "report," to make it clear that a detailed description is not needed. The committee, he said, was concerned about placing additional burdens on attorneys.

A member asked whether the provision is intended to cover a lay witness described by FED. R. EVID. 701. Judge Kravitz responded that a witness under Rule 701 – one who is not an expert witness – is not covered by the amendments, and a lawyer would not be required to provide a summary of the testimony of a non-expert witness.

The member added that some witnesses do not testify as experts, but nonetheless have specialized knowledge. Judge Kravitz pointed out that proposed Rule 26(a)(2)(C) does in fact cover witnesses who are both fact-witnesses and expert-witnesses, and a summary must be provided of their expert testimony.

RULE 26(b)(4)(A)

Judge Kravitz said that under current Rule 26 anything told to or shown to an expert is discoverable. But under proposed Rule 26(b)(4)(A), work-product protection would be extended both to an expert's draft reports and to the communications between a party's attorney and the expert, with three exceptions: (1) compensation for the expert's study or testimony; (2) facts or data supplied by the attorney that the expert considered in forming the opinions to be expressed; and (3) assumptions supplied by the attorney that the expert relied upon in forming the opinions to be expressed. Under current Rule 26(b)(3), work-product protection is limited to "documents and tangible things." But the work-product protection proposed in the amendment would be broader, in the sense that it would cover all lawyer-expert communications not within any of the three exceptions, even if not "documents or tangible things."

A member stated that the proposed changes are excellent. He noted that lawyers now opt out of the current rule by stipulation or play games to avoid discovery of experts' draft reports and communications. He asked whether an attorney who deposes an expert and has a copy of the expert's report may ask the expert whether the attorney who has retained him or her had helped write the report or had made any changes in it. Judge Kravitz said that the question could not be asked under the proposed rule because inquiries about lawyer-expert communications would be out of bounds for discovery. The proposal, he said, is fair because it applies to drafts and communications on both sides.

A member suggested that the key question for the jury to decide is whether it can rely on an expert's opinion because it is based on the expert's own personal expertise. Therefore, the opposition should be permitted to pursue inquiries that could establish that the expert's opinion is not really an independent assessment reflecting the expert's own expertise, but the views of the attorney hiring the expert. Judge Kravitz pointed out, though, that the expert's report itself is not in evidence. The opposition can probe fully into the basis for the expert's opinions, but it just cannot ask whether the lawyer wrote the report. Who wrote the report is not important to the jury, and the jury does not even see the report. The key purpose of the report is really to apprise the opposition of the nature of the expert's testimony.

A member stated that he always enters into stipulations opting out of the current expert-witness provisions of Rule 26 because the current rule leads to a great deal of needless game-playing, discovery, and cross-examination. He explained that he always provides an outline for an expert to use at trial in order to help organize the testimony for the witness. The testimony, though, is that of the expert, not the lawyer. Requiring the outline to be turned over creates largely irrelevant disputes over authorship and distracts from the substance of the expert's testimony. The proposed rule, he concluded, is a major improvement over current practice and is consistent with what good lawyers on all sides are doing right now. And it does not favor one side or the other.

Professor Coquillette agreed and reported that he has often served as an expert witness in attorney-misconduct cases. Under the Massachusetts state rule, which is similar to the advisory committee's proposal, state trial judges do not allow inquiry into who wrote an expert's report. The cases go to trial, and the experts are cross-examined at the trial, but there are no long cross-examinations or interrogations. The jury bases its decision in the final analysis on what the expert says on substance. The state rule, he said, does not take away anything important from the truth-finding process.

On the other hand, in professional malpractice cases in the federal court in Massachusetts, it is routine for an expert to be deposed for an entire day. In the end, though, almost all the cases are settled without trial.

A member asked what the advisory committee had meant by using different language in the last two bulleted exceptions. One would allow discovery of facts and data that an expert "considered," while the other allows inquiry into assumptions that the expert "relied upon." Professor Cooper explained that it is legitimate for the opposition to ask whether an expert considered a particular fact provided by an attorney. But a more restrictive test is appropriate regarding "assumptions" provided by the attorney.

A participant argued that proposed Rule 26(a)(2)(B) explicitly requires an expert report to be "prepared and signed by the witness." Thus, the opposition should be able to ask whether the witness actually prepared the report and whether any part of it had been written by a lawyer. Judge Kravitz responded that the advisory committee had considered removing the word "prepared" from the rule and simply require that a report be signed by the witness. The committee note states clearly that a lawyer may provide assistance in writing the report, but the report should reflect the testimony to be given by the witness. The signature of the expert witness on the report means that he or she embraces it and offers it as his or her own testimony.

At trial, the opposing party may ask whether the expert agrees with the substance and language of the report, but it does not matter who actually drafted it. The current rule uses the word "prepared" and anticipates that a lawyer will provide assistance in drafting the report. But discovery should not be allowed into who wrote which parts of the report or who suggested which words to use. That is what has led to all the excessive costs and artificial gamesmanship that the proposed amendments are designed to eliminate.

A member stated that the proposed amendments are a great idea that will save the enormous time and expense now wasted on discovery into draft reports and lawyer-expert communications. He said that the litigation process should not be cluttered up with the extraneous and expensive issues of who "prepared" expert reports and opinions.

A member noted that under FED. R. EVID. 705 (disclosure of facts or data underlying expert opinion) and other provisions, experts routinely rely on other people, such as lab technicians. Much expert testimony is really the assimilation of much background information, rather than the work of one person. Perhaps a better word could be used than "prepared," but it should be understood that an expert's report will often involve collaboration. An expert could not function properly without speaking with others. If the expert signs the report, and by so doing stands by its substance, it really does not matter who supplied the actual words.

Another member observed that the rule deals with discovery, not trial. But the net effect of it will be to keep some evidence away from a jury, on the theory that it involves work product worthy of protection. Generally, expert witnesses have no direct knowledge of the facts of a case. They bring their own specialized knowledge to the

case, based on their professional expertise, not the lawyer's. A report is required in order for the expert to testify. It is different from a lawyer's communications with an expert. The opposition should be able to inquire into the circumstances of the production of a report that the court requires to be filed.

A member pointed out that most cases settle, and the proposed amendments will clearly reduce the costs of litigation by not allowing discovery of draft reports or inquiry into whether lawyers contributed to preparation. She noted that the three bulleted exceptions in Rule 26(b)(4)(A) draw a distinction between facts or data "considered" and assumptions "relied upon" that will likely lead to litigation over whether something was considered versus relied upon. She suggested that the distinction be eliminated and that in all cases the reference should be to matters "considered, reviewed, or relied upon."

A participant also questioned the validity of the distinction between "facts and data" and "assumptions," suggesting that the third bulleted exception be eliminated and the rule refer only to "facts and data."

The lawyer members of the committee were asked about the contents of the stipulations they use in opting out of the current rule. One responded that the stipulations he negotiates specify that neither party may ask for the drafts of experts, and no discovery will be allowed of lawyer-expert communications leading up to the expert's report. He added that his stipulations, though, allow the other party to ask whether the expert actually drafted the entire report.

Another member, however, said that his stipulations prohibit any inquiry into authorship. He emphasized that if questions of that nature were allowed, it would make more sense just to let the draft reports themselves be discovered because they will establish more reliably whether the expert wrote the whole report. The opposing party, he said, should only be allowed to ask whether the expert's opinion is his or her own, how the expert reached that opinion, and what supports the opinion. All the questions concerning the role of counsel in preparing the report, although not technically irrelevant, are largely pointless. There is no end to the inquiries, and they lead to endless, needless expense. Therefore, in the absence of a stipulation, lawyers and experts are forced to engage in artificialities, put nothing in writing, and avoid communications. As a result, it takes the expert much longer to draft a report, adding another large expense.

Judge Kravitz reiterated that it was important to keep in mind that the central purpose of the report is to provide the other side with notice of what the expert is going to testify about at the trial. It is not to find out who wrote each word.

A member emphasized that the real debate is over how much can be asked of the witness in cross-examination. There is a trade-off between what the other side may find out during cross-examination and the sheer cost of the exercise. Judge Rosenthal added

that the minimal benefits of the information that would be lost under the proposed amendments are simply not worth the expense of the current system.

A member stated that, under the current rule, if he cannot reach a stipulation with the other side to bar discovery of drafts and lawyer-expert communications, he will fight to obtain all the drafts. Unless an attorney knows what the other party can or cannot do, as set forth in a rule or stipulation, he or she will want all reports and communications. It would be best for the committee to cut off this kind of discovery entirely. The proposed amendments, he said, reflect the best of current practice. Without them, though, he will continue to negotiate stipulations.

A member stated that in testing an expert, the opposing party will probe for any inconsistencies between the expert's testimony and what is set forth in the report. The expert may explain an inconsistency by admitting that the particular point in the report had been written by the lawyer. The opposing party should not have to wait to learn about the inconsistency for the first time when the expert is on the witness stand. Inquiry into the inconsistency should be allowed during the discovery process.

In addition, a witness may be impeached by inquiry into the methodology used. It is important to know whether an attorney channeled the methodology for the expert. In other parts of the law, for example, it is common to have statements prepared by lawyers and signed by others, such as affidavits. Law-enforcement agents, for example, do not always write their affidavits in support of search warrants. Moreover, cross-examination is allowed in criminal cases. Issues of inconsistency may arise between a criminal defendant's testimony and a suppression report written by the lawyer. There should not be a different rule for civil and criminal cases.

A member asked why, in proposed Rule 26(b)(4)(A)(iii), the protections and restrictions apply only to a witness who is "required to provide a report." A treating physician, for example, who is not required to file a report under rule 26(a)(2)(B), should be entitled to the same work-product protection. Professor Cooper explained that if the treating physician is not retained by counsel, the work-product protection is really not needed. The relationship with the lawyer for a retained expert is not the same. Therefore, the protection applies only to retained witnesses.

Judge Kravitz suggested the example of an expert witness who is a state trooper, not retained by counsel. There is no need for the lawyer's communications with the trooper to receive work-product protection because there is no special relationship between the two. Troopers and family physicians testify essentially as fact witnesses, although they give some expert advice. The professional witness, on the other hand, is part of the litigation team.

A motion was made to approve the proposed amendments to Rule 26 for publication and to solicit specific public comment on the issues identified during the committee's discussions. Judge Kravitz added that the proposed amendments were still subject to style and format improvements.

The committee, with one member opposed, by voice vote approved the proposed amendments to Rule 26 for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2008 (Agenda Item 9).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, and 59 and HABEAS CORPUS RULE 8

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Criminal Procedure and the Rules Governing §2254 Cases and § 2255 Proceedings.

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

CRIMINAL FORFEITURE

Judge Tallman reported that the proposed amendments to FED. R. CRIM. P. 7 (indictment and information), FED. R. CRIM. P. 32 (sentencing), and FED. R. CRIM. P. 32.2 (forfeiture), dealing with criminal forfeiture, had been initiated at the request of the Department of Justice. They were drafted by an ad hoc subcommittee that had enjoyed significant input from lawyers who specialize in forfeiture matters, both from the Department and the National Association of Criminal Defense Lawyers. The amendments essentially incorporate current practice as it has developed since the forfeiture rules were revised in 2000.

Judge Tallman explained that in some districts the government currently includes criminal forfeiture as a separate count in the indictment and specifies the property to be

forfeited. The proposed rule would specify that the government's notice of forfeiture should not be designated as a count of the indictment. The indictment would only have to provide general notice that forfeiture is being sought, without identifying the specific property to be forfeited. Forfeiture, instead, would be handled through the separate ancillary proceeding set forth in FED. R. CRIM. P. 32.2.

Professor Beale pointed out that the proposal was not controversial and represents a consensus between the Department of Justice and private forfeiture experts. She walked the committee through the details of the amendments and pointed out that they elaborate on existing practice and eliminate some uncertainties regarding the 2000 forfeiture amendments.

A member pointed to language in the committee note cautioning against general orders of forfeiture (where the property to be forfeited cannot be readily identified), except in "unusual circumstances," and asked what those circumstances might be. Judge Tallman suggested that a general order might be appropriate when the government demonstrates that funds derived from narcotics have been used to buy other property. The defendant, in essence, tries to hide assets and the government seeks to forfeit an equivalent amount of property.

Professor Beale pointed out that other examples are found in the cases cited in the note. She noted that the 2000 amendments allowed a forfeiture order to be amended after property has been recovered. Thus, some flexibility in forfeiting property is already accepted in the rules and in case law, although the outer boundary of forfeiture law is still somewhat ambiguous.

Judge Tallman added that the concept of forfeiture is driven by the "relation-back" doctrine, under which the sovereign acquires title to the property obtained by wrongdoing at the time of the wrong. The rule follows the money and perfects the sovereign's interest in an equivalent value of property. A participant recommended using the term "tracing" in the rule, and Judge Tallman suggested that the committee note might add the words "to identify and trace those assets."

A member pointed to an inconsistency in the proposed rule that needed to be corrected. Under proposed Rule 32.2(b)(6)(A) publication by the government is mandatory. But Rule 32.2(b)(6)(C) specifies that publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

Professor Beale suggested changing the heading of Rule 32.2(b)(6)(C) to make it clear that there are exceptions to (A)'s mandatory publication requirement. She noted that the style consultant had advised against adding a cross-reference to subparagraph (C) in

Rule 32.2(b)(6)(A). A member suggested turning the proposed last sentence of (C) into a separate subparagraph (D), but Professor Kimble suggested that it would be better to pull the proposed last sentence of (C) back into (A). Professor Beale recommended that the committee approve the rule subject to further drafting improvements.

A participant noted that proposed Rule 32.2(b)(4)(C) specifies that "a party may file an appeal regarding that property under FED. R. APP. P. 4(b)" and asked whether it applies to an appeal by a third party. Professor Beale responded that the advisory committee had intended the language to refer only to the defendant or the government, not to third parties. It was suggested, therefore, that the rule might be amended to read: "the defendant or the government may file an appeal." A member noted that third parties are not atypical in forfeiture proceedings, and they need to be considered. The defendant takes an appeal from the judgment of conviction, but that obviously does not apply to a third party. So some guidance would be appropriate. Professor Struve added that third parties are not specifically mentioned in FED. R. APP. P. 4.

A member noted that the provision deals only with an appeal of the sentence and judgment. Forfeiture, on the other hand, is an ancillary proceeding governed by Supplemental Rule G. Therefore, no separate provision is needed in the criminal rules. A member added that proposed Rule 32.2(b)(4)(A) states that an order "remains preliminary as to third parties until the ancillary proceeding is concluded."

A member emphasized the need to have the rule make clear when third parties are included and when they are not. He moved to replace the term "a party" with "the defendant or the government" throughout Rule 32.2(b)(6)(A) and (B). Another member suggested that consideration be given to making a global change, such as by adding a new definition in FED. R. CRIM. P. 1 that would define the term "party" for the entire Federal Rules of Criminal Procedure. Judge Rosenthal agreed that the suggestion may have merit, but it would take considerable time to accomplish. She suggested, therefore, that the committee ask Judge Tallman, Professor Beale, the style subcommittee, and the forfeiture experts to refine the language of the amendments in light of the committee's discussion. Judge Tallman added that the advisory committee would favor changing the terminology in Rule 32(b)(6)(2)(C) from "a party" to "the defendant or the government."

Judge Rosenthal recommended that the committee approve the proposed forfeiture rules, subject to the advisory committee, working with others, further refining the exact language of the amendments.

The committee without objection by voice vote approved the proposed forfeiture amendments for approval by the Judicial Conference, subject to revisions by the advisory committee along the lines discussed at the meeting.

FED. R. CRIM. P. 41

Judge Tallman stated that the amendments to FED. R. CRIM. P. 41 (search and seizure) had been drafted to address challenges that courts are facing due to advances in technology. They would establish a two-step procedure for seizing electronically stored information. He noted that a huge volume of data is stored on computers and other electronic devices that law-enforcement agents often must search extensively after probable cause has been established.

Judge Tallman reported that the advisory committee had seen a demonstration of the latest technology at its April 2007 meeting. He noted, for example, that technology now on the market can prevent anyone from making a duplicate image of electronically stored information. Thus, agents in some cases must seize entire computers because they cannot duplicate the contents for off-site review. The Department of Justice, he said, reports that this process requires substantial additional time to execute warrants properly.

To address problems of this sort, the proposed rule sets out a two-step process. First, the data-storage device may be seized. Second, the device may be searched and the contents reviewed. The court may designate a magistrate judge or special master to oversee the search. Maximum discretion is given to judges to provide appropriate relief to aggrieved parties.

Professor Beale stated that the law on particularity under the Fourth Amendment is inconsistent and still evolving. The proposed rule, she said, is not intended to govern the developing case law on the specificity required for a warrant, but merely sets up a procedure. The warrant would authorize both seizure of the device and later review of the contents. The owner of the device may come into the court and seek return of the device or other appropriate relief.

A member stated that the rule makes a great deal of sense, but asked whether the advisory committee had considered how likely it is that a Fourth Amendment challenge will be brought to the proposed procedure. Professor Beale responded that the challenge would not be to the rule per se, but to particular orders or warrants issued under it. In other words, there will be the usual challenges to the breadth of the warrants, but the rule will not be invalidated.

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

HABEAS CORPUS RULES 11 and 12

Judge Tallman explained that the Rules Governing §§ 2254 Cases and 2255 Proceedings conform to the Anti-Terrorism and Effective Death Penalty Act. The statute aims to narrow the focus of issues that might justify issuance of a writ of habeas corpus. When the district court denies a petition for a writ of habeas corpus, it enters a judgment. Under the statute, a certificate of appealability must then be entered before an appeal may be taken by the petitioner, but it is unclear how and by whom it is issued. The Act, in fact, allows it to be issued by a district judge, the court of appeals, or a circuit justice.

Judge Tallman explained that the great majority of petitioners are pro se inmates, and the rules create a potential trap for them. District judges normally will first enter a judgment denying a habeas corpus petition and then later issue a certificate of appealability. But in waiting for the certificate to issue (and often seeking reconsideration of the denial of the certificate), inmates may fail to file a timely appeal. They are generally unaware that motions for a certificate of appealability do not toll the time for filing an appeal.

Judge Tallman said that the advisory committee had attempted to draft new Rule 11 in a way that spells out as clearly as possible, both in § 2254 cases and § 2255 proceedings what inmates have to do. The judges on the committee, he said, believe that district judges should normally issue or deny the certificate at the end of the case, when the facts and issues are still fresh in the judge's mind.

Professor Beale reported that the public comments had expressed some differences of opinion on this issue. Some had suggested that it would be better to bifurcate the two court decisions and allow a district judge to decide on the certificate later than ordering entry of the judgment. But, she said, the advisory committee had concluded that it is important for the court to make the two decisions together, both to promote trial court efficiency and to avoid misleading prison inmates. The committee, however, did revise the proposal after publication to give a trial judge the option of ordering briefing on the issues before deciding on the certificate of appealability. The court may also delay its ruling, if necessary, and include the two actions in a joint ruling. Judge Tallman added that the advisory committee had tried to make it clear in the last sentence of proposed Rule 11(a) that a motion for reconsideration of the denial of a certificate of appealability does not extend the time to appeal.

A member agreed that the revisions to Rule 11 will provide better information to pro se litigants, but questioned the companion amendment to FED. R. APP. P. 22(b). The appellate rule, he suggested, assumes that the district court's decision on issuing the certificate of appealability will be made after the notice of appeal has been filed and sent

to the court of appeals. But under the proposed revisions to Rule 11, the certificate of appealability will usually be issued before a notice of appeal is filed.

Judge Tallman responded that it was not necessarily true that the certificate will issue before the notice of appeal is filed. Under the governing statute, an appeal cannot be filed without a certificate of appealability. Thus, if the court of appeals receives a notice of appeal without a certificate of appealability, it must consider asking the district court to decide on issuing a certificate or granting one itself. Several participants suggested possible improvements in the language of the proposed amendment. One noted that if a habeas petitioner files a notice of appeal without a certificate of appealability, his circuit deems the notice of appeal to be a motion for a certificate of appealability.

A member pointed out that proposed Rule 11 specifies that the district court "must" issue or deny a certificate of appealability when it enters a final order. She suggested that the verb be changed to "should" in order to give district judges discretion in appropriate circumstances. Judge Tallman reported that the advisory committee had deliberately chosen the word "must," believing that a district judge could delay issuing the joint order and certificate to allow time for briefing, if necessary. He said that the advisory committee would be amenable to changing the language if the standing committee preferred to give trial judges greater discretion.

Current Rule 11 of the Rules Governing § 2254 Cases would be renumbered as Rule 12.

A motion was made to approve proposed Rule 11, retaining the verb "must."

The committee, with one objection, by voice vote approved the proposed amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings for approval by the Judicial Conference.

A motion was made to approve the proposed amendment to FED. R. APP. P. 22(b)(1), with a change in language to read, "If the district court issues a certificate, the district clerk must send the certificate . . . ."

The committee without objection by voice vote approved the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 6 (grand jury) had been brought to the advisory committee's attention by magistrate judges, who noted that in some districts no judge is present in the city where the grand jury sits. Therefore, a magistrate judge may have to travel hundreds of miles just to receive the return of an indictment. The proposed amendment would authorize a magistrate judge to take the return by video teleconference.

A participant questioned the language of the amendment that specifies that a judge may take the return "by video teleconference in the court where the grand jury sits." He suggested that the proper phrasing might be "from the court . . . ." Alternatively, the sentence might end after the word "teleconference." Professor Beale responded that the advisory committee wanted to have the return by the grand jury made in a courtroom in order to maintain the solemnity of the proceedings.

A member pointed out that the committee note states that the indictment may be transmitted to the judge in advance for the judge's review. She said that it is surprising that the matter is addressed in the note, rather than the rule itself, because it is essential that the indictment be sent to the judge in advance by reliable telegraphic means.

Judge Tallman agreed that the judge should have a copy of the indictment in hand. The judge would conduct the proceedings remotely by videoconference, and a deputy clerk would be physically present in the courtroom with the grand jury to receive and file the indictment.

A member pointed out that he had served as an assistant U.S. attorney in three different districts, and the practice of receiving grand jury returns varied in each. Nevertheless, there is always at least a deputy clerk present to receive and file the indictment. Judge Tallman emphasized that the thrust of the proposed rule is merely to authorize a judge's participation by video teleconference, not to regularize grand jury practices.

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

Judge Rosenthal stated that there may be some advantage to deferring publication of the proposed amendment to Rule 6 because it may be an unnecessary burden to couple it for publication with the potentially controversial proposed amendments to Rule 15. She suggested that it might be better to publish the amendments to Rule 15 in August 2008, review the public reaction to them, and then publish the amendment to Rule 6 at a later date. She emphasized that no decision had been made on the matter, but asked the committee's approval to delay publication if she deems it appropriate.

The committee without objection by voice vote agreed that the chair of the committee may decide on the timing of publication of the proposed amendment.

FED. R. CRIM. P. 15

Judge Tallman stated that the proposed amendments to FED. R. CRIM. P. 15 (depositions) would authorize, in very limited circumstances, the taking of depositions outside the United States and outside the presence of the criminal defendant, when the presence of a witness for trial cannot be obtained. The procedure, for example, would be permissible when the presence of the witness in the United States cannot be secured because the witness is beyond the district court's subpoena power and the foreign nation in which the witness is located will not permit the Marshals Service to bring the defendant to the deposition.

Judge Tallman noted a recent decision of the Fourth Circuit upholding the taking of depositions in Saudi Arabia in an al-Qaeda case. The Saudi Arabian government would not permit the witnesses to come to the United States. So the district court authorized a video conference where the defendant was in Virginia and the witnesses in Saudi Arabia. The witnesses could see the defendant, and the defendant could see the witnesses. The procedures contained in the proposed amendments, he said, mirror what the Fourth Circuit approved in that case.

Judge Tallman pointed out that the advisory committee was particularly sensitive in this area because the Supreme Court had reviewed earlier proposed amendments in 2002 and had declined to transmit a proposed amendment to FED. R. CRIM. P. 26 to Congress. At that time, Justice Scalia questioned the constitutionality of this kind of procedure, but said it might be permissible if there were case-specific findings that it is necessary to further an important public policy. Judge Tallman explained that the advisory committee had tried to meet Justice Scalia's concerns. Thus, proposed Rule 15(c)(3) lists in detail all the factors that the court must find in order for a deposition to be taken without the defendant's physical presence.

Professor Beale added that the proposed rule would require a court to determine, on a case-by-case basis, what technology is available and whether the technology permits reasonable participation by the defendant. The rule, she said, clearly establishes a preference for the witness to be brought to the United States and covers only those situations where the witness cannot come.

A member stated that certain nations would regard this procedure as a serious abuse of extraterritorial judicial authority by the United States and a violation of their sovereignty. Therefore, it might be helpful to state in the committee note that the

committee takes no position on whether the procedure might be legal in particular foreign nations.

A participant pointed out that the proposal was, in effect, a rule of evidence and suggested tying it to the language of FED. R. EVID. 807(b) (residual exception to the hearsay rule) and its comparative requirement. Under the proposed amendments to FED. R. CRIM. P. 15, for example, the government might have many similar witnesses available in the United States, but their presence is not a listed factor that the court must consider. FED. R. EVID. 807(b), he said, would provide a better, tougher standard. He also questioned the reference in proposed Rule 15(c)(3)(A) to "substantial proof of a material fact." Professor Beale responded that the phrase had been taken from the case law.

A member suggested that the standard in the rule need not be as narrow as FED. R. EVID. 807(b) because the testimony of the witness may not be hearsay evidence. In any event, though, she expressed doubts that the evidence produced by a deposition conducted under the proposed rule would be admissible.

Professor Beale agreed that the proposed rule does not address whether the information obtained from the witness will actually be admissible in evidence. But, she said, several circuits now have allowed district judges to craft specific arrangements in individual cases. The rule, she explained, had been drafted carefully to meet the constitutional standards and provide some structure that would make it possible in appropriate circumstances to have the evidence admitted. Of course, there is little point in conducting the deposition if it produces evidence that cannot be admitted.

A member pointed out that there are many procedural issues that the proposed rule does not address, such as the location of the prosecutor and defense lawyer during the deposition and the transmission of exhibits. She noted that the rule only addresses the initial approval and justification for conducting the deposition at all. Judge Tallman agreed that the advisory committee had intended to leave the logistical arrangements to the individual courts. Mr. Tenpas added that it is wise for the rule to avoid the technology issues because the technology is changing rapidly. It is appropriate that the rule simply focuses on when a court may allow a deposition to be taken. The Department of Justice, he said, supports the committee's best efforts on the matter and hopes that the Supreme Court will accept the rule.

A member suggested adding another circumstance to the list of case-specific findings that support taking a deposition – the physical inability of a criminal defendant to travel to another country. Mr. Tenpas responded that that circumstance may fall within proposed Rule 15(c)(3)(D)(ii), "secure transportation . . . cannot be assured," or proposed Rule 15(c)(3)(D)(iii), "no reasonable conditions will assure an appearance."

A member asked whether the committee planned to ask specifically for public comments on the constitutional issues, especially since the Supreme Court had rejected a similar proposal in the past. Judge Rosenthal responded that the committee would solicit comments on the constitutionality of the proposed procedure, and it must be up front in the publication regarding the history of the earlier amendments submitted to the Supreme Court.

A member pointed out that in some cases the criminal defendant may request a deposition. In that event, the defendant's confrontation-clause rights are not implicated by the deposition. She suggested that the proposed rule would be useful in that situation.

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

FED. R. CRIM. P. 32.1

Judge Tallman stated that the proposed amendment to FED. R. CRIM. P. 32.1(a)(6) (revoking or modifying probation or supervised release) had been brought to the committee's attention by magistrate judges. The current rule, he said, provides that a person accused of a violation of the conditions of probation or supervised release bears the burden of establishing that he or she will not flee or pose a danger, but it does not specify the standard of proof that must be met.

The Bail Reform Act specifies that a "clear and convincing evidence" standard applies at a defendant's initial appearance. Case law establishes that the same standard should be used in determining whether to revoke an order of probation or supervised release. The proposed amendment would explicitly state that the "clear and convincing evidence" standard of proof would apply in revocation proceedings.

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 12, 2008 (Agenda Item 8).

Amendments for Publication

RESTYLING THE FEDERAL RULES OF EVIDENCE

FED. R. EVID. 101-415

Judge Hinkle reported that the advisory committee was restyling the Federal Rules of Evidence in the same way that the appellate, criminal, and civil rules had been restyled to make them easier to read and more consistent, but without making any substantive changes. He pointed out that the committee was requesting approval at this meeting to publish the first third of the rules, FED. R. EVID. 101-415, but not to publish them immediately. The second third of the rules would be presented for approval at the January 2009 meeting, and the final third at the June 2009 meeting. All the restyled evidence rules would then be published as a single package in August 2009.

Judge Hinkle pointed out that additional changes may be needed in the first third of the rules because the advisory committee will have to go back later in the project to revisit all the rules for consistency. He also pointed to some global issues, such as whether the restyled rules should use the term "criminal defendant" or "defendant in a criminal case." Other issues that the advisory committee had been dealing with, he noted, have been set forth in footnotes to the proposed rules. He emphasized that the proposed restyling changes had been very thoroughly vetted at the advisory committee level.

A member noted that the proposed revision of FED. R. EVID. 201(d) (judicial notice) refers to the "nature" of a noticed fact, rather than the "tenor" of the fact, as in the current rule. Professor Capra responded that the advisory committee had examined the case law and could find no discussion of what "tenor" means. As a result, it decided to use "nature," rather than "tenor," because it is easier to understand and does not represent a substantive change.

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

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

Judge Hinkle reported that FED. R. EVID. 804(b)(3) is the hearsay exception for a statement against interest by an unavailable witness. The proposed amendment, he said, would extend the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases. He emphasized that the Department of Justice does not oppose the change.

He noted that the current rule requires corroborating circumstances if the defendant offers a statement, but not if the government does. The anomaly results from the fact that Congress, in drafting the rule, believed that the government could never use

the provision because case law under the Confrontation Clause would preclude the government from submitting evidence under the rule.

The government, however, in fact can use the rule. Therefore, the provision does not impose parallel requirements on the government and the defendant. Nevertheless, some courts have held that the government must show corroborating circumstances, even though the current rule does not contain that requirement.

Judge Hinkle said that there was never any real rationale for the different treatment in the rule. It was just an historical accident because the drafters had assumed that the government could never use the provision.

He stated that the advisory committee had decided not to make any change in the rule regarding civil cases. The amendment, thus, would address only criminal cases. In addition, there are some other current misunderstandings about the rule that the committee decided not to address as part of the current proposal.

Professor Capra stated that the proposed amendments to Rule 804(b)(3) had not yet gone through style review. He pointed out that all the hearsay rules would be restyled together, which will require a great deal of work. Nevertheless, the advisory committee wanted to publish the substantive amendments to Rule 804(b)(3) now, with the understanding that the rule will be restyled in due course as part of the restyling process.

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

Informational Item

Judge Hinkle reported that the most important matter currently affecting the evidence rules is the pending effort to get Congress to enact new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work-product protection). The rule, he noted, had been approved unanimously by the Senate, but was still pending before the House Judiciary Committee.

Judge Hinkle noted that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In that case, the Court held that admitting "testimonial" hearsay violates an accused's right to confrontation unless the accused has had an opportunity to cross-examine the declarant. He said that it is at least possible, in light of *Crawford* and the developing case law, that some hearsay exceptions may be subject to an

unconstitutional application in some circumstances. Case law developments to date suggest that rule amendments not be necessary.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the sealing subcommittee, reported that the subcommittee had decided to confine its inquiry to cases that have been totally sealed by a judge. The Federal Judicial Center, he noted, had been searching the courts' electronic databases to identify all cases filed in 2006 that have been sealed. It divided the civil cases into five categories: (1) False Claims Act cases; (2) cases related to grand jury proceedings; (3) cases involving juveniles; (4) cases involving seizures of property; and (5) all other cases. Criminal cases are being treated separately. In addition, the Center had contacted the clerks of the courts to obtain additional information about the cases. Its initial research to date had identified 74 sealed civil cases, 238 sealed criminal cases, and 3,631 cases sealed by magistrate judges. The Center reported that some of the sealed cases were later resolved by public opinions, including some published opinions.

Judge Hartz reported that the subcommittee planned to hold an additional meeting before the next meeting of the standing committee.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that the committee, with the invaluable assistance of Professor Capra, was continuing its work on reviewing the use of standing orders in the courts. She said that a survey had just been distributed to chief district judges and chief bankruptcy judges, and a good deal of helpful information had been received. Professor Capra, she added, was working on proposed guidelines to assist courts in determining which subjects should be set forth in local rules of court and which may appropriately be relegated to standing orders. In addition, the courts will be urged to post all standing orders on their court web-sites.

NEXT MEETING

The committee agreed to hold the next meeting in early to mid-January 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, January 12-13, in San Antonio, Texas.

Judge Kravitz reported that the civil rules committee was planning to hold three hearings on the proposed amendments to FED. R. CIV. P. 26 and 56 – one on the east coast, one on the west coast, and one in the middle of the country. Judge Rosenthal recommended scheduling the hearings to coincide with upcoming committee meetings. Thus, one hearing will be held on November 17, 2008, in conjunction with the fall meeting of the civil rules committee in Washington, and another will be held in San Antonio on January 14, 2009, the day after the next meeting of the standing committee. The third will be held on February 2, 2009, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB IV

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 16, 2008

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 16, 2008 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2008.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2010, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Agreed to establish a Capital Investment Fund pilot program for a four-year period beginning in fiscal year 2009, subject to congressional approval, which would allow participating court units to —

a. Voluntarily return funds for deposit into the fund up to a maximum at any given time of $50,000;

b. Utilize funds deposited into the Capital Investment Fund in subsequent fiscal years, once the Executive Committee has approved the national Salaries and Expenses financial plan and final allotments have been transmitted to the courts; and

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Agreed to seek legislation adjusting the time periods in 29 statutory provisions affecting court proceedings to account for the proposed changes in the time-computation rules.

Approved proposed amendments to Appellate Rules 4(a)(4), 22, and 26(c), and new Rule 12.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41 as part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 2016, 4008, 7052, 9006, 9015, 9021, 9023, and new Rule 7058 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved revisions to Bankruptcy Official Forms 8, 9F, 10, 23, and Exhibit D to Form 1 to take effect on December 1, 2008.

Approved new Bankruptcy Official Form 27 to take effect on December 1, 2009.

Approved proposed amendments to Bankruptcy Rules 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 part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 13(f), 15(a), 48(c), and 81(d), and new Rule 62.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81, Supplemental Rules B, C, and G, and Illustrative Forms 3, 4, and 60 as part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 7, 32, 32.2, 41, and Rule 11 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, 59, and Rule 8 of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255 as part of the project to improve the time-computation rules and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

TAB V-A

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

As the Committee discussed at its fall 2007 and spring 2008 meetings, the Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), has raised a number of questions concerning the nature of appeal deadlines (as well as other litigation deadlines). My October 2, 2007 and March 13, 2008 memos on *Bowles* reviewed a number of initial questions about the decision.

The purpose of this memo is to update the Committee on the developing caselaw under *Bowles*. Part I of this memo discusses the Supreme Court's decision in *Greenlaw v. United States*, 128 S. Ct. 2559 (2008). Part II briefly surveys court of appeals decisions, handed down since the time of my March 2008 memo, which address *Bowles*' effect on appeal deadlines.[1]

I. Greenlaw

This past June, the Court had occasion to mention Rule 4(b)'s appeal deadlines in the course of its discussion in *Greenlaw v. United States*, 128 S. Ct. 2559 (2008), concerning the cross-appeal requirement. Greenlaw had appealed his sentence to the court of appeals; the government failed to cross-appeal. The court of appeals not only rejected Greenlaw's challenge to his sentence but also "determined, without Government invitation, that the applicable law plainly required a prison sentence 15 years longer than the term the trial court had imposed." 128 S. Ct. at 2562. The Supreme Court vacated the court of appeals' judgment, reasoning that "absent a Government appeal or cross-appeal, the sentence Greenlaw received should not have been increased." *Id*. The Court stated that "[e]ven if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the

[1] Part II limits its survey to decisions relating to appellate practice. Decisions analyzing deadlines that are relevant only to trial-level litigation are omitted; so are non-precedential decisions. This memo does not cover district court discussions of *Bowles*.

Government refrained from pursuing would not fit the bill." 128 S. Ct. at 2566.[2] As the *Greenlaw* Court explained,

> In increasing Greenlaw's sentence by 15 years on its own initiative, the Eighth Circuit did not advert to the procedural rules setting deadlines for launching appeals and cross-appeals. Unyielding in character, these rules may be seen as auxiliary to the cross-appeal rule and the party presentation principle served by that rule. Federal Rule of Appellate Procedure 3(a)(1) provides that "[a]n appeal permitted by law ... may be taken *only by filing a notice of appeal* ... within the [prescribed] time." (Emphasis added.) Complementing Rule 3(a)(1), Rule 4(b)(1)(B)(ii) instructs that, when the Government has the right to cross-appeal in a criminal case, its notice "*must be filed* ... within 30 days after ... the filing of a notice of appeal by any defendant." (Emphasis added.) The filing time for a notice of appeal or cross-appeal, Rule 4(b)(4) states, may be extended "for a period not to exceed 30 days." Rule 26(b) bars any extension beyond that time.
>
> The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality. Thus a defendant who appeals but faces no cross-appeal can proceed anticipating that the appellate court will not enlarge his sentence. And if the Government files a cross-appeal, the defendant will have fair warning, well in advance of briefing and argument, that pursuit of his appeal exposes him to the risk of a higher sentence. Given early warning, he can tailor his arguments to take account of that risk. Or he can seek the Government's agreement to voluntary dismissal of the competing appeals, see Fed. Rule App. Proc. 42(b), before positions become hardened during the hours invested in preparing the case for appellate court consideration.

128 S. Ct. at 2569. The *Greenlaw* Court's discussion is interesting not only for what the Court

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[2] Justice Alito, in dissent, asserted that "the cross-appeal requirement [is] a rule of appellate practice. It is akin to the rule that courts invoke when they decline to consider arguments that the parties have not raised. Both rules rest on premises about the efficient use of judicial resources and the proper role of the tribunal in an adversary system." As such, he argued, the rule can be subject to judge-made exceptions. *Greenlaw*, 128 S.Ct. at 2571 (Alito, J., dissenting). Justice Stevens joined Justice Alito's dissent in whole; Justice Breyer joined in part, but disagreed on the appropriate outcome in *Greenlaw*. (Justices Alito and Stevens, having decided that there can be judge-made exceptions to the cross-appeal rule, would have affirmed because the Court was not asked to determine "whether, under the assumption that the Court of Appeals enjoys discretion to initiate error correction for the benefit of a nonappealing party, the Eighth Circuit abused that discretion in this case," 128 S. Ct. at 2578 n.3; Justice Breyer concurred in the majority's vacatur because he believed that the court of appeals had abused its discretion in ordering the increase in Greenlaw's sentence, *id*. at 2571.)

said but also for what it did not say. Just as the Court declined the opportunity to state whether the cross-appeal requirement is jurisdictional, so too it did not use the word "jurisdictional" when discussing the limits set by Rule 4(b)(1)(B)(ii) and Rule 4(b)(4). *Greenlaw*, then, leaves unresolved the questions raised by *Kontrick v. Ryan*, 540 U.S. 443 (2004), *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), and *Bowles*.

II. Court of appeals decisions analyzing *Bowles*' effect

My March 13, 2008 memo noted that after *Bowles*, the status of many appeal-related deadlines is in flux. That memo observed that statutorily-backed appeal deadlines are likely to be held jurisdictional; that some courts have now held certain entirely rule-based appeal deadlines to be non-jurisdictional; and that a split has developed concerning rule-based provisions that fill gaps in statutory appeal deadline schemes. This memo updates the March 13 memo's analysis by summarizing noteworthy decisions since that time.

A. Statutory appeal deadlines are jurisdictional

Post-*Bowles* decisions continue to confirm that statutory appeal deadlines are jurisdictional. *See, e.g.*, *Contino v. United States*, 535 F.3d 124, 126 (2d Cir. 2008) (Rule 4(a)(1)(B)'s 60-day period is jurisdictional).

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 28 U.S.C. § 2107, and thus it seems likely that under *Bowles*' reasoning these limits are to be regarded as jurisdictional. Rule 4(b)(1)(B)'s 30-day time limit for government appeals roughly mirrors a statutory limit (applicable to certain appeals by the government in criminal cases) that is now codified at 18 U.S.C. § 3731, and thus the same 'jurisdictional' label may in some instances apply to that limit as well.

B. Entirely non-statutory appeal deadlines appear to be non-jurisdictional

There have been further post-*Bowles* decisions consistent with the view that entirely non-statutory appeal deadlines are claim-processing rules rather than jurisdictional deadlines.

The most prominent example of such a deadline is Rule 4(b)(1)(A)'s deadline for appeals by criminal defendants.[3] For this proposition my March 2008 memo cited *United States v.*

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[3] One complexity which the courts have not yet explored with respect to Rule 4(b)(1)(A)'s 10-day time limit is that though there is no corresponding codified statute that reflects the 10-day limit, Rule 4(b)(1)'s 10-day and 30-day appeal time limits for criminal cases

Garduno, 506 F.3d 1287, 1290-91 (10th Cir. 2007), and *United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007). Decisions from the Second and D.C. Circuits can now be added to the list. *See United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008) ("The time to appeal a criminal judgment ... is set forth only in a court-prescribed rule of appellate procedure. Rule 4(b), unlike Rule 4(a), is not grounded in any federal statute. ... It therefore does not withdraw federal jurisdiction over criminal appeals."); *United States v. Byfield*, 522 F.3d 400, 403 n.2 (D.C. Cir. 2008) ("In light of *Bowles*, we now hold that Rule 4(b) is not jurisdictional because it was judicially created and has no statutory analogue.").[4]

Another example of a non-statutory appeal deadline is Civil Rule 23(f)'s 10-day deadline for seeking permission to appeal a class certification ruling. In *Gutierrez v. Johnson & Johnson*, 523 F.3d 187 (3d Cir. 2008), the Third Circuit concluded that Rule 23(f)'s deadline is a nonjurisdictional claim-processing rule. *See id.* at 198. But in *Gutierrez*, that conclusion did not help the would-be appellants because the court applied the 10-day deadline strictly. A reconsideration motion filed more than 10 days after the class certification ruling did not toll Rule 23(f)'s 10-day deadline, even though the extension of time to file the reconsideration motion had been agreed to by the parties and approved by the court. *See id.* at 194, 198-99.

Other similar questions may in the future be addressed by courts applying *Bowles*. Rule 4(a)(3)'s 14-day time limit, Rule 4(a)(4)(A)(vi)'s 10-day limit, Rule 4(a)(5)(C)'s 30-day and 10-day limits, 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," 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.

C. The debate over the nature of hybrid deadlines

My March 2008 memo noted that the Sixth and Ninth Circuits have taken differing views of situations where a basic appeal deadline is set by statute but the Rules fill in statutory gaps or

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were statutorily amended in 1988 to provide for cross-appeals. This statutory intervention, however, should not alter the analysis of whether Rule 4(b)(1)'s 10-day deadline is jurisdictional. The purpose of the 1988 amendment to the 10-day period, rather than limiting the defendant's appeal time, was to protect defendants by permitting them to take cross-appeals outside the original 10-day period if the government decided to take an appeal.

[4] In *Byfield*, though, the D.C. Circuit dismissed the defendant's appeal because the court found that the government had timely raised its timeliness objection. "[W]e do not require a party to raise Rule 4(b) issues in a motion to dismiss.... Here, the government's objection was proper because it was raised in the government's initial brief." 522 F.3d at 403.

otherwise elaborate on the statutory framework. In *National Ecological Foundation v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007), a Sixth Circuit panel majority held that Civil Rule 59(e)'s 10-day time limit is non-jurisdictional, and that when a litigant fails to timely object to the untimeliness of a Rule 59(e) motion and the district court considers that motion, the motion counts as "timely" for purposes of Appellate Rule 4(a)(4)(A). In *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1100-01 (9th Cir. 2008), the Ninth Circuit reached a different view, reasoning that because the issue of "timeliness" under Rule 4(a)(4)(A) determines the method for counting Section 2107's jurisdictional appeal deadline, the motion's timeliness must (for Rule 4(a)(4)(A)'s purposes) likewise be a jurisdictional requirement.

A new entrant into this discussion is the Eighth Circuit's decision this spring in *Dill v. General American Life Ins. Co.*, 525 F.3d 612 (8th Cir. 2008). In *Dill*, the defendant moved for, the plaintiff stated he did not oppose, and the district court purported to grant an extension of the time to file a Civil Rule 50(b) motion. *See id*. at 615. But in its brief in opposition to the Rule 50(b) motion, the plaintiff pointed out that the deadline for such motions cannot be extended. The district court denied the motion. *See id.* The defendant's ensuing appeal was timely only if the untimely Rule 50(b) motion could have tolling effect under Appellate Rule 4(a)(4). The Eighth Circuit, approaching this question, first determined that "[b]ecause the time limitation provisions in Rules 6(b)(2) and 50(b) here, are virtually identical to the provisions at issue in *Kontrick* and *Eberhart*, we conclude that Federal Rules of Civil Procedure 6(b)(2) and 50(b) are nonjurisdictional claim-processing rules." *Dill*, 525 F.3d at 618. But though the court recognized that the plaintiff had "raised the timeliness issue ... too late for General American to take corrective action," the court held that "[b]ecause the district court had not [yet] ruled, we hold that Dill properly and timely raised the untimeliness defense and that the district court properly dismissed General American's Rule 50(b) motion for lack of jurisdiction. As a result, General American's late-filed Rule 50(b) motion did not toll its time for filing its notice of appeal." *Id.* at 619-20. The court also rejected the defendant's attempt to invoke the "unique circumstances" doctrine (presumably, the defendant's argument focused on the fact that the district court had purported to grant an extension of time to file the Rule 50(b) motion).[5] Oddly,

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[5] Prior to *Bowles*, the argument for applying the unique circumstances doctrine in this context would have been strong given that of the initial trio of Supreme Court cases establishing the doctrine, two involved erroneous district court assurances concerning the timeliness of postjudgment motions that were in fact untimely. In *Thompson v. INS*, 375 U.S. 384 (1964), post-trial motions were made after the deadlines set by Rules 52 and 59. The notice of appeal was filed within the appeal deadline computed from the denial of the motions but not within the appeal deadline computed from the original judgment. The court of appeals dismissed the appeal as untimely but the Supreme Court reversed, evidently giving weight to the petitioner's argument "that he relied on the Government's failure to raise a claim of untimeliness when the motions were filed and on the District Court's explicit statement that the motion for a new trial was made 'in ample time'; for if any question had been raised about the timeliness of the motions at that juncture, petitioner could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had

though the *Dill* court had just ruled that Civil Rule 50(b)'s time limit was non-jurisdictional, its apparent reason for rejecting the appellant's reliance on the unique circumstances doctrine was that *Bowles* bars the use of the unique circumstances doctrine to forgive noncompliance with jurisdictional deadlines. "As the sole reason General American seeks to use the doctrine in the instant case is for the same purpose which the Supreme Court overruled it--to make an exception to the jurisdictional timing requirements for filing a notice of appeal--use of the doctrine here would be 'illegitimate.'" *Dill*, 525 F.3d at 620.

III. Conclusion

The courts are continuing to work out the effects of the interplay among *Kontrick*, *Eberhart* and *Bowles*. The Court's decision in *Greenlaw* did not settle these questions. Trends in the court of appeals decisions as of this fall are similar to those discerned last spring: Statutory appeal deadlines are treated as jurisdictional; entirely non-statutory deadlines are treated as non-jurisdictional claim-processing rules; and the courts are divided concerning how to treat rules that fill gaps in or otherwise elaborate on statutory deadline frameworks.

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disposed of the post-trial motions." The Court viewed the case as fitting "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." *Thompson*, 375 U.S. at 386-87.

In *Wolfsohn v Hankin*, 376 U.S. 203 (1964), the district court signed an order purporting to extend the time to move under Rule 59 for rehearing. The appellant moved for rehearing within the extended time but outside the time set by Rule 59. Less than 30 days after the denial of the motion, she filed the notice of appeal. The court of appeals held that the notice did not effect a timely appeal from the judgment. *Wolfsohn v. Hankin*, 321 F.2d 393, 394 (D.C. Cir. 1963). The Supreme Court reversed, citing *Thompson* and *Harris Truck Lines v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). *Wolfsohn*, 376 U.S. at 203.

In *Bowles*, the Court rejected the plaintiff's attempt to rely on the "unique circumstances" doctrine, and the Court "overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 127 S.Ct. at 2366.

TAB V-B

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-H

The Committee's spring 2008 discussion of *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007), led the Committee to consider the concern that where Civil Rule 58 requires a separate document and the district court fails to provide one, an appellant might make a very belated (but still technically timely) postjudgment motion that, under Rule 4(a)(4), suspends the effectiveness of the appeal pending the disposition of the motion.

To address this problem, it was initially proposed that the Committee consider adopting a time limit within which tolling motions must be filed even when there has been no provision of a separate document. Judge Hartz noted that in the Tenth Circuit there are many violations of the separate document rule and there are also many pro se litigants. In many cases a district court dismisses a pro se complaint before the government defendant responds. In such instances, a violation of the separate document requirement may go unremarked and a late-filed motion by the pro se litigant may operate to suspend the effectiveness of the appeal – even at a very late stage in the appeal process. The question was raised, though, whether this concern could be addressed by encouraging better district court compliance with the requirements of Civil Rule 58. It was suggested that violations of the separate document requirement are most likely to arise when a law clerk is just starting out and has not yet learned about the requirement. After further discussion, Judge Hartz suggested that it would be helpful for him to discuss these issues with the Tenth Circuit Clerk. It was noted that it would also be advisable to consult the Civil Rules Committee. A member suggested that it would be useful for Fritz Fulbruge to survey the circuit clerks for their views. It was also suggested that we check with the Federal Judicial Center to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys.

This memo reports on the status of those inquiries. We now have information gained through Judge Hartz's inquiries within the Tenth Circuit; through discussions with the Chair and Reporter of the Civil Rules Committee; through Fritz Fulbruge's survey of his colleagues' views; and through Marie Leary's inquiries within the Federal Judicial Center.

I. Judge Hartz's inquiries within the Tenth Circuit

Judge Hartz raised the separate-document issue at the Tenth Circuit judges' meeting in May 2008. As a result of that discussion, the Tenth Circuit Clerk was authorized to raise the issue with the district courts within the circuit and to request better compliance with the separate document requirement. The resulting improvement in district-court compliance led Judge Hartz to thank the district judges at the Tenth Circuit's judicial conference in September 2008.

As the Tenth Circuit Clerk reports: "Judge Hartz raised the issue and the judges talked at length about the best way to address it--via a new rule or through the 'better compliance method' .... Ultimately, the judges asked me to go back to the district clerks and to encourage them ... to be more vigilant on this. I did, and various emails followed with district court personnel. In a couple instances I did short legal memoranda to advise them of the case law .... That was in May, and we have seen compliance rates jump. My personal position is that this isn't a law clerk issue. It[']s a clerk's office issue. The deputy clerk assigned to each judge should make this an automatic and ministerial task. My message to the clerks went at the issue in that fashion, as I think it is correct that law clerks aren't always going to catch this."

II. Discussions with the Civil Rules Committee

I described to Judge Kravitz and Professor Cooper the Appellate Rules Committee's discussions concerning the separate document requirement. I asked them for their thoughts on the rate of noncompliance with the separate document requirement. Professor Cooper notes that "the revisions of [Civil] Rule 58 responded to an endemic problem. Pat Schiltz ... read more than 500 cases addressing the 'time bomb' problem. And of course they were but the tip of the iceberg."

I also asked them for their impressions concerning how frequently such noncompliance is followed by both an appeal and then (later) a timely postjudgment motion that suspends the appeal's effectiveness. Professor Cooper noted that he has "no empirical or even anecdotal information bearing on" this question.

Judge Kravitz and Professor Cooper agree with the Appellate Rules Committee's intuition that if the Appellate Rules Committee were to decide to proceed with a project addressing these issues, close cooperation with the Civil Rules Committee would be necessary. As Professor Cooper notes, "[a]t a minimum, the Committee will have to consider whether any Appellate Rules revisions should be supported by parallel Civil Rules changes, or whether they have been contrived on a stand-alone basis that generates no collateral consequences."

III. Fritz Fulbruge's survey of the circuit clerks

We are indebted to Fritz Fulbruge for his efforts in surveying his colleagues among the circuit clerks. I asked Fritz to pose the following questions:

> ❶ How frequently do district courts fail to comply with the separate document requirement?
>
> ❷ When such failures occur, how frequently are those failures followed by both an appeal and then (later) a timely postjudgment motion that suspends the appeal's effectiveness?
>
> ❸ When the events described in the preceding sentence occur, how frequently does the tolling motion come so late that the appeal has already required a significant investment of effort by the court of appeals and the litigants (such that its suspension would cause significant inconvenience)?
>
> ❹ I also asked whether procedures are in place to ensure that the court of appeals is aware of the filing of a motion that, in these circumstances, has the effect of suspending the appeal's effectiveness.

To illustrate the questions, I suggested the following scenario: On June 1, the district court enters an order granting summary judgment dismissing the complaint in Smith v. Jones. Civil Rule 58(a) requires that the judgment be set forth on a separate document, but the district court does not comply with this requirement. Smith, one of the plaintiffs, files a notice of appeal on June 25, designating the order dismissing the complaint. The processing of Smith's appeal commences. On October 20, Brown, another plaintiff in Smith v. Jones, moves in the district court (under Civil Rule 59(e)) for reconsideration of the order dismissing the complaint. Under Civil Rule 58(c)(2), Brown's Civil Rule 59(e) motion is timely. Under Appellate Rule 4(a)(4)(A)(iv), Brown's motion counts as one that would suspend the running of the time to appeal the dismissal order (of course, as of October 20 that time has not yet begun to run, due to the lack of a separate document). And under Appellate Rule 4(a)(4)(B)(i), the effectiveness of Smith's notice of appeal is suspended by the filing in the district court of Brown's timely Civil Rule 59(e) motion – with the result that the proceedings on Smith's appeal must now be suspended until the district court disposes of Brown's motion.

With respect to question ❶, the Third Circuit Clerk reports frequent violations of the separate document requirement, but other clerks do not report significant problems:

- Third Circuit: "I find that district courts frequently violate the rule, although some are getting better since cm/ecf."
- Fourth Circuit: "Our district courts are pretty good about the separate document requirement. With regard to the Rule 59 motions, we receive notice from the

district court and do not proceed with an appeal pending resolution of the motion. We have occasional problems in this area, but not to the point of requiring a rule rev[i]sion."

- As to the Fifth Circuit, Fritz reports: "This is not a major problem for us. When we do our jurisdictional review we check to see if a needed separate document has been entered. If not, we 'tickle' it for a period of time and if no entry is made we contact the district court to have the judge prepare the necessary judgment. While it takes time in my office it ultimately gets the job done in almost all the cases."

- Sixth Circuit: "Our experience in the Sixth is very similar to that of the Fourth; there is an occasional problem, but it's by far the exception."

- Seventh Circuit (following the comments by the Sixth Circuit Clerk, above): "Ditto."

- The D.C. Circuit Clerk reports: "Our - only - district court is pretty good about complying with Rule 58."

As to question ❷ and the illustrative hypothetical, two circuit clerks responded that the hypothetical scenario seems rare:

- Third Circuit: "I see a lot of such cases [presumably, cases where the district court failed to comply with the separate document requirement] with timely reconsideration motions and timely notices of appeal, which are not a problem. I have to say that in general I see fewer post-judgment motions than I did years ago. I see some cases with notices of appeal beyond the 30 or 60 days. The situation described, an untimely reconsideration motion filed by a co-party long after the NOA is rare."

- D.C. Circuit: "I don't recall dealing with any instances similar to the example set out by Cathie."

Concerning question ❹, the Third Circuit Clerk reported as follows: "In theory, the district court is supposed to notify us of post-judgment filings, but they often fail to do so. The rule could provide that the party filing such a motion must notify the court of appeals and without such notification, the first appeal can proceed. The time for an NOA would be tolled for the party filing the reconsideration though." The Third Circuit Clerk observed that the proposed change in the deadline for postjudgment motions may exacerbate this problem: "It occurs to me that this may become more of a problem when the new counting rules go into effect. .... We may often see scenarios when the NOA is filed and then a week later a 59e motion is filed and we don't know about it."

Two of the circuit clerks also expressed dissatisfaction with the separate document requirement itself. The Third Circuit Clerk stated: "Let's just do away with the separate judgment rule. It creates more problems than it solves." She observed that the separate document requirement can elevate form over substance: "Often in pro se cases what I see is an opinion of varying length, but usually at least a few pages and then at the end the court says, accordingly, we enter the following order: sum. judgment is granted, the case is closed, any appeal is frivolous. If they just did a page break and repeated the caption all would be well." Fritz expresses agreement with this view: "[T]he pragmatic answer is to do away with the separate document requirement. I suppose you can argue the Fed. R. Civ. P. 58(a) requirement is analogous to the Fed R. App. P. 41 mandate requirement, so some may think it is advisable to keep the separate document notion in place. I think it confuses people more than it helps them."

IV. FJC training materials for new staff attorneys

We are indebted to Marie Leary for pursuing inquiries within the FJC. She reports: "The Federal Judicial Center does only very limited training for staff attorneys, and this issue (separate document requirement) is not covered in that training. I checked with Bruce Clarke (head of the Education Division), along with Brenda Baldwin-White (who is developing some new training for staff attorneys), and they both confirmed that there are no materials on the separate document requirement presented to staff attorneys at this time."

V. Conclusion

Reflecting on the Tenth Circuit's experience, Judge Hartz suggested last month that "trying to solve the problem [of belated tolling motions after violations of the separate-document requirement] by tweaking the rules is probably not a good use of our resources." But he noted that his view could change "if the problem is arising in other circuits or revives in the Tenth." So far, the information from the circuit clerks suggests that the problem appears to be relatively rare. The experience within the Tenth Circuit suggests that efforts to raise awareness of the issue within the district clerk's office may be a good avenue for addressing the problem (in those districts where the problem tends to arise).

TAB V-C

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

At the Committee's April 2008 meeting, members discussed Judge Diane Wood's suggestion that the Committee act to clarify ambiguities in Rule 4(c)'s inmate mailbox rule concerning the prepayment of postage. Relevant questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The current rule could be read to require postage prepayment when the institution has no legal mail system. On the other hand, it may be the case that when the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required. Under *Bowles v. Russell*, 127 S. Ct. 2360 (2007), it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But 28 U.S.C. § 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

During the April 2008 discussion of these questions, it was noted that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. Participants in the discussions raised a number of factual questions about institutions' policies concerning legal mail; Part I of this memo sketches answers to some of those questions. Part II briefly considers the extent to which indigent inmates may have a constitutional right to some amount of free postage for legal mail.

I. Institutional policy concerning legal mail

Litigants who might be affected by Rule 4(c)'s inmate-filing provision include inmates in federal and state prisons, pretrial detainees, incarcerated aliens, and inmates in mental

institutions. So far, I have obtained information concerning federal prison policy[1] and the policies that apply in some state and local facilities.

A. Federal prison policy

Federal Bureau of Prisons regulations provide:

> (a) Except as provided in paragraphs (d), (e), (f), and (i) of this section, postage charges are the responsibility of the inmate. The Warden shall ensure that the inmate commissary has postage stamps available for purchase by inmates.
>
> . . . .
>
> (c) Inmate organizations will purchase their own postage.
>
> (d) An inmate who has neither funds nor sufficient postage and who wishes to mail legal mail (includes courts and attorneys) or Administrative Remedy forms will be provided the postage stamps for such mailing. To prevent abuses of this provision, the Warden may impose restrictions on the free legal and administrative remedy mailings.
>
> . . . .
>
> (i) Holdovers and pre-trial commitments will be provided a reasonable number of stamps for the mailing of letters at government expense.

28 C.F.R. § 540.21.

From the definitional provisions in this Chapter of the C.F.R., it appears that Section 540.21 applies to all federal penal or correctional institutions[2] and that it governs correspondence by convicted prisoners and detainees of various kinds.[3]

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[1] By the time of the November meeting, I also expect to have information concerning federal policy with respect to alien detainees.

[2] Section 500.1(a) defines the Warden to include, inter alios, "the chief executive officer of a U.S. Penitentiary, Federal Correctional Institution, Medical Center for Federal Prisoners, Federal Prison Camp, Federal Detention Center, Metropolitan Correctional Center, or any federal penal or correctional institution or facility." 28 C.F.R. § 500.1.

[3] Section 500.1(c) provides: "Inmate means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses,

B. State and local facilities

It was not practicable for me to locate and analyze all the legal provisions governing prisoner mail in state and local facilities throughout the U.S. However, the following are some examples of state and local policies.

Some entities' regulations appear to require that postage be affixed to outgoing mail.[4] Some facilities will periodically provide a set amount of free postage.[5] Other facilities are directed to supply a "reasonable" amount of free postage for legal mail;[6] sometimes such "reasonable" amounts are subject to upper limits.[7] Florida provides free postage to indigent

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detainees, or otherwise." 28 C.F.R. § 500.1(c).

[4] See, e.g., Oregon Admin. R. 291-131-0020(2) ("Outgoing mail, except business mail to department officials in Central Administration sent through the intra-departmental mail system, shall be enclosed in an approved DOC envelope with U.S. postage.").

[5] See, e.g., Wash. Admin. Code 137-48-060(3) ("Indigent inmates shall be authorized to receive postage up to the equivalent to the mailing cost of ten standard first class letters per week. This indigent postage provision shall cover both legal and/or regular letters."); Policies of Lawrence County Jail, South Dakota, available at http://www.lawrence.sd.us/Sheriff/so_corrections.htm (last visited Sept. 14, 2008) ("The jail will provide 1 stamp a day for any out going mail."); Policies of Stearns County Jail, Minnesota, available at http://www.co.stearns.mn.us/3782.htm#mail (last visited Sept. 14, 2008) ("Upon request, indigent inmates may receive three prepaid postcards per week.).

[6] See, e.g., La. Admin Code. tit. 22, pt. I, § 765(E)(5)(b) ("Indigent youth shall have access to the postage necessary to send out approved legal mail on a reasonable basis and the basic supplies necessary to prepare legal documents."); 20 Ill. Admin. Code 525.130(a) ("Offenders with insufficient money in their trust fund accounts to purchase postage shall be permitted to send reasonable amounts of legal mail and mail to clerks of any court or the Illinois Court of Claims, to certified court reporters, to the Administrative Review Board, and to the Prisoner Review Board at State expense if they attach signed money vouchers authorizing deductions of future funds to cover the cost of the postage. The offender's trust fund account shall be restricted for the cost of such postage until paid or the offender is released or discharged, whichever is soonest."); Michigan Admin. Code R. 791.6603(2) ("A prisoner determined to be indigent by department policy shall be loaned a reasonable amount of postage each month, not to exceed the equivalent of 10 first-class mail stamps for letters within the United States of 1 ounce or less. Additional postage shall be loaned to prisoners as necessary to post mail to courts, attorneys, and parties to a lawsuit that is required for pending litigation.").

[7] The Kansas provision, for example, provides:

inmates for legal mail.[8] Some states recoup the cost of free postage from the inmate when funds are available in the inmate's prison account.[9] Wisconsin provides inmates with a revolving $200

> (2) Indigent inmates, as defined by the internal management policies and procedures of the department of corrections, shall receive reasonable amounts of free writing paper, envelopes, and postage for first-class domestic mail weighing one ounce or less, not to exceed four letters per month.
>
> (3) All postage for legal and official mail shall be paid by the inmate, unless the inmate is indigent, as defined by the internal management policies and procedures of the department of corrections. The cost of postage for legal or official mail paid by the facility on behalf of an indigent inmate shall be deducted from the inmate's funds, if available. Credit for postage for legal and official mail shall be extended to indigent inmates under the terms and conditions of the internal management policies and procedures of the department of corrections....

Kansas Admin. Regs. 44-12-601(f).

[8] The Florida provision states:

> The institution shall furnish postage for mail to courts and attorneys and for pleadings to be served upon each of the parties to a lawsuit for those inmates who have insufficient funds to cover the cost of mailing the documents at the time the mail is submitted to the mailroom, but not to exceed payment for the original and two copies except when additional copies are legally required. The inmate shall be responsible for proving that copies in addition to the routine maximum are legally necessary. Submission of unstamped legal mail to the mailroom or mail collection representative by an inmate without sufficient funds shall be deemed to constitute the inmate's request for the institution to provide postage and place a lien on the inmate's account to recover the postage costs when the inmate receives funds.

33 Fla. Admin. Code. Ann. R. 33-210.102(10)(a).

[9] See, e.g., Wash. Admin. Code 137-48-060(4) ("The department shall recoup any expenditures made by the institution for postage due on incoming mail and/or indigent postage for letters, (as identified in subsection (3) of this section) may be recouped by the institution whenever such indigent inmate has ten dollars or more of disposable income in his/her trust fund account."); 33 Fla. Admin. Code. Ann. R. 33-210.102(10)(b) ("At the time that postage is provided to an inmate for this purpose, the Bureau of Finance and Accounting, Inmate Trust Fund Section, shall place a hold on the inmate's account for the cost of the postage. The cost of providing the postage shall be collected from any existing balance in the inmate's trust fund account. If the account balance is insufficient to cover the cost, the account shall be reduced to zero. If costs remain unpaid, a hold will be placed on the inmate's account, subject to priorities of

loan to defray the cost of paper, copies and postage for legal mail; the superintendent can raise the $200 limit in cases of "extraordinary need."[10] There are some indications in the caselaw that some institutions, at some points in time, have had policies that did not provide free postage for indigent inmates.[11]

II. Constitutional requirements concerning access to courts

Though the overview in Part I is not complete, the data suggest that it may be a common practice to provide indigent inmates with some amount of free postage for legal mail, but also that such free postage is often subject to quite strict limits. Both of these observations seem consistent with my quick survey of relevant federal constitutional doctrine. As discussed below, there is support in the caselaw for the proposition that the Constitution requires the government to provide indigent inmates with some amount of free postage for legal mail – but the caselaw also indicates that the constitutionally required amount of free postage may not be very much.

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other liens, and all subsequent deposits to the account will be applied against the unpaid costs until the debt has been paid."); 20 Ill. Admin. Code 525.130(a); Kansas Admin. Regs. 44-12-601(f)(3).

[10] Wisconsin Administrative Code § DOC 309.51(1) provides in part:

> Correspondence to courts, attorneys, parties in litigation, the inmate complaint review system under ch. DOC 310 or the parole board may not be denied due to lack of funds, except as limited in this subsection. Inmates without sufficient funds in their general account to pay for paper, photocopy work, or postage may receive a loan from the institution where they reside. No inmate may receive more than $200 annually under this subsection, except that any amount of the debt the inmate repays during the year may be advanced to the inmate again without counting against the $200 loan limit. The $200 loan limit may be exceeded with the superintendent's approval if the inmate demonstrates an extraordinary need, such as a court order requiring submission of specified documents. The institution shall charge any amount advanced under this subsection to the inmate's general account for future repayment....

The Seventh Circuit has held that a Wisconsin inmate who had used up his $200 loan balance and who had sought but not yet received permission to borrow more than the $200 limit did not meet what the court viewed as Rule 4(c)(1)'s requirement that postage be prepaid at the time the notice of appeal is deposited in the prison mail system. Ingram v. Jones, 507 F.3d 640, 645 (7th Cir. 2007).

[11] See, e.g., Smith v. Erickson, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that "the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional").

"[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). The *Bounds* Court stated: "It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents[,] with notarial services to authenticate them, and with stamps to mail them." *Bounds*, 430 U.S. at 824-25.[12] The Court continued: "This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial." *Id*. at 825.

More recently, the Court has defined its ruling in *Bounds* narrowly by requiring "that an inmate alleging a violation of *Bounds* must show actual injury." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). As the *Lewis* Court explained: "Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Instead, the inmate must show how the defect in the prison's program impeded the inmate's access to the courts: "He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint." *Lewis*, 518 U.S. at 351. Moreover, the *Lewis* Court stated that not all types of inmate claims trigger rights of access under *Bounds*: "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis*, 518 U.S. at 355.

Citing *Lewis v. Casey*, courts have upheld limitations on indigent inmates' ability to proceed in forma pauperis. *See, e.g.*, *Lewis v. Sullivan*, 279 F.3d 526 (7th Cir. 2002) (upholding the three-strikes provision in the Prison Litigation Reform Act).[13] Litigation over i.f.p. status

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[12] This memo focuses principally on institutional policies concerning the provision of postage to an inmate who has been determined to be indigent. It should be noted that an additional issue concerns the institution's policies for determining who counts as indigent. For example, in his dissent from the affirmance of the dismissal of a complaint raising an access-to-court claim, Judge Murnaghan questioned the reasonableness of a policy that determined inmates' indigency at monthly intervals based on the funds in the inmate's account on the 15th of each month. See White v. White, 886 F.2d 721, 728 (4th Cir. 1989) (Murnaghan, J., dissenting).

[13] The PLRA's three-strikes provision is contained in 28 U.S.C. § 1915(g), which states: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while

often concerns such questions as whether the litigant will be permitted to proceed without prepaying (or giving security for) fees or costs. One might argue that an inmate's need for assistance in paying postage is qualitatively different from an inmate's need for assistance in paying a filing fee, because the inmate's incarceration *requires* the inmate to file by mail rather than in person (assuming that the option of electronic filing is not available) – and thus the need for postage might be seen to stem from the fact of incarceration. *Cf. Lewis v. Sullivan*, 279 F.3d at 530 ("Prisons curtail rights of self-help (and for that matter means of earning income) and have on that account some affirmative duties of protection. ... This is why the right of access to the courts entails some opportunity to do legal research in a prison library (or something equally good); the prison won't let its charges out to use other libraries, so it must make substitute provision, though not necessarily to the prisoner's liking.").

The caselaw varies by circuit and generalizations are tricky because the discussions can be fact-specific. However, it seems fair to say that while a number of courts have recognized (or presupposed) a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount can be relatively small. Cases applying right-of-access principles to prison postage policies include the following (sorted by circuit):

- *Gittens v. Sullivan*, 848 F.2d 389, 390 (2d Cir. 1988) (New York state prison system) (holding that pro se prisoner "was not denied meaningful access to the courts" where the prison "not only provided Gittens with $1.10 per week for stamps, but also provided him with an additional advance of at least $36 for postage for legal mail").
    - Compare *Chandler v. Coughlin*, 763 F.2d 110, 115 (2d Cir. 1985): Court of appeals reversed dismissal of complaint challenging New York state regulation providing that "an inmate may send five one-ounce letters per week at state expense but may not accumulate credit for unused postage or send one five-ounce document in a week in which he mails nothing else" and barring the provision of free postage for any legal brief.
    - Apparently, the relevant regulation was revised in response to *Chandler*. The application of the revised version was upheld in *Gittens*, and was then upheld on remand in *Chandler*. *See Chandler v. Coughlin*, 733 F.Supp. 641, 647 (S.D.N.Y. 1990).
- *Bell-Bey v. Williams*, 87 F.3d 832, 839 (6th Cir. 1996) (Michigan state prison system) ("MDOC has fulfilled its affirmative duty to provide indigent prisoners access to the courts. By allotting ten stamps per month, a prisoner may send ten sealed letters without

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incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

being subject to inspection. If a postage loan is needed for a current suit, a prisoner may either submit proof that the mail pertains to pending litigation, or he may wait until the next month's allotment of postage.”).

- *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (assessing prior version of relevant provision concerning Illinois state prison): “The regulations set forth a minimum number of privileged or non-privileged letters which may be sent at state expense. This provision is supplemented by a ‘safety valve’ provision which permits the additional expenditure of state funds for legal mail when such an expenditure is reasonable. We cannot say that, on its face, this regulation amounts to an unconstitutional impediment on an inmate's access to courts.... Should prison officials abuse these regulations by interpreting them in such a way as to block a prisoner's legitimate access to the courts, the prisoner is not without remedy.”

- *Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that “the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional”).

    - *See also Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (Iowa Men’s Reformatory): The court of appeals affirmed a judgment which “enjoined the practice of imposing a 50 cent per month service charge on negative balances resulting from purchases of legal postage; enjoined the practice, as currently implemented, of requiring inmates with negative balances over $7.50 to show ‘exceptional need;’ and ordered the reformatory to provide indigent inmates with at least one free stamp and envelope per week for purposes of legal mail.”

    - *Compare Blaise v. Fenn*, 48 F.3d 337, 338 (8th Cir. 1995) (Iowa State Penitentiary): Court of appeals affirmed the dismissal of a claim challenging Iowa state policy of providing “a monthly allowance of $7.70 to all inmates regardless of their disciplinary status. Inmates may use this income in any way they wish, including to pay postage for legal mail. Under ISP regulations, if an inmate has no funds, he may charge up to $3.50 in legal expenses to his account as an ‘advance’ on the next month's pay or allowance.... If an inmate needs further funds for legal expenses, he can obtain approval for debt over $3.50 from the deputy warden with a showing of ‘exceptional need.’”

- *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987): Court of appeals reversed the dismissal of a claim challenging “the policy of the Oregon State Hospital limiting indigent patients to three stamps per week.” Liberally construed, plaintiffs’ allegation that they “have often found it necessary to communicate with the courts more than three (3) times per week and often the pleadings need more than twenty (20) cents postage” sufficed to state a claim.

- *Twyman v. Crisp*, 584 F.2d 352, 358 (10th Cir. 1978) (Oklahoma state prison): Court of

appeals affirmed dismissal of complaint challenging prison's policy that "an inmate must have less than $5.00 in his inmate account to qualify for free postage. He then receives postage for a maximum of two letters per week (eight per month), legal or otherwise. Only if a prisoner has zero in his trust fund will stamps for legal mail (no other type) be provided in excess of the eight."

- *Hoppins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir. 1985) (Alabama state prison system) ("[T]he furnishing of two free stamps a week to indigent prisoners is (1) adequate to allow exercise of the right to access to the courts, and (2) adequate to allow a reasonable inmate to conduct reasonable litigation in any court.").

III. Conclusion

The research summarized above provides the basis for two preliminary observations. First, a number of institutions provide a limited amount of postage assistance to indigent inmates who wish to send legal mail. Second, there is some support in the caselaw for the proposition that the Constitution requires some minimal level of assistance for inmates who cannot afford to pay the postage for their legal mail.

However, these observations are necessarily tentative and incomplete. To understand the likely effect of various possible approaches to the inmate-filing provisions in Rule 4(c), it may be useful to engage in further research, for example by contacting organizations which may be able to shed light on the practices of a broader range of state and local prisons and mental institutions around the country.

TAB V-D

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-08

At the Appellate Rules Committee's Spring 2008 meeting, the Committee retained on its study agenda Mark Levy's proposal concerning amicus briefs with respect to rehearing.[1] Though there was no consensus on whether a national rule would be desirable, a consensus did emerge that circuits should consider adopting local rules on the issue. Members suggested that it would be useful to ask judges in circuits which do not currently have a local rule on point why no such local rule exists. Members also observed that circuits without local rules on the subject are most likely to adopt such rules if attorney groups advocate their adoption. Judge Sutton volunteered to contact selected judges for their views on the local rule question, and Mark Levy, Doug Letter and Maureen Mahoney agreed that they would work with me to contact attorney organizations to encourage them to seek the adoption of local rules.

In our consultations after the meeting, it was thought that rather than approaching attorney organizations in the first instance, a good first step would be for Doug Letter to raise the issue with the federal appellate chiefs from around the country to see what their experience has been and whether the lack of local rules on the topic seems problematic. Doug has made inquiries along this line. In addition, Judge Sutton has raised the issue with the Sixth Circuit's local rules committee and has contacted some judges in the circuits that do not have a local rule on point to inquire why they do not have one. And Fritz Fulbruge consulted his fellow Circuit Clerks for their input on the practice in their respective circuits. We will thus be in a position to report to the Committee at the November meeting on the results of these inquiries. In preparation for the meeting, here is a summary of some of our findings.

Judge Sutton has summarized the initial results of his inquiries as follows:[2]

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[1] As previously discussed, Mark has raised 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?

[2] Judge Sutton added an update in early October, when he reported that he had "talked to a few more judges, both of whom were quite negative on a national rule and fairly comfortable

> I have focused on the five circuits that do not have any rule on the issue---the First, Second, Fourth, Sixth and Eighth---and have contacted at least one judge from each circuit. So far, I have come across variations on these three themes. First, most of the judges point out that an amicus can always file a general motion to seek leave to file an amicus brief either when en banc review is sought or after it has been granted. Most circuits say they routinely grant these motions unless doing so would create a recusal issue. One circuit (the Eighth) is a little more skeptical about the value of en banc briefs and does not automatically grant these motions. Second, some courts don't have a rule at least in part because they are ambivalent about the value of en banc amicus briefs and don't want to encourage amicus filings. Third, some courts do not generally authorize new briefing after en banc review has been granted and thus would have to rework the briefing rules if amicus briefs were allowed---at least if they were allowed after en banc review has been granted.
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> While I did not sense any concern from these judges about their courts' rules (or lack of them) on this issue, I also did not get the impression that they would resist reconsidering the stance they have taken so far on the point. I have urged the Sixth Circuit to put together a rule and hope that over the next year or so we can promulgate one.

Fritz asked his colleagues to opine on whether it is feasible and desirable to adopt a national rule governing the procedures for filing amicus briefs in support of petitions for panel/en banc rehearing, or in support of a party (or position) after en banc review has been granted. (He also mentioned some of the specific topics that such a rule might address.) He asked whether, alternatively, the circuits should be encouraged to adopt local rules addressing these questions. And he asked those clerks whose circuits currently lack such a local rule why the circuit in question has not adopted one. The responses to Fritz's inquiries are summarized in the enclosed table. As shown in that table, seven of the respondents – the Clerks for the First Circuit, the Fifth Circuit, and the Seventh through Eleventh Circuits – do not favor a national rule. The Sixth Circuit Clerk suggests that a national rule might be helpful but is not necessary. The Clerks for the Fourth Circuit and the D.C. Circuit note that if a national rule were adopted they would want it to contain specific features (the Fourth Circuit Clerk advocates the requirement of a motion, and the D.C. Circuit Clerk advocates permission for the court to exclude amici who would cause recusals). No Clerk expresses strong support for a national rule. The First Circuit Clerk and Fourth Circuit Clerk report that they have not seen a need for a local rule; but the Eighth Circuit Clerk and Tenth Circuit Clerk favor considering the adoption of a local rule.

Doug Letter polled the U.S. Attorneys' office appellate chiefs committee with which he works on a regular basis, as well as the chiefs of the appellate sections of the litigating divisions

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with their lack of a more-specific local rule."

in Main DOJ. He then consulted with the Solicitor General. He reports as follows:

> I found that this issue of amicus filings by the United States at the rehearing petition or rehearing phases of cases is not much of an issue for our U.S. Attorneys' offices. This is not surprising to me because such amicus filings are much more likely to be made by the litigating divisions in Main DOJ. Between the Civil Division and the Antitrust Division, we do make such filings on a fairly regular basis. We have found that having local rules setting the procedures for making filings at the rehearing petition or rehearing stages is very useful to us because it gives us definite standards to follow for issues such as whether the United States must file a motion seeking leave to make filings, as well as the length and timing of filings. Thus, we have found local rules such as those used by the 9th and 11th Circuits to be very valuable because they remove most of the uncertainty in this area, and make motions unnecessary.
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> My understanding from our prior discussion of the issues, as well as the information provided by Judge Sutton and Fritz Fulbruge, is that a national rule is quite unlikely to be adopted as a practical matter. Accordingly, we do think that it would be quite useful for the Committee to urge the various courts of appeals to strongly consider adopting local rules, such as those in the 9th and 11th Circuits. Minimizing uncertainty for practitioners in this area is a good goal, and we have found that there are enough times that we make amicus filings at the rehearing petition and rehearing stages to justify local rules.

Because Doug's suggestion refers to the local rules of the Ninth and Eleventh Circuits, and because those circuits' provisions are among the most detailed on the subject, I have included copies of the Ninth and Eleventh Circuit provisions as enclosures to this memo.

Encls.

Circuit	Current local rule?	Favors national rule?	Favors local rule?	Full response
First -- Richard Donovan	No	No	No	I tend to agree with Pat [Connor]'s answer, except that when rehearing en banc is granted I think the court sometimes is happy to get an amicus brief. Also, I think the court would likely deny the motion if it would cause a disqualification. I don't really see a need for a rule (local or national).
Second -- Catherine Wolfe	No; cf Interim Local Rule 29			Our court has been intermittently discussing these questions for a while....I've circulated Fritz' email to solicit some views other than my own…
Third -- Marcia Waldron	29.1	no strong feelings		We accept them and have a rule as to timing. It covers both when we ask for rebriefing for rehearing and when we don't ask for rebriefing. It doesn't cover the filing of an amicus to file or rehearing. As to length and other requirements, we'd probably just go with the length of the brief for the side you are supporting. Our local rule does not require court permission, but references 29(e). I think that means it can be filed with the consent of the parties. If the parties don't consent, then a moiton ust be filed. I have seen the court deny a motion if it causes recusal problems. I don't have any strong feelings about a national rule.
Fourth -- Pat Connor	No	if national rule, a motion should be required	No	In answer to your committee's question about amicus briefs after judgment . . . . since FRAP 29 requires a motion whenever an amicus brief is presented more than 7 days after the principal brief (even if all parties consent to the filing), we always require a motion if an amicus seeks to file a brief either in support of a petition for rehearing or after rehearing has been granted. The motion is decided by the panel or, if rehearing en banc has already been granted, by the en banc court. The motion is submitted together with the disclosure information, so the court is aware of any disqualifications that could arise if leave is granted, but we do not prohibit the filing if it would create a disqualification. If amici wish to present their views, the court would much rather have them before it decides the case, rather than at the johnny-come-lately rehearing stage. Nevertheless, the court has probably granted more of these motions than it has denied. We don't see them very often. We have not seen a need for a local rule on this subject. As far as a national rule -- no strong opinion (except that a motion should be required).

Fifth -- Fritz Fulbruge	29.4	No		We have had our local rule for more than 15-20 years and, to my knowledge, this has not posed a problem for practitioners. We apply the same "rules" as to format, length, etc. for an amicus as we do for a party petitioning for panel or en banc rehearing, and again I am not aware that this has been problematic for practitioners. Thus, I do not think a national rule is necessary. We have rare occasions where amicus A tries to file a brief which causes disqualification of a judge, and the brief is rejected. Then about 2 days later amicus B tries to file the exact substantive brief. Some amici are very persistent about trying to get a brief before the court, but I leave for Judge Stewart the discussion whether the judges collectively find great benefit in an amicus brief after the panel opinion comes out.
Sixth -- Leonard Green	No	might be helpful but is not necessary		We have no local rule which addresses this question and, since the occasions when it has arisen are few and far between, no one has seen the need to have one. We require a motion and deal with the matter on a case-by-case basis, sending it to the panel or the en banc court as circumstances dictate. May own view is that while a national rule might be helpful, it is not necessary.
Seventh -- Gino Agnello	35	No		Like Mike, we don't see many (if any) of these at all. I also agree it would be best handled locally. As Tom says, if there is some stiff rule from on high we probably would have to work around it somehow. Then again, since we don't get many it does not matter much.
Eighth -- Michael Gans	No	No	Perhaps	[W]e have never felt a need to address this by local rule. We receive few such requests and the court en banc has felt that it is capable of dealing with the handful we do receive on a case-by-case basis. In an en banc case argued yesterday dealing with whether prison officials violated a prisoner's rights when they shackled her on the delivery table while she was giving birth, the court accepted one post-petition amicus brief and denied another (mainly on grounds it came in too late in the process). I think my court would prefer that it be left to each court to decide whether or not this needs to addressed. I think a rule like yours that prevents parties from coming in to disqualify a judge is useful, and I may recommend such a rule.
Ninth -- Molly Dwyer	29-2	No		The same here - no national rule is necessary. We've been trying to adopt a local rule and, well, we can't even do that - I think we're on draft 15, but, we're close. The question is ultimately best worked out locally within each of the courts.

Tenth -- Betsy Shumaker	29.1	No	favors consideration of local rule	I agree with the others that have chimed in that I don't really feel like a national rule is necessary. Here, our local rule 29.1 advises that "[t]he 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." The goal of that rule was to avoid any attempts to gerrymandering panels through the use of amicus to force recusals. We always require motions in this situation as well, and nothing is automatic, even if there is no opposition. The relevant panel makes the decision. This court adopted the local rule 6 or 8 years ago, and it has been helpful to the judges. It strikes me that this is a local issue, and if the question is whether to encourage circuits to adopt local rules-- I think perhaps it is something every circuit should examine--even if it decides not to alter the local rules.
Eleventh -- Thomas Kahn	35-6, 35-9, 40-6	No		I have learned that there are "always" exceptions to "never" and "always," and therefore am against a national rule. This is something I thinks each court can handle on an individual if not case-by-case basis. And, even if a "national" or "local" rule is adopted, you wind up right back to Rule 2 -- Suspension of the Rules, so you wind up right back where you started!
D.C. -- Mark Langer	35(f); Handbook (no amici that cause recusal)	if national rule, should allow court to exclude amici who cause recusals		We have a local rule that says we won't accept amici briefs directed to petitions for rehearing en banc. We do send motions for leave to the Court and they are mostly denied. Our Handbook of Practice says the court will deny amici motions that will cause a recusal. Both were put in place in the late 1980's because the court suspected amici were being used to cause disqualifications. A national rule would be ok with my Judges, I think, as long as we could continue to exclude amici who cause recusals.
Federal -- Doug Steere (senior staff attorney)	35(g), 40(g)	Probably not		Our local rule, Fed. Cir. R. 35(g), expressly allows the filing of an amicus brief in connection with a petition for hearing en banc, rehearing en banc, or a combined petition. It provides that “[e]xcept 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.” Although I cannot speak on behalf of the court, generally this court has not in the past favored national rules when it believes that courts should have discretion to tailor rules that fit their local practices and concerns.

<u>Ninth Circuit local rule:</u>

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.

CREDIT(S)

(Added eff. July 1, 2007.)

ADVISORY COMMITTEE NOTES

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.

Eleventh Circuit local rules:

Rule 35-6. 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), (j), and (k). 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.

CREDIT(S)

(Added eff. April 1, 2007.)

Rule 35-9. 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.

CREDIT(S)

(As amended eff. Dec. 1, 1998; eff. Dec. 1, 2004; eff. April 1, 2006; eff. April 1, 2007.)

Rule 40-6. Motion for Leave to File Amicus Brief in Support of Petition for Panel Rehearing

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.

CREDIT(S)

(Added eff. April 1, 2007.)

TAB V-E

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-02

At the Appellate Rules Committee's April 2008 meeting, members discussed the proposal to amend Appellate Rule 7 to address the inclusion of attorney fees among the costs for which a Rule 7 bond can be required. Among other information, the members discussed the Federal Judicial Center's initial exploratory study of appeal bonds. Members expressed varying views about the best way to proceed with the study of this topic (and, indeed, about whether to proceed with a proposed amendment at all). But there was general consensus that the use of appeal bonds in class litigation seems to pose issues distinct from those raised by the use of such bonds in other settings. Thus, members concluded that before asking the FJC to invest further resources in a larger study, the Committee should seek the views of the Civil Rules Committee concerning the role of appeal bonds in class litigation. Members also expressed interest in seeking the views of knowledgeable practitioners concerning this question.

As a preliminary means of pursuing these questions, I conveyed the following questions to Judge Kravitz and Professor Cooper:

- What role do sizeable appeal bonds play in class litigation? Do such bonds constitute an undue deterrent to appeals by objectors, or are they a useful tool for courts tasked with managing class litigation? (Or does the answer to this question depend on the specifics?) In this context is the inclusion of attorney fees in the bond the only issue, or might sizeable bonds also result from the inclusion of such anticipated costs as "administrative costs" relating to the delay in implementing a proposed class settlement?

- If appeal bonds play a significant role in class litigation, and if their use is problematic, does it make sense for the Appellate Rules Committee to consider a rulemaking response to those issues in isolation, or should such a response be coordinated with your Committee's consideration of other issues relating to the management of class suits?

- We would also be grateful for your suggestions concerning knowledgeable practitioners whom we might consult for their views concerning these issues (obviously, we would want to seek a range of views from plaintiffs' and defendants' viewpoints, and from both those who have served as class counsel and those who have served as counsel

for objectors).

The Civil Rules Committee's fall meeting, which will occur shortly after the Appellate Rules Committee's meeting, may provide an opportunity to obtain the Committee's views on such questions. In the meantime, Professor Cooper shared some very helpful preliminary thoughts.

Professor Cooper's observations underscore the challenges of moving forward with a provision to address class-action appeals. As a general matter, he notes that to the extent that a commentator takes the view that appeal bonds may be used to respond to perceived problems with the behavior of certain class action objectors, one might question whether the best way to address such behavior is through *appellate* procedure (and specifically through an appeal bond requirement).[1] Moreover, he points out that procedural reforms directed at class-action objectors present challenges: "As to class actions, objectors present many problems. Beginning with the fact that there are, after all, good objectors. And good objections. Back in the earlier phases of the Rule 23 revisions there were provisions that sought both to encourage the good objectors (including an award of fees even if their objections failed) and to discourage bad objectors. Discouraging extortionate appeals was one of the real concerns. At the time we gave up on the idea. That is not to say we should not take it up again, only that it is difficult. So a provision in Appellate Rule 7 looking at class actions only with respect to objector-appellants would be difficult in its own right."

In addition to these big-picture concerns, a project attempting to address class-action appeals would confront challenging technical issues. Professor Cooper notes that the conceptual challenges of addressing the inclusion of attorney fees in appeal bonds extend beyond situations where a *statute* authorizes the award of attorney fees; for example, appeal-bond issues might arise "[i]f class counsel is entitled to a fee out of the common fund, and it seems reasonable to augment the fee out of the common fund that has been preserved for the class by attorney services rendered for the class as appellee." In addition, Professor Cooper notes that class-action appeals include interlocutory appeals by permission under Rule 23(f), and he suggests that consideration of such interlocutory appeals might entail assessment of the present uses (and perhaps misuses) of Rule 23(f). Professor Cooper further questions whether (if one is reassessing the contours of Appellate Rule 7) it might be worthwhile to reexamine why only the *appellant* may be required to file a Rule 7 bond: "As for statutory fee appeals, what if the appellant is the one who will be entitled to fees if successful on appeal? Why not require the appellee to post a bond--because we presume the judgment is correct? Should it depend on whether the statute is a one-way shift, a two-way shift, or a [two-way shift under which]defendant can recover, but only on showing worse behavior than the plaintiff need show to

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[1] Professor Cooper notes that a focus on appeal bonds might be explained by the likelihood that "any part [of an action] that remains certified for class treatment is far more likely to be resolved by settlement than trial, so appeals will be taken by objectors or no one. But trial, with a winner and a loser, is possible: can we ignore it in the rule?"

recover[]?"

Professor Cooper agrees with the Appellate Rules Committee's intuition that if the Committee were to move in the direction of considering an amendment dealing specifically with appeals in class action litigation, it would be desirable for the Civil Rules Committee to be involved in the discussions of such a proposal. He notes, however, that the Civil Rules Committee's consideration of issues relating to the treatment of attorney fees under Appellate Rule 7 carries the possibility of additional complications for the Civil Rules Committee. As the Appellate Rules Committee has noted, the reasoning of *Marek v. Chesny*, 473 U.S. 1 (1985), has played a key role in the lower courts' discussions of the Appellate Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68's reference to "costs"[2] 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.* As Professor Cooper notes, commentators have questioned both the plausibility of the *Marek* Court's inference and the policy implications of *Marek*'s holding. To the extent that the Committees contemplate revising Appellate Rule 7 to address the treatment of attorney fees as part of Rule 7 "costs," and to the extent that such a revision to Appellate Rule 7 entails the consideration of possible amendments to the Civil Rules, the question may arise whether (and how) to address *Marek*'s treatment of attorney fees as "costs" under Civil Rule 68. And the latter issue would undoubtedly prove a thorny one. Admittedly, a change to Appellate Rule 7 which did not entail parallel changes to any Civil Rule might not require the Civil Rules Committee to open the question of Civil Rule 68; but this set of potential complications is worth weighing as the Committees discuss whether, and how, to proceed with possible changes to Appellate Rule 7.

If the Appellate Rules Committee is inclined to continue with research concerning appeal bonds and class action litigation, it would be very helpful to obtain the perspective of litigators with experience in various roles in class litigation. (Daniel Girard's memo, which the Committee considered in connection with its spring 2008 meeting, illustrates how helpful such perspectives can be.) Among those who have assisted the Civil Rules Committee with questions on class action litigation are Allen Black of Fine, Kaplan & Black; Sheila Birnbaum of Skadden, Arps; Robert Heim of Dechert; Jocelyn Larkin of the Impact Fund; and the Public Citizen Litigation Group's co-founder Alan Morrison.[3] I expect that Committee members may have

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[2] If a Rule 68 offer of settlement is not accepted, and "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d).

[3] Though Alan Morrison is no longer with Public Citizen, he and/or some of the current litigators at Public Citizen could comment from the perspective of class-action objectors.

additional suggestions concerning whom to consult; this would be a useful topic to discuss at the November meeting.

TAB V-F

Materials concerning this item may be distributed prior to the meeting.

TAB VI-A

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-A

Judge Kravitz has drawn to the Committee's attention an issue raised by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee") concerning Appellate Rule 3(d). The CBA Local Rules Committee points out that due to the advent of electronic filing, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals."

Part I of this memo discusses Rule 3(d)'s requirements. Part II notes that, as the CBA Local Rules Committee suggestions, the practice in some district courts diverges from Rule 3(d) because of the adoption of CM/ECF; but Part III also notes that this is not yet true of all districts. Part III discusses possible rulemaking responses to this phenomenon.

I. Rule 3(d) and its functions

The requirement that the district clerk notify counsel of the filing of the notice of appeal dates back to the adoption of Civil Rule 73(b) as part of the original Civil Rules.[1] By 1967, Criminal Rule 37(a)(1) included a similar provision.[2] Appellate Rule 3(d), as originally adopted,

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[1] Original Civil Rule 73(b) provided in relevant part: "Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing."

[2] As amended in 1966, Criminal Rule 37(a)(1) provided in part: "The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to all parties other than the appellant. When an appeal is taken by a defendant, the clerk shall also serve a copy of the notice

drew upon (and replaced) these Civil and Criminal Rules provisions.

Appellate Rule 3(d) currently provides:

> (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record--excluding the appellant's--or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries--and any later docket entries--to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.
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> (2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.
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> (3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

Appellate Rule 3(a)(1) provides that "[a]t the time of filing [the notice of appeal], the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)."

II. Current practice

In considering the effect of CM/ECF on practice under Rule 3(d), it is useful to begin by noting the status of CM/ECF in the federal district courts, in the United States Tax Court,[3] in the Bankruptcy Appellate Panels,[4] and in the courts of appeals. CM/ECF is now in use in all 94 federal district courts, and as of June 2008 the vast majority of those courts were accepting

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of appeal upon him, either by personal service or by mail addressed to him. The clerk shall note on each copy to be served the date on which the notice of appeal was filed, and shall note in the docket the names of the parties on whom he serves copies, with the date of mailing or other service. Failure of the clerk to serve notice shall not affect the validity of the appeal."

[3] See Appellate Rules 13 and 14.

[4] See Appellate Rule 6(b)(1).

electronic filings.[5] As of June 2008, the Bankruptcy Appellate Panels in the Sixth, Eighth, Ninth and Tenth Circuits were using CM/ECF (though according to a PACER press release only the Eighth Circuit BAP was accepting electronic filings at that time). As of September 2008, the First Circuit BAP appears to be participating in CM/ECF.[6] The United States Tax Court, however, does not participate in CM/ECF.[7] Of the courts of appeals, as of September 2008 the Fourth, Sixth, Eighth and Ninth Circuits are accepting CM/ECF filings.[8] In sum, most but not all of the courts (from which appeals may be taken in which Rule 3(d) applies) are now using CM/ECF for filings; but only a handful of the courts of appeals are currently using CM/ECF for filings.

The CBA Local Rules Committee aptly points out that some districts in which CM/ECF is in use permit the electronic filing of the notice of appeal and provide that when the notice of appeal is filed electronically the electronic notification provided through the CM/ECF system constitutes the service required by Rule 3(d).[9] Even in those districts, though, there are exceptions to the use of CM/ECF; such exceptions typically cover pro se litigants.[10]

Some other districts permit electronic filing of the notice of appeal but do not explicitly

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[5] See Press Release, Case Management / Electronic Case Files (CM/ECF), June 2008, available at http://www.pacer.psc.uscourts.gov/documents/press.pdf (last visited September 19, 2008).

[6] See http://www.bap1.uscourts.gov/index.php (last visited September 19, 2008).

[7] See Tax Court Rule 22, available at http://www.ustaxcourt.gov/rules/TITLE3.PDF (last visited September 19, 2008).

[8] See Press Release, *supra* note 5 (stating that as of June 2008 the Fourth, Sixth and Eighth Circuits were accepting electronic filings); see also Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases, 8/28/08, available at http://www.ca9.uscourts.gov/ca9/Documents.nsf/ecf-admin-order.pdf (last visited September 26, 2008) (stating that certain types of filings would be accepted via CM/ECF starting in September 2008).

[9] See E.D. Cal. Rule 83-146; D.Colo., ECF--Civ., Part V.P; D. Colo., ECF – Crim., Part V.O; D. Md. ECF Procedures, Part III.C.15.a; D. Wyo., CM/ECF Proc. Part III.M (civil); id. Part IV.K (criminal).

[10] See, e.g., E.D. Cal. Rule 83-146 (providing with respect to notice of appeal that "[c]onventional service shall be made upon, and by, pro se parties unless authorized by the Court to file electronically."); E.D. Cal. Rule 5-133 (exempting pro se litigants from CM/ECF unless the judge grants the litigant permission to participate, and providing that attorneys may apply for exemption from CM/ECF).

discuss the effect of e-filing on Rule 3(d)'s procedures.[11] Such districts' provisions typically include a general statement that the CM/ECF system's electronic notification counts as service upon CM/ECF participants, but that paper copies of filings must be served on non-CM/ECF participants.[12]

Some district courts do not yet employ electronic filing for notices of appeal, even though the district court participates in CM/ECF.[13]

III. Possible Committee responses

The situation described in Part II of this memo may warrant consideration of an amendment to Appellate Rules 3(a)(1) and 3(d). Those rules do not describe the current practice in some districts with respect to cases that involve litigants whose counsel participate in CM/ECF. In cases in which all parties are represented by counsel who participate in CM/ECF, a notice of appeal filed through CM/ECF will ensure that parties are provided with the necessary

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[11] See D. Del., ECF Procedures, Part G(4); M.D. Ga., Administrative Procedures for Filing, Signing, and Verifying Documents by Electronic Means in Civil Cases, Part II.A.2; D.La., WD-ECF Admin Pro., Parts I.A. & II.E.2; D. Mass. ECF Administrative Procedures, Part F; D.N.H. Administrative Procedures for ECF, Part 3.6; W.D. Okla., ECF Policies, Part II.A.3.b; D. Or., Civil L.R. 100.4(d). See also E.D. Tex. Local Court Rule CV-5(a) (requiring electronic filing of notice of appeal, and providing that electronic notice constitutes service on CM/ECF participants).

[12] See M.D. Ga., Administrative Procedures for Filing, Signing, and Verifying Documents by Electronic Means in Civil Cases, Parts II.B.1 & II.B.3; D.La., WD-ECF Admin Pro., Parts I.D.2 & II.B.3; D. Mass. ECF Administrative Procedures, Part E.3; D.N.H. Administrative Procedures for ECF, Parts 2.8(b) & (d); W.D. Okla., ECF Policies, Parts I.B., II.B.1, & II.B.2.

[13] N.D. Cal. Order 45 provides: "Until such time as the United States Courts of Appeals for the Ninth Circuit and the Federal Circuit institute rules and procedures to accommodate Electronic Case Filing, notices of appeal to those courts shall be filed, and fees paid, in the traditional manner on paper rather than electronically. All further documents relating to the appeal shall be filed and served in the traditional manner as well. Appellant's counsel shall provide paper copies of the documents that constitute the record on appeal to the District Court Clerk's Office."

Similarly, E.D. Wis. ECF Procedural Order, Part 11, provides: "Until such time as the United States Court of Appeals for the 7th Circuit and the Federal Circuit institute rules and procedures to accommodate ECF, notices of appeal to those courts shall be filed, and fees paid, in the traditional manner on paper rather than electronically."

information – i.e., the fact that a notice of appeal has been filed and the date of its filing[14] – and it would thus make sense to provide, as some districts do, that the clerk need not serve paper copies of the notice of appeal in such cases.

On the other hand, it would not be appropriate to delete entirely from Rule 3(d) the requirement that the clerk serve notification on the parties when a notice of appeal is filed. Even in districts that permit CM/ECF filing of the notice of appeal, paper filing and paper service will occur with respect to some litigants (e.g., pro se litigants). A litigant who does not participate in CM/ECF will need to receive paper notice from the clerk under Rule 3(d) when another party files a notice of appeal electronically.[15]

Moreover, when an inmate confined in an institution files a notice of appeal under Rule 4(c), that filing will be in paper form. With respect to such inmate filings, Rule 3(d)(2) requires the clerk to alert counsel (and pro se parties) to the *date of docketing* of the notice; this is important because in such instances Rule 4(c) provides that certain periods that would run from the date of the inmate's filing are counted from the date of docketing rather than the date of filing. I am unsure whether parties who participate in CM/ECF would receive notice of the date of docketing through the CM/ECF electronic notification system, but if not, then Rule 3(d)(2)'s requirement would continue to be important even for participants in CM/ECF.

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[14] That date, of course, is significant not only to the timeliness of the appeal but also to the determination of a number of deadlines set elsewhere in the Appellate Rules. The date of the filing of the notice starts the running of Rule 4(a)(3)'s period for cross-appeals in civil cases. The date of filing is also relevant to the deadlines set by Rules 4(b)(1)(A)(ii) and 4(b)(1)(B)(ii) in criminal cases.

[15] Rule 3(d)(1)'s requirement that when a criminal defendant appeals "the clerk must also serve a copy of the notice of appeal on the defendant" is somewhat ambiguous: Does this require service on the attorney for a represented defendant, or on the defendant himself or herself? The 1966 Committee Note to Criminal Rule 37(a)(1) explained this requirement by stating that "The duty imposed on the clerk by the sixth sentence is expanded in the interest of providing a defendant with actual notice that his appeal has been taken and in the interest of orderly procedure generally." This might suggest that the defendant himself or herself is to be notified. On the other hand, when this provision was originally adopted in Criminal Rule 37(a)(1) the Rule also spoke of service of the notice on "all parties other than the appellant," perhaps suggesting that the drafters used "party" to refer to counsel in the case of represented parties. The notification provided by Rule 3(d)(1) may be particularly useful to a defendant who has availed himself or herself of the option – provided by Criminal Rule 32(j)(2) – to ask the clerk to prepare and file a notice of appeal on the defendant's behalf.

To the extent that Rule 3(d)(1) requires a criminal defendant-appellant to be personally served with the notice of appeal – even if represented – this would add another category of appeals in which paper service by the clerk would ordinarily be necessary.

Another requirement that should be retained for the moment is Rule 3(d)(1)'s requirement that the district clerk notify the court of appeals of the filing of the notice of appeal and of any later district-court filings that may affect the progress of the appeal (e.g., motions that may suspend the effectiveness of the notice of appeal). I imagine that when CM/ECF is fully operational in all the courts of appeals, one benefit may be that such notifications become automatic. But until then, I would guess that the Rule's requirement will continue to be important.

One possible response to the issues raised concerning Rule 3(d) might be to amend Rules 3(a)(1) and 3(d) to set special rules for cases in which (1) the notice of appeal is filed through CM/ECF and (2) all parties to the case are participants in CM/ECF. In such cases, the Rule could be amended so that it does not require the filer to provide paper copies for the purpose of service, and so that it does not require such service of paper copies by the clerk.

Another possible response would be for the Committee to wait and see how matters develop as the courts gain experience with CM/ECF. In this regard, it is notable that the courts of appeals are still in the process of making the transition to CM/ECF, and that not all districts currently permit the use of CM/ECF for filing the notice of appeal. The wait-and-see approach may make particular sense at this juncture in the light of the Committee's general practice of "bundling" proposed amendments. That practice may result in the decision not to seek permission to publish any amendments for comment in August 2009; if this is the case, then the Committee could gain the benefit of an additional year's experience with CM/ECF before determining what amendments, if any, would be most appropriate for Rules 3(a) and 3(d).

TAB VI-B

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-C

Appellate Rule 26(c) is the target of ongoing criticism. An amendment which is currently on track to take effect December 1, 2009[1] will remove undesirable ambiguity from the rule but will not eliminate calls for the rule's abolition.

Such calls have recurred periodically, and surfaced most recently in the public comments on the time-computation project. Those comments included the suggestion that Appellate Rule 26(c)'s "three-day rule" be abolished. This memo summarizes the issue and suggests that the Committee coordinate its consideration of this issue with the Bankruptcy, Civil and Criminal Rules Committees.

I. The comments

Four comments on the time-computation project are relevant to the three-day rule. Those four comments are enclosed. The central comment, with respect to Appellate Rule 26(c), is

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[1] The proposed amendment to Rule 26(c) was approved by the Judicial Conference in September 2008. If the Supreme Court also approves the amendment and Congress takes no contrary action during the statutorily-mandated waiting period, the amendment will take effect December 1, 2009. The proposed time-computation amendments, which also are currently on track to take effect December 1, 2009, would delete the word "calendar" from Rule 26(c) to reflect the fact that Rule 26(c)'s three-day period will be counted using the new days-are-days approach. Accordingly, as of December 1, 2009, if the amendments take effect Rule 26(c) will read:

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

Chief Judge Easterbrook's.

A. Chief Judge Easterbrook's suggestion: abolish the three-day rule

In commenting last year on the time-computation project, Chief Judge Easterbrook suggested that in addition to the proposed changes, the three-day rule contained in Appellate Rule 26(c) should be abolished. He argued that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by the time-computation project's preference for setting periods in multiples of seven days. Robert J. Newmeyer, an administrative law clerk to Judge Roger T. Benitez of the U.S. District Court for the Southern District of California, similarly suggested that Civil Rule 6(d)'s three-day rule be abolished.

As the Appellate Rules Deadlines Subcommittee reported last spring, the suggestion that the three-day rule be eliminated is well worth considering. Though Chief Judge Easterbrook's suggestion relates only to the Appellate Rules, the criticism of the three-day rule is relevant, as well, to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). Over the past nine years, there have been lengthy discussions of whether electronic service ought to be included within the three-day rule. The Appellate, Bankruptcy, and Civil Rules Advisory Committees, and the Standing Committee, have discussed the question periodically since at least the spring of 1999. More recently, the time-computation project also discussed the matter. Though there has been some support, in those discussions, for excluding electronic service from the three-day rule, ultimately the decision was taken to include electronic service within the three-day rule for the moment.

Some of the reasons given for including electronic service may be somewhat less weighty now than they were a decade ago: Concerns that e-service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form are perhaps less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. It may also be the case that as districts or circuits move to make CM/ECF mandatory for counsel, counsel might no longer (as a practical matter) have the inclination or, perhaps, ability to decline consent to electronic service; in those districts or circuits, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service). However, the concern remains that counsel might strategically e-serve on a Friday night in order to inconvenience an opponent. Thus, though some of the rationales for including e-service in the three-day rule may have become less persuasive over time, the concern over possible strategic misuse of e-filing persists.

In the courts of appeals the shift to CM/ECF is not yet complete. As of September 2008

the Fourth, Sixth, Eighth and Ninth Circuits were accepting CM/ECF filings.[2] At this point, the bankruptcy courts and district courts have much more experience with CM/ECF than do the courts of appeals.

B. Suggestions concerning Civil Rule 6(d) and backward-counted deadlines

Two other comments – by the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee") and by Alexander Manners, a vice president of CompuLaw LLC – obliquely relate to the issues considered here. Those two comments highlight the incongruities that can arise under Civil Rule 6(d) with respect to backward-counted time periods. Such backward-counted periods will end on the same date no matter what method of service the opponent has used (which means that the opponent can effectively shorten the litigant's time to respond by employing service by mail).

The only backward-counted deadlines in the Appellate Rules are those for reply briefs, and the reply brief deadlines seem unlikely to cause the same degree of concern as deadlines for motion papers under the Civil Rules. In response to the EDNY Committee's points about backward-counted deadlines, the Appellate Rules Deadlines Subcommittee considered whether the Appellate Rules' timing for reply briefs[3] should be transmuted into a forward-counted period and concluded that such a change is unnecessary. The EDNY Committee focused its concern on the Civil Rules' deadlines for motion papers, and did not mention the Appellate Rules' deadlines for reply briefs. This is not surprising, since it may be questioned how frequently appellate briefing and argument schedules are compressed enough to trigger the backward-counted deadlines for reply briefs. Currently, the presumptive deadline for reply briefs is the earlier of (1) 14 days after the prior brief is served, or (2) 3 days before argument. Under the proposals published for comment, the presumptive deadline for reply briefs will be the earlier of (1) 14 days after the prior brief is served, or (2) 7 days before argument. Deadline (1) will ordinarily be the salient deadline, because deadline (2) will only become relevant when argument follows very close on the heels of briefing. Given the infrequency with which deadline (2) is likely to apply,

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[2] See Press Release, Case Management / Electronic Case Files (CM/ECF), June 2008, available at http://www.pacer.psc.uscourts.gov/documents/press.pdf (last visited September 19, 2008) (stating that as of June 2008 the Fourth, Sixth and Eighth Circuits were accepting electronic filings); see also Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases, 8/28/08, available at http://www.ca9.uscourts.gov/ca9/Documents.nsf/ecf-admin-order.pdf (last visited September 26, 2008) (stating that certain types of filings would be accepted via CM/ECF starting in September 2008).

[3] Under Appellate Rules 28.1(f) and 31(a), a reply brief must be filed "at least 3 days before argument, unless the court, for good cause, allows a later filing." The time-computation proposals would change the three-day period to seven days.

there seems to be no reason to consider eliminating the backward-counted deadlines in Rules 28.1(f) and 31(a). This is especially true given that those deadlines can be extended by the court "for good cause."

It therefore seems unnecessary for the Committee to consider the problems associated with backward-counted deadlines when considering whether and how to modify Appellate Rule 26(c)'s three-day rule.

II. Conclusion

It would be useful for the Committee to give preliminary consideration to the suggestion that Appellate Rule 26(c)'s three-day rule be altered or abolished. Unless there is some strong reason why the Appellate Rules present exceptional considerations, it seems best to conform Rule 26(c)'s approach to that taken in the time-counting rules that apply in the lower courts. Thus, it seems preferable that any change to FRAP 26(c)'s three-day rule be coordinated with the Bankruptcy, Civil and Criminal Rules Committees. The Appellate Rules Committee's tentative views on the matter can be communicated to those Committees, with a view to discussing whether a joint project concerning the three-day rule would be desirable.

Encls.

07-CV-004

07-CR-003

07-AP-003

07-BR-015

"Frank H. Easterbrook"
<frank.easterbrook@acsalaska.net>
12/12/2007 02 29 AM

To Rules_Comments@ao uscourts gov
cc
Subject August 2007 Rules Package

I have only a few brief comments on these proposals.

The time-computation rules are nicely done. I recommended changes along these lines during my time on the Standing Committee and am pleased to see that the task is largely complete. These amendments should take effect in 2009, "only" 16 years after a majority of the Standing Committee urged that changes of this kind be accomplished as soon as possible.

The benefits of using real days are so apparent that I am left to scratch my head about the survival (and proposed amendment in this cycle) of Fed. R. App. P. 26(c), which adds 3 days whenever time is calculated from a document's service rather than its filing. Why should this rule persist? Build the time into the deadline for briefs; don't leave it up in the air whether three days should be added to some other period. (For 3 days are *not* added if the document is "delivered" on the service date.)

The rule makes little sense. It was originally designed to accommodate delay in the Postal Service. Today briefs and similar documents regularly are delivered by FedEx or courier; increasingly they are delivered electronically with zero waiting. Yet Rule 26(c), which says that no days are added if a courier plops the document on counsel's desk, provides that 3 days *are* added if the document arrives as an email attachment, or via message from a court's e-filing site That's inconsistent.

My court has concluded that the entire routine is absurd and has overridden Rule 26(c)--not by a local rule, which wouldn't be cricket (see Fed. R. App. P. 47(a)(1)), but by setting a briefing schedule by order in almost every case. Each order gives a date on which the brief must be *filed*

When a deadline applies to filing rather than service, Rule 26(c) drops out of the picture. Although the Seventh Circuit has been doing this for more than 20 years, lawyers regularly are confused by the difference between "filing" dates, to which Rule 26(c) does not apply, and "service" dates, to which it does, so each of these orders includes a warning that the conversion to a filing date means that no time is added on account of service by mail.

That the Seventh Circuit must add this proviso to each order shows the potential for confusion caused by the differing rules for computation of time following filing versus service.

Note, by the way, that the three extra days *also* interferes with the goal of allocating time in 7-day parcels, which then end on weekdays. Adding three days to a 30-day or 45-day period is not likely to increase the chance that the last day will be a weekend, but adding 3 days to a 14-day period (used for some motions) will.

So the Standing Committee should complete the time-computation project by rescinding rather than amending Rule 26(c), with adjustments in other deadlines if appellees and respondents otherwise would have too little time.

One other brief comment, concerning both Fed. R. App. P. 4(a)(1)(B) and Fed. R. App. P. 40(a)(1). The draft amendments to these two rules refer to "the United States; a United States agency; [and] a United States officer". United States is a proper noun; the first usage ("the United States") is therefore correct. Treating a proper noun as an adjective ("a United States agency") is not correct; it is an example of noun plague. We should not have stylistic backsliding so soon after the style project rewrote all of these rules. "Federal agency" is better, using a real adjective as an adjective. If you have some compelling need to use "United States," then say "agency of the United States" (etc.). Sometimes Congress writes this error into a statute ("United States Court of Appeals"), and there is nothing the judiciary can do about the legislature's poor drafting. But the Constitution gets it right ("We the People of the United States"; "the Congress of the United States"; "the judicial Power of the United States"; "the Chief Justice of the United States"), and the federal judiciary should do no less

Frank H. Easterbrook

Robert
Newmeyer/CASD/09/USCOURTS
02/04/2008 08 06 PM

To Rules_Comments@ao uscourts gov

cc

Subject August 2007 Proposed Timing Rules Changes

07-AP-007 **07-BK-011** **07-CV-008**

Dear Members of the Rules Committee, **07-CR-008**

I offer three comments

1 Title 28 U S C § 636(b)(1) *must* be changed from 10 days to 14 days for making Objections to Magistrate Judge rulings in order to achieve consistency with the proposed changes in FRCP 6 & 72, FRCrP 59, and Rule 8 of the §2254 and §2255 Rules, as has been mentioned in the Committee Comments

2 Since other significant time periods are being considered for change, it would be worthwhile to consider the merits and demerits of changing the short time period for filing Objections to rulings by Magistrate Judges when the rulings address case-dispositive matters For example, under the current rules, if a Magistrate Judge issues a Report & Recommendation on a case-dispositive issue such as a civil motion to dismiss or motion for summary judgment, a Social Security Appeal, a Bankruptcy appeal, or a petition for habeas corpus relief, an aggrieved party has only 10 days (not including intervening Saturdays, Sundays, and holidays, etc) to file an appeal (or "Objections") These types of decisions are often worthy of significant research, effort and reflection, since they may deal with numerous or complex issues For this reason alone, justice may demand a longer appeal time for litigants The short time line (14 calendar days under the proposed Rule changes) may work even harsher effects on prisoner litigants who may receive delayed notice of Magistrate Judge decisions due to the imponderables of prison mail systems

There is already a natural division addressing the time for Objections between FRCP Rule 72(a) and (b) Rule 72(b) would be an appropriate place to insert a more generous time period for objecting to potentially dispositive rulings of a Magistrate Judge, such as 28 days (a multiple of 7) or 30 days (a common practice) In the interests of fairness to prisoner litigants, some courts already include a 30-day time period for Objections within the court order or R&R. For consistency, amendments would also be required to Rule 8 of the §2254 and §2255 Rules as well as 28 U S C 636(b)(1)

3 It is not clear whether the proposed FRCP Rule 6 timing amendments retain, or discard, the extra 3 days provided in current Rule 6(d) and former Rule 6(e) The proposed Civil Rule 6 does not appear to address the subject in the way that the proposed Appellate Rule 26(c) does Perhaps subsection (d) of Civil Rule 6 is meant to be left as it currently exists

I would suggest it be given a state funeral and then forgotten Currently, it is the subject of much confusion and debate among litigants It occassionaly spawns needless motions to strike the filing that looks "late" but is not It is not needed when a document is served electronically but the existing rule still grants 3 extra days Questions abound from the rule Does a party receive the 3 extra days when it is the court that is serving an order electronically? If a plaintiff serves a motion by mail or by e-mail under proposed civil Rule 6 on Monday, February 11th 14 days before a hearing scheduled for Monday, February 25th by when must the defendant file his or her response brief? Under the proposed amendments, would it be Tuesday, February 19th (because seven days prior to the hearing counting backwards would be Monday, February 18th, which is a holiday, which would requiring counting backward to the next business day of Friday, February 15th, plus 3 additional days because of mail/email service which would land back on the holiday Monday, February 18th, moving forward this time to the next day the Clerk's Office is open for business, *i e*, Tuesday, February 19th)? If the 3-day rule applies when an opposition brief must be filed, then a court may not receive the full 7 days' time consideration prior to a hearing If the 3-day rule does not apply, then a responding party may have a very short window between receipt of a motion and the time for filing a response

Whatever the intent of the proposed amendments, an official Committee Note would be extremely helpful

Sincerely,

Robert J Newmeyer

Administrative Law Clerk for the
Honorable Roger T Benitez
United States District Judge
United States District Court
Southern District of California

COMMENTS OF THE COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ON THE PROPOSED TIME-COMPUTATION AMENDMENTS

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York respectfully submits the following comments on the proposed time-computation amendments which were circulated for public comment in August 2007 by the Standing Committee on Rules of Practice and Procedure.

1. The Proposed Time-Computation Amendments Would Cause Serious Practical Disruptions That Would Outweigh Their Theoretical Benefits

By changing the current rule under which intermediate Saturdays, Sundays, and holidays are not counted in computing time period of ten days or less, the proposed time-computation amendments would cause serious practical problems. Judicial officers, court personnel, and practitioners have become familiar with the existing time-computation rule over the course of many years. They have learned to rely upon it as a default rule which will apply unless other specific dates are set by the court. Statutes, local rules, standard-form orders, and practitioners' forms have all evolved against the backdrop of the current rule. Any change in the current time-computation rule would lead to significant disruptions while the new rule is promulgated, disseminated, absorbed, and assimilated into practice. The new rule would continue to be a trap for the unwary for an extended period.

The Committee does not believe that there are significant problems in practice under the current time-computation rule. It is simple and easy to apply

for lawyers and nonlawyers alike. To the extent that the current rule requires resort to a calendar to determine which intermediate days fall on weekends or holidays, the same would also be true under the proposed amended rule, under which time periods that end on a weekend or a holiday are extended to the next business day.

To the extent that there is any concern that some lawyers and court personnel may have difficulty making the necessary computations under the existing time-computation rule – which we have not observed to be the case – a more efficient solution would be to incorporate the necessary software for making such computations directly into the Electronic Case Filing system, thus providing an authoritative means of making and recording the necessary computations.

2. The Proposed Time-Computation Amendments Do Not Adequately Mitigate the Adverse Effects That Would Be Caused by Their Introduction

The Committee recognizes that the drafters of the proposed time-computation amendments have sought to mitigate their adverse effects by, for example, lengthening most five-day periods to seven days and lengthening most ten-day periods to fourteen days. These changes, however, would only offset the adverse effects caused by including weekend days in the new time computations. They would not offset other significant adverse effects of the new rule, including its application to holiday periods and its effect on time periods prescribed by statutes and by local rules.

A. Time Periods That Include Holidays

One would like to believe that motions served on the eve of holiday

periods would be a problem seldom met with and easily solved. Sadly, the Committee's experience teaches that this is not always the case. By including intervening holidays in the time computation, the proposed amendments would exacerbate this problem.

Consider, for example, a motion with a ten-day response period (which, as noted below, is more reflective of current practice than the four-day period prescribed by Fed. R. Civ. P. 6(d)) which is served by hand at 5:00 P.M. on Christmas Eve. Even the current exclusion of holidays does not begin to offset the burden and disruption of responding to such a motion during the year-end holiday period. Including holidays in the time computation would make matters even worse.

B. Time Periods Prescribed by Statute

Large numbers of short time periods are prescribed by statutes that have been enacted against the backdrop of the present time-computation rule. With commendable industry, the Standing Committee has tabulated some (but not all) of these statutes in a 108-page attachment to its proposal. Our Committee believes that, if the proposed amendments are transmitted to Congress (which our Committee hopes will not occur), they should be transmitted with a provision that they will only become effective if Congress passes and the President signs a technical corrections bill making corresponding changes in all the statutory time periods listed by the Standing Committee, as well as in all other litigation-related statutory time periods of ten days or less that can be unearthed by exhaustive research. Otherwise, these statutory time periods will cause persons relying upon

the existing time-computation rule that they have known and used for many years to incur a serious risk of losing substantive rights.

C. Time Periods Prescribed by Local Rule

For the same reasons, no new time-computation rule should become effective without corresponding changes in time periods of ten days or less that are contained in local rules, standing orders, and standard-form orders. Ensuring that such changes are made in a timely fashion, and are publicized to everyone who needs to be aware of them, would be a monumental task in itself.

In addition, any amendments should clarify whether district courts may continue to have local rules that measure time periods in business days. One such local rule is Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which (in the Committee's experience) has worked satisfactorily for more than a decade since it was adopted in its current form in 1997.

3. The Committee Supports the Proposed Lengthening of Certain Time Periods

As part of the time-computation project, the Rules Committees have reviewed the time periods provided in the existing rules, and have proposed certain changes in those time periods that are independent of the merits of the time-computation project itself. Although our Committee is unable to support the time-computation project generally, it does support some of the independent changes that have been proposed in certain time periods.

The Committee supports the lengthening of the time periods for moving and responding papers in civil motions under Fed. R. Civ. P. 6(d) from five days

and one day to fourteen days and seven days, as a more realistic reflection of the time needed for most motions. Although our Committee is not unanimous on this point, we suggest that the Civil Rules Committee may wish to consider specifying a longer period for substantive motions than for discovery motions, as is done, for example, by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York.

The Committee also supports the lengthening of the time for post-trial motions under Fed. R. Civ. P. 50, 52, and 59 from ten days to 30 days. Again, this is a more realistic time period than is provided by the present rules.

4. Time Periods That Count Backward Should Be Changed to Time Periods That Count Forward

When a time period which counts backward ends on a weekend or holiday, the proposed amendments would continue to count backward until a weekday is reached. This would exacerbate the adverse effects of the proposed amendments by shortening still further a response period that may already be shorter than it would be under the current rules.

In addition, when time periods are counted backward, the rules contain no provisions for giving the other parties extra days when service is made by mail. Nor is it clear how a workable rule could be drafted that would do this.

The way to avoid these and other practical problems caused by counting backward is to amend the rules that currently count backward so that they count forward. As a practical matter, the most important rule that would be affected by this change is Fed. R. Civ. P. 6(d), which currently determines the times for serving motion papers on civil motions by counting backwards from "the time

specified for hearing" (despite the fact that most civil motions today are not determined at a hearing). How Fed. R. Civ. P. 6(d) could be amended to count forward is demonstrated by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which was amended in 1997 to do exactly that, and which has worked smoothly for more than a decade.

5. Conclusion

We thank the Standing Committee for the opportunity to comment on the proposed time-computation amendments. For the reasons set forth above, although we support changes in the time periods in certain rules, we urge the Standing Committee to disapprove the time-computation amendments as a whole.

Guy Miller Struve, Esq. – Chair
Edwin J. Wesely, Esq. – Chair Emeritus
Igou M. Allbray, Esq.
Daniel R. Alonso, Esq.
Peter J. Ausili, Esq.
Ernest T. Bartol, Esq.
Robert L. Begleiter, Esq.
Jonathan B. Behrins, Esq.
Joel Berger, Esq.
Professor Margaret A. Berger
Anton J. Borovina, Esq.
Michael Cardello, III, Esq.
Professor Edward D. Cavanagh
Professor Oscar G. Chase
June Duffy, Esq.
Steven M. Edwards, Esq.
Jerry Fortinsky, Esq.
Muriel Goode-Trufant, Esq.
John C. Gray, Jr., Esq.
James Henly, Esq.
Steven A. Hoffner, Esq.
George F. Hritz, Esq.
Robert N. Kaplan, Esq.
Lewis Liman, Esq.

Loretta Lynch, Esq.
V. Anthony Maggipinto, Esq.
Robert J. Rando, Esq.
Jonathan S. Sack, Esq.
Charles Evan Stewart, Esq.
James M. Wicks, Esq.
Members Emeritus:
Sol Schreiber, Esq.
Ex Officio:
The Honorable Raymond J. Dearie
Chief Magistrate Judge Steven M. Gold
James E. Ward, Jr.
Robert C. Heinemann, Esq.
Lawrence J. Zweifach, Esq.
Professor Susan Herman
Greg Andres, Esq.
Susan Riley, Esq.
Gerald P. Lepp, Esq.

Comments on the Proposed Changes to Federal Rules Related to Computation of Time

The Time-Computation Subcommittee has done an admirable job in analyzing the issues related to computation of time However, as such substantial changes are currently under consideration, we believe that this is an opportune time to examine some additional issues related to the computation of time and holidays that continue to cause problems for practitioners Below we have set out comments on some of the proposed amendments, together with additional issues we believe should be considered

Proposed new Civil Rule 6(a)(5)

The addition of Rule 6(a)(5) will finally remove the ambiguity that has existed when calculating backward-counting deadlines that land on a non-court day. We support its addition

Proposed amendment to Civil Rule 6(c)

Proposed Rule 6(c) sets new deadlines for the service of notice of motion and motion opposition papers, yet most district courts currently set their own motion deadlines by local rule which may differ from the current and the proposed new deadlines The rule is ambiguous as to whether the Federal rule takes precedence over such local rules We propose that in order to eliminate any confusion as to how to apply the Federal motion rules, and to be consistent with Rule 56, Rule 6(c)(1)(C) be amended as follows

> *"(C) When a ~~court order – which a party may, for good cause, apply for ex parte – sets a different time~~ different time is set by local rule or court order"*

Proposed Civil Rule 6(a)(6) - Holidays

We believe proposed Rule 6(a)(6)(B) to be confusing as it is uncertain whether state holidays are always considered legal holidays, irrespective of whether the district court is closed Although this issue is not created by the proposed amendment to Rule 6(a)(6)(B), but exists under the current rule, we believe that this rule should be clarified to resolve the uncertainty

Proposed Rule 6(a)(6)(B) defines a legal holiday as

> *" . any other day declared a holiday by the President, Congress, or the state where the district court is located."*

Many states observe holidays other than the federal holidays set forth in proposed Rule 6(a)(6)(A) However, these holidays may not be observed by the U.S District Court in that state[1]. Under the current and proposed rules it can be interpreted that such state holidays are legal holidays for the purposes of counting time, even though the court is open on such days

[1] For example, Alabama observes Confederate Memorial Day, Maine and Massachusetts observe Patriots' Day, Nebraska observes Arbor Day, yet the district courts in those states do not close on these holidays

Furthermore, in recent years we have observed a trend for more and more district courts to close on state holidays or other non-Federal holidays, yet not declare the day an official holiday This was observed in 2007 when courts closed on the day before Christmas, yet determined this was not a legal court holiday. We therefore have a situation where courts are officially open on legal holidays (state holidays) and closed on non-legal holidays (day after Thanksgiving, day before Christmas, etc.).

Occasionally, courts may publish an official notice that they are observing such a state holiday and that it is deemed an official holiday pursuant to FRCP 6(a)(4)(B). However, the majority of the district courts will not list such a holiday on their official published holiday calendar Instead, at a time close to the date, they will issue a notice stating that the court is closed on such a day. Often, the court notice will state that the court will be open in some limited capacity for emergency filings, or that their Electronic Case Filing (ECF) system will still be available for filing. The fact that the court may be open for certain types of filing further clouds the issue as to whether the court is officially closed or not, and whether that day should be counted for purposes of calculating deadlines.

To clarify this issue, we propose Rule 6(a)(6)(B) be further amended as follows.

> *"any other day declared a holiday by the President, Congress, or the state where the district court is located <u>and officially noticed as a legal holiday by the district court</u>."*

Bankruptcy Rule 9006(f)

As part of the 12/1/07 amendments to the Civil Rules, Civil Rule 5(b)(2) was rearranged so that what was 5(b)(2)(B), (C) and (D) is now 5(b)(2)(C), (D), (E) and (F) Bankruptcy Rule 9006(f) was not amended to reflect this, with the result that Bankruptcy Rule 9006(f) no longer references authority for service by electronic means or delivery by other means This may cause confusion because Bankruptcy Rule 9006(f) relates to the computation of time after certain types of service

Bankruptcy Rule 9006(f) references Civil Rule 5(b)(2)(C) and (D) in the title and the text of the subsection. Civil Rule 5(b)(2)(C) now authorizes service by mailing to the person's last known address and 5(b)(2)(D) authorizes service by leaving a copy with the clerk of the court, if the person served has no known address In the earlier version, subsection 5(b)(2)(D) authorized service by "[d]elivering a copy by any other means, including electronic means, consented to in writing by the person served." The current version moves the authority for service by electronic means to subsection 5(b)(2)(E) and service by other means to subsection 5(b)(2)(F).

According to the Advisory Committee Notice to the 2007 Amendments, the changes to Civil Rule 5 were meant to be stylistic only. Therefore, it appears that the revision was not meant to have a substantive affect on Bankruptcy 9006(f) We note that Federal Rule of Criminal Procedure 45(c) was not amended to reflect the 12/1/07 amendment to Civil Rule 5(b)(2) We are aware that the Committee on Rules of Practice and Procedure and the Judicial Conference of the United States have approved a technical amendment to align Criminal Procedure Rule 45(c) with Civil Rule 5(b)(2) This revision is part of the amendments pending approval by the United States Supreme Court that will take effect on 12/1/08 absent contrary Congressional action

To remedy the discrepancy between the Civil Rule 5(b)(2) and the Bankruptcy Rule, we propose that Bankruptcy 9006(f) be amended as follows.

(f) Additional time after service by mail or under Rule 5(b)(2)~~(C) or~~ (D),(E) or (F). *When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5 (b)(2)~~(C) or~~ (D), (E) or (F) F.R.Civ P , three days are added after the prescribed period would otherwise expire under Rule 9006(a).*

Civil Rule 6(d) – Backward-Counting Deadlines

When the rules set a deadline to act prior to an event, as is required in Rules 6(c) and 68(a), there is confusion as to whether the deadline should be moved further back if the act is to be performed by service other than by hand.

Rule 6(d) states:

> *"When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C),(D),(E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)."*

A plain reading of this rule would indicate that the only circumstance in which additional time is added to a deadline is when a party has been served with a document and the rule expressly states that the period of time is counted from the date of service. In that case, deadlines calculated by counting back from an event in order to determine the last day an act may be performed would not fall under Rule 6(d), as the party is not required to act within a specified time after service However, from a logical point of view, the purpose of Rule 6(d) is to afford a party served by methods other than hand the same amount of time to act as it they had been served by hand.

For example, under proposed Rule 6(c), a party may serve notice of motion by any method on the 14th day before the hearing. If the moving party chooses to serve notice by mail, the party served would have less time to review the moving papers and prepare an opposition than if they were served by hand, especially if intervening holidays and weekends delayed the delivery of the moving papers even more than the 3 days afforded by Rule 6(d). As another example, under proposed Rule 68(c), parties may serve an offer of judgment 14 days prior to trial and the party served is allowed 14 days to serve an acceptance of the offer. We presume that the two deadlines were written to ensure that any acceptance of the offer is made prior to the start of trial However, under the current and proposed rules, it can be argued that the time to serve an offer is not extended to an earlier date if the offer is served by mail, but that the party served with the offer by mail is allowed an extra 3 days under Rule 6(d). This would mean that the party served could respond to the offer three days after the trial has begun

Some district courts have resolved this issue by stating separate deadlines for parties to perform acts by mail For example, Central District of California Local Rule 6-1

> *"If mailed, the notice of motion shall be served not later than twenty-four (24) days before the Motion Day designated in the notice. If served personally, the notice of motion shall be served not later than twenty-one (21) days before the Motion Day designated in the notice "*

Some states resolve this issue in their time rule by extending any period of notice that must be given when service is made by means other then by hand For example, California Code of Civil Procedure § 1013(a):

"The service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail .."

This issue can be clarified once and for all by either amending Rule 6(d) to add that any period of notice is extended if service is made by methods other than by hand, or by adding provisions for extending time to each rule that has a backward-counting deadline. The first option would be more beneficial as it would provide a uniform system of time calculation for all rules, including local and judges' rules

Proposed Civil Rule 6(a) - Implementation

The Time-Computation Subcommittee recognizes that the proposed changes to the Federal Rules may cause hardship if the short time periods set in local rules are not adjusted accordingly The local rulemaking bodies and judges should consider the reason why court days were used in the first place, as well as why most state courts continue to use court days when counting short periods of time The reason for the use of court days is twofold. First, if short periods of time were not counted in court days, then intermediate holidays and weekends would have too large an impact on the total number of court days in a given period, affording parties or the court a smaller number of actual business work days to complete an act than the number of days envisaged by the authors of the rule. For example, a four-day deadline to perform an act prior to a hearing may allow a party four business days if the hearing is on a Friday, but only two business days if the hearing is on a Tuesday. The Committee has accounted for this issue in the Federal Rules by enlarging shorter time periods for Federal Rules

Second, if court days are not used when calculating two or more deadlines triggered by the same event, such as the deadline to serve notice of a motion hearing and the deadline to serve the motion opposition under Rule 6(c), one deadline may be affected by intervening non-court days while the other is not. For example, some district courts now observe the day after Thanksgiving as a legal holiday[2] pursuant to Rule 6(a)(4)(B). This creates four consecutive non-court days Under proposed Rule 6(c), if a motion hearing was noticed on November 21, 2008, for a December 5, 2008, hearing, the opposing party would need to serve their opposing papers by November 26. This would give them only three business days to review the moving papers, assuming they were served at the end of the business day on November 21st, 2008 If they were served by mail and extra time was not added to the notice deadline under Rule 6(d), then they may get no time at all (see "Backward-counting Deadlines" above)

Even though this example may occur only on such four-day weekends, courts need to take this issue into consideration when amending local rule deadlines to conform to the proposed new Federal time rules. To ensure that parties are given at least the minimum amount of time that was allowed when counting in court days, courts should take into account the maximum number of consecutive non-court days that may occur in their jurisdiction.

The local rulemaking bodies and judges should also be advised to use multiples of seven when changing deadlines that are currently calculated in court days to calendar days, as the

[2] The Northern and Central Districts of California both observe the day after Thanksgiving, a California state holiday as a legal court holiday

Committee has done with the proposed deadline changes to the Federal Rules This will help alleviate the potential issue of parties picking certain days to perform an act in order to afford opposing parties a lesser amount of time to act, review or respond to the papers with which they were served, or to give the serving party additional time, based on intervening non-court days Such gamesmanship was experienced in California State Courts when court days were removed from certain deadlines in the past[3].

Finally, consideration needs to be given to the oversight of the implementation of the new time standards by the district courts Often, district courts are not aware of federal changes that affect their local rules, or are aware but fail to amend their local rules accordingly[4]. We propose the creation of an implementation guide and timeline for district courts to follow in order to ensure their local and judges' rules are amended correctly and in time to coincide with the adoption of the new Federal Rules.

Thank you for your consideration of these comments

Alexander J. Manners
Vice President of Legal Rules Products
CompuLaw LLC
10277 W. Olympic Blvd
Los Angeles, CA 90067.

[3] In 1999, the California Legislature amended the State code to change the deadlines for service and filing of notice of motions and motion opposition and replies from a number of court days before the hearing to a number of calendar days. The Legislature was forced to change these deadlines back to court days in 2005 in order to stop such manipulation of deadlines

[4] The Middle and Northern Districts of Georgia still follow their local rules which contradict the 2005 amendments made to Rule 6(d) to clarify date calculation methods

TAB VI-C

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-D, 08-AP-E, and 08-AP-F

As the Committee discussed during the Spring 2008 meeting, the pending amendment to Rule 4(a)(4)(B)(ii)[1] drew three comments relating generally to the operation of Rule 4(a)(4). Although the Committee decided not to alter the proposed amendment to Rule 4(a)(4)(B)(ii) in response to those comments, the Committee placed the comments on its study agenda.[2]

The three comments – by Peder Batalden, Public Citizen Litigation Group, and the Seventh Circuit Bar Association Rules and Practice Committee – make overlapping but distinct suggestions for amending Rule 4(a)(4). Part I of this memo discusses Mr. Batalden's concerns about the possibility of a time lag between entry of an order disposing of a post-judgment motion and entry of an amended judgment pursuant to such an order. Part II discusses the suggestions by Public Citizen and by the Seventh Circuit Bar Association that an original notice of appeal be deemed to encompass challenges to the disposition of any postjudgment motion.

I. The potential time lag between the order and the amended judgment

Peder K. Batalden, an associate at Horvitz & Levy, LLP, points out that the proposed amended Rule 4(a)(4)(B)(ii) "[t]ether[s] the time to appeal from the *amended judgment* to the entry of the *order*" disposing of the last remaining tolling motion. He observes that this "poses a

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[1] The proposed amendment to Rule 4(a)(4)(B)(ii) was approved by the Judicial Conference in September 2008. If the Supreme Court also approves the amendment and Congress takes no contrary action during the statutorily-mandated waiting period, the amendment will take effect December 1, 2009. Rule 4(a)(4)(B)(ii) would then read:

(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.

[2] The comments are enclosed.

problem in cases where the amended judgment is not entered until more than 30 days after the entry of the order." He points out that a district court may permit the prevailing party to submit a proposed amended judgment, may then allow the other party time to object, and thus may take more than 30 days between entering the order disposing of the tolling motion and entering the amended judgment. Mr. Batalden underscores his point by reporting that he "face[s] a comparable issue in a current case." Mr. Batalden suggests "delet[ing] entirely the language 'or a judgment's alteration or amendment upon such a motion' from the amended rule." He envisions that the effect of such a deletion would be as follows:

> In the few cases where the district court does enter an amended judgment, the losing party could file a separate notice of appeal from the amended judgment if the amendment is substantive.... [B]y operation of Rule 4, the losing party could timely file that separate notice of appeal within 30 days of the entry of the amended judgment.

Mr. Batalden's insight is an astute one: there may indeed be some instances when more than 30 days elapses between the entry of an order disposing of a postjudgment motion and the entry of any amended judgment pursuant to that order. It is worth considering under what circumstances such a time lag is most likely to arise. Two types of scenarios seem like plausible candidates.

<u>The remittitur scenario.</u> One possible scenario can be illustrated as follows. Imagine a defendant who both renews a prior motion for judgment as a matter of law and also moves for a new trial on the ground that the jury award of $ 1 million is against the weight of the evidence. Suppose that on November 3, 2008, the district court enters an order which (1) denies judgment as a matter of law, (2) conditionally grants a new trial unless the plaintiff agrees to accept a reduced award of $ 800,000 within 40 days from the date of the court's order and (3) orders that if plaintiff agrees within that 40-day period to accept the reduced award of $ 800,000, the motion for a new trial is denied and the clerk is directed to correct the judgment to reflect the reduced award of $ 800,000. Suppose further that the defendant wishes to challenge this disposition on appeal (arguing, for example, both that the defendant should have received judgment as a matter of law on the question of liability and, alternatively, that the district court abused its discretion with respect to the size of the remittitur). Appellate Rule 4(a)(4)(B)(ii) tells the defendant to file the notice of appeal no later than December 3, 2008. But suppose that, as of December 3, the plaintiff has not yet decided whether to accept the reduced award. If the plaintiff decides not to accept the reduced award, the case is headed to a new trial; thus, until the plaintiff makes a decision on this issue (or the 40-day time period runs out) there would seem to be no final judgment. What, then, should the defendant do – file a notice of appeal from a not-yet-appealable judgment? That appears to be what Appellate Rule 4(a)(4)(B)(ii), read literally, directs. In this scenario, the defendant's options appear to be:

> (1) file the notice of appeal by December 3, and then either withdraw the notice of appeal (if the plaintiff rejects the reduced award) or amend the notice of appeal (if the plaintiff accepts the reduced award and the judgment is amended to reflect the reduced

award);

(2) point out the timing problem to the district court and seek an extension of time to file the notice of appeal under Rule 4(a)(5); or

(3) wait to file the notice of appeal until the judgment has become final by virtue of the plaintiff's acceptance of the reduced award.

I would guess that the prudent litigant would wish to avoid Option (3). Granted, a strong argument can be made that choosing Option (3) results in a timely notice: It would make little sense to penalize a litigant for waiting to appeal until there exists an appealable final judgment. But the language of Rule 4(a)(4) might still make the litigant nervous, and prudent litigants are naturally risk-averse about appeal times. Option (1) would seem to carry little downside other than the cost of paying the filing fee for an appeal which might not proceed. Option (2)'s downsides include the cost of making the motion and the fact that granting such a motion rests within the district court's discretion (though it would seem that a strong argument could be made that this scenario provides "good cause" for extending the appeal time).

Perhaps the simplest solution to this particular problem lies in the drafting of the order conditionally denying the new trial. My choice of "40 days" in the hypothetical is both intentional and perhaps unrealistic. In actuality, the time period specified in the court's order may often be something more like 10 days, in which event the difficulty described above would not arise. I.e., if the period given to the plaintiff in which to decide whether to accept the reduced amount is significantly less than 30 days, then there will be time between the plaintiff's acceptance of the reduced award and the end of the 30-day period (calculated from entry of the order disposing of the post-judgment motions) within which the defendant can file the notice of appeal without worrying about the timing problem noted above.

<u>The complex judgment scenario.</u> Another possible scenario can be illustrated by imagining a case involving a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose the defendant timely moves for reconsideration, arguing that no injunction is warranted and, alternatively, that if an injunction is warranted the scope of the injunction should be narrower. Suppose the district court concludes that the defendant has shown that the judgment, as entered, is inappropriate and only a narrower injunction is warranted. Suppose further that on November 3, 2008, the district court enters an order which (1) grants the motion for reconsideration and (2) directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And suppose that the plaintiff wishes to challenge this disposition on appeal. Appellate Rule 4(a)(4)(B)(ii) tells the plaintiff to file the notice of appeal no later than December 3, 2008. But what if, by that point, the parties have yet to agree on the wording of the proposed amended judgment?

This scenario seems likely to be relatively rare. When the court grants injunctive relief, Civil Rule 58(b)(2)'s directive that "the court must promptly approve the form of the judgment,

which the clerk must promptly enter" will apply. The rulemakers' expectation has been that this directive removes the risk of undue delay in determining the form of the judgment. And the background principle – reflected in Civil Rule 58 until 2002 – has been that attorney submission of a suggested form of judgment should occur only in rare cases.[3] In the rare instances where the situation described in the hypothetical arises, I would think the correct answer is that there is no final and appealable judgment until the parties have submitted, and the court has approved, the wording of the proposed amended judgment.[4]

The consideration of these two scenarios suggests that Mr. Batalden has identified a conceptual problem, but it also provides some reason to wonder whether Mr. Batalden's proposal will necessarily solve that conceptual problem. Under Mr. Batalden's proposal, Rule 4(a)(4)(B)(ii) would be amended to read: "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." This change would remove the requirement that the notice of appeal challenging the judgment's alteration or amendment be filed within 30 days from entry of the order disposing of the motion. But in the scenarios described above, this change would not remove the incongruity concerning the timing of a notice of appeal challenging the order itself;

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[3] Prior to 2002, Civil Rule 58 provided that "[a]ttorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course." In 2002, this provision was replaced by current Civil Rule 58(d), which authorizes a party to request that a judgment be set out in a separate document. As the 2002 Committee Note to Civil Rule 58(d) explains: "New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments.... The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement."

[4] See, e.g., Goff v. Nix, 113 F.3d 887, 889-90 (8th Cir. 1997) (1993 district-court decision directing defendant to submit a remedial plan was not a final judgment, and thus a notice of appeal filed within 30 days after the ultimate 1995 judgment was timely); Bradley v. Milliken, 468 F.2d 902, 902-03 (6th Cir. 1972) ("The order from which these appeals are taken requires the parties to submit proposed plans for desegregation of the Detroit schools within a stipulated period of time which time had not passed at the time the appeals were filed. The order in question is not a final order within the meaning of Title 28 U.S.C. § 1291, neither is it an interlocutory order or decree which may be appealed to this Court under Title 28 U.S.C. § 1292(a).").

Rule 4(a)(4)(B)(ii) would still purport to direct that such a notice of appeal be filed within 30 days after entry of the order, even if there is not yet a final and appealable judgment on that 30th day. Moreover, the proposed change might be undesirable in that it would remove from the Rule text which currently serves to remind would-be appellants of the need to file a notice of appeal that encompasses the amendment or alteration of the judgment (if the appellant wishes to challenge that alteration or amendment).

II. Expanding the scope of an original notice of appeal to encompass dispositions of postjudgment motions

Public Citizen suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion." Public Citizen argues that where the appellant has already filed a notice of appeal from the original judgment, it serves no useful purpose to require a new or amended notice of appeal when the appellant also wishes to challenge the disposition of a post-judgment motion. Public Citizen asserts that there are many instances when a notice of appeal does not itself provide clear notice of the precise nature of the issues to be raised on appeal – for example, when a notice of appeal from a final judgment brings up for review issues relating to prior orders that merged into that judgment. In many instances, Public Citizen argues, the appellee instead "is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk." Thus, deleting the requirement that appellants file a new or amended notice in order to challenge the disposition of a postjudgment motion "would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts."

Thomas J. Wiegand, writing on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee ("Seventh Circuit Bar Association"), reports that the Seventh Circuit Bar Association sponsored a lunchtime discussion of the proposed Rules amendments in December 2007. Participants in that discussion doubted whether the proposed amendment to Rule 4(a)(4)(B)(ii) "would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party always will file an amended notice of appeal." Participants suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

Public Citizen's proposal – that "the original notice of appeal [should] serve[] as the appellant's appeal from any order disposing of any post-trial motion" – and the Seventh Circuit Bar Association's proposal – that the original notice should be deemed to encompass "any post-appeal amendment" – are worth exploring. In this regard it is worthwhile to note Rule 4(b)'s approach with respect to criminal appeals. Rule 4(b)(3)(C) provides, with respect to criminal appeals, that "[a] valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)."

An initial question, then, is why Rule 4(b)'s approach differs from Rule 4(a)'s. My first thought was that perhaps the difference arose from the differing origins of Rule 4(a) (drawn from former Civil Rule 73) and Rule 4(b) (drawn from former Criminal Rule 37). But a look at the history of Rule 4(b) disproves this intuition. The relevant language in Rule 4(b) did not come into the Rule until the 1993 amendments, which added, among other features, the following provision: "Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions." Interestingly, the 1993 Committee Note to Rule 4(b) does not explain this addition. Instead, the Committee Note focuses its explanation on the addition of language designed to make clear that certain types of post-verdict motions in criminal cases did not nullify a previously-filed notice of appeal.

As it happens, the 1993 amendments also added Rule 4(a)'s language specifying that one wishing to challenge the disposition of a postjudgment motion in a civil case must amend a previously-filed notice of appeal. (Prior to 1993, such an admonition would have been unnecessary as a technical matter, because from 1979 to 1993 Rule 4(a) provided that a tolling motion nullified any previously-filed notice of appeal.) As shown in the April 1991 Appellate Rules Committee Minutes, the substance of both these changes was adopted in the course of the same meeting. At that meeting, the Committee decided both (1) to adopt language in Rule 4(a) stating that a challenge to the disposition of a post-judgment motion in a civil case requires a new or amended notice of appeal[5] and (2) to adopt in Rule 4(b) language stating that a

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[5] The minutes state in relevant part:

> Judge Keeton asked whether the intent of the motion was to eliminate the requirement of a new notice of appeal. Judge Williams stated that the rule should not add any more requirements as to notices of appeal than those already in Fed. R. App. P. 3. He suggested that the Committee Note make reference to Fed. R. App. P. 3(c) and state that in order to appeal from disposition of a post trial motion a party may need to file a new notice of appeal or amend the original notice.
>
> Judge Keeton suggested a revision of the sentences in question to read as follows:
>
> An appeal from an order disposing of any of the above motions requires an amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

Minutes of the April 17, 1991, Meeting of the Advisory Committee on Federal Rules of Appellate Procedure ("April 1991 Minutes"), at 14-15.

previously-filed notice of appeal encompasses the disposition of tolling motions.[6]

The April 1991 Minutes do not explain why the Committee decided to take these differing approaches with respect to civil and criminal appeals. One reason might be that members were more concerned about criminal defendants' appeals due to the particularly serious nature of the stakes in criminal cases. Another reason might be that in most criminal cases the potential for confusion (as to what the defendant-appellant is likely to be appealing from) is relatively small; thus, providing that the initial notice of appeal encompasses challenges to subsequent dispositions of tolling motions probably does not make it difficult for the government to discern the nature of the orders being appealed. In complex civil cases, by contrast, there may be multiple postjudgment motions involving various parties, which might make it harder for the appellee to discern, in the first instance, which orders are being appealed if Rule 4(a) were to provide that an initial notice of appeal encompasses challenges to subsequent orders disposing of tolling motions.

The questions for the Committee, then, include whether current practice under Rule 4(a)(4)(B)(ii) poses undue difficulties for practitioners, and, if so, whether the benefits of a provision directing that an initial notice of appeal be read to encompass any challenges to subsequent dispositions of tolling motions would outweigh the possible downsides of such a provision. As Public Citizen's comments suggest, a key question might be whether, under such a regime, the notice of appeal would provide sufficient information to the appellee, and if not, whether other filings early in the course of the appeal would supply the missing specificity.

III. Conclusion

The suggestions discussed above are thoughtful and intriguing. The issues are complex and it seems fair to say that the discussion in this memo has failed to capture all the possible permutations that might arise. The Committee will presumably wish to consider both whether the problems which these proposals seek to remedy are widespread in practice, and also whether

---

[6] The minutes state in relevant part:

> Judge Logan suggested eliminating the language at lines 33 through 41 of the draft requiring a new notice or amended notice of appeal in order to bring an appeal from denial of a post trial motion. Judge Logan moved, and the motion was seconded by Judge Ripple, substitution of the following language for lines 33 through 41 of the draft:
>
> > Notwithstanding the provision of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions.

April 1991 Minutes at 18.

the proposed solutions avoid the risk of creating unintended and undesirable complications.

Encls.

HORVITZ & LEVY LLP

Peter Abrahams
David M Axelrad
Kris S Bahr
Peder K Batalden
Dean A Bochner
Karen M Bray
Frederic D Cohen
Curt Cutting
David S Ettinger
Adam M Flake
Andrea M Gauthier▲
Daniel J Gonzalez
Ellis J Horvitz*
Loren H Kraus▲
Barry R Levy*
Jason R Litt
Kim L Nguyen
Stephen E Norris
Bradley S Pauley
Lisa Perrochet
Alicia A Pell
John F Querio
Jeremy B Rosen
Felix Shafir
Mary-Christine Sungaila
John A Taylor, Jr
Margaret S Thomas
Mitchell C Tilner
S Thomas Todd
H Thomas Watson
Julie L Woods
Robert H Wright

*A Professional Corporation
▲Of Counsel

15760 Ventura Blvd.
18th Floor
Encino, CA 91436-3000
Tel (818) 995-0800
Fax (818) 995-3157

www.horvitzlevy.com

February 8, 2008

07-AP-009

BY ELECTRONIC MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: ***Proposed Amendment to Fed. R. App. P. 4(a)(4)(B)***

Dear Mr. McCabe:

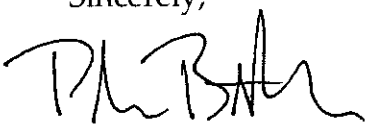
The Advisory Committee's proposed amendments to the Federal Rules of Appellate Procedure are welcome. I write only because the Committee's proposed amendment to Rule 4(a)(4)(B) carries an unintended consequence.

Under the amended rule, the losing party may appeal from an order resolving one of the tolling motions listed in Rule 4(a)(4)(A). The notice of appeal must be filed within 30 days of the entry of that order. If the district court elects to enter an amended judgment reflecting its order, the losing party's 30-day period to appeal from the amended judgment also runs from the entry of the order. Tethering the time to appeal from the *amended judgment* to the entry of the *order* poses a problem in cases where the amended judgment is not entered until more than 30 days after the entry of the order. In this situation, it is literally impossible for the losing party to file a timely notice of appeal from the amended judgment—the amended judgment will not have come into existence by the time the notice must be filed.

This is not a matter of idle curiosity. I face a comparable issue in a current case. Other litigants will face this issue whenever the district court affords the prevailing party ample time (say, two weeks) to propose an amended judgment and, in turn, allows the losing party ample time (say, another two weeks) to file objections to that proposal, before the district court finally rules on the objections and enters the amended judgment.

One solution to this quandary is to delete entirely the language "or a judgment's alteration or amendment upon such a motion" from the amended rule. Frankly, this language appears to be unnecessary. In most cases, the district court does not enter an amended judgment after ruling on tolling motions. In the few cases where the district court does enter an amended judgment, the losing party could file a separate notice of appeal from the amended judgment if the amendment is substantive. Absent the language quoted above, by operation of Rule 4, the losing party could timely file that separate notice of appeal within 30 days of the entry of the amended judgment.

Sincerely,



Peder K. Batalden

PKB/klt

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009

(202) 588-1000
(202) 588-7795 (FAX)

BRIAN WOLFMAN
DIRECT DIAL (202) 588-7730
E-MAIL BRIAN@CITIZEN.ORG

February 12, 2008

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comments on Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe.

Enclosed are the comments of Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Appellate Procedure. Thank you for your consideration of these comments

Sincerely,

/s/

Brian Wolfman

Public Citizen Litigation Group's
Comments on Proposed FRAP Amendments

Proposed Rule 12.1 (Indicative Rulings)

• We share the concern expressed in the proposed committee note that, because of the potential loss of appellate jurisdiction over the initial appeal (and, thus, the issues raised in that appeal), a remand terminating all appellate proceedings should occur "only when the appellant has stated clearly its intention to abandon the appeal." As the committee explains, that is a serious concern because if the first appeal is terminated, the appellant might be "limited to appealing [only] the denial of the postjudgment motion." The committee note does not say *how* an appellant should express an intent to abandon an appeal, and, moreover, an advisory committee note is not binding. We believe that this problem should be resolved in the Rule itself, by inserting the following as the penultimate sentence of proposed Rule 12.1(b): "The court of appeals shall not dismiss the appeal unless, in the notice referred to in subdivision (a), the appellant expressly requests that the appeal be dismissed."

• The proposed committee note also states that when a motion is filed in the district court during the pendency of an appeal, litigants should "bear in mind" that a separate notice of appeal may be necessary "to challenge the district court's disposition of the motion." We believe that the committee note should remind litigants that an *amended* notice of appeal may be filed in this circumstance. That is a worthwhile reminder because an amended notice of appeal does not require a new filing fee. *See* FRAP 4(a)(4)(B)(iii).

• We have one stylistic suggestion regarding Rule 12.1(a): Change "because of an appeal that has been docketed" to "because an appeal has been docketed."

Proposed Amendment to Rule 4(a)(4)(B)(ii)

We have no quarrel with the proposed wording change. We question, however, whether this subdivision serves a useful purpose. In 1993, Rule 4 was amended to provide that a notice of appeal filed before disposition of one of the "tolling" post-judgment motions becomes effective upon disposition of the motion. FRAP 4(a)(4)(B)(i). That Rule presumes that appellants intend to pursue their initial appeals after disposition of post-judgment motions. That makes sense because the appellee is not prejudice by that presumption, and, if the appellant does not want to pursue the initial appeal after disposition of a post-trial motion, it can simply abandon that appeal.

But why not go further and provide that the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion? To be sure, that order could not have been referenced in the appellant's original notice of appeal, *see* FRAP 3(c)(1)(B), but that "failure" of notice would not prejudice the appellee. After all, because all interlocutory orders are said to merge into the final judgment, and many appealable orders resolve numerous contested issues, Rule 3(c)(1)(B) – which requires only that the notice of appeal designate "the judgment, order, or part thereof being appealed" – does not actually put the appellee or the court on notice of the issues to be raised on appeal. Rather, the appellee generally is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk. *Cf.* FRAP 10(b)(3)(A). In any event, it is difficult to see what benefit flows from requiring the appellant to file another notice of appeal (or an amended notice) or what harm is caused by allowing the original notice of appeal to serve as an appeal from the order disposing of a post-judgment motion. In sum, our

amendment would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts.

Proposed Amendments to Rules 4(a)(1)(B)(iv) and 40(a)(1)(D)

In general, we support this amendment. We have one concern about its wording. Assume that an appeal is taken 31 days after judgment is entered by the district court or a petition for rehearing is filed 15 days after judgment is entered by the court of appeals. Assume further that the case is one in which, to quote the proposed Rules, the plaintiff alleges that the defendant is a "a United States officer or employee" and suit has been brought against that officer or employee in his or her individual capacity based on an "act or omission [allegedly] occurring in connection with duties performed on the United States' behalf." What if the court of appeals holds that the act or omission did *not* occur in connection with duties performed on the United States' behalf? Does that mean the court of appeals did not have jurisdiction over the appeal because it was filed late or that the rehearing petition was untimely? We assume that is not the committee's intent, but the Rule could be read that way. And there could be an adverse consequence of reading it that way. If the court finds that the officer or employee was not acting in connection with his or her official duties, the officer or employee might still be held individually liable on some other basis (such as under state common law), and we would not want a situation in which the court felt it lacked power to act on the ground that the appeal or rehearing petition was filed too late. We believe that any ambiguity can be resolved by replacing "occurring in connection" with "alleged to have occurred in connection."

Brian Wolfman – February 12, 2008

7th Circuit Bar Association

The Seventh Circuit Bar Association

219 South Dearborn Street, Suite 2722
Chicago, IL 60604
admin@7thcircuitbar.org

07-BR-036 07-CV-018 07-AP-018

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BY ELECTRONIC DELIVERY TO:
Rules_Comments@ao.uscourts.gov

To: **Committee on Rules of Practice and Procedure, Judicial Conference of the United States**

From: **Thomas J. Wiegand, Chair**
Seventh Circuit Bar Association, Rules and Practice Committee

Re: **Proposed Amendments to Federal Rules**

Date: **February 15, 2008**

On August 15, 1997, the Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules published proposed amendments to those Rules, and solicited comments from the bench and bar. The leadership of the Seventh Circuit Bar Association wanted to promote awareness among, and encourage comments from, its membership. On December 4, 2007, the Seventh Circuit Bar sponsored a lunchtime program where seasoned practitioners in each of these four practice areas presented an overview of the proposed changes and solicited any comments or discussion. Our members were able to attend either in person, at the Chicago office of Winston & Strawn LLP, or electronically from their computers through a "webinar" connection that allowed a live feed of the presentation and the ability to submit questions electronically in writing. This was the first year we have attempted this format, and are pleased that about 40 attorneys attended, including two sitting judges. We recommend this format to other federal bar associations.

Most of the proposed changes were received at the session with little or no comment, but a few of them led to interesting comments that we believe are important to forward to you:

New Civil Rule 62.1 and new Appellate Rule 12.1: It appeared that these new rules are aimed primarily or exclusively at motions pursuant to civil Rule 60. If that indeed is the case, then the new rules or the comments might mention that fact, so as to avoid a variety of other motions being made under the new rules, such as motions for fees. **Appellate Rule 4(a)(4)(B)(ii)**: Participants doubted whether the proposed change to this Rule for amending notices of appeal would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party

always will file an amended notice of appeal in order to avoid any risk of waiving an issue on appeal. The suggestion for avoiding this was to amend the Rule to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal.

Bankruptcy Rule 8002: The existing Rule allows 10 days in which to file an appeal from the judgment or order of a bankruptcy court. Proceeding on an expedited basis through the appeal process is a hallmark of bankruptcy practice and is often necessary in cases in which an entity operating in bankruptcy is depending on the resolution of a significant business matter before the bankruptcy court. However, as part of the time computation project, it is proposed to extend this period from 10 to 14 days. Some attorneys attending the meeting were strongly concerned that the reduction of this period would disrupt long-standing expectations regarding the pace of a bankruptcy case (and particularly a corporate restructuring case) and slow the bankruptcy appellate process without conferring on the parties or the courts any demonstrable benefit. As an alternative it was suggested, consistent with the desire to move to multiples of 7, to change the time period to 7 days. This period would come closer to maintaining current practice while also rendering its duration consistent with the time computation project's general goal of uniformity.

"Hours-are-hours": Also related to the time computation project, it was noted that the "hours-are-hours" approach to computing time would conflict with how Civil Rule 30(d)(2)'s 7-hour limit for depositions is calculated. (The advisory committee's notes to the 2000 amendment of Rule 30 state that only the time taken for the actual deposition, not including lunch or other breaks, counts toward the 7 hours, and case law states that the deposition is to occur in one day.) While there was no unanimous view, some present at our session suggested that adopting the "hours-are-hours" approach to the 7-hour deposition would be a beneficial change, as 7 hours of actual testimony in one day, with a single witness being asked questions by a single examiner, can be difficult.[1] It may be that no further comment is needed, as no change is being proposed to the 7-hour limit of Rule 30(d)(2). Yet if an overall explanation is anywhere offered for the time computation project, the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2).

Civil Rule 15: Finally, one change that received strong support at the session was the proposed change to Civil Rule 15, requiring that a party desiring to amend a complaint after a responsive pleading is filed must seek leave of court. This promotes economy and eliminates delay where a Rule 12 motion is filed in response to the original complaint and the amendments ultimately do not alter the bases for the Rule 12 motion.

We thank the Advisory Committees for all of the hard work they have done in developing the proposed amendments, and hope these comments prove helpful. Please feel free to contact me if we can provide any further comment or explanation.

---

[1] On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future

TAB VI-D

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-H

Mark Levy has suggested that the Committee consider whether the Rules might usefully be amended to respond to the current circuit split on the viability of "manufactured finality" as a means of securing appellate review. "Manufactured finality" describes instances when the district court dismisses with prejudice fewer than all of the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in the hopes of achieving a final – and thus appealable – judgment. As outlined in Mark's recent article in the National Law Journal,[1] the circuits are split concerning the circumstances under which such a maneuver results in a final, appealable judgment. A recent piece in the newsletter of the American Academy of Appellate Lawyers also notes this circuit split and argues that it should be resolved either by the Supreme Court or through the rulemaking process.[2] That this issue has long occupied the attention of appellate litigators is evidenced by Judge Kravitz's 2002 article on the subject.[3]

Part I of this memo describes the doctrinal issue and briefly surveys the varying approaches taken by different circuits. Part II considers the possibility and advisability of a rulemaking response to this issue.

I. The "manufactured finality" doctrine

28 U.S.C. § 1291 grants the courts of appeals (other than the Federal Circuit)[4]

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[1] See Mark I. Levy, Manufactured Finality, Nat'l L.J., May 5, 2008, at 13. A copy of this article is enclosed.

[2] See Laurie Webb Daniel, Circuit Split Report: Appellate Jurisdiction When Claims Are Voluntarily Dismissed Without Prejudice, The Appellate Advocate, Issue 2, 2008, at 4. A copy of this article is enclosed.

[3] See Mark R. Kravitz, Creating Finality, Nat'l L.J., July 8, 2002, at B9. A copy of this article is enclosed.

[4] With respect to the Federal Circuit, similar questions of finality arise concerning appellate jurisdiction under 28 U.S.C. § 1295.

"jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." Under Section 1291, "a decision is not final, ordinarily, unless it '"ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."'" Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 521-522 (1988) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945))). The purposes served by the final judgment rule are well known. It conserves appellate resources by preventing piecemeal appeals,[5] and it protects the parties and the district court from the delay that could ensue if interlocutory appeals were permitted as a matter of routine.

But there are costs to the final judgment rule, and thus both Congress and the rulemakers have adopted certain safety valves. Of most relevance here, 28 U.S.C. § 1292(b) permits interlocutory appeals – but only if both the district court and the court of appeals grant permission, and only if the district court certifies both that an immediate appeal "may materially advance the ultimate termination of the litigation" and that the challenged order "involves a controlling question of law as to which there is substantial ground for difference of opinion." Civil Rule 54(b) only requires permission from the district court (not the court of appeals); it permits the district court (in cases involving multiple claims or parties) to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." However, Rule 54(b) certification is only proper if the district court certifies "that there is no just reason for delay." This determination lies within the district court's discretion.

As Mark points out, the final judgment rule can pose a quandary if the court dismisses the plaintiff's most important claims ("central claims"), leaving only claims about which the plaintiff cares less ("peripheral claims").[6] The continued pendency of the peripheral claims

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[5] See, e.g., Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974) ("Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy.").

[6] I borrow the terms "peripheral" and "central" from Rebecca A. Cochran, Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims, 48 Mercer L. Rev. 979, 982 (1997).

Distinct issues are posed when the district court dismisses the plaintiff's federal-law claims with prejudice and dismisses supplemental state-law claims without prejudice under 28 U.S.C. § 1367(c). See, e.g., Erie County Retirees Ass'n v. County of Erie, Pa., 220 F.3d 193, 202 (3d Cir. 2000) ("While the district court's order in this case did permit appellants to reinstitute their dismissed state law claims, they could do so only in state court, as there would be no basis for the district court to exercise jurisdiction over such a reinstituted action. Thus, we have jurisdiction over this appeal."); Amazon, Inc. v. Dirt Camp, Inc. 273 F.3d 1271, 1275 n.4

means there is no final judgment despite the dismissal of the central claims. The district court may not be willing to enter a final judgment on the central claims under Civil Rule 54(b); for example, the district court may not be convinced that there is "no just reason for delay" in entering the final judgment.[7] And, similarly, there may not be strong arguments that the order dismissing the central claims "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation"; even if there are good arguments to this effect, a permissive appeal under Section 1292(b) requires both trial court and appellate court permission.[8] But what if the plaintiff voluntarily dismisses the peripheral claims, thus leaving no claims in the suit? Can the plaintiff thereby "manufacture" a final judgment? It should first be noted that in many instances the plaintiff will need either the consent of all parties who have appeared or court permission in order to dismiss the remaining claims.[9] Several scenarios might then result. Part I.A. discusses the circuits' varying responses to those scenarios. Part I.B. considers proposals for altering those approaches.

(10th Cir. 2001) ("The district court's decision to decline supplemental jurisdiction over the state law claims effectively excluded the remainder of Amazon's suit from federal court through no action of Amazon, and the order is therefore final as to the federal court proceedings."). I do not address these issues in this memo.

[7] Even if the district judge is willing to enter a Rule 54(b) judgment, there are some outer limits on the district judge's discretion to do so. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1434 (7th Cir. 1992) (discussing "limits on the district court's discretion to grant a final judgment under Rule 54(b)").

[8] For the transcript of a colloquy in which a district judge criticized the Seventh Circuit for its unwillingness to permit interlocutory appeals and Rule 54(b) appeals, see Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1437-39 (7th Cir. 1992). The district judge's enthusiasm for the proposed solution to this problem – manufacturing a final judgment so that the court of appeals would "have to take" the appeal – did not persuade the court of appeals in *Horwitz*.

[9] The plaintiff may file a notice of dismissal without party consent or court order if the notice is filed "before the opposing party serves either an answer or a motion for summary judgment." Civil Rule 41(a)(1)(A)(i). This might occur, for example, if the plaintiff's most important claims were dismissed on a pre-answer motion to dismiss under Civil Rule 12(b)(6).

Even if all parties consent to the dismissal of the peripheral claims *and* to the plaintiff's attempt to appeal the dismissal of the central claims, it is to be expected that the court of appeals will consider itself bound to raise the question of appellate jurisdiction. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1435 (7th Cir. 1992) ("It is our own threshold and independent obligation to make that determination even though both parties agreeably considered the order to be final and appealable.").

A. Current circuit caselaw

This section briefly canvasses existing circuit law. It does not attempt an exhaustive exploration, but rather aims to show the existence of inter-circuit (and sometimes intra-circuit) division and to demonstrate that a number of factors may influence the determination concerning finality.

Peripheral claims dismissed with prejudice.[10] In this scenario, most courts take the view that there exists a final, appealable judgment.[11]

However, one case from the Eleventh Circuit appears to take a different view. In Druhan v. American Mutual Life, 166 F.3d 1324 (11 Cir. 1999), the district court denied plaintiff's motion to remand, holding that her claims were completely preempted by ERISA. The plaintiff then secured a voluntary dismissal of her "ERISA" claim with prejudice. See id. at 1325. The court of appeals held that the order denying remand was unreviewable; it stated both that there was no longer a case or controversy (because the plaintiff herself had requested the dismissal) and that Congress has not authorized appeals from orders denying remand. Id. at 1326. In so holding, the court of appeals recognized the existence of caselaw from other circuits stating "that allowing appeals from voluntary dismissals with prejudice 'furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end.'" Id. (citing Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996)). The *Druhan* majority refused to follow such precedents, reasoning that the decision to adopt such a view "rests in the hands of Congress, which, along with the Constitution, sets the boundaries of this court's jurisdiction." *Id.* at 1326. Judge Barkett concurred in the determination that the court of appeals lacked

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[10] Courts of appeals have permitted the plaintiff-appellant (who had previously dismissed peripheral claims without prejudice) to stipulate on appeal that the dismissal of the peripheral claims is with prejudice – thus providing appellate jurisdiction. See, e.g., JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 776-77 (7th Cir. 1999) ("[W]hen we raised this point at argument, the plaintiff's lawyer quickly agreed that we could treat the dismissal of the two claims as having been with prejudice, thus winding up the litigation and eliminating the bar to our jurisdiction."). See also In re Grandote Country Club Company, Ltd., 252 F.3d 1146, 1149 (10th Cir. 2001) ("At the time this appeal was filed, we questioned whether the district court's judgment was a final, appealable order because it dismissed some of Kojima's claims without prejudice.... The district court subsequently amended its judgment to dismiss all claims with prejudice, and thus there is no longer any doubt that the judgment is appealable and that we have jurisdiction under 28 U.S.C. § 1291.").

[11] See John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 107 (1st Cir. 1998); Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005); Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996); Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 688 (8th Cir. 1999).

jurisdiction, on the ground that the plaintiff could have continued to press her claim under ERISA, and thus that authorities from other circuits (holding that a voluntary dismissal with prejudice of all remaining claims creates a final judgment) were inapposite. See id. at 1327 (Barkett, J., concurring).

Peripheral claims *conditionally* dismissed with prejudice – i.e., plaintiff dismisses the peripheral claims on the understanding that the dismissal is with prejudice *unless the court of appeals reverses the dismissal of the central claims.*[12] In this scenario, the Second Circuit has held that there is a final judgment:

> [W]hen a plaintiff is completely free to relitigate voluntarily dismissed claims, the final judgment rule ordinarily precludes this court from reviewing any adverse determination by the district court in that case. However, where, as here, a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court, the finality rule is not implicated in the same way.... Purdy runs the risk that if his appeal is unsuccessful, his malpractice case comes to an end. We therefore hold that a conditional waiver such as Purdy's creates a final judgment.

Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003). However, the Third and Ninth Circuits have disagreed.[13]

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[12] Judge Easterbrook has noted the possibility that the principle advocated by the plaintiff in such a case might be viewed as analogous to "the principle that allows a dispositive *issue* to come up, when the plaintiff is willing to stake the entire case on its resolution." First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800, 802 (7th Cir. 2001). But the *First Health Group* court did not need to decide whether the analogy held, because the plaintiff decided to dismiss the relevant claims unconditionally, thus removing the jurisdictional question. Id.

[13] In the Third Circuit, see Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 440 (3d Cir. 2003) ("[T]he Consent Judgment preserved Freddie Mac's right to reinstate Counts Two and Three, if we were to reverse and remand the district court's ruling.... The Consent Judgment thus represented an inappropriate attempt to evade § 1291's requirement of finality."). The original order had stated that the relevant counts were "dismissed, without prejudice, subject to the plaintiffs' right to reinstate Counts Two and Three if the March 19th Order should be vacated and this matter remanded for trial by the Third Circuit Court of Appeals based upon the appeal." Id. at 437. After oral argument, Freddie Mac sought and obtained a district-court order dismissing Counts 2 and 3 "with prejudice," and this rendered the judgment final. Id. at 442.

In the Ninth Circuit, see Dannenberg v. Software Toolworks Inc., 16 F.3d 1073, 1076 (9th Cir. 1994) (stating that "stipulations to dismiss claims with the right to reinstate upon

Peripheral claims dismissed without prejudice, and the statute of limitations has run out on the peripheral claims (or there is some other reason why the peripheral claims cannot be reasserted). This scenario ought to be functionally similar to a dismissal with prejudice. The statute of limitations, if it has run, would bar the plaintiff from reinstating the peripheral claims, assuming that the defendant properly asserts the statute of limitations bar in the future proceeding. Panels in the Second, Third and Tenth Circuits have approved such an approach.[14]

The Fourth Circuit took a somewhat similar approach in GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170 (4th Cir. 2007). The *GO Computer* plaintiffs had asserted a number of

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reversal ... implicate identical policy concerns" as dismissals without prejudice). See also Cheng v. C.I.R., 878 F.2d 306, 311 (9th Cir. 1989) ("A plaintiff who has alleged several separate claims could conceivably appeal as many times as he has claims if he is willing to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment) the court has not yet considered."). The Ninth Circuit later suggested that the presence of a stipulation permitting reinstatement of the peripheral claims in the event that the dismissal of the central claims is reversed on appeal shows intent to circumvent the final judgment rule, and thus indicates that appellate jurisdiction should be disallowed; in making this observation, the court distinguished plain dismissals without prejudice, which the court said leave the plaintiff exposed to the risk that the peripheral claims will become time-barred. James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002).

[14] In the Second Circuit, see Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 n.3 (2d Cir. 1996) ("It is appropriate to take a practical view of the dismissal.") (citing *Fassett*, below, with approval).

In the Third Circuit, see Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 1150, 1155 (3d Cir. 1986) ("Because Fassett and Buckley retained no viable cause of action against Troy, we conclude that the dismissal, which was nominally without prejudice, was for our purposes, a final dismissal.") (alternative holding, over a dissent).

In the Tenth Circuit, see Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1238 (10th Cir. 2006) ("Although the district court dismissed Jackson and Great Basin's civil conspiracy claim without prejudice, it dismissed their underlying tort claims with prejudice. Thus, practically speaking, Jackson and Great Basin Companies are barred from further litigation on the conspiracy claim because they cannot litigate the predicate torts.... Accordingly, the case is ripe for appellate consideration.").

See also Carr v. Grace, 516 F.2d 502, 503 (5th Cir. 1975) ("Under the peculiar circumstances of this case, we have no difficulty in concluding that a dismissal even 'without prejudice' after the statute of limitations has run is a final order for purposes of appeal. The appealability of an order depends on its effect rather than its language."). *Carr* is not directly on point, for present purposes, because in *Carr* the entire case had been dismissed.

antitrust claims, including claims for injuries to another company (Lucent). The district court, expressing serious concerns about the factual basis for the claims based on injuries to Lucent, struck the allegations relating to those claims from the complaint. Plaintiff obtained reconsideration of this order by "offer[ing] to voluntarily dismiss its federal claims for continuing antitrust injuries to Lucent, promising not to seek reinstatement of those claims or to file a new complaint raising them." Id. at 174-75. Ultimately, the district court dismissed the other claims on statute of limitations grounds and permitted the voluntary dismissal without prejudice of the claims based on injuries to Lucent. See id. at 175. Oddly, when GO Computer appealed, its first contention on appeal was that the absence of a final judgment deprived the court of appeals of appellate jurisdiction. Taking a "pragmatic" approach to the final judgment rule, the court of appeals held that it had jurisdiction:

> When the district court dismissed some of GO's claims without prejudice, it was utterly finished with GO's case. The claims in question, of course, are those based on injuries to Lucent that GO never had a right to allege .... GO escaped Rule 11 sanctions and won dismissal without prejudice by promising never to raise these claims in federal court again. And even if another district court by some chance did allow GO to file a new complaint for the Lucent claims, that case would be based on distinct facts from this one; in no sense would GO have saved this action by amending this complaint. The district court thus rendered a final judgment, and we have jurisdiction to consider it.

GO Computer, 508 F.3d at 176.

Dismissal without prejudice of peripheral claims results in the complete removal of a particular defendant from the suit. In this context, two courts of appeals have held that the dismissal creates a final judgment. The Eighth Circuit panel majority, in so holding, reasoned that cases refusing to permit appeals from the dismissal of a plaintiff's central claim against a defendant where peripheral claims against the same defendant were later dismissed without prejudice "further the well-entrenched policy that bars a plaintiff from splitting its claims against a defendant. But this policy does not extend to requiring a plaintiff to join multiple defendants in a single lawsuit, so the policy is not violated when a plaintiff 'unjoins' multiple defendants through a voluntary dismissal without prejudice." State ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1106 (8th Cir. 1999). The Ninth Circuit, reaching a similar conclusion in Duke Energy Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001), felt the need to distinguish Dannenberg v. The Software Toolworks Inc., 16 F.3d 1073 (9th Cir.1994), which the *Duke Energy* court characterized as holding that the court of appeals "did not have jurisdiction under § 1291 over an order granting partial summary judgment where the parties stipulated to the dismissal of the surviving claims without prejudice, subject to the plaintiff's right to reinstate them in the event of reversal on appeal." Duke Energy, 267 F.3d at 1049. The *Duke Energy* court distinguished its ruling in *Dannenberg* on the ground that *Dannenberg* "did not involve the effect of the complete dismissal of a defendant pursuant to Rule 41(a)(1)(i) for appellate jurisdiction purposes." *Duke Energy*, 267 F.3d at 1049.

The peripheral claims are dismissed without prejudice and there is no reason to think that their reassertion would necessarily be barred by the statute of limitations or any other impediment. Panels in the Second,[15] Third,[16] Fifth,[17] Seventh,[18] Tenth[19] and Eleventh[20]

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[15] See Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005) ("[I]mmediate appeal is unavailable to a plaintiff who seeks review of an adverse decision on some of its claims by voluntarily dismissing the others *without prejudice*."); Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996) ("[B]ecause a dismissal without prejudice does not preclude another action on the same claims, a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will effectively have secured an otherwise unavailable interlocutory appeal.").

[16] See LNC Investments LLC v. Republic Nicaragua, 396 F.3d 342, 347 (3d Cir. 2005) ("LNC's voluntary dismissal without prejudice of the pending garnishment actions against Megatel, LLC and Invertel, LLC, as a practical matter, does not effectively bar a future garnishment action against the parent companies arising from the Enitel Agreement. Accordingly, the District Court's December 18, 2002 Order is not final...."). See also Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 460 F.3d 470, 477 (3d Cir. 2006): "[T]he treatment of dismissals without prejudice as not being final 'disallows the manipulative plaintiff from having his cake (the ability to refile the claims voluntarily dismissed) and eating it too (getting an early bite at reversing the claims dismissed involuntarily).'... On the other hand, ... a case dismissed without prejudice that cannot be reinstituted is in the same position as a case dismissed with prejudice in that both classes of cases have reached finality."

[17] "[A]ppellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice." Swope v. Columbian Chems. Co., 281 F.3d 185, 192 (5th Cir. 2002).

[18] See Horwitz v. Alloy Auto. Co., 957 F.2d 1431, 1435-36 (7th Cir. 1992) ("It makes no difference that the court and the parties may have contemplated that, if this court were to accept jurisdiction and affirm the dismissal of Counts I-IV, the plaintiffs might later decide not to pursue the voluntarily dismissed counts originally held to have stated a cause of action.").

[19] A case where "[t]he district court did not adjudicate Defendants' counterclaims but rather dismissed them without prejudice" was the "exact type of case for which Rule 54(b) was designed." Heimann v. Snead, 133 F.3d 767, 769 (10th Cir. 1998). See also Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992) ("Cook has attempted to subvert the requirements of Rule 54(b) by voluntarily dismissing her first and second claims when the district court would not grant certification on her third claim for relief.").

[20] In State Treasurer of State of Michigan v. Barry, 168 F.3d 8 (11th Cir. 1999), an Eleventh Circuit panel applied circuit precedent stating that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice," id. at 11. A panel member wrote separately to criticize that approach and to advocate en banc

Circuits have concluded that the judgment is not final for appeal purposes in this situation. It should be noted, however, that the Seventh Circuit caselaw on this question is in some disarray.[21]

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reconsideration of it, see id. at 21 (Cox, J., specially concurring). The panel majority suggested that its ruling might be limited to cases involving "an appellant (1) who suffered an adverse non-final decision, (2) who subsequently either requested dismissal without prejudice under Rule 41(a)(2), or stipulated to dismissal without prejudice under Rule 41(a)(1), of the remaining claims." Id. at 15 n.10.

The Eleventh Circuit subsequently followed *Barry*, observing that *Barry* followed this approach as "1. consistent with 28 U.S.C. § 1291; 2. followed by two other circuits; 3. allowing district courts, not litigants, to control when and what interim orders are appealed; 4. forcing litigants to make hard choices and to evaluate seriously their cases; and 5. circuit precedent for 25 years." Hood v. Plantation Gen. Med. Ctr., Ltd., 251 F.3d 932, 934 (11th Cir. 2001).

In a case decided the same year as *Barry*, the Eleventh Circuit refused to extend *Barry* to a situation in which the plaintiff first voluntarily dismissed certain claims, and the district court only later dismissed all other claims on the merits. In such a situation, the court explained, the danger of manipulation of appellate jurisdiction does not exist, and in addition there would be no opportunity, in such a situation, for the district court to enter a judgment under Civil Rule 54(b). Schoenfeld v. Babbitt, 168 F.3d 1257, 1265-66 (11th Cir. 1999).

[21] A Seventh Circuit panel has narrowly interpreted *Horwitz* (discussed supra note 16), as a case that turned on the court's view of the parties' and the district court's intent: "*Horwitz* did not announce a principle that dismissal of some claims without prejudice deprives a judgment on the merits of all other claims of finality for purposes of appeal. Rather, the court concentrated on the intent of the district court and the parties to bypass the rules." United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir. 1993). In *Kaufmann*, the court of appeals had dismissed the defendant's prior appeal from a judgment of conviction on one count because other counts were unresolved. The district court then (on the government's motion) dismissed the other counts without prejudice under Criminal Rule 48. The court of appeals took jurisdiction of this second appeal; it emphasized that its disposition of the prior appeal had explicitly contemplated such a mechanism, and it distinguished *Horwitz* by concluding that in *Kaufmann* that the parties were not attempting to manipulate the court's jurisdiction. *Kaufmann*, 985 F.2d at 891.

On the other hand, a Seventh Circuit panel later followed *Horwitz* after noting the difficulty of reconciling the circuit's divergent precedents: "The recent cases disallowing a sort of manufactured finality like that found in the present lawsuit are consistent with the fundamental policy disfavoring piecemeal appeals. Hence, West's voluntary dismissal without prejudice is under current law insufficient to create a final judgment." West v. Macht, 197 F.3d 1185, 1189-90 (7th Cir. 1999). The *West* court noted a relatively early case, Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1266 (7th Cir. 1976), in which

By contrast, panels in the Sixth[22] and Federal[23] Circuits have concluded that a voluntary dismissal of the peripheral claims produces a final judgment. Without explicitly considering the question of jurisdiction, panels in the First[24] and D.C.[25] Circuits have reached the merits of

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the remaining claims had been voluntarily dismissed without prejudice and the court of appeals rejected a challenge to its appellate jurisdiction. The court in *West* noted that "[s]ubsequent cases have, without mentioning *Division 241*, avoided that case's result, though *Division 241* has never been overruled." West, 197 F.3d at 1188.

On still another hand, the Seventh Circuit yet more recently distinguished *West* and followed *Kauffman* in deciding that a prior judgment was final and appealable and thus eligible for res judicata effect. See Hill v. Potter, 352 F.3d 1142 (7th Cir. 2003). The *Hill* court rejected the contention that the prior judgment lacked finality because one of the claims had been voluntarily dismissed without prejudice. The court explained: "[A] litigant is not permitted to obtain an immediate appeal of an interlocutory order by the facile expedient of dismissing one of his claims without prejudice so that he can continue with the case after the appeal is decided.... But, as in United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir.1993), and James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir.2002), that is not the proper characterization of Hill's motion to dismiss his claim of retaliation. The record is clear that the reason for the request to dismiss was to avoid two trials, by joining the claim to the EAS claims that had been dismissed for failure to exhaust, after exhausting those claims." Hill v. Potter, 352 F.3d 1142, 1145 (7th Cir. 2003). As the court's citation to the *James* case suggests, it is possible to read this as endorsing a test that looks to the intent behind the dismissal of the claim without prejudice.

[22] See Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) ("[P]laintiff's dismissal with the concurrence of the court of the only count of her complaint which remained unadjudicated imparted finalty to the District Court's earlier order granting summary judgment.").

[23] "The appellants have explained that their remaining claim is of minor significance and is not worth taking through trial, and in their reply brief in this court they expressed their intention to drop that claim in the event that the trial court's judgment on the other claims is affirmed. Thus, treating the trial court's judgment as an appealable final judgment would not be inconsistent with the federal policy against piecemeal litigation. Additionally, by allowing their claim as to scheduled overtime to be dismissed without prejudice, the appellants have run the risk that all or part of that claim will be barred by the statute of limitations if they seek to assert it at a later date." Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008).

[24] Though it did not explicitly consider the issue of its jurisdiction, the First Circuit took jurisdiction and affirmed on the merits in a case where the district court had granted summary judgment dismissing one count and the appellant then "voluntarily dismissed Count Two without prejudice and requested entry of a final order to allow an immediate appeal of the court's ruling on Count One." Rymes Heating Oils, Inc. v. Springfield Terminal R. Co., 358 F.3d 82, 87 (1st

appeals taken after peripheral claims were dismissed without prejudice.

The Eighth Circuit has taken varying approaches to this issue. In Hope v. Klabal, 457 F.3d 784, 789-90 (8th Cir. 2006), the Eighth Circuit panel noted some prior cases in which it had either recharacterized a dismissal without prejudice as a dismissal with prejudice[26] or had dismissed for lack of a final judgment. However, the court adhered to other circuit caselaw and held that the voluntary dismissal without prejudice created a final judgment.[27]

Cir. 2004).

[25] Though it did not explicitly consider the question of its jurisdiction, the D.C. Circuit reversed on the merits in a case where "[i]n order to make final the court's dismissal of the bulk of their claims, appellants subsequently voluntarily dismissed without prejudice the viewpoint discrimination claim and the statutory civil rights claim." Stewart v. District of Columbia Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988).

[26] "Following the district court's grant of partial summary judgment, MPB voluntarily dismissed all its remaining claims for the purpose of making the district court's profits ruling final and appealable. If MPB took this action assuming that it could later revive its claims for other relief, it has badly miscalculated. When entered, the district court's profits order did not resolve all of MPB's claims and therefore was not appealable absent a Fed.R.Civ.P. 54(b) determination. A Rule 54(b) determination would have been an abuse of the district court's discretion-the rejection of one form of Lanham Act equitable relief, an accounting of profits, should not be appealed until the court has resolved whether MPB is entitled to Lanham Act injunctive relief.... That being so, MPB may not evade the final judgment principle and end-run Rule 54(b) by taking a tongue-in-cheek dismissal of its remaining claims. Those claims must be deemed dismissed with prejudice." Minnesota Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1245 (8th Cir. 1994).

The Eighth Circuit has also suggested that the question could be approached from another angle, by reviewing the propriety of the Rule 41(a)(2) dismissal: "[W]hat Farmland presents as a jurisdictional issue is in fact the question whether the district court abused its discretion when it dismissed the remaining claims without prejudice for the purpose of allowing the class to appeal the court's interlocutory summary judgment orders." Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 689 (8th Cir. 1999). Accordingly, the court indicated, one response could be to review the propriety of the Rule 41(a)(2) order. (The court did not follow this course in *Great Rivers Co-op*, however, because of the case's "unique procedural posture" with respect to dismissal of claims by a plaintiff class. 198 F.3d at 690.)

[27] In another rather unusual situation, the Eighth Circuit held that it had appellate jurisdiction where the district court had denied summary judgment to the plaintiff on certain claims and the plaintiff had then dismissed all other claims (some with prejudice and some without). (The court reasoned that the denial of summary judgment to the plaintiff "had the effect of terminating any further consideration of the" claims on which the plaintiff had sought

The Ninth Circuit has injected an "intent" test into the analysis. In James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir. 2002), the court held that the district court's grant of plaintiff's request under Rule 41(a)(2) to dismiss the peripheral claims created a final judgment. The court distinguished cases where the district court had previously refused a Rule 54(b) request, reasoning that in *James* the district court's grant of the Rule 41(a)(2) request evinced a judgment similar to that which a district court would make under Rule 54(b). See id. at 1069. "[W]hen a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291." Id. at 1070. The Ninth Circuit's intent-to-manipulate test seems somewhat unpredictable in application. For a decision holding – over a dissent – that manipulation foreclosed appellate jurisdiction, see American States Insurance Co. v. Dastar Corp., 318 F.3d 881, 891 (9th Cir. 2003) ("[T]he parties appear to have colluded to manufacture appellate jurisdiction by dismissing their indemnity claims after the district court's grant of partial summary judgment.").

B. Possible alternatives to current law

Ideally, the principles governing appellate jurisdiction should be as clear and predictable as possible.[28] Moreover, it would seem preferable that the scope of the "final judgment" concept be uniform among the circuits. If there were to be a uniform approach, what form should it take?

As noted above, where the plaintiff dismisses the peripheral claims with prejudice, the best view is that this produces a final judgment that permits appellate review of the central claims.[29] That conclusion makes sense, since there is no danger of a piecemeal appeal. As to the peripheral claims, no further litigation will result under any scenario.[30] To the extent that the Eleventh Circuit's decision in *Druhan* indicates that such a dismissal does not create an appealable judgment, the *Druhan* court's reasoning would not bar the adoption of a rule or statute that alters this approach. *See Druhan*, 166 F.3d at 1326 (stating that there may be good

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summary judgment.) Helm Fin. Corp. v. MNVA R.R., Inc., 212 F.3d 1076, 1080 (8th Cir. 2000).

[28] See Levy, Manufactured Finality, supra note 1.

[29] See Kravitz, Creating Finality, supra note 3.

[30] Because the dismissal of the peripheral claims is voluntary, the plaintiff would be unable to challenge that dismissal on appeal. See, e.g., Chavez v. Illinois State Police, 251 F.3d 612, 628 (7th Cir. 2001) ("[W]e may not review claims that were dismissed pursuant to plaintiffs' request for voluntary dismissal with prejudice...."); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987) ("[T]he plaintiff cannot appeal since the judgment is not an involuntary adverse judgment against the plaintiff.").

policy reasons to permit a dismissal with prejudice to create an appealable judgment, but that "is a decision that rests in the hands of Congress"). Where the dismissal was nominally without prejudice but a time-bar or other impediment ensures that the peripheral claims can no longer be reasserted, it would make sense to treat the dismissal the same as one that is nominally "with prejudice." (This, however, seems less important to establish, assuming that the plaintiff can cure any problem by stipulating after the fact that the dismissal is with prejudice; in instances where the peripheral claim clearly cannot be reasserted, such a stipulation provides a way to make clear that the judgment is final.)

Where the peripheral claims are conditionally dismissed with prejudice, the plaintiff agrees to dismiss the peripheral claims and not to reassert them unless the central claim's dismissal is reversed on appeal. It would probably make sense to provide that this creates a final judgment.[31] If the court of appeals affirms the dismissal of the central claim, the litigation is at an end. If the court of appeals reverses the dismissal of the central claim, the plaintiff can reassert the peripheral claims on remand (assuming that there is no time bar or other impediment). But that arguably is efficient, since the litigation will continue in any event with respect to the now-reinstated central claim. And if one pictures the alternative scenario (which would arise if the conditional dismissal with prejudice does not create an appealable judgment), that would be a scenario in which the plaintiff litigates the peripheral claims to final judgment; then appeals the dismissal of the central claim;[32] wins reversal of the dismissal of the central claim; and then litigates the central claim on remand. Either way, there may be more than one appeal; so it seems unclear that permitting conditional dismissals with prejudice to create an appealable judgment would be inefficient. It is true that the delay occasioned by the appeal from the central claim's dismissal might disadvantage the defendant, but an outer limit on the disadvantage posed by such delay would be provided by the statute of limitations on the peripheral claims. As to the other concern embodied in the final judgment rule – maintaining the district court's control over the progress of the litigation – one might argue that if the district court approves a conditional dismissal with prejudice, that indicates the district court's view that the proposed appeal will further efficient resolution of the matters in the district court. (Of course, if the district court holds such a view, then in many instances it may be possible for the district court to enter a partial final judgment under Civil Rule 54(b).)

When the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.[33] Admittedly, the plaintiff runs the risk that the peripheral claims might be time-barred by the time the plaintiff attempts to reassert them; but

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[31] See Levy, Manufactured Finality, supra note 1.

[32] This assumes either that the plaintiff either has lost on the peripheral claim or failed to recover as much on the peripheral claim as the plaintiff expects to recover on the central claim.

[33] It would, however, make sense to permit a plaintiff who sought such a dismissal without realizing that it would fail to produce an appealable judgment to stipulate that the dismissal of the peripheral claims is with prejudice, thereby rendering the judgment appealable.

reassertion (after disposition of the appeal from the dismissal of the central claim) seems in general to be a likely enough scenario that this permutation could be seen as an end run around the constraints of Civil Rule 54(b).[34] Not surprisingly, the circuits are split on this question and I will not attempt to argue here in favor of either side of the split.[35] One thing that can be said is that the Ninth Circuit's approach – which in some instances has injected an inquiry concerning the intent behind the dismissal – may be unpredictable in its application.[36]

Resolving these issues would entail difficult choices; and some of the choices would alter practice in a number of circuits. This memo does not attempt to suggest definitively which choices are best; instead, my goal is to sketch some of the relevant questions. Nor does this memo canvass all potentially related issues. For instance, this memo also does not address the related question of appealability that arises when an appellant's remaining claims are dismissed for want of prosecution or as a sanction for failure to comply with court orders, and the appellant seeks to challenge on appeal prior orders dismissing other claims.[37]

II. Possibility and advisability of a rulemaking response

Since 1990, the Rules Enabling Act has authorized the promulgation of rules that "define when a ruling of a district court is final for the purposes of appeal under [28 U.S.C. §] 1291." 28 U.S.C. § 2072(c). Accordingly, the rulemaking process is a possible avenue for addressing the circuit split on manufactured finality. The obvious alternatives to a rulemaking response would be legislation or the grant of certiorari by the Supreme Court in a case that would permit it to resolve the circuit split. The Court recently passed up the opportunity to address the issue when it denied certiorari in *Perez v. City of Miami Beach*, 128 S.Ct. 2082 (2008).[38]

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[34] As noted above, the Eighth and Ninth Circuits take the view that a final judgment is created if the claims dismissed without prejudice are against a different defendant than the claims the dismissal of which the plaintiff seeks to appeal. The strength of such a distinction is not entirely clear.

[35] Laurie Webb Daniel argues that dismissals without prejudice should be regarded as producing a final judgment. See Daniel, Circuit Split Report, supra note 2, at 6.

[36] Mark Levy has also criticized the intent test as "tautological[]." See Levy, Manufactured Finality, supra note 1.

[37] See, e.g., John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 105 (1st Cir. 1998) (adopting the rule that "interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and are therefore unappealable").

[38] The denial of certiorari in *Perez* might have resulted partly from the fact that *Perez* presented some complications in addition to the manufactured-finality issue. See Petition for a Writ of Certiorari at i, Perez v. City of Miami Beach, 128 S. Ct. 2082 (2008) (No. 07-1092),

Assuming that the rulemaking process provides a useful way to address the issue, there is the further question of which Advisory Committee should take the lead. Both of the Rules that currently bear upon the question as it arises in civil litigation – Civil Rule 54(b) and, less centrally, Civil Rule 41(a) – are contained in the Civil Rules. A number of the policy concerns that animate the final judgment rule concern the efficient conduct of, and the district judge's control over, proceedings in the district court. These considerations obviously require, at a minimum, that the Appellate Rules Committee proceed in consultation with the Civil Rules Committee; they might also weigh in favor of deferring to the Civil Rules Committee's consideration of this proposal in the first instance.[39] Of course, the final judgment rule has obvious implications for appellate practice and docket control in the courts of appeals, so the Appellate Rules Committee, too, has a clear interest in the matter.

Encls.

2008 WL 508033 (asserting as one of the questions presented "[w]hether, contrary to the Eleventh Circuit's approach below, other circuits have correctly held that there is a bright line rule that a judgment is final and thus appealable under 28 U.S.C. § 1291 when it dismisses all served defendants, leaving only unserved defendants in the case").

[39] United States v. Kaufmann, 985 F.2d 884 (7th Cir. 1993) (discussed in note 21) illustrates that similar questions of finality may sometimes arise in criminal cases. If the Committee were to proceed with this project, consultation with the Criminal Rules Committee would also seem advisable.

The National Law Journal

Manufactured Finality

Mark I. Levy

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For lawyers and clients who have lost an important ruling in the district court, the only solace may be the prospect of reversal on appeal. However, pursuant to the well-established "final judgment" rule under 28 U.S.C. 1291, appellate review ordinarily is not immediately available but must await the conclusion of the entire case. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978).

The lack of prompt appellate review is especially problematic in litigation involving multiple claims. Such cases are common in the federal courts, given the complexity of many disputes and the liberal joinder provisions of the Federal Rules of Civil Procedure. By definition, disposition of some, but not all, claims is not a final and appealable judgment.

Fed. R. Civ. P. 54(b) specifically vests in district courts the authority to permit immediate appeals in multiclaim cases under a prescribed standard. In some cases, however, the parties do not request entry of a Rule 54(b) judgment or the district judge declines to enter one.

Appellate courts are wary of manufactured finality

In that situation, a strategy often employed by plaintiffs is the dismissal without prejudice of the unadjudicated claims. Under this approach, the district court can render a judgment that dismisses some counts with prejudice on the merits and the remaining counts without prejudice at the behest of the plaintiff. In this way, the plaintiff seeks to file an immediate appeal regarding the claims dismissed on the merits with prejudice and still be free later to litigate those dismissed without prejudice.

Not surprisingly, courts of appeals are wary of such efforts to manufacture a final judgment that permits immediate appellate review of some parts of a case but does not in fact resolve all of the claims presented. Moreover, the possibility of future litigation over the claims dismissed without prejudice means that the appellate court could face a second appeal involving the same dispute, thus allowing the sort of piecemeal review that the final-judgment rule is designed to prevent. See *Coopers & Lybrand*, 437 U.S. at 467, 472 n.8.

Nevertheless, immediate appeal of some claims and reservation of others for possible future litigation may be the most sensible course for the parties and the most efficient procedure for the judicial system. For example, suppose that the claims dismissed with prejudice are the principal ones in the case, and that the claims dismissed without prejudice are of lesser importance that are not worthwhile for the plaintiff to pursue on their own but only as components of the larger lawsuit. If the dismissals with prejudice are affirmed on appeal, the plaintiff will abandon the other claims, and neither the district court nor the appellate court will ever have to consider them. Conversely, if the appeal results in reversal of the dismissals with prejudice, the plaintiff will be able on remand of those claims to litigate the claims dismissed without prejudice as well.

The courts of appeals have followed different approaches to this issue. In view of this circuit split, counsel must carefully identify and follow the controlling rule in the applicable jurisdiction.

The U.S. Court of Appeals for the Federal Circuit addressed this question in *Doe v. U.S.*, 513 F.3d 1348 (Fed. Cir. 2008). There, the plaintiffs (joined by the defendants) sought a dismissal of an unadjudicated claim without prejudice because it was of only minor significance and not worth litigating on its own; indeed, the plaintiffs represented that they would drop that claim altogether if they did not prevail in their appeal of the claims that had been dismissed with prejudice. Id. at 1354. The trial court entered the requested judgment dismissing all but one claim with prejudice and the remaining claim without prejudice.

The Federal Circuit held that this was a final and appealable judgment. Its decision relied on the law in several circuits allowing appeals in those circumstances. Those courts have adopted a "flexible approach" (id. at 1353) and "declined to follow a bright-line rule that judgments must always be treated as nonfinal whenever unresolved claims are voluntarily dismissed without prejudice." Id., citing *James v. Price Stern Sloan*, 283 F.3d 1064 (9th Cir. 2002); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991); *Hicks v. NLO Group Inc.*, 825 F.2d 118 (6th Cir. 1987).

The Federal Circuit rejected the strict rule to the contrary in other circuits that there is no final judgment — and hence no appellate jurisdiction — when "unresolved claims are voluntarily dismissed without prejudice." Doe, 513 F.3d at 1352, citing *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207 (2d Cir. 2005); *Marshall v. Kansas City S. Ry. Co.*, 378 F.3d 495 (5th Cir. 2004); *West v. Macht*, 197 F.3d 1185 (7th Cir. 1999); *State Treasurer v. Barry*, 168 F.3d 8 (11th Cir. 1999). See also *Erie County Retirees Ass'n v. County of Erie*, Pa., 220 F.3d 193 (3d Cir. 2000), cert. denied, 532 U.S. 913 (2001); *John's Insulation Inc. v. L. Addison Assoc. Inc.*, 156 F.3d 101 (1st Cir. 1998); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147 (10th Cir. 1992).

The former line of cases adopting the more flexible approach allows an appeal as of right even though not all the claims have been finally disposed of. For this reason, these decisions seem to circumvent the policy balance struck by Rule 54(b) to permit appeals in multiclaim cases only if the district court determines that the conditions expressed in the rule are satisfied. In addition, 28 U.S.C. 1292(b), authorizing certification of controlling questions of law, provides another possible avenue of appellate review.

Relying on the 9th Circuit's decision in *James*, the Federal Circuit in *Doe* explained that appellate jurisdiction would not exist when there is " 'evidence of intent to manipulate our appellate jurisdiction' " or " 'the record reveal[s] that the district court and the parties have schemed to create jurisdiction over an essentially interlocutory appeal.' " 513 F.3d at 1353. It is not entirely clear what the court meant by this statement. If it is enough to defeat appellate jurisdiction that counsel deliberately sought to devise an appealable final judgment, that will always be true; tautologically, that is the whole point of seeking a dismissal without prejudice.

Nor is it clear that appellate jurisdiction should turn on the subjective intent of the parties. "[J]urisdictional rules should be clear," and "[m]otives are difficult to evaluate." *Lapides v. Board of Regents of the University System of Ga.*, 535 U.S. 613, 621 (2002). Furthermore, appellate courts are particularly ill-suited to make factual determinations regarding intent.

One common situation arises in which immediate review of a judgment dismissing a claim without prejudice would seem to be proper under 28 U.S.C. 1291 and would not be at odds with Rule 54(b) or run afoul of the policy against piecemeal appeals. If the case is dismissed on the condition that the plaintiff permanently forgo the lesser claims that were dismissed without prejudice unless the appellate court overturns the dismissal of the principal claims with prejudice, a final-judgment appeal should lie.

In this situation, there is no danger of piecemeal appeals; neither the trial nor the appellate court is burdened with unnecessary or duplicative proceedings; and the plaintiff is afforded the opportunity of immediate review of the dismissal with prejudice of the main part of its case while still preserving the lesser claims if (and only if) there is a reversal on the principal claims. In essence, the judgment being appealed is final in the sense that it is a conditional dismissal with prejudice in the event the court of appeals does not reverse the principal portion of the trial court's judgment.

Conditional dismissal constitutes a final judgment

Significantly, the 2d Circuit has allowed a final-judgment appeal in these circumstances. In *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003), the district court granted summary judgment against the plaintiff on two of his claims and dismissed the third claim "without prejudice to refiling it if, but only if, the dismissal of his first two claims was reversed on appeal"; because the case was dismissed "with that condition," "plaintiff's ability to reassert [the] claim [was] made conditional on obtaining a reversal from th[e appellate] court." Id. at 257-58.

The court of appeals held that the plaintiff's "conditional waiver . . . create[d] a final judgment reviewable by this court," emphasizing that the plaintiff ran the risk that his case would be over in the event his appeal proved to be unsuccessful. Id. at 258. Thus, although the 2d Circuit generally disallows an appeal based on a dismissal without prejudice (see *Rabbi Jacob Joseph Sch.*, supra), it permitted immediate review when the judgment would terminate the case once and for all if the appeal did not succeed.

This conclusion is consistent with the principle, followed in every circuit, that the dismissal of the remaining claims with prejudice at the request of the plaintiff gives rise to a final judgment. As the 2d Circuit recognized in *Purdy*, the plaintiff's election to relinquish those claims unless it prevails on appeal "'furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end.'" 337 F.3d at 258. See also *James*, 283 F.3d at 1068 (plaintiff's reasons for dismissal "were entirely legitimate" because a trial only on the claim dismissed without prejudice "would not be an efficient use of time and resources").

The same analysis is applicable to a judgment that, although in form dismissing some claims without prejudice, effectively results in a dismissal of the case in its entirety if the plaintiff does not obtain appellate reversal on the principal claims that were dismissed with prejudice.

Mark I. Levy *is the chairman of the Supreme Court and appellate advocacy practice in the Washington office of Kilpatrick Stockton. He can be reached at MLevy@KilpatrickStockton.com.*

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THE
APPELLATE ADVOCATE

NEWSLETTER OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS ▪ 2008 ISSUE 2

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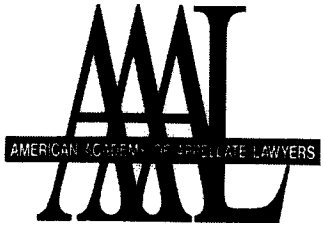
IMPORTANT DATES

2008 Fall Meeting
Portland, Oregon
September 18-20, 2008

2009 Spring Meeting
Austin, Texas
March 26-28, 2009



PRESIDENT'S COLUMN

By President Catherine Wright Smith
Edwards, Sieh, Smith & Goodfriend, Seattle, WA

I am writing this on an early morning plane to Seattle from Saint Paul, where I had the pleasure of seeing Fellow and Academy past-President **Eric Magnuson** formally sworn in as the twenty-first Chief Justice of the Minnesota Supreme Court. Our other "Minnesota twin," past-President **David Herr**, was present and received a special "shout-out" from Eric during his inspiring remarks following the robing.

Eric's former partner, Fellow **Diane Bratvold**, spoke during the swearing-in ceremony. Along with a full contingent of Minnesota Fellows, **Laurie Daniel,** in town from Atlanta, Georgia, on business, attended. Joining me as the unofficial delegation from the Academy's left coast was Ventura, California, Fellow **Wendy Lascher**.

> The swearing-in ceremony, at the historic Landmark Center in downtown Saint Paul, was suitably august, and very well-attended...

The swearing-in ceremony, at the historic Landmark Center in downtown Saint Paul, was suitably august, and very well-attended by Minnesota judges and justices, legislators, Governor Tim Pawlenty, and a lawyer who looked just like Al Franken (I asked; he wasn't). Folks in Minnesota are just as cheerful and nice as you have heard. The after-party at the Saint Paul Hotel was lots of fun.

Wendy and I agreed our whirlwind trip was just like a weekend in Las Vegas, only with less neon and more references to fishing. But what happens in Saint Paul, stays in Saint Paul. So I turn to an update of the work of the Academy's Board this past year:

The Board's first task was thrust upon us by the untimely death of Fellow **Kathleen McCree Lewis** shortly after our fall 2007 meeting in Boston. Although the Academy has been in existence for almost two decades, Kathleen's death was the first of a past-President. Coming so soon after her strong year as President in 2005-2006, her death was quite a shock to those of us who had grown to know and love Kathleen during her active participation in the Academy.

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Circuit Split Report: Appellate Jurisdiction When Claims Are Voluntarily Dismissed Without Prejudice

By Laurie Webb Daniel
Holland & Knight LLP, Atlanta, Georgia

There is a circuit split on this question: Can a voluntary dismissal without prejudice of all remaining claims produce a final judgment?

In deference to the goal of the final judgment rule – to avoid piecemeal litigation – some circuits have taken a hard line approach. They hold that, with few exceptions, a judgment following such a dismissal is non-final and outside their jurisdiction. Others, however, hold that a judgment is final if there was no apparent attempt to keep "dismissed claims on ice." And, some circuits allow appellate review as long as the voluntary dismissal was approved by the district court. This article first discusses the divergent opinions on the effect of voluntary dismissals under Rule 41(a) of the Federal Rules of Civil Procedure. It then addresses why it is time to resolve this conflict through Supreme Court review or a rule change.

Three Approaches To Finality Yield Conflicting Rules

The circuits divide into three camps when dealing with finality following voluntary dismissals without prejudice – although there is not complete intra-circuit consistency. The Second, Fifth, Tenth, and Eleventh Circuits take a hard line approach, rejecting finality if a dismissal of all remaining claims is without prejudice. The First, Sixth, and Eighth Circuits have adopted a safe harbor rule that treats a judgment as final if the district court approved the dismissal without prejudice. The Third, Fourth, Seventh, Ninth, and Federal Circuits travel the middle of the road. While acknowledging the evils of piecemeal litigation, they look to the circumstances to determine whether they have appellate jurisdiction after a dismissal without prejudice.

> Can a voluntary dismissal without prejudice of all remaining claims produce a final judgment?

1.

The Hard Line Approach: With Limited Exceptions, Dismissing Remaining Claims Without Prejudice Does Not Produce Finality

The Fifth Circuit has adopted the harshest approach to dismissals without prejudice, which is known as "the *Ryan* rule." *See Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298 (5th Cir. 1978). Under *Ryan*, a dismissal of remaining claims without prejudice cannot produce finality or appealability. *Marshall v. Kansas City Southern Railway Co.*, 378 F.3d 495, 500 (5th Cir. 2004). The *Ryan* rule condemns attempts to "manufacture" § 1291 appellate jurisdiction and "disallows the manipulative plaintiff from having his cake (the ability to refile the claims voluntarily dismissed) and eating it too (getting an early appellate bite at reversing the claims dismissed involuntarily)." *Id.*

Fifth Circuit precedent pre-dating the birth of the Eleventh Circuit is binding on that circuit as well, and the Eleventh Circuit has strictly applied the *Ryan* rule. *See Construction Aggregates, Ltd v. Forest Commodities Corp.*, 147 F.3d 1334, 1336 (11th Cir. 1998). For example, in the Eleventh Circuit the dismissal of a counterclaim without prejudice prevents finality and appellate jurisdiction with respect to summary judgment entered against the plaintiff. *Id.*; *see also State Treasurer of the State of Michigan v. Barry*, 168 F.3d 8 (11th Cir. 1999);

Mesa v. United States, 61 F.3d 20 (11th Cir. 1995).

The Tenth Circuit also follows the *Ryan* rule. *See Cook v. Rocky Mountain Bank Note Co.,* 974 F.2d 147, 148 (10th Cir. 1992). "We agree with the reasoning of the Fifth Circuit. A plaintiff cannot be allowed to undermine the requirements of Rule 54(b) by seeking voluntarily dismissal of her remaining claims and then appealing the claim that was dismissed with prejudice." *Id.* Similarly, the Second Circuit has warned that "[t]olerance of that practice would violate the long-recognized federal policy 'against piecemeal appeals.'" *Rabbi Jacob Joseph School v. Province of Mendoza,* 425 F.3d 207, 210 (2d Cir. 2005). According to the Second Circuit, permitting an appeal under these circumstances "is clearly an end-run around the final judgment rule." *Id.*

There are a few exceptions to the approach taken by these circuits. In *Schoenfeld v. Babbitt,* 168 F.3d 1257, 1265 (11th Cir. 1999), the Eleventh Circuit read *Ryan* and its progeny to apply only when a party "voluntarily dismisses its remaining claims without prejudice after a nonfinal adverse district court order has been entered." *Id.* at 1266. In an unpublished opinion, the Tenth Circuit followed *Schoenfeld* and accepted jurisdiction because the voluntary dismissal occurred more than nine months before the adverse summary judgment on the remaining claims. *See Perkins v. Chris Hunt Water Huling Contractor, Inc.,* 46 Fed.Appx. 903, 905 (10th Cir. 2002). And, the Second Circuit has noted that a dismissal without prejudice will produce finality if the dismissed claims could not be re-instituted in another lawsuit, such as where the statute of limitations had run. *See Chappelle v. Beacon Communications Corp.,* 84 F.3d 652, 654 n.3 (2d Cir. 1996). These decisions, however, make clear that, as a general rule, the Second, Fifth, Tenth, and Eleventh Circuits take a hard line approach to finality following a Rule 41(a) dismissal.

2.

The Middle of the Road: Finality Exists If There Is No Apparent Intent To Re-File the Dismissed Claims

The Ninth Circuit articulated a more lenient approach in *James v. Price Stern Sloan, Inc.,* 283 F.3d 1064, 1070 (9th Cir. 2002). The *James* court held that "when a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291." *Id.* In *James,* the plaintiff's motion to dismiss without prejudice indicated a lack of interest in pursuing the remaining claims given the small amount involved. *Id.* at 1068. And, there was no stipulation that "kept the dismissed claims on ice while appeal was taken." *Id.* at 1066. Because there was no evidence of improper intent to circumvent Rule 54(b) or to manufacture a false finality, the court held that it had appellate jurisdiction.

In reaching this conclusion, the *James* court looked to Seventh Circuit law. It noted that, "[a]lthough the Seventh Circuit has, on occasion, disallowed an appeal after a dismissal without prejudice, it has done so only where the record revealed that the district court and the parties have schemed to create jurisdiction over an essentially interlocutory appeal." *Id.* at 1069. Later, the Seventh Circuit cited the *James* decision with approval. *See Hill v. Potter,* 352 F.3d 1142, 1145 (7th Cir. 2003). In *Hill,* the Seventh Circuit agreed that "a litigant is not permitted to obtain an immediate appeal of an interlocutory order by the facile expedient of dismissing one of his claims without prejudice so that he can continue with the case after the appeal is decided." *Id.* But, the court refused to apply that rule where, as in *James,* the record showed that the voluntary dismissal was prompted by a desire to avoid unnecessary proceedings. *Id.*; *see also United States v. Kaufman,* 985 F.2d 884, 890-891 (7th Cir. 1993) (distinguishing cases reflecting intent to bypass finality rules from case where there is no apparent intent to refile dismissed claim).

The Third, Fourth, and Federal Circuits also have based jurisdiction rulings on record evidence of the parties' intent. In *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.,* 460 F.3d 470, 477-478 (3d Cir. 2006), the court held that it lacked appellate jurisdiction

because the dismissal order expressly contemplated that there could be subsequent proceedings. The court found, however, that finality exists where the record reveals the dismissing party's intent to renounce further action. *Id.* In *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 176 (4th Cir. 2007), the Fourth Circuit held that it had jurisdiction because GO "won dismissal without prejudice by promising never to raise these claims in federal court again." And, in *Doe v. United States,* 513 F.3d 1348, 1354 (Fed. Cir. 2008), the Federal Circuit relied on evidence that the dismissed claim was not worth taking through trial. Like the Ninth Circuit, the Federal Circuit also found that the risk of losing a dismissed claim due to the statute of limitations countered an inference of improper intent to manipulate appellate jurisdiction. *Id.*

3.

The Safe Harbor: Court Approval Of A Dismissal Without Prejudice Of All Remaining Claims Yields A Final Judgment For Purposes Of Appeal

The Sixth and Eighth Circuits have held unconditionally that court approval of a dismissal of remaining claims without prejudice establishes finality and appealability. As stated by the Sixth Circuit: "Where a court has entered judgment against a plaintiff in a case involving more than one claim and the plaintiff voluntarily dismisses the claim or claims, which made the judgment non-appealable and the dismissal is brought to the attention of the district court, this Court will not penalize the plaintiff by dismissing his or her appeal." *Hicks v. NLO, Inc.*, 825 F.2d 118 (6th Cir. 1987). The Eighth Circuit has held simply that the district court's dismissal without prejudice of remaining claims pursuant to Rule 41 effected "a final judgment for purposes of appeal, even though the district court had not so certified under Fed. R. Civ. P. 54(b)." *Chrysler Motors Corp. v. Thomas Auto Co., Inc.*, 939 F.2d 538 (8th Cir. 1991). And, while not elaborating, the First Circuit apparently follows the straightforward approach announced in *Hicks* and *Chrysler. See Howard v. Surface Transportation Brd.*, 389 F.3d 259, 265 (1st Cir. 2004) (stating that the district court entered a final judgment after granting voluntary dismissal without prejudice as to remaining counts); *Rymes Heating Oils, Inc. v. Springfield Terminal Railway Co.*, 358 F.3d 82, 87 (1st Cir. 2004) (same).

We Need A Uniform And Fair Approach That Provides Certainty

"The time of appealability, having jurisdictional consequences, should above all be clear." *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988). As the Supreme Court has noted more than once, "'[t]he considerations that determine finality are not abstractions but have reference to very real interests – not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system.'" *Id.* at 201 (quoting *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 69 (1948)). Thus, "what is of importance here is ... preservation of operational consistency and predictability in the overall application of § 1291." *Id.* at 202. These concerns led the *Budinich* Court to adopt a bright-line rule on finality in the context of attorneys fee motions.

While *Budinich* addressed the effect of attorneys fee motions, its concerns are equally applicable to the issue under discussion now. Appellate jurisdiction should not depend on geography. The application of § 1291 should be consistent, predictable, and pertain to the smooth functioning of our judicial system. The present circuit split on the effect of voluntary dismissals frustrates these goals.

In a concurring opinion, Judge Cox of the Eleventh Circuit has explained why only the safe harbor approach to voluntary dismissals achieves the objectives described in *Budinich. See State Treasurer,* 168 F.3d at 16-21 (Cox, J., concurring). After analyzing the circuit split and dividing the courts basically along the lines described above, Judge Cox found that the practice of combing the record for evidence of manipulative intent wastes resources and lacks predictability. *Id.* at 21. Further, Judge Cox noted that, while the *Ryan* rule draws a bright line, *id.*, it embraces bad policy that could put a party into jurisdictional limbo with no way to ever obtain a final judgment. *Id.* at 19.

This last point is illustrated by *Hood v. Plantation General Medical Center, Ltd.*, 251 F.3d 932 (11th Cir. 2001). Two businessmen, Hood and

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Circuits Split
[*continued*]

Maden, alleged racial discrimination in procurement activities in violation of 42 U.S.C. § § 1981 and 2000d. The district court dismissed Hood's 2000d claim for lack of standing and dismissed both of Maden's claims. The parties then filed a new complaint adding Maden's business, "Micro," as a new § 1981 plaintiff. Maden lost interest in the case, but Hood wanted to appeal the dismissal of his section 2000d claim. So, Hood asked for a Rule 54(b) certification or in the alternative for a dismissal with prejudice of his § 1981 claim. The district court dismissed with prejudice Hood's § 1981 claim and Micro then dismissed its § 1981 claim without prejudice, leaving no litigation pending in the court. But, the Eleventh Circuit held that it lacked jurisdiction over Hood's appeal under the *Ryan* rule because Micro technically had the right to re-file its § 1981 claim. Because Hood had no control over Micro, his right to appeal was indefinitely suspended. And, under the Eleventh Circuit's ruling, Micro's lack of interest could permanently deprive Hood of his appeal rights. Even if Micro later renounced its § 1981 claim, it is unclear when or by what mechanism Hood's appeal time would start. Such a predicament is at odds with a smooth functioning of our judicial system.

Judge Cox urged the Eleventh Circuit to rethink the *Ryan* rule en banc, keeping in mind that § 1291 confers appeal by right. 168 F.3d at 21. Citing the concerns discussed in *Budinich*, Judge Cox proposed a bright-line rule under which dismissals without prejudice are considered a proper component of finality. *Id.* In his view, this approach comports with the traditional definition of a final judgment. "A 'final decision' under 28 U.S.C. § 1291 is 'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* at 19 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). "A voluntary dismissal, even without prejudice, fits the definition – the district court's job is finished *in that action*." *Id.* (emphasis original).

The Eleventh Circuit has not changed its approach as suggested by Judge Cox. But, this issue is ripe for consideration by the Supreme Court, given the entrenched circuit split on appellate jurisdiction following voluntary dismissals without prejudice. Alternatively, it could be addressed by an amendment to the Federal Rules of Civil Procedure. Whether by writ of certiorari or by rule change, however, we need a uniform and fair approach to voluntary dismissals that provides certainty with respect to appellate jurisdiction. We also need an approach that honors the policy behind the final judgment rule without infringing on the underlying right to appeal granted by 28 U.S.C. § 1291. ❖

Editor's Note
[*continued*]

also hope to provide more support to Academy committees by describing their activities.

You will find evidence of progress toward each of those goals in this issue. On request, Atlanta, Georgia Fellow **Laurie Webb Daniel**, who chairs Holland & Knight LLP's national appellate practice team, has written a well-reasoned analysis and proposed clarification of the vexing rule that sometimes defeats appellate review when remaining claims are voluntarily dismissed.

Similarly, Fellow **Nancy Winkelman** of Schnader Harrison Segal & Lewis in Philadelphia has offered up a cogent examination of the U.S. Supreme Court's latest reminder that it is what a district court *does*, not what it *says*, that controls finality.

Fellow **Thomas B. Weaver** of Armstrong Teasdale LLP in St. Louis has put together a quick summary that brings us current on the changes the federal rules committees have in store for us.

Fellow **Wendy Lascher** of Lacher & Lascher P.C., Ventura, California, chairs the Kathleen McRee Lewis Award Committee. She tells us why Fellow **Dan Meador** will receive that award.

Finally, you will also find here a reprint of Fellow **Roger Hughes**' hilarious illustration of how instant messaging language will be used in future appellate briefs and opinions. We can only hope that, 10 years from now, readers will still be LOL rather than treating his article WSA. ❖

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Monday, July 8, 2002

The Practice
master class

CREATING FINALITY

with Mark R. Kravitz

Mark R. Kravitz chairs the Appellate Practice Group at Wiggin & Dana in New Haven, Conn. He welcomes comments and suggestions at mkravitz@wiggin.com.

FOR SOME TIME now, lawyers and district judges, too, have expressed dissatisfaction with the way in which federal appellate courts approach interlocutory appeals under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. 1292(b).

Each provision gives circuit courts effective control over whether to allow such appeals, and the appellate courts have not been shy about exercising their veto power to control the number of those appeals. This situation has led lawyers in some cases to work with cooperative district judges to "manufacture" final judgments to ensure their appeals are heard.

There's a deep split among the circuits over finality

A common technique in multiclaim or multiparty lawsuits is to transform a district court's "interlocutory" ruling on a single claim or party into a "final judgment" by voluntarily dismissing all remaining claims or parties without prejudice. A recent decision by Judge Alex Kozinski for the 9th U.S. Circuit Court of Appeals highlights the deep split among, and even within, circuits regarding the legitimacy of this method of creating finality. James v. Price Stern Sloan, 283 F.3d 1064 (9th Cir. 2002).

Ordinarily, an appeal in the federal system must be from a "final judgment"_ described by the U.S. Supreme Court as a "decision of the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Cooper & Lybrand v. Livesay, 437 U.S. 463, 467 (1978). There are, however, certain judge-made and statutory exceptions to the final judgment rule.

For example, § 1292(b) permits a district court to certify an interlocutory ruling

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for immediate appeal where it involves a controlling and debatable question of law and immediate appeal will materially advance the case's ultimate disposition. In addition, Rule 54(b) allows a district court to direct entry of a final judgment as to fewer than all the claims or parties in a case.

A district court's approval of an immediate appeal under Rule 54(b) or § 1292(b) is no guarantee that the appeal will be heard. The circuit courts have the final say on whether they will entertain an appeal under either provision.

To the growing frustration of both litigants and district judges, courts of appeal have not hesitated to exercise their prerogative to restrict such appeals. Facing bulging dockets, appellate courts are concerned that district courts do not exercise sufficient restraint in authorizing immediate appeals; for their part, district judges often believe that appellate courts are unnecessarily inhospitable to interlocutory appeals and too insensitive to trial judges' efforts to manage their own swelling caseloads. Horowitz v. Alloy Automotive Co., 957 F.2d 1431 (7th Cir. 1992), nicely illustrates both sides of this debate.

To avoid having their interlocutory appeals bounced by appellate courts, some litigants have chosen to bypass Rule 54(b) and § 1292(b) entirely, asking the district court instead to "devise and enter a 'final order,' which [the appellate] court would have to take." Id. at 1433. Essentially, the parties and the district court cooperate (some appellate courts have used the word "collude") to dismiss voluntarily all unadjudicated claims and parties under Rule 41, hoping thereby to convert the court's prior interlocutory ruling disposing of a single claim or party into a final and appealable judgment.

If the unresolved claims or parties are dismissed with prejudice, there would seem to be little objection to the technique. The combination of the earlier ruling disposing of one claim and the dismissal of all other claims with prejudice does truly end the litigation on the merits. Coopers & Lybrand, 437 U.S. at 467. Conversely, when the unadjudicated claims are dismissed without prejudice, the litigant retains the ability to pursue those claims at some later point, a fact that has caused some to question how "final" this final judgment really is. One scholar has called such tactics "manufacturing finality." R. Cochran, Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims, 48 Mercer L. Rev. 979 (1997).

Because voluntary dismissals without prejudice raise fears of collusive manipulation of appellate jurisdiction, it is not surprising that some appeals courts have taken a dim view of manufacturing finality in this way. Perhaps more surprising, however, is that other federal appellate courts have been willing to find jurisdiction and entertain appeals in such circumstances. And still other circuits have fashioned a middle approach, accepting appeals of this sort in some instances and rejecting them in others.

The 2d, 5th, 10th and 11th circuits have adopted what is essentially a bright-line rule barring such appeals, derived from Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978). See State Treasurer v. Barry, 168 F.3d 8 (11th Cir. 1999) (cataloguing cases adopting the Ryan approach). The word "essentially" is used because even these courts recognize some limited exceptions to what is otherwise an

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unbending rule. See Schoenfeld v. Babbitt, 168 F.3d 1257 (11th Cir. 1999). Ryan and its progeny apply only when a party dismissed claims without prejudice after the district court issues its ruling. Chappelle v. Beacon Comm. Corp., 84 F.3d 652 (2d Cir. 1996) (listing exceptions). In Ryan, after dismissing parts of the plaintiff's complaint under Rule 12(b)(6), the district court initially granted the plaintiff's request for a Rule 54(b) judgment. Later, the court vacated that judgment and instead accepted the plaintiff's voluntary dismissal of all remaining claims without prejudice.

After considering at length the purposes underlying the final-judgment rule and its limited exceptions, the 5th Circuit refused to allow Rule 54(b) to be circumvented in this manner. As the court put it, "If the district court did not think certification appropriate, it could not properly arrive at the same result through the device of allowing a voluntary dismissal." 577 F.2d at 302. Because the voluntary dismissal of the unadjudicated claims under Rule 41 left the plaintiff free to revive them at some later point, the court concluded that it was not a ruling that was adverse to the plaintiff and it did not terminate the litigation in any realistic sense. Therefore, the dismissal did not satisfy the finality requirement of § 1291.

Ryan's approach has its critics, however. In a spirited concurrence in Barry, supra, Judge Emmett R. Cox explained at length why he believes Ryan rests on a mistaken view of Rule 41. According to Cox, a Rule 41 voluntary dismissal without prejudice is a final judgment under § 1291 because the district court's job is finished in that action. As he put it, "the game is over in the district court. All the claims are gone and the clerk has entered judgment." 168 F.3d at 18.

In Cox's view, the Ryan rule also is bad policy. It "does not serve the interests of just resolution of claims, respect for the busy district courts, or judicial efficiency." Id. at 19. In particular, he wrote, Ryan "encourages pointless district court litigation" by forcing the parties to pursue all claims to disposition on the merits, and its concern for piecemeal appeals is overblown, since there are "built-in deterrents" (e.g., the statute of limitations and cost) to resurrecting claims dismissed without prejudice. Id. at 20.

Other circuits (though not the 11th) appear to share Cox's view. The 6th and 8th circuits have each held that appellate jurisdiction exists where a plaintiff dismisses without prejudice the remaining claims in a case in order to make an earlier ruling on another claim final and appealable. Helm Fin. Corp. v. MNVA RR., 212 F.3d 1076 (8th Cir. 2000); Hicks v. NLO Inc., 825 F.2d 118 (6th Cir. 1987).

According to the 8th Circuit, Ryan "ignore[s] the well established test for determining whether a district court judgment that seemingly ends the case is an appealable 'final decision' "_namely, whether there is a "clear and unequivocal manifestation" of the trial court's belief that the case has come to an end. Great Rivers Cooperative v. Farmland Indus. Inc., 198 F.3d 685, 689 (8th Cir. 1999). A dismissal order satisfies that jurisdictional standard_ even if it is without prejudice_so long as the complaint is dismissed in its entirety.

The 3d Circuit has adopted a pragmatic approach to this issue, putting less reliance on labels (that is, with or without prejudice) and more emphasis on

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whether the plaintiff is effectively barred from reasserting the dismissed claims (by, for example, the running of a statute of limitations) or has abandoned the remaining claims altogether. Trevino-Barton v. Pittsburgh Nat'l Bank, 919 F.2d 874 (3d Cir. 1990). The 7th Circuit also has been willing to allow an appeal when it was convinced that the appellant would not pursue the remaining claims. JTC Pet. Co. v. Piasa Motor Co., 190 F.3d 775 (7th Cir. 1999) (counsel at oral argument agreed to abandon all remaining claims). However, it has also disallowed an appeal involving a dismissal without prejudice where it was persuaded that the parties and the trial court had colluded to evade appellate jurisdictional limits. Horowitz, supra.

Judge Kozinski steps into the relative disarray

Into this relative disarray stepped Judge Alex Kozinski in James, supra. First, he, like Cox, found that a judgment based on a voluntary dismissal of remaining claims without prejudice satisfied all the requirements of a final judgment. It disposed of all the claims and left nothing further for the district court to hear. Then, after canvassing prior 9th Circuit case law that seemingly rejected the "dismissal without prejudice" path to finality, Kozinski fashioned an intent-based rule that permits the practice so long as there is no evidence of an attempt to "manipulate our appellate jurisdiction by artificially 'manufacturing' finality." 283 F.3d at 1064.

According to the court, a joint stipulation that permitted the appellant to reinstate dismissed claims if the judgment was reversed on appeal would show an improper motive. Similarly, if the dismissal followed a district court's refusal to grant a Rule 54(b) order and parties refiled the dismissed claims in a separate lawsuit while the appeal was pending, that, too, would reflect manipulation of the system and be improper.

By contrast, The Unilateral Dismissal In James Was "much less likely to reflect manipulation," since the plaintiff assumed the risk that the statute of limitations might bar her claim by the time the case returned to the lower court. Id. The plaintiff also sought the district court's permission for the dismissal in James and accepted the court's condition (requested by the defendant) that discovery in the case be available in the event of any subsequent proceeding between the parties. Finally, the plaintiff's stated motives for seeking dismissal "seemed entirely legitimate," since without her primary claim (which the trial court had dismissed), she did not believe her remaining claims warranted a federal trial. Id.

James, which acknowledged the division among circuits, is unlikely to be the last word on this controversial practice. To date, the U.S. Supreme Court has shown no willingness to enter the fray. Until the court does so, lawyers looking to create finality via a voluntary dismissal without prejudice will need to keep a close eye on case law in the circuits in which their cases are pending.

7/8/02 NLJ B9, (Col. 1)

END OF DOCUMENT

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TAB VI-E

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-I

This memo follows up on a suggestion made by Professor Daniel Meltzer during the Standing Committee meeting in June. During the Committee's consideration of the time-computation project, one topic of discussion was the timing of postjudgment motions. In connection with that discussion, Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions which seek reconsideration of matters already decided. He suggested that if such concerns are well founded they might raise the question whether the Civil Rules are too permissive about when a postjudgment motion can be made. Professor Meltzer also noted, however, that in considering such questions one should also weigh the need not to unduly foreclose the appropriate uses of post-trial motions.

This issue is one as to which the Civil Rules Committee has primary jurisdiction. I expect that, as Professor Meltzer noted, the decision whether to pursue this issue will depend on whether practitioners and judges perceive that there are problems in this area of practice. Given that postjudgment motions also affect appellate practice (for example, by tolling the time to appeal) and given Appellate Rules Committee members' experience with both trial-level and appellate litigation, it would be useful to obtain Committee members' views on this question. It is true that not all post-judgment motions are necessary in the sense that they are required to preserve issues for appeal. But such motions may still be useful; for instance, they can provide an opportunity for the trial judge to reconsider in a more measured setting rulings that were issued during the trial. An evaluation of current practices would presumably entail consideration of the proportion of post-judgment motions that are (a) necessary in order to preserve an issue for appellate review, (b) not necessary in that sense but still useful because they provide a fruitful opportunity for reconsideration, or (c) truly superfluous.

At the November meeting, it would be helpful to discuss this issue to determine Committee members' views; we can then share those reactions with the Civil Rules Committee when it meets shortly thereafter.

TAB VI-F

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-J

This memo describes, for the Committee's preliminary consideration, an inquiry received last spring concerning the Judicial Conference's Mandatory Conflict Screening Policy. As outlined in the enclosed letter from Judge Gordon Quist to Judge Rosenthal, the Judicial Conference Committee on Codes of Conduct has tentatively raised three questions with the Standing Committee. These questions may have implications for practice under Appellate Rule 26.1, which requires certain disclosures designed to help judges determine whether a conflict requires their recusal from hearing an appeal.[1]

The basic principle at issue with respect to each of Judge Quist's questions relates to Canon 3C(1) of the Code of Conduct for United States Judges, which provides in part:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> ...
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding; [or]
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person:
>
> ...
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding ....

The inquiry by the Committee on Codes of Conduct raises three issues. The first –

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[1] In the district courts, corporate disclosures are required in civil cases by Civil Rule 7.1, in criminal cases by Criminal Rule 12.4, and in bankruptcy cases by Bankruptcy Rule 7007.1.

addressed in Part I of this memo – concerns the similarities and differences among the disclosures required by Appellate Rule 26.1, any disclosures required by a local circuit provision, and any information required by the CM/ECF system in the courts of appeals which are currently operational on CM/ECF. Part II of this memo briefly sketches the second and third issues, which appear to fall within the primary jurisdiction of (respectively) the Bankruptcy Rules Committee and the Criminal Rules Committee.

These questions are not yet ripe for full consideration, because the Committee on Codes of Conduct has been asked for additional information concerning some of the questions stated in Judge Quist's letter. A response from the Committee on Codes of Conduct is expected late this year. Nonetheless, if time permits, it could be useful to give the questions preliminary consideration at the November meeting, albeit on the understanding that this Committee will revisit the issue at the Spring 2009 meeting after receiving further information from the Committee on Codes of Conduct.

I. National rules, local rules, and the CM/ECF system

The first question raised in Judge Quist's letter, as it relates to appellate practice, concerns the interaction among Appellate Rule 26.1, any local circuit disclosure requirements, and the requirements imposed by the CM/ECF system in those circuits where CM/ECF is already operational. Appellate Rule 26.1(a) provides that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."

Any inquiry into the CM/ECF requirements is necessarily somewhat premature, because the courts of appeals are still in the process of completing the transition to CM/ECF. As of September 2008 the Fourth, Sixth, Eighth and Ninth Circuits were accepting CM/ECF filings.[2] It would presumably be useful for the circuits, in consultation with the Administrative Office, to consider the questions raised by Judge Quist as they adopt and refine their CM/ECF systems. Perhaps the CM/ECF system can be tailored to prompt the user to input all of the information required by Appellate Rule 26.1, plus any additional information required by local circuit provisions.

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[2] See Press Release, Case Management / Electronic Case Files (CM/ECF), June 2008, available at http://www.pacer.psc.uscourts.gov/documents/press.pdf (last visited September 19, 2008) (stating that as of June 2008 the Fourth, Sixth and Eighth Circuits were accepting electronic filings); see also Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases, 8/28/08, available at http://www.ca9.uscourts.gov/ca9/Documents.nsf/ecf-admin-order.pdf (last visited September 26, 2008) (stating that certain types of filings would be accepted via CM/ECF starting in September 2008).

One question raised by Judge Quist's letter relates to possible overlap between the CM/ECF system's requirements and Rule 26.1(c)'s requirements. If the CM/ECF system prompts the party to enter its Rule 26.1 disclosure information the first time that the party logs in to the CM/ECF system for the court of appeals, then perhaps it will someday be redundant to require – as Rule 26.1(c) does – that an original and three copies be filed when the Rule 26.1(a) statement is filed before the principal brief. However, such redundancies could probably be addressed by means of a local rule, since Rule 26.1(c) provides that the court can direct the filing of "a different number [of copies] by local rule." In any event, even if automated prompts by the CM/ECF system render obsolete Rule 26.1's requirement of paper copies of the disclosure, the need for Rule 26.1(b)'s continuing disclosure requirement would persist.

Though the Committee Note to original Rule 26.1 attempted to discourage the adoption of circuit-specific disclosure requirements,[3] local rules on the topic are numerous. As of mid-2008, relevant local provisions included D.C. Circuit Rule 26.1; Third Circuit Local Appellate Rule 26.1.1; Fourth Circuit Rule 5; Fourth Circuit Rule 8; Fourth Circuit Rule 9(a); Fourth Circuit Rule 21(b); Fourth Circuit Rule 26.1; Fourth Circuit Rule 27(c); Fourth Circuit Rule 27(d); Fourth Circuit Form A; Fifth Circuit Rule 26.1.1; Fifth Circuit Rule 28.2.1; Sixth Circuit Rule 26.1; Sixth Circuit Rule 28(e); Sixth Circuit Form 6CA-1; Seventh Circuit Rule 26.1; Eighth Circuit Rule 26.1A; Ninth Circuit Rule 21-3; Eleventh Circuit Rule 5-1; Eleventh Circuit Rule 21-1; Eleventh Circuit Rule 26.1-1; Eleventh Circuit Rule 26.1-2; Eleventh Circuit Rule 26.1-3 & accompanying IOP; Eleventh Circuit Rule 27-1(a)(9); Eleventh Circuit Rule 28-1(b); Eleventh Circuit Rule 29-1; Eleventh Circuit Rule 35-5; IOP foll. Eleventh Circuit Rule 42-4; IOP foll. Eleventh Circuit Rule 47-6; Eleventh Circuit Add. II(a); Federal Circuit Rule 26.1; and Federal Circuit Rule 47.4. At least one circuit has adopted local rules requiring electronic submission of disclosure statements.[4] Once further clarification is received from the Committee on Codes of Conduct concerning the specifics of that Committee's inquiry, it may be fruitful to analyze these local circuit requirements. Such an analysis may help to highlight areas for future Appellate Rules Committee consideration.

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[3] The 1989 Committee Note to Rule 26.1 observes: "If a Court of Appeals wishes to require additional information, a court is free to do so by local rule. However, the committee requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits." It may be the case that the advent of CM/ECF will ease the burden imposed by differing local circuit rules, in the sense that the CM/ECF prompts will alert attorneys to the nature of the particular circuit's disclosure requirements.

[4] See Eleventh Circuit Rule 26.1-2(b) ("On the same day a certificate is served, the party filing it must also complete the court's web-based certificate at www.ca11.uscourts.gov, providing the information required by that form. Pro se parties are not required or authorized to complete the web-based certificate."); Eleventh Circuit Rule 26.1-2(g) ("On the same day an amended certificate is served, that party must also update the web-based certificate to reflect the amendments.").

II. Issues relating to bankruptcy and criminal practice

The second issue raised in Judge Quist's letter concerns bankruptcy practice. The Committee on Codes of Conduct asks whether the Rules adequately address the challenges of conflict screening in bankruptcy proceedings. The letter observes that "the changing status of creditors and other interested parties during the course of a bankruptcy case makes it more difficult to apply an automated conflict screening program to the bankruptcy courts." This observation seems most directly relevant to Bankruptcy Rule 7007.1. It is not immediately apparent that such concerns would affect the conduct of a bankruptcy-related appeal in a way that would require changes to Appellate Rule 26.1. Rule 26.1's disclosure requirement encompasses "[a]ny nongovernmental corporate party to a proceeding in a court of appeals." Upon initial consideration, there does not seem to be any reason to think that this definition would require broadening. However, the Bankruptcy Rules Committee plans to discuss the question of practice under Bankruptcy Rule 7007.1 at its spring 2009 meeting, and Professor Gibson has promised to alert us if the Bankruptcy Rules Committee discerns a reason to consider changes to Appellate Rule 26.1.

The third issue raised in Judge Quist's letter relates to "the need to obtain restitution information related to criminal victims so that judges can consider whether to recuse." The letter questions whether Criminal Rule 12.4 currently requires sufficient disclosure in this respect. This inquiry obviously falls within the primary jurisdiction of the Criminal Rules Committee; when that Committee considers the question, it will be useful to obtain advice concerning the practice in connection with appeals in which restitution is an issue. It appears that in at least some of those appeals Appellate Rule 26.1 would already require the appropriate disclosures.[5] But it would be advisable to obtain the Criminal Rules Committee's input on whether this will always be true. For example, are there any instances in which an appeal to which the victim is not a party might nonetheless implicate the question of restitution? The Criminal Rules Committee's advice on such questions would help to inform this Committee's further deliberations.

Encl.

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[5] Thus, if the victim seeking restitution is a nongovernmental corporate party and that victim is a party to the proceeding in the court of appeals, Appellate Rule 26.1(a)'s disclosure requirement would be triggered.

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
482 GERALD R. FORD FEDERAL BUILDING
110 MICHIGAN STREET, N.W.
GRAND RAPIDS, MI 49503-2363

JUDGE JANICE ROGERS BROWN
JUDGE KAREN K. BROWN
JUDGE CAMERON McGOWAN CURRIE
JUDGE JAY A. GARCIA-GREGORY
JUDGE ANDREW S. HANEN
JUDGE RICHARD G. KOPF
JUDGE ALAN D. LOURIE
JUDGE JAMES F. McCLURE, JR.
JUDGE M. MARGARET McKEOWN
JUDGE ALAN H. NEVAS
JUDGE RUDOLPH T. RANDA
JUDGE HUGH B. SCOTT
JUDGE RONALD A. WHITE
JUDGE CHARLES R. WILSON

ROBERT DEYLING
COUNSEL

(202) 502-1100

JUDGE GORDON J. QUIST
CHAIRMAN

Tel. (616) 456-2253
Fax (616) 456-2243
Email: quist@miwd.uscourts.gov

May 8, 2008

Honorable Lee H. Rosenthal
Chair
Committee on Rules of Practice and Procedure
United States District Court
11535 Bob Casey United States Courthouse
515 Rusk Street
Houston, TX 77002-2600

Re: Conflict Screening Policy Issues

Dear Judge Rosenthal:

In September 2006, the Judicial Conference adopted the Mandatory Conflict Screening Policy (attached). The Judicial Conference Committee on Codes of Conduct, which recommended the adoption of the conflict screening policy, has identified three issues related to conflict screening that may merit the attention of the Standing Committee on Rules. Briefly, these issues all concern potential amendments to the federal rules of procedure that require the disclosure of corporate parent information, information that judges need in order to make informed determinations concerning recusal.[1]

[1] The federal rules of procedure require the parties to file statements disclosing their corporate parents. *See* Fed. R. Civ. P. 7.1, Fed. R. Crim. P. 12.4, Fed. R. App. P. 26.1; Fed. R. Bank. P. 7007.1

The first issue the Committee has identified concerns the scope of the disclosures, and the method used to file them. The district court version of the Case Management/Electronic Case Files (CM/ECF) system now permits attorneys to enter corporate parent information electronically, and allows the attorneys to label corporations as either a "parent" or "affiliate" when entered into the database. Similar adjustments are planned for the bankruptcy court CM/ECF system. Thus, the CM/ECF system now provides attorneys with an electronic method to enter corporate parent information directly into the system, which will ease the burden on clerks' offices to manually enter the information from the disclosure statements filed by attorneys.

At the same time, however, it seems clear that attorneys may be required to prepare and transmit the same information twice: once when preparing the disclosure statement to be filed with the court, and again when entering the information into the CM/ECF database. In addition, because some courts require the disclosure of *expanded* corporate disclosure information that is not required by the federal rules (i.e., information about the parties' corporate affiliates other than corporate parents), there may be differences between the information required in the disclosure statements and the information that attorneys enter in the electronic system. The Committee has been informed that the Administrative Office is examining additional steps that could be taken to address this issue, but the CM/ECF system does not currently have the capability to extract information from a disclosure statement, add it to the CM/ECF conflict screening database, and use that information to perform conflict screening.

Second, the Committee observes that the changing status of creditors and other interested parties during the course of a bankruptcy proceeding may complicate the implementation of conflict screening software in the bankruptcy courts. In a bankruptcy case there are usually numerous creditors who are not considered parties for recusal purposes but who may become parties during the course of the case. A creditor's status could change, for example, with the filing of an "adversary proceeding." A creditor's status may also change with the filing of a "contested matter" that is also adversarial in nature. Moreover, in bankruptcy cases there may be many "interested parties," such as a potential lender or bidder who may pose a financial conflict for the presiding judge. Once a potential conflict is identified, a judge can determine whether it is necessary to withdraw from the matter or the case. The conflict, however, must first be identified. Thus, the changing status of creditors and other interested parties during the course of a bankruptcy case makes it more difficult to apply an automated conflict screening program to the bankruptcy courts.

Accordingly, the Committee suggests that the Standing Committee on Rules may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters. I would also note, in this regard, that the Bankruptcy Judges Advisory Group has established a special subcommittee to consider unique issues related to conflict screening for bankruptcy judges.

The third issue the Committee has identified concerns the need to obtain restitution information related to criminal victims so that judges can consider whether to recuse. The Committee has advised that a judge presiding over a criminal case must recuse if the judge has an

interest that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) of the Code of Conduct for United States Judges, or if the judge's impartiality might reasonably be questioned under Canon 3C(1). Obtaining appropriate disclosures from the parties to permit judges to fulfill this potential recusal obligation may require an amendment to the Federal Rules of Criminal Procedure, as current Rule 12.4 does not appear to cover disclosure of information related to restitution. *See* Fed. R. Crim.P. 12.4 (Advisory Committee Notes).

Thank you for considering the issues that the Committee has identified concerning the relationship between the federal rules and the judiciary's Mandatory Conflict Screening Policy. If you have any question, please feel free to contact me.

For the Committee,

Gordon J. Quist
Chairman

Encl.

cc: James C. Duff, Director, Administrative Office of the U.S. Courts

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

October 19, 2006

MEMORANDUM

To: Chief Judges, United States Courts

From: James C. Duff

RE: NEW POLICY ON AUTOMATED CONFLICT SCREENING
(ACTION REQUESTED)

RESPONSE DUE DATES: November 30, 2006 and January 31, 2007

As you are aware, on September 19, 2006, the Judicial Conference adopted a new policy requiring the use of automated conflict screening software to assist judges in identifying financial conflicts of interest (*see Attachment A*). The mandatory policy requires courts to implement automated conflict screening and requires judges and judicial officers to develop a conflicts list, update it on a regular basis, and use it in automated screening (as a supplement to personal review of cases for conflicts). The judiciary's Case Management/Electronic Case Files (CM/ECF) system contains software for this purpose and is the preferred option.

The policy assigns chief judges and circuit councils specific responsibilities that will require immediate attention. **By November 30, 2006,** each chief judge is required to report to their circuit council the status of automated conflict screening in their court, including the number of judicial officers participating in automated screening, and any other information the circuit council seeks. **By January 31, 2007,** each circuit council is required to report to the Judicial Conference a preliminary plan to implement the policy. Courts not subject to the authority of a circuit council are to assume these responsibilities directly.

The Administrative Office will continue to improve existing CM/ECF conflict screening functionality and will provide training and assistance. In addition, I have assembled a working group of AO staff to support your implementation of this policy. They will be working with judges, court staff, and the Federal Judicial Center to develop

and disseminate guidance and materials for use in carrying out these new responsibilities. In that regard, and as a first step, they have developed a checklist for chief judges to use in preparing the November 30, 2006, report to the circuit councils (*see Attachment B*). In addition, the working group is developing the following materials that will be available in the near future:

- a checklist for circuit councils which will identify tasks that should be considered in implementing the policy;
- a checklist of decisions to be made by judges and clerks' office staff as they implement automated conflicts screening in CM/ECF; and
- an illustrative implementation plan, which circuit councils can use as a model for the preliminary plans to be submitted to the Judicial Conference by January 31, 2007.

If questions arise regarding policy guidance or interpretation, please contact Marilyn Holmes or Robert Deyling, Office of General Counsel, (202) 502-1100; for technical questions about the CM/ECF conflict screening software, please contact Gary Bockweg or Cam McCarthy, Office of Court Administration, (202) 502-2500. Peggy Irving, Chief of the Article III Judges Division, is coordinating AO support on these initiatives and she may be contacted for general information. The respective offices within the AO that support your operations are, of course, also available. These individuals, as well as the other members of the working group, will ensure your concerns are responded to quickly and comprehensively.

Attachments

cc: All United States Judges
Circuit Executives
District Court Executives
Clerks, United States Courts

ATTACHMENT A

Judicial Conference Policy on Mandatory Conflict Screening

Approved September 19, 2006

The Judicial Conference recognizes the efforts of the many courts which, with the assistance of the Administrative Office, have instituted automated conflict screening. Based on the proven effectiveness of automated screening and the importance of extending its use to all courts, the Judicial Conference adopts a mandatory conflict screening policy. This policy will be administered and directed by the circuit councils under the authority set forth in 28 U.S.C. 332(d)(1) (or by the individual courts not subject to the authority of a circuit council) and will provide that:

(1) The Administrative Office, in cooperation with the courts[1], shall continue developing, refining and deploying the necessary hardware and software for use in automated conflict screening in the Case Management/Electronic Case Files (CM/ECF) system, shall examine methods to improve the screening (including incorporating more sophisticated matching mechanisms and features available in other software), and shall provide information, training, and assistance to facilitate implementation of and participation in the screening.

(2) Each court shall implement automated conflict screening to identify financial conflicts of interest for judicial officers, and to notify the judicial officer (or designee) when a financial conflict is identified, through the screening component of the CM/ECF system (or other software with comparable function approved by the circuit council). The clerk's office shall administer the screening (including obtaining from the parties and entering upon receipt, or causing the parties to enter and update, if feasible, corporate parent information[2] and other relevant information). The clerk's office shall screen for financial conflicts on a regular schedule, including screening new matters as they are filed, and shall make reports as requested by the chief judge of the court and the respective circuit council. Each clerk's office shall also provide information (including periodic reminders to judicial officers), training, and assistance to facilitate participation in the screening.

(3) In addition to each judicial officer's personal review of cases for conflicts, each judicial officer shall develop a list identifying financial conflicts for use in conflict screening[3], shall review and update the list at regular intervals, and shall employ the list personally or with the assistance of court staff to participate in automated conflict screening.

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[1] This Judicial Conference policy extends to courts of appeals, district courts, the Court of International Trade, the Court of Federal Claims, and bankruptcy courts, and to the judicial officers thereof, but does not extend to the Supreme Court.

[2] *See* Fed. R. App. P. 26.1; Fed. R. Civ. P. 7.1; Fed. R. Crim. P. 12.4; Fed. R. Bankr. P. 7007.

[3] A model form is available for this purpose. *See* Form AO-300.

(4) Each chief judge shall report to the respective circuit council by November 30, 2006, with an initial report on the status of automated financial conflict screening in the court, the number of judicial officers participating in automated conflict screening, and any additional information sought by the circuit council. Each circuit council shall report to the Judicial Conference by January 31, 2007, with a preliminary plan for implementation of the mandatory financial conflict screening program within the circuit, and shall thereafter make such further reports as are required by the Judicial Conference.

(5) Each circuit council shall make all necessary and appropriate orders to implement the foregoing mandatory conflict screening policy within the circuit, taking into account the specific circumstances of that circuit and each judicial officer and court within it, and providing for appropriate exceptions (e.g., a seriously ill judge who is not being assigned cases).

(6) Each court not subject to the authority of a circuit council shall assume the responsibilities described above for circuit councils.

ATTACHMENT B

CHECKLIST FOR THE CHIEF JUDGE'S REPORT TO THE CIRCUIT COUNCIL ON AUTOMATED CONFLICT SCREENING
(Due November 30, 2006)

On September 19, 2006, the Judicial Conference adopted a new policy mandating the use of automated conflict screening software to identify financial conflicts of interest for judges. Pursuant to the new policy, each chief judge shall make an initial report to the respective circuit council on the status of automated conflict screening in the court, including the number of judicial officers participating in automated conflict screening and any additional information sought by the circuit council. The report is due to the circuit council by November 30, 2006.

To assist chief judges with this report, the following checklist of information has been compiled for each chief judge.

☐ Determine the number of judges on the court using automated conflict screening.

- How many judges use the CM/ECF conflict screening system?
- How many judges use some other automated conflict screening system? (The circuit council might require a general description of the software to determine whether it is comparable to CM/ECF.)

☐ Is there other information the circuit council has requested from the chief judge? (For example, the circuit council might require the name, title, and location of judges not using automated conflict screening, or require the reasons why judges are not using automated conflict screening.)

☐ Are there any other circumstances unique to this court the circuit council should consider when developing the implementation plan?

☐ Prepare and send the report to the circuit council by November 30, 2006.

TAB VI-G

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-K

In May 2008, Judge Rosenthal received a letter from Public.Resource.Org raising concerns about the presence of social security numbers and alien registration numbers in federal appellate opinions. A copy of that letter is enclosed. A copy of the letter's attachment is also enclosed, but (mindful that this memo will become part of the public record) I have redacted that attachment to remove the cites and docket numbers for the listed opinions. I would be glad to provide a hard copy of the unredacted attachment; please let me know if you would like one.[1]

Public.Resource.Org points out that the inclusion within appellate opinions of social security numbers or alien registration numbers raises privacy concerns, and Public.Resource.Org proposes a number of measures to address this concern. These suggestions have been referred to the Court Administration and Case Management Committee of the Judicial Conference (CACM), which has primary jurisdiction over the Conference's privacy policy. When it developed the original privacy policy, CACM considered, but ultimately rejected, the possibility of requiring parties to redact alien registration numbers, driver license numbers, and passport numbers. CACM will reconsider this issue at its meeting on December 4-5, 2008. It has been suggested that preliminary discussion of the issue by the Appellate Rules Committee could be helpful, since the results of such a discussion could be provided to CACM for consideration at CACM's December 2008 meeting. CACM will be reviewing the matter in depth and will provide us with its analysis and recommendations, so the goal at this point is not to arrive at a definitive position but rather to collect any preliminary views that may be useful to CACM in its consideration of the matter.

Part I of this memo briefly summarizes the development of the current privacy standards and rules. Part II sketches the issues raised by Public.Resource.Org. Part III concludes that the Committee does not yet have enough information to reach anything other than tentative reactions concerning the matter. The most helpful input might consist of identifying promising avenues for further research or consideration.

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[1] For similar reasons, I have redacted page 3 of Public.Resource.Org's letter.

I. Federal rules and principles concerning privacy in federal litigation

Some nine years ago, CACM formed a Privacy Subcommittee and tasked it with studying the privacy implications of providing the public with electronic access to federal case files. CACM's Privacy Subcommittee held meetings and consulted various experts. After obtaining input from CACM and other committees, the Privacy Subcommittee requested public comment on a "document outlining policies under consideration to address issues of privacy and security concerns related to the electronic availability of court case files."[2] The notice of request for public comment outlined various policy options for addressing privacy concerns in the civil, criminal, bankruptcy and appellate contexts. More than 240 comments were received. After the comment period closed, a public hearing was held in March 2001.

In September 2001, the Judicial Conference adopted a policy on privacy and access to electronic case file information. In December 2002, the E-Government Act of 2002 was enacted. Its stated purposes included "provid[ing] enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws." Act of December 17, 2002, § 2(b)(11), Pub. L. No. 107-347, 116 Stat. 2899. Section 205(c)(3) of the Act mandated the adoption of privacy rules through the rulemaking process. See 116 Stat. 2899, 2914-15. Less than two years later, Congress amended Section 205(c)(3) in two respects. The amendment extended the mandate to cover not only privacy issues regarding "documents filed electronically" but also privacy issues regarding documents "converted to electronic form." Moreover, the amendment authorized the adoption of privacy rules that require the use of redacted identifiers along with a reference list (filed under seal) to explain the redacted identifiers. As amended, the relevant provision now states:

> 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

[2] Committee on Court Administration and Case Management, Subcommittee on Privacy and Electronic Access to Court Files, Notice of Request for Public Comment, 65 Fed. Reg. 67016 (Nov. 8, 2000).

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--

(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.".

Act of August 2, 2004, Pub. L. No. 108-281, 118 Stat. 889-90.

Pursuant to the mandate of the E-Government Act (as amended), the Appellate, Bankruptcy, Civil, and Criminal Rules were amended in 2007 to include provisions concerning privacy.[3] The privacy Rules are similar to the Judicial Conference's privacy policy (as adopted in 2001 and revised in 2003). They require the redaction from filings of names of minor children, birth dates, and all but the last four digits of Social Security numbers, taxpayer I.D. numbers, and financial-account numbers; in criminal cases Criminal Rule 49.1 also requires redaction of all but the city and state of an individual's home address. The rules do not mention alien registration numbers, and it does not appear that they were much discussed in the advisory committee deliberations (though alien registration numbers were among the personal identifiers which had been discussed during the deliberations leading to the adoption of the Judicial Conference's privacy policy). A search of the US-RULESCOMM database on Westlaw for the terms "alien number" or "alien registration number" pulls up only one hit:[4] During the consideration of the criminal version of the privacy rule, the Criminal Rules Committee

> addressed the question of whether information about a person's home address should be limited to city and state. Following a brief discussion, the Committee approved the proposed language limiting a home address to city and state. As part of that discussion, a question was raised about whether a person's driver license number or alien registration number should be exempted from redaction. Judge Friedman commented that the overall purpose of Congress' intent was to make as much information public as possible. The Committee ultimately decided not to include those items in the list.

Minutes of the Advisory Committee on Criminal Rules, October 30, 2004.

One reason why alien registration numbers may not have been much discussed is that Civil Rule 5.2(c) presumptively limits access to electronic files "in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention."[5]

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[3] See Civil Rule 5.2; Criminal Rule 49.1; Bankruptcy Rule 9037; and Appellate Rule 25(a)(5).

[4] Admittedly, if the minutes employ the terms "A. Number" or "A-Number" this search would not have pulled those terms up. Accordingly, I also searched the same database using the following search: ("a number" "a-number" "a. number" "a.-number") /100 (alien immigrant immigration). This second search pulled up no discussions of A-numbers.

[5] A proceeding in the court of appeals for direct review of an agency determination in an immigration matter would be governed by Civil Rule 5.2's privacy protections. See Appellate Rule 25(a)(5).

The Committee Note explains: "Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that nonparties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal."

The privacy rules that apply to court of appeals review of agency determinations in immigration cases – Appellate Rule 25(a)(5) and Civil Rule 5.2 – focus on filings by parties and non-parties and do not specifically discuss privacy concerns relating to the filing of an opinion by the court itself.

II. Concerns raised by Public.Resource.Org

This section analyzes the issues raised by Public.Resource.Org. As noted in Part II.A., Public.Resource.Org's list indicates that a large number of published opinions contain alien registration numbers. Part II.B. considers possible arguments why the publication of such numbers may be undesirable. This part of the memo focuses on the issue of alien registration numbers rather than social security numbers because the data provided by Public.Resource.Org indicate that the publication of opinions containing social security numbers is relatively rare and because there appears to be consensus (as evidenced by the privacy rules) that the publication of social security numbers should not occur. Part II.C. suggests considerations that might weigh against the redaction of alien registration numbers.

A. The presence of alien registration numbers in appellate opinions

Alien registration numbers, or "A-numbers," have been provided to immigrants for over 60 years.[6] Currently they are assigned by the Bureau of Immigration and Customs Enforcement, which uses them for purposes of tracking and identification.[7] In recent years the numbers have had eight digits, preceded by an "A"; in July 2008 the Executive Office for Immigration Review

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[6] The U.S. Citizenship and Immigration Services website states: "The Immigration and Naturalization Service (INS) began issuing each immigrant an alien registration number in 1940, and on April 1, 1944, began using this number to create individual files, called Alien Files or A-Files."

[7] See Brief for Defendant-Appellee at 5, CEI Washington Bureau, Inc. v. Department of Justice, 469 F.3d 126 (D.C. Cir. 2006); Declaration of Dorothy A. Lee ¶ 25, CEI Washington Bureau, Inc. v. Department of Justice, Civil Action No. 03cv2651 (D.D.C.).

(EOIR) announced the transition to nine-digit alien registration numbers.[8] Freedom of Information staff at the Customs and Immigration Service have described A-numbers' significance as follows:

> "The 'A' number serves as a personal unique identifier for all persons who have 'A' files. An Alien (A) file is the series of records the [CIS] keeps on certain individuals to document the history of their interaction with the agency as prescribed by the Immigration and Nationality Act, and Title 8 of the Code of Federal Regulations (C.F.R.). It is the single most complete set of records kept by CIS. CIS maintains 'A' files on individuals with immigrant status, those applying for immigration, individuals who break immigration laws (such persons may be either U.S. citizens, lawful permanent residents or non-immigrants), those who have derived or acquired citizenship, and those who have relinquished their citizenship. These 'A' files usually contain forms, correspondence, photographs, and fingerprints. In some instances, investigative reports from federal agencies, foreign governments or local and state agencies are contained in 'A' files. In addition, legal documents prepared by agency attorneys, other government attorneys and a variety of court documents can appear in 'A' files."[9]

A-numbers are also used to track case files in the EOIR's immigration courts and in the Board of Immigration Appeals.[10]

Public.Resource.Org's letter states that it is a nonprofit corporation "dedicated to making public information more readily available on the Internet." Among other activities, it has "obtained 50 years of Courts of Appeals decisions from a commercial vendor"; Public.Resource.Org "made this data available in bulk, and it is now being used by numerous for-profit and non-profit organizations." In April 2008 an individual notified Public.Resource.Org "that his Alien Number, the personal identifier used on the Green Card, had been published on the Internet." In investigating this issue, Public.Resource.Org scanned its data for alien registration numbers and social security numbers. As noted in the letter, it found that 1,718 published opinions contain such identifiers. Table 1 of the letter ranks the Circuits by how many such identifiers can be found in their published opinions (the Ninth Circuit apparently tops the list with 990 opinions). The results provided by Public.Resource.Org include cases through 2007 but do not include any 2008 decisions; the letter does not state what the date parameters of the search were. Appendix A to the letter lists each case Public.Resource.Org found; the

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[8] See U.S. Department of Justice, Executive Office for Immigration Review, News Release, July 18, 2008, available at http://www.usdoj.gov/eoir/press/08/9DigitANumberRequirement071708.htm (last visited Oct. 3, 2008).

[9] Lee Declaration, supra note 7, at ¶ 26.

[10] See id.

appendix indicates that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits each issued one or more decisions from 2006 or later which list an alien number.[11] It would seem that the Public.Resource.Org attachment lists only published opinions, and omits unpublished opinions even if they are accessible on Westlaw. My quick Westlaw search for the search term "No. A" – limited to opinions from 2008 – turned up one or more unpublished opinions from each of the Second, Third, Ninth and Eleventh Circuits which appear to contain A numbers.

Fritz Fulbruge has provided a very helpful chart listing the practices of many of the circuits as of October 2008; that chart is appended to the end of this memo. Fritz also circulated to his fellow circuit clerks a preliminary draft of this memorandum, and Fritz's October 10, 2008 memo summarizing their comments is enclosed.

B. Privacy concerns

The privacy concerns about social security numbers are well known, so this section will focus on the potential concerns about alien registration numbers. I should stress that I am not a specialist in immigration law or practice, so the observations that follow are tentative.[12] But some questions seem worth investigating further. It appears that a person's A-number could be used to obtain information about their immigration case (including information that might allow an asylum seeker to be located by one wishing to do him or her harm). A person's A-number might also be used by one wishing to create false identification documents for a person in the United States illegally. Not only would the existence of such false I.D.s pose a law enforcement problem, but also a false I.D. might jeopardize the status of the person to whom the A-number was issued (for instance, if the holder of the false I.D. were carrying it when apprehended for the commission of a crime).

Alien registration numbers can be used to look up case information in the immigration courts' "Automated Status Inquiry System" (available at 1-800-898-7180). The information

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[11] I have not checked all the cases listed in Public.Resource.Org's appendix. I spot checked a few cases from that list and I did find one case – Metropolitan Property and Cas. Ins. Co. v. Shan Trac, Inc., 324 F.3d 20 (1st Cir. 2003) – which appears to be a false positive: Public.Resource.Org lists it as an opinion that quotes a social security number, but in fact the relevant portion of the opinion lists a number that – although in the format xxx-xx-xxxx – appears to be an insurance policy number rather than a social security number.

[12] Both the Department of Justice and groups which provide legal services to immigrants would be useful sources of information on the scope and degree of privacy risk posed by the publication of A-numbers.

obtainable through this system includes the alien's next hearing date.[13] This could be a matter of concern in cases where someone wishing to harm the alien might use the hearing date as a means of finding the person. Asylum cases would present this concern, as would cases in which the alien has been the victim of domestic abuse.

The other concern relating to A-numbers is that they could be used in identity theft. The FTC's regulations recognize this possibility. They define "identity theft" as "a fraud committed or attempted using the identifying information of another person without authority," 16 C.F.R. § 603.2(a),[14] and they define "identifying information" to mean:

> any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including any--
>
> (1) Name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> (2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> (3) Unique electronic identification number, address, or routing code; or
>
> (4) Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

16 C.F.R. § 603.2(b).

Similarly, a federal criminal statute mandates punishment for one who, under certain specified circumstances, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7).[15] The statute defines "means of identification" as

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[13] See generally Department of Justice, Executive Office for Immigration Review, Customer Service Initiatives, available at http://www.usdoj.gov/eoir/npr.htm (last visited Oct. 2, 2008).

[14] See also 15 U.S.C. § 1681a(q)(3) ("The term 'identity theft' means a fraud committed using the identifying information of another person, subject to such further definition as the Commission may prescribe, by regulation.").

[15] See also 18 U.S.C. § 1028A (imposing penalties for aggravated identity theft and using Section 1028's definition of "means of identification").

> any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any--
>
> (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> (C) unique electronic identification number, address, or routing code; or
>
> (D) telecommunication identifying information or access device (as defined in section 1029(e)) ....

18 U.S.C.A. § 1028(d)(7).[16]

Identity theft by means of an A-number would not seem likely to directly involve financial fraud; my preliminary research did not disclose any reason to believe that one could obtain credit using an A-number alone. Thus, the identity-theft risk posed by A-numbers is likely to differ significantly from that posed by social security numbers. Nonetheless, the concern over identity theft based on A-numbers does not seem entirely fanciful. See, e.g., U.S. Immigration and Customs Enforcement, News Release, "5 Kansas City federal building workers indicted for using false social security numbers," November 7, 2007, available at http://www.ice.gov/pi/news/newsreleases/articles/071107kansascity.htm (last visited Oct. 4, 2008) (announcing indictments alleging that defendants "committed identity theft by using counterfeit Social Security cards and counterfeit U.S. permanent resident alien cards - with Social Security account numbers and alien registration numbers that were assigned to other persons - in order to conceal their status as illegal aliens").

The Connecticut state legislature appears to have responded to concerns about identity theft in enacting a statute which took effect on October 1, 2008. The statute requires "[a]ny person in possession of personal information of another person" to "safeguard the data, computer files and documents containing the information from misuse by third parties...." The statute defines "personal information" as "information capable of being associated with a particular

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[16] A 2005 amendment to the Bankruptcy Code authorizes the court to protect from public access information that constitutes a "means of identification" under the definition provided by Section 1028: "The bankruptcy court, for cause, may protect an individual, with respect to the following types of information to the extent the court finds that disclosure of such information would create undue risk of identity theft or other unlawful injury to the individual or the individual's property: (A) Any means of identification (as defined in section 1028(d) of title 18) contained in a paper filed, or to be filed, in a case under this title...." 11 U.S.C.A. § 107(c)(1).

individual through one or more identifiers, including, but not limited to, a Social Security number, a driver's license number, a state identification card number, an account number, a credit or debit card number, a passport number, an alien registration number or a health insurance identification number." (The definition excludes "publicly available information that is lawfully made available to the general public from federal, state or local government records or widely distributed media.") The statute sets a civil penalty of $ 500.00 for each intentional violation (capped at $ 5,000.00 for any one event). See Connecticut Public Act No. 08-167, available at http://www.cga.ct.gov/2008/ACT/PA/2008PA-00167-R00HB-05658-PA.htm (last visited Oct. 5, 2008).

As noted in the enclosed memo from Fritz Fulbruge, some circuit clerks have questioned the extent of the privacy risks associated with the publication of A-numbers. As those clerks point out, it would be advisable to seek further data on this question.

C. Considerations that weigh against requiring redaction of A-numbers

In order to assess the desirability of protecting A-numbers from disclosure in appellate opinions, it is necessary to consider not only the benefits but also the costs of such an approach. This section briefly sketches some of those costs, but I expect that appellate judges, circuit clerks and immigration practitioners will be able to provide a more complete exposition of the relevant costs.

It seems likely that a blanket requirement for redaction of A-numbers would impose costs on courts that currently include those numbers in their opinions, as well as on attorneys wishing to keep track of their own cases or to research decisions in other cases. Including A-numbers in the court of appeals opinion links that opinion readily to the relevant decision(s) by the Board of Immigration Appeals. Redacting A-numbers would therefore impose information costs on both judges and lawyers dealing with immigration matters. Moreover, redaction could presumably add significantly to the work of the Clerk's office, particularly in circuits – such as the Ninth – which deal with a huge volume of immigration appeals.

As some of the circuit clerks have pointed out, eliminating the use of A-numbers in connection with immigration appeals could result in a net harm to aliens if the redaction significantly increased the risks of erroneous determinations due to confusion concerning the identity of the alien involved in the appeal. Catherine Wolfe, the Clerk for the Second Circuit (which adjudicates a large number of immigration appeals), writes:

> The use of the number to accurately link government action to the correct individual - successful for the most part - for decades should be recognized by the policymakers charged with deciding whether it should be eliminated. In a basic cost/benefit analysis this tangible benefit has to be accounted for against theoretical harm that, while rational, does not seem to really exist. Also, if the number is to be redacted or eliminated a comparable system must be proposed

> and implemented before the old system is discarded, otherwise all too real harm will be visited upon aliens when government action is taken against the wrong individual.

There is a further question whether requiring redaction of A-numbers from court of appeals opinions would even render those numbers inaccessible to Internet users. The Board of Immigration Appeals publishes its precedential decisions on the Internet.[17] Except in asylum cases, those decisions list the relevant A-number(s). If an A-number is listed in an opinion published on the BIA website, then redacting that A-number from the court of appeals opinion would not seem to make that A-number less accessible to Internet users.

There is, however, one category of case in which the BIA currently does appear to redact A-numbers. Federal regulations provide that "[i]nformation contained in or pertaining to any asylum application, records pertaining to any credible fear determination conducted pursuant to § 208.30, and records pertaining to any reasonable fear determination conducted pursuant to § 208.31, shall not be disclosed without the written consent of the applicant, except as permitted by this section or at the discretion of the Attorney General." 8 C.F.R. § 208.6(a). A quick look at some of the precedential opinions on the BIA's website suggests that the BIA does not include A-numbers when publishing a precedential opinion in an asylum case. It is unclear to me whether circuits which currently include A-numbers in their opinions make an across-the-board exception for appeals in asylum matters.

Encls.

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[17] The precedential decisions are available at http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html (last visited Oct. 6, 2008). 8 C.F.R. § 1003.1(g) provides:

> Decisions as precedents. Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three-member panel or by the Board en banc may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and decisions of the Secretary of Homeland Security to the extent authorized in paragraph (i) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

III. Conclusion

The current privacy Rules do not explicitly address the contents of court opinions. However, it would seem to be clearly in keeping with the treatment of social security numbers in those Rules to avoid the inclusion of social security numbers in court opinions (whether published or unpublished).

The privacy Rules do not mention alien registration numbers. Alien registration numbers are presumably not ordinarily used to obtain credit (as social security numbers are). It seems possible that A-numbers may be used in other types of identity fraud, particularly in types of identity fraud that implicate immigration issues. A person's privacy interest in his or her A-number stems from the implications that such identity fraud could have for the legitimate holder of the A-number; the privacy interest also reflects the fact that the A-number can be used to access information concerning the person's immigration case. Federal statutes and regulations reflect the recognition that A-numbers may be used in identity theft; so does a recently-enacted Connecticut state statute.

It should be noted, however, that such statutes and regulations also mention other personal identifiers such as driver's license numbers. A-numbers, therefore, are not the only personal identifiers which are recognized as potential tools of identity theft, yet driver's license numbers, too, are not currently protected by the privacy rules.

A determination concerning the appropriate treatment of A-numbers should take into account not only the privacy concerns discussed in Part II.B. but also the potential costs of redaction discussed in Part II.C. Moreover, in considering whether to require redaction of A-numbers it would be necessary to compare A-numbers to other personal identifiers not currently accorded special protection by the privacy rules. Perhaps an additional topic of consideration might be whether the privacy interests discussed in Part II.B. are strongest – and the costs of redaction discussed in Part II.C. are reduced – if one focuses solely on asylum cases.[18]

In short, the length of this memo notwithstanding, the above discussion serves to underscore the preliminary nature of this inquiry. A full consideration of the costs and benefits of a change to the privacy protections applied in immigration appeals would require additional exploration of both the privacy interests discussed in Part II.B. and the costs of redaction summarized in Part II.C.

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[18] However, as Marcia Waldron, the Third Circuit Clerk, points out, an approach that treats some immigration appeals differently from others would entail the risk that a given case would be mischaracterized. She notes: "I would not like a system that says we include the A numbers on certain immigration matters and not in others. For me, it is easier to have an all or nothing approach. Redacting only on asylum cases or only on asylum cases dealing with hardship, torture, etc., will only lead to mistakes."

1st	The Alien # is on the docket, but not on orders, opinions, judgments or correspondence. It does appear on pleadings and other documents filed by the parties.
2nd	The A # appears on almost everything - petitioners use it too. It is on virtually every paper the court sends out - as the lower court docket #. It is on summary orders and judgments. The only document that routinely omits it is the opinion.
3rd	Everything - docket, orders, opinions (pub'd and unpub'd); briefs may or may not have it on them.
4th	The A number is on the docket, orders, judgments, notices, and most party filings, but not on opinions.
5th	The Fifth Circuit puts the A # on almost all correspondence, as well as mandates and unpublished opinions. They DO NOT put the number on published opinions or on orders. Short list of documents on which the A number can be found: docket sheet; docketing letter; briefing notice; transmittal / cover letters to parties; unpublished opinions; mandates
6th	The only use the court makes of the "A" number is as the identifier for the lower court number when opening the case in CM.
7th	For those judges that use the Alien# on the opinions and unpublished orders, they use the full number. The court uses the Alien # as the equivalent of a DC # when they open a case, so the number is on all captions and documents. There have also been a couple opinions written recently without any reference to the Alien # in the caption
8th	The Alien # appears on the docket sheet, all orders, on all correspondence, as well as the judgment. It also appears on many pleadings, including briefs. The Alien # does <u>not</u> appear on the opinion.
9th	The Alien # appears on every piece of paper coming in and going out of the Ninth Circuit. It also appears on the docket.
10th	The Alien # appears on the court docket, on the records and for the most part on pleadings coming in from attorneys. The court does not put it on orders, opinions or orders & judgments (their version of an unpublished decision).
11th	The Alien # appears on all documents coming in and going out of the Eleventh Circuit. It also appears on the docket.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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July 16, 2008

Mr. Carl Malamud
Public.Resource.Org, Inc.
1005 Gravenstein Highway North
Sebastopol, CA 95472

Dear Mr. Malamud:

Thank you for the materials you provided on personal identifiers in appellate opinions. It is enormously helpful to have the benefit of the empirical research that you have done. As you know, the Judicial Conference Rules Committees and the Committee on Court Administration and Case Management have implemented the E-Government Act requirements by developing rules and procedures to protect personal identifiers from being included in court filings, particularly those that are remotely accessible electronically. We are continuing to work to ensure that this implementation is effective and efficient. I hope you will keep us informed about your ongoing work.

I am sending a copy of your materials to Judge Carl Stewart, Chair of the Appellate Rules Committee, as well. Thank you for your commitment to improving the court system.

Very truly yours,

Lee H. Rosenthal

cc: The Hon. Carl Stewart
Peter McCabe, Esq.
John Rabiej, Esq.

PUBLIC.RESOURCE.ORG ~ *A Nonprofit Corporation*

Public Works Projects for the Internet

To: The Honorable Lee H. Rosenthal, Chairman
Judicial Conference Committee on Rules and Procedure

Cc: The Honorable Alex Kozinski, Chief Judge, Ninth Circuit
The Honorable Edith H. Jones, Chief Judge, Fifth Circuit
The Honorable Dennis Jacobs, Chief Judge, Second Circuit
The Honorable J.L. Edmondson, Chief Judge, Eleventh Circuit
The Honorable Karen J. Williams, Chief Judge, Fourth Circuit

From: Public.Resource.Org

Date: May 3, 2008

Subj: **Confidential - 1,718 Personal Identifiers Found in Appellate Opinions**

Examination of appellate decisions reveals 1,718 cases with Alien Numbers or Social Security Numbers published in the opinions. The issue applies across all circuits and many of the opinions in question are still available on court web sites. This memorandum explains the problem and suggests corrective actions to be taken.

Background: Personal Identifiers in Court Opinions

The E-Government Act of 2002 and Appellate Rule 25 "require that personal identification information be redacted from from documents filed with the court." While the focus of the Privacy Rules are on lawyers, requiring them to redact personal identification numbers from documents filed with the courts, there is also an obligation for the courts themselves to do their part, particularly when the appearance of personal identification materials in court opinions is the result of the opinion publication process or is inherent in the procedures established by the courts for submitting appeals.

In a recent Memorandum Describing the Privacy Rules and Judicial Conference Privacy Policy issued by the Rules Committee, special note was made of immigration and Social Security cases:

> Cases That Are Not Subject to the Redaction Requirement
>
> In addition, the new Civil Rules becoming effective on December 1, 2007, do not apply the redaction requirements to certain categories of cases that are exempted from remote public access. These categories are immigration cases and Social Security cases.
>
> The parties have remote electronic access to filings in these cases, but the public has access to the filings only at the courthouse.

It is clear that Alien Numbers and Social Security Numbers are not meant to be made available for general public access as publication of these numbers poses a substantial and real threat of identity theft for the individuals involved.

carl@media.org 1005 GRAVENSTEIN HIGHWAY NORTH, SEBASTOPOL, CALIFORNIA 95472 • PH: (707) 827-7290 • FX: (707) 829-0104

Opinions Found Containing Personal Identifiers

Public.Resource.Org is a 501(c)(3) nonprofit corporation dedicated to making public information more readily available on the Internet. As part of our mission, we recently obtained 50 years of Courts of Appeals decisions from a commercial vendor, reformatted this data to be compliant with modern Internet standards such as XML markup, SHA1-based document integrity checks, and explicit labels indicating the public domain status of the underlying data.

We then made this data available in bulk, and it is now being used by numerous for-profit and non-profit organizations providing access to the general public and legal professionals.

In April, we were notified by an individual that his Alien Number, the personal identifier used on the Green Card, had been published on the Internet. We investigated the issue and determined that the Immigration and Naturalization Service routinely used the Alien Number as the Docket Number for their cases, and this information is present in 1,499 published opinions, many of which are currently available on court web sites.

In addition, we scanned the corpus for Social Security Numbers and found those present in 219 published opinions. All told, 1,718 published opinions contain these personal identifiers. These opinions are distributed among all the circuits, as detailed in Table 1.

Court	Number of Cases with Personal Identifiers in the Published Opinion
Ninth Circuit	990
Fifth Circuit	171
Second Circuit	93
Eleventh Circuit	85
Fourth Circuit	81
Seventh Circuit	64
Eighth Circuit	54
Sixth Circuit	53
Third Circuit	42
Tenth Circuit	40
First Circuit	22
DC Circuit	16
Federal Circuit	6
Court of Claims	1

Table 1: Number of Cases by Circuit

The Problem Is Ongoing

Table 2 shows the number of opinions found over time. As can be seen from the continuing high volume of incidents, the problem is ongoing and not just historical.

Year	Number of Cases with Personal Identifiers in the Published Opinion
1949-1979	53
1980-1989	154
1990-1994	210
1995-1999	816
2000-2004	370
2005	60
2006	82
2007	26

Table 2: Number of Cases by Year

Appendix A contains a detailed listing of each case found. The table contains the citation in the National Reporter Series, any docket numbers found, the date (which in some cases is date submitted and in others is date filed), and indicators if the case contains an Alien Number or a Social Security Number and if the case appears to be accessible via the court's own web site.

We would be happy to make available additional information from our database of cases found, such as names of judges (or *en banc* status), URLs to access the pages, and the specific patterns and resulting matches.

It is important to note that these identification numbers are present in the opinions delivered by the courts, not just in briefs submitted by the appellants. In many cases, the summary information is embedded in the prefatory information generated by the courts. For example, take the case of *Hasan N. Nasar v. the Immigration & Naturalization Service* in the Court of Appeals for the Tenth Circuit:

http://www.ck10.uscourts.gov/opinions/96/

As can be seen, directly after the named Petitioner and Respondent, the docket number is followed by A73-4[redacted], Mr. Nasser's Alien Number:

HASAN N. NASER, Petitioner, v. IMMIGRATION & NATURALIZATION SERVICE, Respondent.	(Petition for Review) (INS No. A73 4[redacted])

Corrective Steps

A series of specific actions have been mandated for all Executive Branch agencies in OMB Memorandum M-07-16, "Safeguarding Against the Breach of Personally Identifiable Information," where breach is defined as "the loss of control, compromise, unauthorized disclosure, unauthorized acquisition, unauthorized access, or any similar term referring to situations where persons other than authorized users and for an other than authorized purpose have access or potential access to personally identifiable information, whether physical or electronic." That policy goes on to state:

> "Safeguarding personally identifiable information in the possession of the government and preventing its breach are essential to ensure the government retains the trust of the American public. ... this memorandum requires agencies to develop and implement a breach notification policy **within 120 days.**" [emphasis in original.]

Upon discovery of a breach of personal identifiers, a series of steps are considered Best Current Practices, both in industry and in government:

1. Mitigate the immediate damage by fixing the breach.
2. Notify upstream sources and downstream users of the data.
3. Investigate the cause and implement corrective steps to prevent reoccurrence.

Upon discovery of breach, Public.Resource.Org took the following steps:

1. We algorithmically scanned all court cases to find Alien Numbers and Social Security Numbers, then individually checked all numbers flagged. We then scrambled the identifiers, substituting random alphabetic characters for the numbers.
2. Bulk users of our data ("downstream users") were notified of the specific cases found. Per this memorandum, we are notifying the courts ("upstream sources").
3. We have implemented a policy of scanning all databases we post for personal identifiers, even if those databases are public records produced by the government. We have also implemented a policy which allows users to notify us if they discover information.

We believe the courts should take a similar set of steps:

1. Active steps should be taken to redact the personal identifiers, particularly the ones found on your web sites, as well as scanning for additional materials such as briefs containing this information.
2. Best Current Practices require the notification of affected parties of the breach. We believe it is incumbent on you to notify all of the individuals who were exposed. In addition you should notify your downstream users, particularly the major legal services such as West, Lexis, and AltLaw.
3. The presence of personal identifiers, particularly in immigration cases, is well known and documented as evidenced by Judicial Conference reports. An investigation as to why that did not translate into concrete actions by the courts and how to prevent further breaches is thus recommended.

We realize that mitigating this breach will require time and money, but this is essential to "ensure the government retains the trust of the American Public," a principle that applies equally to all three branches of our government.

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
1st Circuit		04/05/2006		Alien ID	Yes
		05/04/2006		Alien ID	Yes
		11/09/2005		Alien ID	Yes
		10/09/2003		Alien ID	Yes
		12/06/2002		SSAN	Yes
		10/06/2000		Alien ID	Yes
		06/05/2000		Alien ID	Yes
		07/07/1999		SSAN	Yes
		06/10/1999		Alien ID	Yes
		03/19/1999		Alien ID	Yes
		10/23/1998		Alien ID	Yes
		09/09/1996		SSAN	Yes
		02/27/1995		Alien ID	Yes
		06/23/1994		Alien ID	Yes
		01/31/1994		Alien ID	Yes
		08/17/1992		SSAN	
		07/18/1991		SSAN	
		05/02/1991		Alien ID	
		01/24/1990		SSAN	
		06/30/1989		SSAN	
		03/23/1987		SSAN	
		03/08/1982		SSAN	
2nd Circuit		10/30/2006		Alien ID	Yes
		04/18/2007		Alien ID	Yes
		06/05/2007		Alien ID	Yes
		02/13/2007		Alien ID	Yes
		05/16/2007		Alien ID	Yes
		03/16/2007		Alien ID	Yes
		05/10/2007		Alien ID	Yes
		02/13/2007		Alien ID	Yes
		04/12/2007		Alien ID	Yes
		03/28/2007		Alien ID	Yes
		01/19/2007		Alien ID	Yes
		01/24/2007		Alien ID	Yes
		11/29/2006		Alien ID	Yes
		11/15/2006		Alien ID	Yes
		02/22/2007		Alien ID	Yes
		01/18/2007		Alien ID	Yes
		11/01/2006		Alien ID	Yes
		10/06/2006		Alien ID	Yes
		01/22/2007		Alien ID	Yes
		11/18/2004		Alien ID	Yes
		01/12/2007		Alien ID	Yes
		10/30/2006		Alien ID	Yes
		09/12/2006		Alien ID	Yes
		12/08/2006		Alien ID	Yes
		01/06/2006		Alien ID	Yes
		05/18/2006		Alien ID	Yes
		11/17/2005		Alien ID	Yes
		08/10/2006		Alien ID	Yes
		04/20/2006		Alien ID	Yes
		09/19/2006		Alien ID	Yes

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
2nd Circuit		09/21/2006		Alien ID	Yes
		09/26/2006		Alien ID	Yes
		09/25/2006		Alien ID	Yes
		06/08/2006		Alien ID	Yes
		09/01/2006		Alien ID	Yes
		06/22/2006		Alien ID	Yes
		03/22/2006		Alien ID	Yes
		02/14/2006		Alien ID	Yes
		04/19/2006		Alien ID	Yes
		06/14/2006		Alien ID	Yes
		03/01/2005		Alien ID	Yes
		06/13/2006		Alien ID	Yes
		05/11/2006		Alien ID	Yes
		05/10/2006		Alien ID	Yes
		02/17/2006		Alien ID	Yes
		05/10/2006		Alien ID	Yes
		01/10/2006		Alien ID	Yes
		04/05/2006		Alien ID	Yes
		02/15/2006		Alien ID	Yes
		04/05/2006		Alien ID	Yes
		04/03/2006		Alien ID	Yes
		05/11/2005		Alien ID	Yes
		05/17/2005		Alien ID	Yes
		06/23/2005		Alien ID	Yes
		05/13/2005		Alien ID	Yes
		05/19/2005		Alien ID	Yes
		04/11/2005		Alien ID	Yes
		01/07/2005		Alien ID	Yes
		07/14/2004		Alien ID	Yes
		12/03/2003		Alien ID	Yes
		11/14/2003		Alien ID	Yes
		04/14/2003		Alien ID	Yes
		09/27/2001		Alien ID	Yes
		09/25/2001		SSAN	Yes
		01/24/2001		Alien ID	Yes
		09/14/2000		Alien ID	Yes
		02/04/2000		Alien ID	
		01/26/1999		SSAN	
		09/29/1998		SSAN	
		08/02/1996		Alien ID	
		06/06/1995		Alien ID	
		05/02/1995		Alien ID	
		06/02/1995		SSAN	
		05/19/1995		Alien ID	
		03/31/1995		Alien ID	
		02/10/1995		Alien ID	
		01/24/1995		Alien ID	
		11/25/1994		Alien ID	
		12/07/1994		Alien ID	
		10/06/1994		Alien ID	
		06/15/1994		Alien ID	
		03/07/1994		Alien ID	
		02/16/1994		Alien ID	

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
2nd Circuit		06/28/1991		Alien ID	
		06/29/1990		Alien ID	
		08/09/1989		SSAN	
		06/08/1988		SSAN	
		07/20/1982		SSAN	
		06/09/1980		SSAN	
		11/11/1977		SSAN	
		11/08/1972		SSAN	
		11/13/1967		SSAN	
		09/19/1967		SSAN	
3rd Circuit		03/07/2006		Alien ID	Yes
		04/03/2006		Alien ID	Yes
		03/10/2005		Alien ID	Yes
		12/14/2004		Alien ID	Yes
		06/29/2004		Alien ID	Yes
		06/18/2004		Alien ID	Yes
		10/16/2001		Alien ID	Yes
		07/24/2001		Alien ID	Yes
		02/12/2001		Alien ID	Yes
		01/24/2001		Alien ID	Yes
		07/22/1999		Alien ID	Yes
		06/25/1997		Alien ID	
		05/06/1997		Alien ID	
		04/02/1997		Alien ID	
		01/03/1997		Alien ID	
		11/01/1996		Alien ID	
		08/09/1996		Alien ID	
		06/28/1996		Alien ID	
		03/28/1996		Alien ID	
		03/28/1996		Alien ID	
		02/13/1996		Alien ID	
		12/15/1995		Alien ID	
		11/13/1995		Alien ID	
		08/17/1995		Alien ID	
		07/31/1995		Alien ID	
		05/19/1995		Alien ID	
		03/24/1995		SSAN	
		12/09/1994		Alien ID	
		11/02/1994		Alien ID	
		05/05/1994		Alien ID	
		06/11/1993		Alien ID	
		09/15/1987		SSAN	
		06/03/1985		SSAN	
		04/20/1984		SSAN	
		10/06/1982		Alien ID	
		01/04/1979		Alien ID	
		11/01/1978		Alien ID	
		04/10/1978		Alien ID	
		04/25/1977		SSAN	

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
3rd Circuit		01/28/1972		SSAN	
		01/20/1971		SSAN	
		09/17/1970		SSAN	
4th Circuit		09/19/2006		Alien ID	Yes
		06/03/2004		Alien ID	Yes
		02/27/2002		Alien ID	Yes
		05/06/2002		Alien ID	Yes
		10/31/2001		SSAN	Yes
		01/23/1997		Alien ID	Yes
		12/04/1996		Alien ID	Yes
		11/18/1996		Alien ID	Yes
		11/18/1996		SSAN	Yes
		09/13/1996		Alien ID	Yes
		07/28/1995		Alien ID	
		06/19/1995		Alien ID	
		06/09/1995		Alien ID	
		01/09/1995		Alien ID	
		10/25/1994		Alien ID	
		09/19/1994		Alien ID	
		07/20/1994		Alien ID	
		08/03/1994		Alien ID	
		10/27/1993		Alien ID	
		10/06/1993		SSAN	
		06/21/1993		SSAN	
		06/21/1993		Alien ID	
		12/23/1992		SSAN	
		09/22/1992		Alien ID	
		09/15/1992		Alien ID	
		07/09/1992		SSAN	
		06/01/1992		Alien ID	
		02/21/1992		Alien ID	
		01/28/1992		Alien ID	
		11/20/1991		Alien ID	
		11/07/1991		Alien ID	
		10/08/1991		SSAN	
		08/30/1991		Alien ID	
		06/26/1991		Alien ID	
		06/25/1991		Alien ID	
		06/24/1991		SSAN	
		02/25/1991		Alien ID	
		02/25/1991		Alien ID	
		12/26/1990		Alien ID	
		11/14/1990		Alien ID	
		10/31/1990		SSAN	
		10/30/1990		Alien ID	
		09/24/1990		SSAN	
		09/20/1990		Alien ID	
		09/20/1990		Alien ID	
		09/04/1990		Alien ID	
		08/27/1990		Alien ID	

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
4th Circuit		06/20/1990		SSAN	
		03/15/1990		SSAN	
		03/28/1990		SSAN	
		03/30/1990		SSAN	
		10/06/1989		SSAN	
		12/27/1989		SSAN	
		10/06/1989		SSAN	
		09/28/1989		SSAN	
		08/09/1989		SSAN	
		08/04/1989		SSAN	
		07/12/1989		SSAN	
		04/12/1989		SSAN	
		12/09/1988		SSAN	
		01/03/1989		SSAN	
		11/01/1988		SSAN	
		08/25/1987		SSAN	
		05/19/1987		SSAN	
		03/18/1987		SSAN	
		03/02/1987		SSAN	
		12/05/1986		SSAN	
		09/18/1986		SSAN	
		09/16/1986		SSAN	
		02/27/1986		SSAN	
		10/25/1984		SSAN	
		01/12/1984		SSAN	
		04/07/1982		Alien ID	
		04/15/1982		SSAN	
		12/18/1970		SSAN	
		12/18/1970		SSAN	
		11/13/1961		SSAN	
		04/29/1961		SSAN	
		04/11/1961		SSAN	
		03/09/1960		Alien ID	
		01/08/1960		Alien ID	
5th Circuit		04/24/2006		Alien ID	Yes
		04/20/2006		Alien ID	Yes
		04/29/2005		SSAN	Yes
		04/28/2004		Alien ID	Yes
		04/15/1999		Alien ID	Yes
		04/15/1999		Alien ID	Yes
		03/25/1999		Alien ID	Yes
		03/03/1999		Alien ID	Yes
		02/22/1999		Alien ID	Yes
		02/19/1999		Alien ID	Yes
		02/15/1999		Alien ID	Yes
		02/12/1999		Alien ID	Yes
		02/11/1999		Alien ID	Yes
		02/08/1999		Alien ID	Yes
		02/04/1999		Alien ID	Yes
		12/22/1998		Alien ID	Yes
		11/18/1998		Alien ID	Yes

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
5th Circuit		11/17/1998		Alien ID	Yes
		10/21/1998		Alien ID	Yes
		10/21/1998		Alien ID	Yes
		09/30/1998		Alien ID	Yes
		09/17/1998		Alien ID	Yes
		09/04/1998		Alien ID	Yes
		05/18/1998		Alien ID	Yes
		01/30/1998		SSAN	Yes
		02/21/1997		Alien ID	Yes
		02/21/1997		Alien ID	Yes
		02/20/1997		Alien ID	Yes
		02/17/1997		Alien ID	Yes
		01/30/1997		Alien ID	Yes
		01/10/1997		Alien ID	Yes
		12/24/1996		Alien ID	Yes
		12/18/1996		Alien ID	Yes
		12/06/1996		Alien ID	Yes
		11/26/1996		Alien ID	Yes
		11/26/1996		Alien ID	Yes
		09/19/1996		Alien ID	Yes
		09/17/1996		Alien ID	Yes
		09/03/1996		Alien ID	Yes
		08/22/1996		Alien ID	Yes
		08/07/1996		Alien ID	Yes
		07/29/1996		Alien ID	Yes
		07/18/1996		Alien ID	Yes
		07/18/1996		Alien ID	Yes
		07/09/1996		Alien ID	Yes
		07/01/1996		Alien ID	Yes
		06/26/1996		Alien ID	Yes
		06/14/1996		Alien ID	Yes
		03/01/1996		Alien ID	Yes
		05/17/1996		Alien ID	Yes
		05/15/1996		Alien ID	Yes
		05/03/1996		Alien ID	Yes
		04/17/1996		Alien ID	Yes
		04/16/1996		Alien ID	Yes
		04/12/1996		Alien ID	Yes
		04/12/1996		Alien ID	Yes
		04/09/1996		Alien ID	Yes
		04/01/1996		Alien ID	Yes
		03/21/1996		Alien ID	Yes
		03/20/1996		Alien ID	Yes
		03/20/1996		Alien ID	Yes
		03/13/1996		Alien ID	Yes
		03/01/1996		Alien ID	Yes
		03/01/1996		Alien ID	Yes
		03/01/1996		Alien ID	Yes
		02/09/1996		Alien ID	Yes
		02/06/1996		Alien ID	Yes
		01/16/1996		Alien ID	Yes
		12/21/1995		Alien ID	Yes
		12/21/1995		Alien ID	Yes

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
5th Circuit		12/20/1995		Alien ID	Yes
		12/20/1995		Alien ID	Yes
		12/20/1995		Alien ID	Yes
		12/19/1995		Alien ID	Yes
		12/13/1995		Alien ID	Yes
		12/01/1995		Alien ID	Yes
		11/22/1995		Alien ID	Yes
		11/21/1995		Alien ID	Yes
		10/24/1995		Alien ID	Yes
		10/23/1995		Alien ID	Yes
		10/20/1995		Alien ID	Yes
		10/19/1995		Alien ID	Yes
		10/19/1995		Alien ID	Yes
		10/17/1995		Alien ID	Yes
		10/13/1995		Alien ID	Yes
		10/12/1995		Alien ID	Yes
		10/04/1995		Alien ID	Yes
		10/03/1995		Alien ID	Yes
		09/29/1995		Alien ID	Yes
		09/15/1995		Alien ID	Yes
		09/08/1995		Alien ID	Yes
		09/05/1995		Alien ID	Yes
		08/31/1995		Alien ID	Yes
		08/30/1995		Alien ID	Yes
		08/25/1995		Alien ID	Yes
		08/23/1995		Alien ID	Yes
		08/22/1995		Alien ID	Yes
		10/23/1995		SSAN	Yes
		08/16/1995		Alien ID	Yes
		08/08/1995		Alien ID	Yes
		08/07/1995		Alien ID	Yes
		07/20/1995		Alien ID	Yes
		07/19/1995		Alien ID	Yes
		07/07/1995		Alien ID	Yes
		07/07/1995		Alien ID	Yes
		07/07/1995		Alien ID	Yes
		07/03/1995		Alien ID	Yes
		06/30/1995		Alien ID	Yes
		06/21/1995		Alien ID	Yes
		06/21/1995		Alien ID	Yes
		06/19/1995		Alien ID	Yes
		06/06/1995		Alien ID	Yes
		06/06/1995		Alien ID	Yes
		06/05/1995		Alien ID	Yes
		06/02/1995		Alien ID	Yes
		04/26/1995		Alien ID	Yes
		04/26/1995		Alien ID	Yes
		04/21/1995		Alien ID	Yes
		04/20/1995		Alien ID	Yes
		03/31/1995		Alien ID	Yes
		03/30/1995		Alien ID	Yes
		03/29/1995		Alien ID	Yes
		03/24/1995		Alien ID	Yes

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
5th Circuit		03/20/1995		Alien ID	Yes
		03/03/1995		Alien ID	Yes
		03/02/1995		Alien ID	Yes
		03/01/1995		Alien ID	Yes
		02/17/1995		Alien ID	Yes
		02/16/1995		Alien ID	Yes
		02/09/1995		Alien ID	Yes
		02/02/1995		Alien ID	Yes
		02/02/1995		Alien ID	Yes
		02/01/1995		Alien ID	Yes
		01/11/1995		Alien ID	Yes
		12/29/1994		Alien ID	Yes
		12/23/1994		Alien ID	Yes
		12/19/1994		Alien ID	Yes
		12/14/1994		Alien ID	Yes
		12/14/1994		Alien ID	Yes
		12/13/1994		Alien ID	Yes
		01/24/1995		Alien ID	Yes
		12/06/1994		Alien ID	Yes
		12/06/1994		Alien ID	Yes
		11/25/1994		Alien ID	Yes
		11/11/1994		Alien ID	Yes
		11/09/1994		Alien ID	Yes
		11/07/1994		Alien ID	Yes
		07/29/1994		SSAN	Yes
		01/05/1994		SSAN	Yes
		12/18/1991		Alien ID	
		03/15/1991		SSAN	
		05/17/1990		SSAN	
		07/05/1988		SSAN	
		12/20/1985		SSAN	
		09/24/1984		SSAN	
		09/28/1983		Alien ID	
		09/19/1983		SSAN	
		08/30/1982		SSAN	
		08/13/1982		SSAN	
		12/14/1981		SSAN	
		06/04/1981		SSAN	
		11/27/1978		SSAN	
		11/17/1978		SSAN	
		12/30/1974		SSAN	
		04/19/1974		SSAN	
		07/12/1973		SSAN	
		11/02/1971		SSAN	
		06/15/1971		SSAN	
		06/15/1971		SSAN	
		05/14/1954		SSAN	
		05/14/1954		SSAN	
6th Circuit		04/18/2007		Alien ID	Yes
		06/07/2005		Alien ID	Yes
		07/17/2006		Alien ID	Yes
		09/15/2005		Alien ID	Yes

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
6th Circuit		01/25/2005		Alien ID	Yes
		10/14/2004		Alien ID	Yes
		01/29/2004		Alien ID	Yes
		10/23/2003		Alien ID	Yes
		10/16/2002		Alien ID	Yes
		11/14/2001		Alien ID	Yes
		10/02/2001		Alien ID	Yes
		04/17/2001		Alien ID	Yes
		11/06/2000		Alien ID	Yes
		01/12/2001		Alien ID	Yes
		01/02/2001		Alien ID	Yes
		01/10/2001		Alien ID	Yes
		12/04/2000		Alien ID	Yes
		09/12/2000		Alien ID	Yes
		06/13/2000		Alien ID	
		11/08/1999		Alien ID	
		06/24/1998		SSAN	
		01/09/1998		SSAN	
		03/20/1997		Alien ID	
		01/22/1997		Alien ID	
		11/22/1996		Alien ID	
		10/31/1995		SSAN	
		07/06/1995		Alien ID	
		05/30/1995		Alien ID	
		03/09/1995		Alien ID	
		02/08/1995		Alien ID	
		11/09/1994		SSAN	
		08/30/1994		SSAN	
		07/01/1994		SSAN	
		05/11/1994		SSAN	
		03/23/1994		Alien ID	
		03/21/1994		SSAN	
		06/10/1993		Alien ID	
		04/13/1993		SSAN	
		07/31/1991		SSAN	
		04/01/1991		SSAN	
		10/19/1990		SSAN	
		05/12/1988		SSAN	
		08/18/1986		SSAN	
		06/12/1985		SSAN	
		06/20/1985		Alien ID	
		05/09/1985		SSAN	
		05/22/1984		SSAN	
		07/24/1981		SSAN	
		10/19/1979		SSAN	
		02/20/1969		SSAN	
		02/20/1969		SSAN	
		12/28/1966		SSAN	
		12/28/1966		SSAN	
7th Circuit		11/28/2006		Alien ID	
		05/25/2004	[illegible]	Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
7th Circuit		09/12/2002		SSAN	
		11/14/2001		Alien ID	
		09/07/2001		Alien ID	Yes
		08/09/2001		Alien ID	Yes
		07/05/2001		Alien ID	Yes
		04/11/2001		Alien ID	Yes
		03/05/2001		Alien ID	Yes
		03/06/2001		Alien ID	Yes
		02/22/2001		Alien ID	Yes
		02/12/2001		Alien ID	Yes
		01/03/2001		Alien ID	Yes
		12/07/2000		Alien ID	Yes
		12/05/2000		Alien ID	Yes
		09/19/2000		Alien ID	Yes
		08/23/2000		Alien ID	Yes
		04/05/2000		Alien ID	Yes
		05/18/2000		Alien ID	Yes
		08/01/2000		Alien ID	Yes
		07/28/2000		Alien ID	Yes
		03/10/2000		Alien ID	Yes
		02/03/2000		Alien ID	Yes
		12/09/1999		Alien ID	Yes
		12/02/1999		Alien ID	
		01/10/2000		Alien ID	Yes
		01/06/2000		Alien ID	Yes
		11/02/1999		Alien ID	
		11/01/1999		Alien ID	
		08/23/1999		Alien ID	
		06/21/1999		Alien ID	
		04/19/1999		Alien ID	
		10/28/1998		Alien ID	
		08/11/1998		Alien ID	
		03/30/1998		Alien ID	
		02/10/1998		Alien ID	
		03/06/1998		Alien ID	
		02/17/1998		Alien ID	
		03/11/1997		Alien ID	
		10/01/1996		Alien ID	
		04/25/1996		Alien ID	
		04/26/1996		Alien ID	
		02/29/1996		Alien ID	
		07/17/1995		Alien ID	
		02/28/1994		SSAN	
		12/23/1993		Alien ID	
		11/17/1993		Alien ID	
		10/22/1993		SSAN	
		07/16/1993		Alien ID	
		04/06/1993		Alien ID	
		02/19/1992		SSAN	
		07/03/1991		Alien ID	
		10/18/1990		SSAN	
		11/14/1989		SSAN	
		08/10/1988		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
7th Circuit		09/04/1986		SSAN	
		02/24/1982		SSAN	
		11/02/1981		Alien ID	
		09/19/1977		SSAN	
		05/30/1975		SSAN	
		06/28/1957		SSAN	
		06/28/1957		SSAN	
		12/27/1949		SSAN	
		12/27/1949		SSAN	
8th Circuit		06/22/2005		Alien ID	Yes
		11/17/2004		Alien ID	Yes
		04/16/2004		Alien ID	Yes
		02/12/2004		Alien ID	Yes
		12/18/2003		Alien ID	Yes
		12/10/2002		Alien ID	Yes
		10/09/2002		Alien ID	Yes
		12/13/2001		Alien ID	Yes
		02/15/2002		Alien ID	Yes
		09/12/2001		SSAN	Yes
		09/05/2000		Alien ID	Yes
		03/20/1998		Alien ID	Yes
		01/14/1997		SSAN	Yes
		08/12/1996		Alien ID	Yes
		08/12/1996		Alien ID	Yes
		08/12/1996		Alien ID	Yes
		07/03/1995		Alien ID	
		01/11/1995		Alien ID	
		08/22/1994		Alien ID	
		08/03/1994		SSAN	
		08/09/1994		SSAN	
		07/27/1994		SSAN	
		06/09/1994		Alien ID	
		06/08/1994		SSAN	
		05/11/1994		SSAN	
		03/29/1994		SSAN	
		04/04/1994		Alien ID	
		03/22/1994		SSAN	
		03/08/1994		SSAN	
		12/06/1993		SSAN	
		11/17/1993		SSAN	
		10/15/1993		SSAN	
		10/14/1993		SSAN	
		09/20/1993		Alien ID	
		07/02/1993		SSAN	
		04/01/1993		SSAN	
		02/17/1993		SSAN	
		01/29/1993		SSAN	
		01/29/1993		SSAN	
		11/02/1992		SSAN	
		01/09/1991		SSAN	
		12/12/1990		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
8th Circuit		07/09/1990		SSAN	
		06/14/1990		SSAN	
		08/04/1989		SSAN	
		06/26/1989		Alien ID	
		10/27/1987		SSAN	
		07/31/1986		SSAN	
		12/31/1985		SSAN	
		03/12/1982		Alien ID	
		10/15/1980		SSAN	
		07/03/1980		Alien ID	
		09/18/1972		SSAN	
		08/15/1968		Alien ID	
9th Circuit		09/14/2006		Alien ID	Yes
		05/16/2007		Alien ID	Yes
		05/18/2007		Alien ID	Yes
		04/20/2007		Alien ID	Yes
		11/16/2006		Alien ID	Yes
		04/18/2007		Alien ID	Yes
		02/13/2007		Alien ID	Yes
		12/07/2006		Alien ID	Yes
		02/14/2007		Alien ID	Yes
		12/07/2006		Alien ID	Yes
		08/16/2006		Alien ID	Yes
		04/20/2007		Alien ID	Yes
		09/14/2006		Alien ID	Yes
		12/13/2005		Alien ID	Yes
		03/05/2007		Alien ID	Yes
		10/05/2006		Alien ID	Yes
		10/16/2006		Alien ID	Yes
		08/12/2005		Alien ID	Yes
		06/15/2005		Alien ID	Yes
		10/17/2006		Alien ID	Yes
		10/16/2006		Alien ID	Yes
		10/20/2006		Alien ID	Yes
		03/10/2006		Alien ID	Yes
		01/10/2007		Alien ID	Yes
		10/20/2005		Alien ID	Yes
		10/20/2006		Alien ID	Yes
		12/08/2006		Alien ID	Yes
		10/19/2006		Alien ID	Yes
		11/16/2006		Alien ID	Yes
		10/17/2006		Alien ID	Yes
		10/16/2006		Alien ID	Yes
		04/06/2006		Alien ID	Yes
		11/17/2006		Alien ID	Yes
		06/07/2006		Alien ID	Yes
		10/16/2006		Alien ID	Yes
		05/17/2006		Alien ID	Yes
		12/09/2005		Alien ID	Yes
		11/15/2006		Alien ID	Yes
		02/17/2006		Alien ID	Yes
		11/14/2005		Alien ID	Yes

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		03/23/2006		Alien ID	Yes
		01/10/2006		Alien ID	Yes
		12/07/2005		Alien ID	Yes
		04/04/2006		Alien ID	Yes
		04/04/2006		Alien ID	Yes
		05/09/2006		Alien ID	Yes
		06/16/2006		Alien ID	Yes
		04/02/2004		Alien ID	Yes
		06/07/2006		Alien ID	Yes
		04/03/2006		Alien ID	Yes
		04/06/2006		Alien ID	Yes
		12/13/2005		Alien ID	Yes
		03/23/2006		Alien ID	Yes
		02/17/2006		Alien ID	Yes
		07/15/2004		Alien ID	Yes
		02/09/2006		Alien ID	Yes
		10/18/2005		Alien ID	Yes
		07/15/2004		Alien ID	Yes
		08/09/2004		Alien ID	Yes
		02/14/2006		Alien ID	Yes
		12/09/2004		Alien ID	Yes
		10/20/2005		Alien ID	Yes
		05/04/2005		Alien ID	Yes
		09/13/2005		Alien ID	Yes
		09/15/2005		Alien ID	Yes
		07/15/2005		Alien ID	Yes
		02/11/2003		Alien ID	Yes
		09/15/2005		Alien ID	Yes
		12/10/2004		Alien ID	Yes
		11/18/2005		Alien ID	Yes
		10/21/2005		Alien ID	Yes
		06/21/2005		Alien ID	Yes
		12/09/2004		Alien ID	Yes
		03/11/2005		Alien ID	Yes
		05/04/2005		Alien ID	Yes
		09/16/2005		Alien ID	Yes
		09/15/2005		Alien ID	Yes
		04/02/2004		Alien ID	Yes
		08/12/2005		Alien ID	Yes
		01/10/2005		Alien ID	Yes
		12/09/2004		Alien ID	Yes
		06/21/2005		Alien ID	Yes
		01/13/2005		Alien ID	Yes
		05/05/2005		Alien ID	Yes
		06/17/2005		Alien ID	Yes
		04/15/2005		Alien ID	Yes
		02/09/2004		Alien ID	Yes
		10/06/2004		Alien ID	Yes
		04/07/2005		Alien ID	Yes
		02/03/2005		Alien ID	Yes
		06/17/2005		Alien ID	Yes
		11/03/2004		Alien ID	Yes
		04/12/2005		Alien ID	Yes

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		06/17/2005		Alien ID	Yes
		02/09/2005		Alien ID	Yes
		11/03/2004		Alien ID	Yes
		03/11/2005		Alien ID	Yes
		08/07/2002		SSAN	Yes
		04/15/2005		Alien ID	Yes
		07/17/2003		Alien ID	Yes
		02/15/2005		Alien ID	Yes
		04/08/2005		Alien ID	Yes
		05/09/2005		Alien ID	Yes
		10/06/2004		Alien ID	Yes
		05/06/2004		Alien ID	Yes
		09/01/2004		Alien ID	Yes
		01/13/2004		Alien ID	Yes
		04/18/2005		Alien ID	Yes
		02/16/2005		Alien ID	Yes
		07/15/2004		Alien ID	Yes
		02/07/2005		Alien ID	Yes
		07/30/2004		Alien ID	Yes
		02/07/2005		Alien ID	Yes
		11/03/2004		Alien ID	Yes
		06/10/2004		Alien ID	Yes
		05/12/2004		Alien ID	Yes
		06/10/2004		Alien ID	Yes
		12/10/2004		Alien ID	Yes
		04/14/2004		Alien ID	Yes
		10/07/2004		Alien ID	Yes
		12/08/2004		Alien ID	Yes
		11/03/2004		Alien ID	Yes
		08/11/2004		Alien ID	Yes
		09/01/2004		Alien ID	Yes
		11/01/2004		Alien ID	Yes
		05/13/2004		Alien ID	Yes
		09/02/2004		Alien ID	Yes
		09/02/2004		Alien ID	Yes
		11/16/2004		Alien ID	Yes
		05/10/2004		Alien ID	Yes
		02/06/2004		Alien ID	Yes
		12/05/2003		Alien ID	Yes
		10/06/2004		Alien ID	Yes
		06/10/2004		Alien ID	Yes
		10/08/2004		Alien ID	Yes
		06/10/2004		Alien ID	Yes
		09/02/2004		Alien ID	Yes
		09/14/2004		Alien ID	Yes
		05/13/2004		Alien ID	Yes
		04/08/2003		Alien ID	Yes
		08/12/2004		Alien ID	Yes
		04/14/2004		Alien ID	Yes
		05/13/2004		Alien ID	Yes
		12/05/2003		Alien ID	Yes
		08/06/2004		Alien ID	Yes
		04/14/2004		Alien ID	Yes

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		01/13/2004		Alien ID	Yes
		10/09/2003		Alien ID	Yes
		04/15/2004		Alien ID	Yes
		04/09/2003		Alien ID	Yes
		10/10/2003		Alien ID	Yes
		11/07/2003		Alien ID	Yes
		04/04/2003		Alien ID	Yes
		04/10/2001		Alien ID	
		04/01/2004		Alien ID	Yes
		04/15/2004		Alien ID	Yes
		02/13/2004		Alien ID	Yes
		02/13/2004		Alien ID	Yes
		04/14/2004		Alien ID	Yes
		02/09/2004		Alien ID	Yes
		03/31/2004		Alien ID	Yes
		12/05/2003		Alien ID	Yes
		11/07/2003		Alien ID	Yes
		05/13/2004		Alien ID	Yes
		04/02/2004		Alien ID	Yes
		10/08/2002		Alien ID	Yes
		04/01/2004		Alien ID	Yes
		03/10/2004		Alien ID	Yes
		03/08/2004		Alien ID	Yes
		07/11/2002		Alien ID	Yes
		03/18/2004		Alien ID	Yes
		02/13/2004		Alien ID	Yes
		03/03/2004		Alien ID	Yes
		02/13/2004		Alien ID	Yes
		11/07/2003		Alien ID	Yes
		11/07/2003		Alien ID	Yes
		05/12/2003		Alien ID	Yes
		02/09/2004		Alien ID	Yes
		07/16/2003		Alien ID	Yes
		12/05/2003		Alien ID	Yes
		09/16/2003		Alien ID	Yes
		10/08/2003		Alien ID	Yes
		04/04/2003		Alien ID	Yes
		03/09/2001		Alien ID	
		08/13/2003		Alien ID	Yes
		04/09/2003		Alien ID	Yes
		08/15/2003		Alien ID	Yes
		03/12/2003		Alien ID	Yes
		07/10/2003		Alien ID	Yes
		05/16/2003		Alien ID	Yes
		09/19/2003		Alien ID	Yes
		09/11/2003		Alien ID	Yes
		11/07/2002		Alien ID	Yes
		03/04/2003		Alien ID	Yes
		05/08/2003		Alien ID	Yes
		02/07/2003		Alien ID	Yes
		05/16/2003		Alien ID	Yes
		06/12/2003		Alien ID	Yes
		02/07/2003		Alien ID	Yes

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		05/15/2003		Alien ID	Yes
		03/06/2003		Alien ID	Yes
		06/03/2003		Alien ID	Yes
		06/12/2003		Alien ID	Yes
		03/05/2002		SSAN	Yes
		07/07/2003		Alien ID	Yes
		05/09/2003		Alien ID	Yes
		03/11/2003		Alien ID	Yes
		06/03/2003		Alien ID	Yes
		06/06/2003		Alien ID	Yes
		04/07/2003		Alien ID	Yes
		12/04/2002		Alien ID	Yes
		02/07/2003		Alien ID	Yes
		03/05/2003		Alien ID	Yes
		03/12/2003		Alien ID	Yes
		02/05/2002		Alien ID	Yes
		01/17/2003		Alien ID	Yes
		12/06/2002		Alien ID	Yes
		03/14/2003		Alien ID	Yes
		02/07/2003		Alien ID	Yes
		03/12/2003		Alien ID	Yes
		01/17/2003		Alien ID	Yes
		02/14/2003		Alien ID	Yes
		03/11/2003		Alien ID	Yes
		11/06/2002		Alien ID	Yes
		02/07/2003		Alien ID	Yes
		02/14/2003		Alien ID	Yes
		09/09/2002		Alien ID	Yes
		11/07/2001		Alien ID	Yes
		11/05/2002		Alien ID	Yes
		09/09/2002		Alien ID	Yes
		01/17/2003		Alien ID	Yes
		02/12/2002		Alien ID	Yes
		07/11/2002		Alien ID	Yes
		11/07/2002		Alien ID	Yes
		10/10/2002		Alien ID	Yes
		09/11/2002		SSAN	Yes
		08/14/2002		Alien ID	Yes
		11/05/2001		Alien ID	Yes
		06/05/2002		Alien ID	Yes
		11/14/2000		Alien ID	
		10/15/2001		Alien ID	Yes
		06/13/2002		Alien ID	Yes
		06/10/2002		Alien ID	Yes
		06/10/2002		Alien ID	Yes
		05/10/2002		Alien ID	Yes
		02/14/2002		Alien ID	Yes
		07/12/2002		Alien ID	Yes
		10/16/2001		Alien ID	Yes
		02/06/2002		Alien ID	Yes
		06/05/2002		Alien ID	Yes
		06/13/2002		Alien ID	Yes
		04/11/2002		Alien ID	Yes

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		03/07/2002		Alien ID	Yes
		01/11/2001		Alien ID	
		10/03/2001		Alien ID	Yes
		12/13/2000		Alien ID	
		02/14/2002		Alien ID	Yes
		04/05/2002		Alien ID	Yes
		12/05/2001		Alien ID	Yes
		01/11/2001		Alien ID	
		09/14/2001		Alien ID	Yes
		01/16/2002		Alien ID	Yes
		01/09/2002		Alien ID	Yes
		12/28/2001		Alien ID	Yes
		01/16/2002		Alien ID	Yes
		11/28/2001		Alien ID	Yes
		12/07/2001		Alien ID	Yes
		12/05/2001		Alien ID	Yes
		12/05/2001		Alien ID	Yes
		10/18/2001		Alien ID	Yes
		10/23/2001		Alien ID	Yes
		10/22/2001		Alien ID	Yes
		10/23/2001		Alien ID	Yes
		09/14/2001		Alien ID	Yes
		09/21/2001		Alien ID	Yes
		09/11/2001		Alien ID	Yes
		09/10/2001		Alien ID	Yes
		08/20/2001		Alien ID	
		08/14/2001		Alien ID	
		08/13/2001		Alien ID	
		06/28/2001		Alien ID	
		07/26/2001		Alien ID	
		07/31/2001		Alien ID	
		07/23/2001		Alien ID	
		07/05/2001		Alien ID	
		07/03/2001		Alien ID	
		06/25/2001		Alien ID	
		06/22/2001		Alien ID	
		06/28/2001		Alien ID	
		06/26/2001		Alien ID	
		06/18/2001		Alien ID	
		06/14/2001		Alien ID	
		06/05/2001		Alien ID	
		06/05/2001		Alien ID	
		05/14/2001		Alien ID	
		05/11/2001		Alien ID	
		05/07/2001		Alien ID	
		05/03/2001		Alien ID	
		04/25/2001		Alien ID	
		04/23/2001		Alien ID	
		04/20/2001		Alien ID	
		04/18/2001		Alien ID	
		04/04/2001		Alien ID	
		04/02/2001		Alien ID	

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		04/17/2001		Alien ID	
		11/14/2000		Alien ID	
		03/27/2001		Alien ID	
		03/15/2001		Alien ID	
		03/22/2001		Alien ID	
		03/21/2001		Alien ID	
		03/09/2001		Alien ID	
		02/15/2001		Alien ID	
		01/23/2001		Alien ID	
		12/27/2000		Alien ID	
		01/26/2001		Alien ID	
		01/26/2001		Alien ID	
		05/11/2001		Alien ID	
		01/19/2001		Alien ID	
		12/11/2000		Alien ID	
		12/08/2000		Alien ID	
		11/21/2000		Alien ID	
		11/21/2000		Alien ID	
		11/15/2000		Alien ID	
		11/14/2000		Alien ID	
		11/03/2000		Alien ID	
		10/18/2000		Alien ID	
		10/12/2000		Alien ID	
		12/11/2000		Alien ID	
		09/21/2000		Alien ID	
		09/26/2000		Alien ID	
		09/20/2000		Alien ID	
		12/08/1999		Alien ID	
		03/10/2000		Alien ID	
		11/04/1999		Alien ID	
		05/04/2000		Alien ID	
		08/03/2000		Alien ID	
		09/08/2000		Alien ID	
		08/22/2000		Alien ID	
		09/06/2000		Alien ID	
		08/02/2000		Alien ID	
		08/01/2000		Alien ID	
		07/25/2000		Alien ID	
		07/21/2000		Alien ID	
		09/27/2000		Alien ID	
		07/20/2000		Alien ID	
		08/15/2000		Alien ID	
		12/11/2000		Alien ID	
		07/18/2000		Alien ID	
		07/14/2000		Alien ID	
		06/30/2000		Alien ID	
		06/20/2000		Alien ID	
		06/06/2000		Alien ID	
		06/30/2000		Alien ID	
		06/09/2000		Alien ID	
		06/26/2000		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		05/31/2000		Alien ID	
		05/19/2000		Alien ID	
		05/03/2000		Alien ID	
		04/14/2000		Alien ID	
		04/05/2000		Alien ID	
		03/27/2000		Alien ID	
		04/03/2000		Alien ID	
		03/14/2000		Alien ID	
		03/27/2000		Alien ID	
		03/27/2000		Alien ID	
		06/20/2000		Alien ID	
		03/08/2000		Alien ID	
		03/08/2000		Alien ID	
		03/03/2000		Alien ID	
		03/02/2000		Alien ID	
		12/27/1999		Alien ID	
		11/09/1999		Alien ID	
		10/25/1999		Alien ID	
		10/13/1999		Alien ID	
		09/16/1999		Alien ID	
		10/26/1999		Alien ID	
		09/07/1999		Alien ID	
		08/19/1999		Alien ID	
		07/14/1999		Alien ID	
		07/13/1999		Alien ID	
		07/21/1999		Alien ID	
		07/13/1999		Alien ID	
		06/22/1999		Alien ID	
		04/30/1999		Alien ID	
		04/30/1999		Alien ID	
		04/22/1999		Alien ID	
		04/21/1999		Alien ID	
		03/29/1999		Alien ID	
		03/19/1999		Alien ID	
		03/26/1999		Alien ID	
		03/23/1999		Alien ID	
		03/18/1999		Alien ID	
		03/02/1999		Alien ID	
		01/06/1999		Alien ID	
		05/07/1998		Alien ID	
		07/24/1998		Alien ID	
		11/13/1998		Alien ID	
		10/27/1998		Alien ID	
		10/23/1998		Alien ID	
		09/29/1998		Alien ID	
		09/02/1998		Alien ID	
		08/31/1998		Alien ID	
		09/01/1998		Alien ID	
		07/24/1998		Alien ID	
		07/16/1998		Alien ID	
		07/02/1998		Alien ID	
		06/26/1998		Alien ID	
		06/24/1998		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		06/17/1998		Alien ID	
		05/07/1998		Alien ID	
		05/20/1998		Alien ID	
		05/19/1998		Alien ID	
		05/19/1998		Alien ID	
		05/07/1998		Alien ID	
		05/22/1998		Alien ID	
		05/22/1998		Alien ID	
		05/20/1998		Alien ID	
		05/06/1998		Alien ID	
		06/12/1998		Alien ID	
		05/20/1998		Alien ID	
		04/27/1998		Alien ID	
		06/03/1998		Alien ID	
		05/19/1998		Alien ID	
		04/27/1998		Alien ID	
		05/22/1998		Alien ID	
		05/17/1998		Alien ID	
		05/07/1998		Alien ID	
		05/01/1998		Alien ID	
		05/01/1998		Alien ID	
		04/29/1998		Alien ID	
		04/10/1998		Alien ID	
		04/24/1998		Alien ID	
		04/22/1998		Alien ID	
		04/21/1998		Alien ID	
		04/20/1998		Alien ID	
		04/28/1998		Alien ID	
		04/28/1998		Alien ID	
		04/28/1998		Alien ID	
		04/22/1998		Alien ID	
		04/20/1998		Alien ID	
		04/14/1998		Alien ID	
		04/24/1998		Alien ID	
		04/22/1998		Alien ID	
		04/16/1998		Alien ID	
		04/16/1998		Alien ID	
		04/16/1998		Alien ID	
		04/24/1998		Alien ID	
		04/22/1998		Alien ID	
		04/22/1998		Alien ID	
		03/18/1998		Alien ID	
		03/18/1998		Alien ID	
		03/30/1998		Alien ID	
		03/24/1998		Alien ID	
		03/19/1998		Alien ID	
		03/18/1998		Alien ID	
		03/18/1998		Alien ID	
		03/26/1998		Alien ID	
		03/25/1998		Alien ID	
		02/25/1998		Alien ID	
		03/31/1998		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		03/25/1998		Alien ID	
		03/24/1998		Alien ID	
		03/23/1998		Alien ID	
		03/23/1998		Alien ID	
		03/19/1998		Alien ID	
		03/18/1998		Alien ID	
		03/17/1998		Alien ID	
		03/11/1998		Alien ID	
		03/19/1998		Alien ID	
		03/18/1998		Alien ID	
		03/02/1998		Alien ID	
		03/24/1998		Alien ID	
		03/24/1998		Alien ID	
		03/18/1998		Alien ID	
		03/16/1998		Alien ID	
		03/24/1998		Alien ID	
		03/18/1998		Alien ID	
		03/18/1998		Alien ID	
		03/18/1998		Alien ID	
		03/18/1998		Alien ID	
		04/15/1998		Alien ID	
		03/20/1998		Alien ID	
		03/20/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/17/1998		Alien ID	
		02/18/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/17/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		02/23/1998		Alien ID	
		03/24/1998		Alien ID	
		03/16/1998		Alien ID	
		03/09/1998		Alien ID	
		03/02/1998		Alien ID	
		02/19/1998		Alien ID	
		01/21/1998		Alien ID	
		01/22/1998		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		01/26/1998		Alien ID	
		01/16/1998		Alien ID	
		12/01/1997		Alien ID	
		01/20/1998		Alien ID	
		12/31/1997		Alien ID	
		12/19/1997		Alien ID	
		01/06/1998		Alien ID	
		01/05/1998		Alien ID	
		01/20/1998		Alien ID	
		01/20/1998		Alien ID	
		01/20/1998		Alien ID	
		01/08/1998		Alien ID	
		12/31/1997		Alien ID	
		12/19/1997		Alien ID	
		12/17/1997		Alien ID	
		01/20/1998		Alien ID	
		12/19/1997		Alien ID	
		01/06/1998		Alien ID	
		12/19/1997		Alien ID	
		12/18/1997		Alien ID	
		12/23/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/15/1997		Alien ID	
		12/10/1997		Alien ID	
		12/05/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/09/1997		Alien ID	
		12/09/1997		Alien ID	
		12/22/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/18/1997		Alien ID	
		12/15/1997		Alien ID	
		11/21/1997		Alien ID	
		11/21/1997		Alien ID	
		11/21/1997		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		10/22/1997		Alien ID	
		11/25/1997		Alien ID	
		11/21/1997		Alien ID	
		11/26/1997		Alien ID	
		11/20/1997		Alien ID	
		11/20/1997		Alien ID	
		11/21/1997		Alien ID	
		11/14/1997		Alien ID	
		11/05/1997		Alien ID	
		11/06/1997		Alien ID	
		11/10/1997		Alien ID	
		11/06/1997		Alien ID	
		11/10/1997		Alien ID	
		11/07/1997		Alien ID	
		11/06/1997		Alien ID	
		11/06/1997		Alien ID	
		10/17/1997		Alien ID	
		10/14/1997		Alien ID	
		10/14/1997		Alien ID	
		10/14/1997		Alien ID	
		10/01/1997		Alien ID	
		09/26/1997		Alien ID	
		09/26/1997		Alien ID	
		09/26/1997		Alien ID	
		09/26/1997		Alien ID	
		09/26/1997		Alien ID	
		09/23/1997		Alien ID	
		09/15/1997		Alien ID	
		09/15/1997		Alien ID	
		09/15/1997		Alien ID	
		09/15/1997		Alien ID	
		09/15/1997		Alien ID	
		09/15/1997		Alien ID	
		09/12/1997		Alien ID	
		09/15/1997		Alien ID	
		09/30/1997		Alien ID	
		09/03/1997		Alien ID	
		09/15/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		08/27/1997		Alien ID	
		08/27/1997		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		08/27/1997		Alien ID	
		09/05/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		08/27/1997		Alien ID	
		08/27/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		09/03/1997		SSAN	
		08/27/1997		Alien ID	
		08/27/1997		Alien ID	
		08/27/1997		Alien ID	
		09/04/1997		Alien ID	
		09/04/1997		Alien ID	
		08/27/1997		Alien ID	
		05/30/1997		Alien ID	
		08/08/1997		Alien ID	
		07/18/1997		Alien ID	
		07/17/1997		Alien ID	
		07/16/1997		Alien ID	
		07/14/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		07/01/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		06/24/1997		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		06/24/1997		Alien ID	
		06/24/1997		Alien ID	
		07/03/1997		Alien ID	
		06/27/1997		Alien ID	
		06/25/1997		Alien ID	
		06/24/1997		Alien ID	
		06/19/1997		Alien ID	
		06/05/1997		Alien ID	
		06/16/1997		Alien ID	
		06/12/1997		Alien ID	
		06/12/1997		Alien ID	
		06/09/1997		Alien ID	
		06/09/1997		Alien ID	
		06/05/1997		Alien ID	
		06/05/1997		Alien ID	
		06/05/1997		Alien ID	
		06/17/1997		Alien ID	
		05/28/1997		Alien ID	
		05/28/1997		Alien ID	
		05/28/1997		Alien ID	
		05/30/1997		Alien ID	
		05/23/1997		Alien ID	
		04/30/1997		Alien ID	
		04/29/1997		Alien ID	
		04/29/1997		Alien ID	
		05/14/1997		Alien ID	
		05/14/1997		Alien ID	
		05/05/1997		Alien ID	
		04/29/1997		Alien ID	
		04/29/1997		Alien ID	
		04/29/1997		Alien ID	
		04/29/1997		Alien ID	
		04/30/1997		Alien ID	
		04/29/1997		Alien ID	
		04/29/1997		Alien ID	
		05/02/1997		Alien ID	
		05/02/1997		Alien ID	
		04/30/1997		Alien ID	
		05/14/1997		Alien ID	
		04/17/1997		Alien ID	
		04/10/1997		Alien ID	
		03/31/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/21/1997		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		03/18/1997		Alien ID	
		04/04/1997		Alien ID	
		04/01/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/27/1997		Alien ID	
		03/20/1997		Alien ID	
		03/19/1997		Alien ID	
		03/13/1997		Alien ID	
		02/14/1997		Alien ID	
		02/13/1997		Alien ID	
		02/13/1997		Alien ID	
		02/13/1997		Alien ID	
		02/12/1997		Alien ID	
		02/20/1997		Alien ID	
		02/20/1997		Alien ID	
		02/14/1997		Alien ID	
		02/12/1997		Alien ID	
		02/10/1997		Alien ID	
		02/20/1997		Alien ID	
		02/13/1997		Alien ID	
		02/20/1997		Alien ID	
		02/20/1997		Alien ID	
		02/14/1997		Alien ID	
		02/13/1997		Alien ID	
		02/12/1997		Alien ID	
		02/10/1997		Alien ID	
		02/26/1997		Alien ID	
		01/27/1997		Alien ID	
		02/03/1997		Alien ID	
		01/27/1997		Alien ID	
		01/24/1997		Alien ID	
		01/21/1997		Alien ID	
		12/27/1996		Alien ID	
		12/24/1996		Alien ID	
		01/24/1997		Alien ID	
		02/05/1997		Alien ID	
		01/13/1997		Alien ID	
		12/30/1996		Alien ID	
		01/02/1997		Alien ID	
		12/30/1996		Alien ID	
		12/23/1996		Alien ID	
		12/31/1996		Alien ID	
		12/20/1996		Alien ID	
		12/20/1996		Alien ID	
		12/20/1996		Alien ID	
		01/06/1997		Alien ID	
		12/30/1996		Alien ID	
		01/09/1997		Alien ID	
		12/06/1996		Alien ID	
		12/06/1996		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		12/06/1996		Alien ID	
		12/06/1996		Alien ID	
		11/26/1996		Alien ID	
		12/06/1996		Alien ID	
		12/06/1996		Alien ID	
		11/20/1996		Alien ID	
		11/06/1996		Alien ID	
		11/15/1996		Alien ID	
		11/14/1996		Alien ID	
		11/14/1996		Alien ID	
		11/14/1996		Alien ID	
		11/14/1996		Alien ID	
		11/14/1996		Alien ID	
		05/08/1996		Alien ID	
		11/14/1996		Alien ID	
		10/22/1996		Alien ID	
		10/25/1996		Alien ID	
		10/16/1996		Alien ID	
		08/27/1996		Alien ID	
		10/16/1996		Alien ID	
		11/08/1996		Alien ID	
		11/06/1996		Alien ID	
		10/11/1996		Alien ID	
		10/09/1996		Alien ID	
		10/02/1996		Alien ID	
		10/03/1996		Alien ID	
		10/03/1996		Alien ID	
		10/02/1996		Alien ID	
		09/12/1996		Alien ID	
		09/25/1996		Alien ID	
		09/24/1996		Alien ID	
		09/23/1996		Alien ID	
		09/23/1996		Alien ID	
		09/13/1996		Alien ID	
		05/03/1996		Alien ID	
		09/25/1996		Alien ID	
		09/24/1996		Alien ID	
		09/13/1996		Alien ID	
		09/12/1996		Alien ID	
		09/12/1996		Alien ID	
		08/30/1996		Alien ID	
		09/27/1996		Alien ID	
		09/26/1996		Alien ID	
		09/25/1996		Alien ID	
		08/29/1996		Alien ID	
		09/16/1996		Alien ID	
		09/16/1996		Alien ID	
		08/20/1996		Alien ID	
		06/19/1996		Alien ID	
		08/08/1996		Alien ID	
		08/19/1996		Alien ID	
		09/09/1996		Alien ID	
		09/06/1996		Alien ID	

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Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		08/30/1996		Alien ID	
		07/23/1996		Alien ID	
		08/05/1996		Alien ID	
		08/19/1996		Alien ID	
		07/05/1996		Alien ID	
		07/15/1996		Alien ID	
		07/16/1996		Alien ID	
		07/10/1996		Alien ID	
		06/26/1996		Alien ID	
		06/17/1996		Alien ID	
		06/10/1996		Alien ID	
		05/07/1996		Alien ID	
		05/10/1996		Alien ID	
		05/10/1996		Alien ID	
		05/10/1996		Alien ID	
		04/26/1996		SSAN	
		05/08/1996		Alien ID	
		05/03/1996		Alien ID	
		04/19/1996		Alien ID	
		03/26/1996		Alien ID	
		04/10/1996		Alien ID	
		04/02/1996		Alien ID	
		03/08/1996		Alien ID	
		02/26/1996		Alien ID	
		03/01/1996		Alien ID	
		03/02/1995		Alien ID	
		11/02/1995		Alien ID	
		10/19/1995		Alien ID	
		09/05/1995		Alien ID	
		09/29/1995		Alien ID	
		08/14/1995		Alien ID	
		08/11/1995		Alien ID	
		07/20/1995		Alien ID	
		07/20/1995		Alien ID	
		07/13/1995		Alien ID	
		06/26/1995		Alien ID	
		07/05/1995		Alien ID	
		07/03/1995		Alien ID	
		06/30/1995		Alien ID	
		06/30/1995		Alien ID	
		06/30/1995		Alien ID	
		06/30/1995		Alien ID	
		07/10/1995		Alien ID	
		07/07/1995		Alien ID	
		07/05/1995		Alien ID	
		06/30/1995		Alien ID	
		07/13/1995		Alien ID	
		06/20/1995		Alien ID	
		06/19/1995		Alien ID	
		06/12/1995		Alien ID	
		06/12/1995		Alien ID	
		12/21/1994		Alien ID	
		05/26/1995		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		06/08/1995		Alien ID	
		06/08/1995		Alien ID	
		06/08/1995		Alien ID	
		06/08/1995		Alien ID	
		05/23/1995		Alien ID	
		05/22/1995		Alien ID	
		05/05/1995		Alien ID	
		05/12/1995		Alien ID	
		05/11/1995		Alien ID	
		05/05/1995		Alien ID	
		05/05/1995		Alien ID	
		05/23/1995		Alien ID	
		05/22/1995		Alien ID	
		05/22/1995		Alien ID	
		05/19/1995		Alien ID	
		05/18/1995		Alien ID	
		05/05/1995		Alien ID	
		06/02/1995		Alien ID	
		05/05/1995		Alien ID	
		03/02/1995		Alien ID	
		02/28/1995		Alien ID	
		02/28/1995		Alien ID	
		02/23/1995		Alien ID	
		03/10/1995		Alien ID	
		02/27/1995		Alien ID	
		02/23/1995		Alien ID	
		02/24/1995		Alien ID	
		02/24/1995		Alien ID	
		02/24/1995		Alien ID	
		02/24/1995		Alien ID	
		02/17/1995		Alien ID	
		01/12/1995		Alien ID	
		11/03/1994		Alien ID	
		10/03/1994		Alien ID	
		08/26/1993		Alien ID	
		09/16/1993		Alien ID	
		09/13/1993		Alien ID	
		08/18/1993		Alien ID	
		09/16/1993		Alien ID	
		09/14/1993		Alien ID	
		09/08/1993		Alien ID	
		08/27/1993		Alien ID	
		08/26/1993		Alien ID	
		09/15/1993		Alien ID	
		09/14/1993		Alien ID	
		09/14/1993		Alien ID	
		03/12/1993		Alien ID	
		02/10/1993		Alien ID	
		02/11/1993		Alien ID	
		03/23/1993		Alien ID	
		03/01/1993		Alien ID	
		02/22/1993		Alien ID	
		02/19/1993		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		03/04/1993		Alien ID	
		02/23/1993		Alien ID	
		02/19/1993		Alien ID	
		02/23/1993		Alien ID	
		02/18/1993		Alien ID	
		02/10/1993		Alien ID	
		02/10/1993		Alien ID	
		03/10/1993		Alien ID	
		02/22/1993		Alien ID	
		02/22/1993		Alien ID	
		02/08/1993		Alien ID	
		02/08/1993		Alien ID	
		02/04/1993		Alien ID	
		02/03/1993		Alien ID	
		02/03/1993		Alien ID	
		02/09/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/03/1993		Alien ID	
		01/27/1993		Alien ID	
		02/08/1993		Alien ID	
		02/08/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/03/1993		Alien ID	
		02/03/1993		Alien ID	
		02/08/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/04/1993		Alien ID	
		02/03/1993		Alien ID	
		09/09/1992		Alien ID	
		09/09/1992		Alien ID	
		09/04/1992		Alien ID	
		06/11/1992		Alien ID	
		03/04/1992		Alien ID	
		12/05/1991		SSAN	
		10/23/1991		Alien ID	
		08/20/1991		Alien ID	
		07/30/1991		Alien ID	
		03/25/1991		Alien ID	
		03/15/1991		Alien ID	
		03/13/1991		Alien ID	
		03/05/1991		Alien ID	
		03/04/1991		Alien ID	
		02/13/1991		Alien ID	
		01/28/1991		Alien ID	
		11/16/1990		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
9th Circuit		08/30/1990		SSAN	
		09/13/1989		SSAN	
		04/05/1989		Alien ID	
		05/05/1986		SSAN	
		01/06/1986		Alien ID	
		06/12/1985		SSAN	
		05/31/1985		Alien ID	
		08/28/1984		Alien ID	
		01/05/1984		Alien ID	
		02/14/1984		Alien ID	
		04/10/1984		Alien ID	
		07/11/1983		SSAN	
		08/19/1982		SSAN	
		08/19/1982		SSAN	
		01/28/1982		SSAN	
		02/19/1981		Alien ID	
		06/04/1980		Alien ID	
		08/02/1979		SSAN	
		06/27/1978		Alien ID	
		11/11/1977		SSAN	
		07/10/1975		SSAN	
		11/29/1974		SSAN	
		11/11/1971		SSAN	
		11/05/1999		Alien ID	
10th Circuit		02/10/2004		Alien ID	Yes
		04/11/2003		Alien ID	Yes
		07/25/2001		Alien ID	Yes
		04/06/2001		Alien ID	Yes
		02/26/2001		Alien ID	Yes
		01/19/2001		Alien ID	Yes
		10/05/2000		SSAN	Yes
		06/02/2000		Alien ID	Yes
		12/15/1999		SSAN	Yes
		11/08/1999		Alien ID	Yes
		03/01/1999		Alien ID	Yes
		12/31/1998		Alien ID	Yes
		01/07/1998		Alien ID	Yes
		07/28/1997		Alien ID	Yes
		07/28/1997		Alien ID	Yes
		07/01/1997		Alien ID	Yes
		06/05/1997		Alien ID	Yes
		06/05/1997		Alien ID	Yes
		03/03/1997		Alien ID	Yes
		01/27/1997		SSAN	Yes
		08/30/1996		SSAN	Yes
		08/08/1996		Alien ID	Yes
		04/30/1996		Alien ID	Yes
		03/04/1996		Alien ID	
		03/26/1996		Alien ID	
		03/12/1996		Alien ID	
		01/16/1996		Alien ID	
		01/16/1996		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
10th Circuit		08/25/1995		Alien ID	
		05/30/1995		Alien ID	
		05/03/1995		Alien ID	
		02/27/1995		Alien ID	
		02/13/1995		Alien ID	
		09/27/1994		Alien ID	
		05/02/1994		Alien ID	
		06/23/1993		SSAN	
		10/09/1991		SSAN	
		09/04/1987		SSAN	
		03/21/1985		SSAN	
		10/09/1984		SSAN	
11th Circuit		01/04/2007		Alien ID	Yes
		08/25/2006		Alien ID	Yes
		05/05/2006		Alien ID	Yes
		10/18/2004		Alien ID	Yes
		04/16/2004		SSAN	Yes
		01/13/2003		Alien ID	Yes
		05/21/2002		Alien ID	Yes
		01/30/2002		SSAN	Yes
		01/02/2002		Alien ID	Yes
		12/19/2001		Alien ID	Yes
		09/10/2001		Alien ID	Yes
		07/19/2001		Alien ID	Yes
		07/18/2001		Alien ID	Yes
		07/12/1999		Alien ID	Yes
		01/29/1999		Alien ID	Yes
		12/15/1998		Alien ID	Yes
		12/22/1998		Alien ID	Yes
		08/18/1998		Alien ID	
		12/02/1997		Alien ID	Yes
		01/31/1997		Alien ID	
		01/31/1997		Alien ID	
		12/27/1996		Alien ID	
		12/31/1996		Alien ID	
		12/20/1996		Alien ID	
		12/18/1996		Alien ID	
		11/14/1996		Alien ID	
		11/14/1996		Alien ID	
		11/13/1996		Alien ID	
		11/01/1996		Alien ID	
		10/31/1996		SSAN	
		10/29/1996		Alien ID	
		08/12/1996		Alien ID	
		08/08/1996		Alien ID	
		08/29/1996		Alien ID	
		08/21/1996		Alien ID	
		07/25/1996		Alien ID	
		07/24/1996		Alien ID	
		07/11/1996		Alien ID	
		07/08/1996		Alien ID	

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
11th Circuit		05/22/1996		Alien ID	
		05/14/1996		Alien ID	
		05/10/1996		Alien ID	
		03/26/1996		Alien ID	
		01/16/1996		Alien ID	
		12/11/1995		Alien ID	
		12/06/1995		Alien ID	
		12/04/1995		Alien ID	
		11/21/1995		Alien ID	
		11/08/1995		Alien ID	
		11/07/1995		Alien ID	
		10/18/1995		Alien ID	
		09/26/1995		Alien ID	
		09/13/1995		Alien ID	
		06/19/1995		Alien ID	
		06/22/1995		Alien ID	
		05/19/1995		Alien ID	
		05/12/1995		Alien ID	
		05/12/1995		Alien ID	
		04/28/1995		Alien ID	
		04/24/1995		Alien ID	
		06/07/1995		SSAN	
		03/27/1995		Alien ID	
		03/27/1995		Alien ID	
		03/17/1995		Alien ID	
		03/13/1995		Alien ID	
		02/07/1995		Alien ID	
		01/27/1995		Alien ID	
		01/09/1995		Alien ID	
		11/28/1994		Alien ID	
		11/08/1994		Alien ID	
		09/17/1993		SSAN	
		04/08/1992		SSAN	
		09/09/1991		SSAN	
		08/26/1991		Alien ID	
		04/24/1991		SSAN	
		03/11/1991		SSAN	
		02/21/1991		SSAN	
		11/02/1988		SSAN	
		06/16/1988		SSAN	
		09/22/1987		SSAN	
		03/18/1986		SSAN	
		01/10/1986		SSAN	
		07/11/1985		Alien ID	
		12/13/1984		SSAN	
		11/30/1981		SSAN	
Court of Claims		07/20/1967		Alien ID	
DC Circuit		10/04/2000		SSAN	Yes
		01/08/1999		SSAN	Yes
		02/10/1998		Alien ID	Yes

Appendix A: Listing of U.S. Appellate Opinions Containing Personal Identifying Information

Court	National Reporter Citation	Date	Docket Numbers	Personal Identifier Type	On Court's Site?
DC Circuit		02/16/1993		Alien ID	
		02/04/1992		Alien ID	
		01/10/1989		Alien ID	
		08/16/1988		Alien ID	
		05/01/1987		SSAN	
		12/09/1986		SSAN	
		12/14/1984		Alien ID	
		08/04/1980		Alien ID	
		11/16/1977		SSAN	
		03/18/1977		Alien ID	
		03/10/1975		Alien ID	
		03/02/1971		SSAN	
		11/06/1970		SSAN	
Federal Circuit		02/20/1991		SSAN	
		10/13/1988		SSAN	
		07/29/1988		SSAN	
		09/03/1987		SSAN	
		05/22/1987		SSAN	
		08/02/1983		SSAN	

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Memorandum

TO : Cathie Struve, Reporter, Appellate Rules Committee

FROM : Charles R. Fulbruge III, Clerk, (504) 310-7654

DATE : October 10 ,2008

SUBJECT : Alien Registration Number Follow-up

I provide comments from the appellate clerks on your proposed memo.

a. Catherine Wolfe from the Second Circuit, which has a high number of immigration cases, notes: I agree with Marcy and Molly's comments ... In addition to their comments, I would add that there should be more analysis of the benefits and harms of the A number. The number has been in use for approximately 60 years, as I recall from one of our conference calls, and the report cites only one recorded instance of misuse. That misuse was by a federal employee, I might add.

The use of the number to accurately link government action to the correct individual - successful for the most part - for decades should be recognized by the policymakers charged with deciding whether it should be eliminated. In a basic cost/benefit analysis this tangible benefit has to be accounted for against theoretical harm that, while rational, does not seem to really exist. Also, if the number is to be redacted or eliminated a comparable system must be proposed and implemented before the old system is discarded, otherwise all too real harm will be visited upon aliens when government action is taken against the wrong individual.

Finally, immigration advocacy groups would be a more reliable source of information about the scope of this problem - or not - than Mr. Malamud.

b. Marcy Waldron from the Third Circuit comments:

A few observations about the memo. I agree that what the BIA does is beyond the scope of our authority, but it might be worth a footnote that they don't seem to have any problem putting it on some of their opinions or giving it out when you call their automated system and put your name in. One complaint I recall mentioned that he was being deported and that having the opinion with his A number on it could subject him to reprisals at home just for having applied for asylum.

I also think it would be good to include the problems Molly has encountered [people being improperly deported because the A number was not available], and the newspaper item [Washington Post, October, 5, 2008] someone mentioned about people being detained because of not being able to identify the A number.

Any solution must be forward looking. I do not want to have to go back and redact stuff already filed or old opinions. As I recall, this Public Resources.Org guy wants us to do that. Also, if I recall correctly, he wants us to leave the A number off so that he won't have to do the work of redaction before he puts things on his web site.

In a later e-mail, Marcy added another thought: I would not like a system that says we include the A numbers on certain immigration matters and not in others. For me, it is easier to have an all or nothing approach. Redacting only on asylum cases or only on asylum cases dealing with hardship, torture, etc., will only lead to mistakes

c. Molly Dwyer of the Ninth Circuit offers the following: In terms of the memo ... I suspect that the likelihood of identity theft using A numbers is overblown, as is the likelihood that someone would track down someone else to do them harm based on the use of an A number. I await the government's response - if they devise another numbering system, great. We will use it. If someone comes up with an easy way to input the whole number in a searchable format but only show the last 4 digits publically, great. Meanwhile has any group representing immigration petitioners been queried about all this? I find it a bit odd that they haven't seemed all that interested in the issue. If any party to an immigration case asked us to

redact the number, we would. As Marcy points out [Mr.] Malamud seems to be more interested in having us do his redaction work for him.

d. In general I agree that more empirical study needs to be given, and the views of the immigration and DOJ constituencies solicited and considered carefully. Likewise, and solution must be forward looking.

As for the chart itself, the information is unchanged for the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits.

The Fourth Circuit puts the A number on the docket, orders, judgments, notices, most party filings, but not on opinions. The Fifth has made no changes yet, but the matter of putting the A number on all opinions, not just unpublished ones, may be considered by our court at its retreat next week. The Sixth Circuit uses the A number on the docket as case opening, but not elsewhere. I have a call in to the Eleventh Circuit chief deputy, and have received a note from the First Circuit clerk who advises he has been out of town but will respond ASAP. Nothing yet from the D.C. or Federal Circuit.

Sincerely,

Fritz Fulbruge

TAB VI-H

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-G

Proposed amendments designed to conform Appellate Form 4 to the privacy rules[1] have been published for comment (comments are due by February 17, 2009).[2] At the time that it decided to request permission to publish those proposed amendments, the Committee noted that, in the future, it would also consider other changes to Form 4. For one thing, an effort is underway to restyle all the forms. More substantively, participants in the Committee's fall 2007 meeting noted that Form 4 requires a lot of detail. Not all in forma pauperis (IFP) applications require so much detail; for example, a much simpler form might be appropriate in the habeas context. In addition, the Committee noted that it will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments.

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[1] The privacy rules which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). The Administrative Office ("AO") has made interim changes to the version of Form 4 that is posted on the AO's website, but those interim changes do not remove the need to amend the official version of Form 4 to conform to the privacy requirements.

[2] The proposed amendments would make the following changes in the Form:

7. *State the persons who rely on you or your spouse for support.*
Name [or, if under 18, initials only] Relationship Age
_____ _____ ____

* * * * *

13. *State the ~~address~~ city and state of your legal residence.*
_____
Your daytime phone number: (____) _____
Your age: _____ Your years of schooling: _____
~~Your~~ Last four digits of your social-security number: _____

The purpose of this memo is to update the Committee on developments since the time of the Committee's Spring 2008 meeting. Part I of this memo summarizes the actions taken by the Forms Working Group of judges and clerks when it met on October 15, 2008. Part II of the memo notes that the Forms Working Group would like to obtain the Appellate Rules Committee's guidance on the question of whether to adopt a fill-in form version of Form 4; Part II also notes that in the meantime, the courts of appeals have addressed this need by adopting their own electronic versions of Form 4. Part III notes a policy question concerning amendments to Forms: Should such amendments be accompanied by a Committee Note? If so, then the Committee may wish to consider adding a Note to the currently pending Form 4 proposals when the Committee considers those proposals at its Spring 2009 meeting. Part IV notes issues – such as those concerning Question 10 – which the Committee may wish to address as it continues its consideration of Form 4.

I. Actions taken by the Forms Working Group

At its October 15, 2008, meeting, the Forms Working Group approved a revised version of Form AO 240 and also approved a newly created form AO 239. The versions approved by the Forms Working Group are enclosed. Timothy Dole, an attorney in the AO Rules Committees Support Office, explains that new Form AO 239 was created "to address judges' concerns that although AO 240 was adequately detailed for prisoner litigation, a longer IFP application form, similar to Form 4, was needed for non-prisoner litigation in district court."

A. Revised Form AO 240 and new Form AO 239

Form AO 240 is a "Short Form" for use in connection with applications to proceed IFP in the district court. Many of the changes to Form AO 240 approved by the Forms Working Group are stylistic. The more notable changes include the following. The revised Form no longer refers to 28 U.S.C. § 1915. In item 2, it no longer asks an unemployed applicant for information about the person's last employment (but, to the extent that information would be relevant to the application, it would be elicited by Question 3 concerning "other income"). The revised Form adds new questions (numbered 6 and 8) concerning expenses and debts. The revised Form complies with the new privacy rules by not seeking the full names of minor dependents. And the revised Form adds to the closing declaration the statement that "I ... understand that a false statement may result in the dismissal of my claims."

Form AO 239 is a "Long Form" which is very similar to Appellate Form 4. The two forms are, however, distinct. Form AO 239 seeks to make this fact clear by means of its title, which is "Application to Proceed **in District Court** Without Prepaying Fees or Costs" (emphasis added). The next part of this memo compares the two forms.

B. Comparing new Form AO 239 to Appellate Form 4

If AO 239 and Form 4 were substantively the same in all material respects, it might seem desirable to consolidate the forms so that the district courts and courts of appeals could use a single form for all purposes. However, there are some differences, including one quite substantive difference.

Some differences may not be consequential. AO 239's "affidavit," unlike Form 4, includes a statement (similar to revised AO Form 240's) that "I ... understand that a false statement may result in a dismissal of my claims." Unlike Form 4, AO 239's affidavit does not cite 28 U.S.C. § 1746[3] and 18 U.S.C. § 1621.[4] It may well be that these references are not essential, given that many applicants would not look the statutes up and given that (I would guess) perjury prosecutions for false statements on an IFP application are rare to nonexistent. But before concluding that the difference is immaterial I would want to investigate why the statutory references were included in Form 4.

Another difference between Form AO 239 and Form 4 is that Form 4's inquiry (in Question 12) why the applicant cannot pay "the docket fees for your appeal" has been replaced, in Form AO 239, with the more general question why the applicant cannot pay "the costs of these proceedings." This difference, of course, stems from the fact that AO 239 is intended for use in connection with applications to proceed IFP in the district court.

The most substantive difference between AO 239 and Form 4 is that Form 4 directs the applicant to state the applicant's issues on appeal. The use of a form that does not ask the applicant to state his or her issues on appeal could be problematic when an applicant is seeking permission to proceed IFP on appeal to the court of appeals. Appellate Rule 24(a)(1) requires the applicant to attach to his or her motion an affidavit that, inter alia, "states the issues that the party intends to present on appeal." It is true that this information might appear elsewhere in some submission by the applicant, but that is not assured. After all, at the time that the applicant seeks IFP status in connection with the appeal, he or she may not have filed any other appeal-related items other than the notice of appeal. And the notice of appeal need not specify the issues on appeal – it need merely designate the judgment or order appealed from.[5] The court needs to know what the issues on appeal will be in order to apply the standard for permission to proceed IFP, which requires inter alia that there be a nonfrivolous or colorable issue on appeal.[6]

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[3] Section 1746 permits an unsworn declaration to be used instead of an affidavit.

[4] Section 1621 criminalizes perjury and sets the penalties for it.

[5] By contrast, when one petitions the Supreme Court for certiorari review one must, in the petition, specify the questions presented – which explains why the Supreme Court's IFP form does not request a statement of issues.

[6] I suppose also that if it is not clear what issues are involved in the appeal, that might additionally raise issues with respect to 28 U.S.C. § 1915(a), which requires that the applicant's affidavit "state the nature of the … appeal and affiant's belief that the person is entitled to

II. Electronic versions of Form 4 (and similar forms used by the circuits)

The AO has posted WordPerfect and Word-compatible versions of Form 4 on the www.uscourts.gov website.[7] However, Timothy Dole points out that it could be helpful to post a text-fillable PDF version on the public judiciary forms page.[8] Tim's research shows that many of the courts of appeals provide an electronic version of Form 4. My quick analysis of the circuits (based largely on the documents found at the links provided by Tim) is set forth in the appendix to this memo.

As shown in the appendix, each circuit currently provides an electronic document, on the court's website, which serves as that circuit's version of (or substitute for) Form 4. Not all the circuits provide a text-fillable PDF version of the relevant form, so it seems likely that a text-fillable version of Form 4 would be useful. I would suggest that the Committee consider recommending that the AO prepare a text-fillable version of Form 4 which incorporates (on an interim basis) the changes that are currently out for comment.

Another reason why a text-fillable version of Form 4 might be useful is that it could assist the circuits in employing a form that is up-to-date. As noted in the appendix, despite Fritz Fulbruge's excellent work in disseminating to his colleagues the news of the privacy rules' implications for Form 4, not all circuits have removed from their forms both the request for full names of minor dependents and the request for the applicant's social security number.

In addition, many circuits still request the full address of the applicant's legal residence, which is technically inappropriate in cases governed by Criminal Rule 49.1. Admittedly, when the applicant is currently incarcerated, as many defendants involved in criminal appeals will be, the applicant's residence – i.e., the institution in which the applicant is incarcerated – will presumably be a matter of public record anyway. But this will not be true of a non-incarcerated defendant appealing the imposition of a criminal fine.[9]

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redress."

[7] See http://www.uscourts.gov/rules/apforms2.htm.

[8] That page is available at http://www.uscourts.gov/forms/uscforms.cfm?ShowAll=Yes.

[9] It is also true that Criminal Rule 49.1's 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 (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.

I notice as well that many of the circuits' forms, when directing prisoners to provide their prison trust account statements, do not limit that directive (as Form 4 does) to appeals in "civil action[s] or proceeding[s]." I presume that the basis for the forms' directive is 28 U.S.C. § 1915(a)(2), which provides:

> A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

Judging from Section 1915(a)(2), Form 4's limitation of this directive to "a judgment in a civil action or proceeding" seems reasonable. On the other hand, perhaps the premise of the circuits which do not so limit the directive is that the limitation would be needlessly confusing. If the appellant is a criminal defendant who was determined to be financially unable to employ counsel, Rule 24(a)(3) permits that party to proceed on appeal IFP "without further authorization" unless the district court (stating its reasons in writing) certifies the appeal as not taken in good faith or finds that the party is not otherwise entitled to proceed IFP. So perhaps the experience of the courts of appeals is that the great majority of IFP applications under Rule 24 are applications by litigants in civil cases.

One final point that may be worth noting about the circuit-specific forms is that many of them (e.g., those used by the Sixth, Seventh, Ninth, Tenth, Eleventh, D.C. and Federal Circuits) are captioned with the name of the court of appeals. In this respect these forms differ from Form 4, which is captioned with the name of the relevant district court. Form 4 presumably uses the district court because, under Rule 24(a)(1), the motion to proceed IFP on appeal is to be made, in the first instance, in the district court.

III. Committee Notes for Forms

As the Committee is aware, the proposed amendment to Form 4 that is currently out for comment does not include a Committee Note. The reason I had not included one, in the version which I submitted to the Committee for its consideration, is that the Appellate Rules' forms do not ordinarily seem to have Committee Notes. I have found only one such note, concerning the 2002 adoption of Form 6, and it states only: "Changes Made After Publication and Comments[:] No changes were made to the text of the proposed amendment or to the Committee Note."

As a practical matter, for purposes of public comment the rationale for the proposed Form 4 amendments is nicely summarized in the AO's Brochure (which has been distributed with the hard copies of the proposed amendments and posted on the AO's website). The rationale for the proposals is also explained in the excerpts of Judge Stewart's report to the

Standing Committee which are included among the materials published for comment. Thus, for the purposes of publication the functions which would be served by a Note are already served by the published materials taken as a whole.

However, it would be useful to obtain the sense of the Committee (informed by the guidance of other participants in the Committee's meeting) concerning the general policy to be pursued when amending Forms. If such amendments should be accompanied by Committee Notes, a proposed Note can be included in the draft that will be proffered to the Committee in preparation for the Spring 2009 meeting.

IV. Additional issues

One issue which the Committee may wish to consider, on an ongoing basis, has to do with the relationship among the various forms in use in the district courts, the courts of appeals, and the Supreme Court. IFP requests at those three levels are inter-related both in terms of the procedure for making the request and in terms of the substantive standards which apply; but the specifics of practice relating to IFP requests may well vary among the different courts.

Another issue has to do with Question 10 on current Form 4. Professor Coquillette has noted that the Committee may wish to consider revising that question, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. Professor Coquillette stated that the National Association of Criminal Defense Lawyers has argued that these questions seek information that is protected by the attorney-client privilege; he noted that some other commentators dispute that view. More recently, in connection with the Forms Working Group's publication of proposed new Form AO 239, the Working Group received comments from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts, who state:

> [W]e are concerned with the specific information solicited by questions 10 and 11 related to a litigant's payment of money towards the services of an attorney and/or paralegal. These questions single out indigent litigants by requiring them to publically disclose whether legal advice was sought, and if so, from whom. This could have a negative impact on the indigent litigants efforts to prosecute their case - particularly when this information is available to opposing counsel and could be used in formulating litigation strategies. Perhaps a more generic question could be asked instead which would simply ask whether funds have been or will be used in the prosecution of the litigation for costs or attorney's fees.

A consideration of these and similar concerns might involve assessment of (1) the extent to which attorney-client privileged information might be at issue; (2) the extent to which, even if not privileged, the information might be such that its disclosure could disadvantage the applicant; and (3) the extent to which the request for information might be rephrased so as to elicit the facts pertinent to the IFP request while limiting any such disadvantage to the applicant.

I did not have time to perform such an analysis in preparation for the fall meeting, but this is an issue which I can address in preparation for the Committee's Spring 2009 meeting.

Encls.

Appendix: Electronic IFP forms currently in use in the circuits[10]

- First Circuit:
  - PDF (non-fill-in) version of Form 4. Appears to be the current version of Form 4, except that it does not request a social security number. Also, in its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."
  - Privacy issues: requests full names of minor dependents. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.
  - Available at http://www.ca1.uscourts.gov/files/forms/form4.pdf.
- Second Circuit:
  - PDF (non-fill-in) version of Form 4. Appears to be the current version of Form 4, except that in its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."
  - Privacy issues: requests full names of minor dependents and applicant's full social security number. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.
  - Available at http://www.ca2.uscourts.gov/Docs/Forms/FormaPauperis.pdf.
- Third Circuit:
  - PDF (non-fill-in) version of Form 4. Appears to be the current version of Form 4, except that:
    - The form requests both the case number below and the appeal number.
    - In its directive to prisoners to provide their prison trust account

[10] This appendix presents my rough analysis of the circuits' forms. In the interests of time I did not perform a line-by-line comparison of those forms to Appellate Form 4. Thus, this appendix is not designed as a comprehensive analysis, but rather as an overview of some relevant issues.

statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."

- Question 8 does not specifically ask (as Form 4 does) about motor vehicle installment payments.

- The form does not request the applicant's social security number.

○ Privacy issues: requests full names of minor dependents. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.

○ Available at http://www.ca3.uscourts.gov/internet/Forms%20and%20Information%20Sheets/Case%20Opening%20to%20Issuance%20of%20Briefing%20Schedule/IFP04.pdf.

- Fourth Circuit:

○ PDF (partly fill-in) version of Form 4. Appears to be the current version of Form 4, except that:

- In its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."

- In the query concerning dependents, the form asks only for initials rather than full names.

- The form omits question 13 (address, phone, age, schooling, social security number).

○ Privacy issues: none.

○ Available at http://www.ca4.uscourts.gov/pdf/IFPapp.pdf.

- Fifth Circuit:

○ PDF (non-fill-in) version of Form 4. Appears to be the current version of Form 4, except that:

- In its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."

- In Question 13 the form requests only the city and state of the applicant's legal residence, and only the last four digits of the applicant's social security number.

  - Privacy issues: requests full names of minor dependents.

  - Available at http://www.ca5.uscourts.gov/clerk/docs/frap2007.pdf.

- Sixth Circuit:

  - PDF fill-in version of Form 4. Appears to be the current version of Form 4, except that:

    - In its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."

    - The form does not request the applicant's social security number.

  - Privacy issues: requests full names of minor dependents. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.

  - Available at http://www.ca6.uscourts.gov/Internet/forms/ifp/form4.pdf

- Seventh Circuit:

  - PDF (non-fill-in) version of Form 4. Appears to be the current version of Form 4, except that:

    - The form requests the district judge's name.

    - In its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."

  - Privacy issues: requests full names of minor dependents and applicant's full social security number. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.

  - Available at: http://www.ca7.uscourts.gov/forms/pauperis.pdf

- Eighth Circuit:

- PDF fill-in version of Form 4. Appears to be the current version of Form 4, except that:

  - The form requests both the case number below and the appeal number.

  - In its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."

- Privacy issues: requests full names of minor dependents and applicant's full social security number. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.

- Available at: http://www.ca8.uscourts.gov/newcoa/forms/ifpFill.pdf

- Ninth Circuit:

  - PDF fill-in version of Form 4. Appears to be the current version of Form 4, except that:

    - In its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]."

    - The form requests only the initials of minor dependents, only the last four digits of the applicant's social security number, and only the city and state of the applicant's legal residence.

  - Privacy issues: none.

  - Available at: http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/144acda0d770e1cb88256bc300757a61?OpenDocument

- Tenth Circuit:

  - PDF (fill-in version), WordPerfect and Word versions. The Tenth Circuit provides two forms, one for civil cases not covered by the Prison Litigation Reform Act, and one for cases covered by the PLRA.

  - Non-PLRA civil cases:

- This form requests basically the same information as Form 4, but the Tenth Circuit form puts the questions in a somewhat different order and requests some additional information.

    - Question 3 on the Tenth Circuit form requests information concerning the applicant's last employment, if unemployed.

    - Question 9 (which is the rough equivalent of Form 4's Question 8) requests some additional information (charitable contributions, and support payments for dependents not living at home).

    - Question 14 asks how much the applicant can pay each month toward the docket fee for the appeal.

- Privacy issues: requests full names of minor dependents and applicant's full social security number.

- Available at: http://www.ca10.uscourts.gov/downloads/a14ifpcv.pdf.

○ PLRA cases:

- The Tenth Circuit form for use in PLRA cases is similar to the Tenth Circuit's non-PLRA form, except that it also includes information specific to the PLRA – including an addendum containing a certification about the prisoner's trust account and an authorization to deduct funds from that account.

- Privacy issues: requests full names of minor dependents and applicant's full social security number.

- Available at: http://www.ca10.uscourts.gov/downloads/a-13ifp.pdf.

● Eleventh Circuit:

○ PDF (fill-in) version of Form 4. Appears to be the current version of Form 4, except that the form leaves very little room for the applicant to state the issues on appeal.

○ Privacy issues: requests full names of minor dependents and applicant's full social security number. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.

○ Available at: http://www.ca11.uscourts.gov/documents/pdfs/form4.pdf.

- D.C. Circuit:
  - PDF (non-fill-in) version of Form 4. Appears to be the current version of Form 4, except that:
    - The document includes a form for the motion as well as the affidavit.
    - The form adds a question (Question 7) asking about any indebtedness of the applicant or the applicant's spouse.
    - The form does not request the applicant's social security number.
  - Privacy issues: requests full names of minor dependents. Also, as discussed in the memo, the form's request for the full address of the applicant's legal residence would raise an issue in criminal appeals involving non-incarcerated defendants.
  - Available at: http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Motion+for+Leave+to+Proceed+on+Appeal+In+Forma+Pauperis+and+Affadavit+in+Support/$FILE/IFP+Motion+with+Affidavit.pdf
- Federal Circuit:
  - PDF (fill-in) form titled Federal Circuit Form 6. The form is similar to Form 4 but differs in the following respects:
    - The form's instructions include instructions on the timing of the motion to proceed IFP.
    - The form cites 28 U.S.C. § 1915.
    - In its directive to prisoners to provide their prison trust account statements, the form does not limit itself (as Form 4 does) to "civil action[s] or proceeding[s]." (In the Federal Circuit, however, I would think that such a limitation would be implicit.)
    - The form requests only the initials of dependents.
    - The form requests the "name and docket number" for any other case in the Federal Circuit in which the applicant has asked to proceed IFP.
    - The form does not request the applicant's social security number.

- The form directs that the declaration is made under penalty of perjury, but it does not cite 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

- Federal Circuit Form 6A is a supplemental PDF (fill-in) form to be completed by prisoners. It includes an authorization for the deduction of funds from the appellant's institutional trust account and it also includes questions relevant to the operation of the PLRA's three-strikes provision.

- Privacy issues: none.

- Available at: http://www.cafc.uscourts.gov/contents.html .

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff	)	
v.	)	Civil Action No.
_____	)	
Defendant	)	

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS
(Short Form)

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested.

In support of this application, I answer the following questions under penalty of perjury:

1. *If incarcerated.* I am being held at: _____ . If employed there, or have an account in the institution, I have attached to this document a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months for any institutional account in my name. I am also submitting a similar statement from any other institution where I was incarcerated during the last six months.

2. *If not incarcerated.* If I am employed, my employer's name and address are:

My take-home pay or wages are: $ _____ per *(specify pay period)* _____ .

3. *Other Income.* In the past 12 months, I have received income from the following sources *(check all that apply)*:

(a) Business, profession or other self-employment	❒ Yes	❒ No
(b) Rent payments, interest, or dividends	❒ Yes	❒ No
(c) Pension, annuity, or life insurance payments	❒ Yes	❒ No
(d) Disability, or worker's compensation payments	❒ Yes	❒ No
(e) Gifts, or inheritances	❒ Yes	❒ No
(f) Any other sources	❒ Yes	❒ No

If you answered "Yes" to any question above, describe below or on separate pages each source of money and state the amount that you received and what you expect to receive in the future.

4. Amount of money that I have in cash or in a checking or savings account: $ _____ .

5. Any automobile, real estate, stock, bond, security, trust, jewelry, art work, or other financial instrument or thing of value that I own, including any item of value held in someone else's name *(describe the property and its approximate value)*:

6. Any housing, transportation, utilities, or loan payments, or other regular monthly expenses *(describe and provide the amount of the monthly expense)*:

7. Names (or, if under 18, initials only) of all persons who are dependent on me for support, my relationship with each person, and how much I contribute to their support:

8. Any debts or financial obligations *(describe the amounts owed and to whom they are payable)*:

Declaration: I declare under penalty of perjury that the above information is true and understand that a false statement may result in a dismissal of my claims.

Date: _____

_____
Applicant's signature

_____
Printed name

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
Plaintiff/Petitioner	)	
v.	)	Civil Action No.
_____	)	
Defendant/Respondent	)	

APPLICATION TO PROCEED IN DISTRICT COURT WITHOUT PREPAYING FEES OR COSTS (Long Form)

Affidavit in Support of Application

I am a plaintiff or petitioner in this case and declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief requested. I declare under penalty of perjury that the information below is true and understand that a false statement may result in a dismissal of my claims.

Signed: _____

Instructions

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 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.

Date: _____

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, 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.

Assets owned by you or your spouse	
Home *(Value)*	$
Other real estate *(Value)*	$
Motor vehicle *#1 (Value)*	$
Make and year:	
Model:	
Registration #:	
Motor vehicle *#2 (Value)*	$
Make and year:	
Model:	
Registration #:	
Other assets *(Value)*	$
Other assets *(Value)*	$

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 (or, if under 18, initials only)	**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 *(including lot rented for mobile home)* Are real estate taxes included? ❒ Yes ❒ No Is property insurance included? ❒ Yes ❒ 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 costs of these proceedings.

13. Identify the city and state of your legal residence.

Your daytime phone number: _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

TAB VI-I

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-L

A pending amendment will remove an ambiguity in Rule 4(a)(4) that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). The amendment was approved by the Judicial Conference in September; if the Supreme Court approves it and Congress takes no action to the contrary, the amendment will take effect December 1, 2009. The amendment would alter Rule 4(a)(4)(B)(ii) as follows:

> 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.

As *Sorensen* explains: "The [restyled] 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 pending 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.

During the course of research this summer, I became aware of a similar ambiguity in Rule 6(b)(2)(A)(ii), dealing with the effect of motions under Bankruptcy Rule 8015 on the time to appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge **an altered or amended judgment, order, or decree** must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 ... measured from the entry of the order disposing of the motion." Before the 1998 restyling of the FRAP, the comparable subdivision of Rule 6 instead read "A party intending to challenge **an alteration or amendment of the judgment, order, or decree** shall file an amended notice of appeal …."

Part I of this memo briefly reviews the history of Rule 6(b)(2) and suggests that the Committee may wish to consider amending Rule 6(b)(2) for reasons similar to those that led the Committee to propose the pending amendment to Rule 4(a)(4)(B)(ii). Part II suggests possible language for such an amendment.

I. The history of Rule 6(b)(2)

The substance of current Rule 6(b)(2) came into the Rule in 1993, when the Rule was amended to read in relevant part:

> If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.

The Note indicates that this language was intended to track the language of Rule 4(a)(4). As amended in 1993, Rule 4(a)(4) then read in relevant part:

> If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. …. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions 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 an 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. No additional fees will be required for filing an amended notice.

Thus, prior to 1998, the relevant language in Rules 4(a)(4) and 6(b) was parallel. In 1998, the restyling condensed two of the Rule 4(a)(4) sentences into one ("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.") but the drafters did not attempt the same thing with Rule 6. The restyling also introduced into both Rule 4(a)(4) and Rule 6(b)(2) the

ambiguity mentioned above.

Accordingly, current Rule 6(b)(2)(A)(ii) reads:

> (ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

Removing the ambiguity in Rule 6(b)(2)(A)(ii) would seem to be worthwhile for the same reasons that justify the pending amendment to Rule 4(a)(4)(B)(ii). If the Committee decides to amend Rule 6(b)(2)(A)(ii), it may also wish to consider amending the provision's first sentence so that it tracks more closely the approach taken in Rule 4(a)(4)(B)(ii). Unless there is a reason for the two provisions to diverge, it seems preferable for their language to be as similar as possible. In addition, the first sentence of current Rule 6(b)(2)(A)(ii) might strike the reader as odd because it seems to assume that there has been a previously filed notice of appeal: It refers only to amending the prior notice, and not also to filing a new notice. Admittedly, common sense would dictate that if a notice has not previously been filed, one is required in order to challenge the order disposing of the Bankruptcy Rule 8015 motion. But there would seem to be no reason not to refer to both possibilities (i.e., to both filing a notice of appeal and amending a prior notice of appeal), as is currently done in Rule 4(a)(4)(B)(ii) and the second sentence of Rule 6(b)(2)(A)(ii).

II. A possible amendment to Rule 6(b)(2)(A)(ii)

In case the Committee is inclined to consider amending Rule 6(b)(2)(A)(ii), here is possible language for such an amendment:

> (ii) ~~Appellate review of~~ A party intending to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon such a motion – ~~requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal, or an amended notice of appeal, in compliance with Rules 3(c) and 6(b)(1)(B). The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and ~~4~~(b) – measured from the entry of the order disposing of the motion.

Committee Note

Subdivision (b)(2)(A)(ii). Subdivision (b)(2)(A)(ii) is amended to

address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …."

The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that 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). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii).

Rule 4(a)(4) [was amended in 2009] to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree." The amendment also revises the Rule so that it more closely parallels the language of Rule 4(a)(4)(B)(ii).

TAB VI-J

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-M

While revising volume 16A of the Federal Practice & Procedure treatise this summer, I came across an issue that might warrant the attention of the Committee. This memo briefly describes the issue. I hope to have additional information on this topic by the time that the Committee meets in November.

In revising the treatise's section on Appellate Rules 13 and 14 (which deal with court of appeals review of Tax Court decisions), I noticed an apparent quirk concerning interlocutory appeals in tax matters. In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court.[1] In 1986, Congress responded to *Shapiro*[2] by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts.[3] Section 7482(a)(2) provides that "[w]hen any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation," the court of appeals "may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order." When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).[4]

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[1] The *Shapiro* court explained: "The language of s 1292(b) refers only to orders by a 'district judge' and proceedings in a 'district court,' making no reference to orders of any other court. Moreover, Fed.R.App.P. 5, governing appeals from interlocutory orders under s 1292(b), also refers solely to the 'district court,' and Rule 5 is expressly excluded from application to the Tax Court by Rule 14." *Shapiro*, 632 F.2d at 171.

[2] *See* H. R. Conf. Report No. 99-841, III, 1986 U.S.C.C.A.N. 4075, 4894.

[3] *See generally* Knibb, Fed. Ct. App. Manual § 18:1 (5th ed.).

[4] *See, e.g., General Signal Corp. & Subsidiaries v. C.I.R.*, 104 T.C. 248, 255 (U.S. Tax Ct. 1995).

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what Rules govern an interlocutory appeal by permission under Section 7482(a)(2). As of 2008, though, Tax Court Rule 193(a)[5] states in part: "For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure." This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5.

Tax Court Rule 193 seems to cover nicely the question of how to seek the permission of the Tax Court for a permissive interlocutory appeal under Section 7482(a)(2). As Tax Court Rule 193(a) suggests, Appellate Rule 5 would be the obvious candidate to govern court of appeals procedure in connection with such appeals – but as a technical matter Appellate Rule 14 provides that Appellate Rule 5 does not apply to the review of a Tax Court decision. It thus occurred to me to wonder whether it might be useful to remove a source of potential confusion by amending Appellate Rule 14 to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2) (with references to the "district court" in Appellate Rule 5 being treated as references to the Tax Court, cf. Appellate Rule 13(d)(1)).[6]

Because I am not familiar with tax litigation, I thought it best to try to ascertain whether interlocutory tax appeals occur with regularity or whether (alternatively) interlocutory tax appeals under Section 7482(a)(2) are so rarely seen that it might not be worth fixing this apparent glitch in the Appellate Rules. And, of course, I also wanted to check whether I am misunderstanding the relevant rules or practices. I have made an informal inquiry seeking this information (while emphasizing that I am asking only on my own behalf and that the Committee has not yet considered the issue). I hope to have the results of that inquiry by the time that the Committee meets.

Encl.

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[5] Tax Court Rules 190 - 193 (concerning appeals) are enclosed.

[6] Another possible question that might arise in this connection is whether an interlocutory Tax Court order should be regarded as a "decision" for purposes of the Appellate Rules. A distinction between interlocutory orders and final decisions might be evidenced by Section 7482(a)(2)(B), which provides: "(2) Interlocutory orders.– .... (B) Order treated as tax court decision. For purposes of subsections (b) and (c), an order described in this paragraph shall be treated as a decision of the Tax Court." The referenced statutory subsections concern the venue for appeals to the court of appeals and the powers of the courts with respect to such appeals. In my view, this statutory definition raises, but does not settle, the question whether an interlocutory order appealed by permission under Section 7482(a)(2)(B) should be treated as a "decision" for purposes of the Appellate Rules. Title III of the Appellate Rules (containing Rules 13 and 14) addresses itself to review of a "decision" of the Tax Court, and the term "decision" also appears in the titles and text of Rules 13 and 14.

TITLE XIX

APPEALS

RULE 190. HOW APPEAL TAKEN

(a) General: Review of a decision of the Court by a United States Court of Appeals is obtained by filing a notice of appeal and the required filing fee with the Clerk of the Tax Court within 90 days after the decision is entered. If a timely notice of appeal is filed by one party, then any other party may take an appeal by filing a notice of appeal within 120 days after the Court's decision is entered. Code sec. 7483. For other requirements governing such an appeal, see rules 13 and 14 of the Federal Rules of Appellate Procedure. A suggested form of the notice of appeal is contained in Appendix I. See Code sec. 7482(a).

(b) Dispositive Orders: (1) *Entry and Appeal:* A dispositive order, including (A) an order granting or denying a motion to restrain assessment or collection, made pursuant to Code section 6213(a), and (B) an order granting or denying a motion for review of a proposed sale of seized property, made pursuant to Code section 6863(b)(3)(C), shall be entered upon the record of the Court and served forthwith by the Clerk. Such an order shall be treated as a decision of the Court for purposes of appeal.

(2) *Stay of Proceedings:* Unless so ordered, proceedings in the Tax Court shall not be stayed by virtue of any order entered under Code section 6213(a) that is or may be the subject of an appeal pursuant to Code section 7482(a)(3) or any order entered under Code section 6863(b)(3)(C) that is or may be the subject of an appeal.

(c) Venue: For the circuit of the Court of Appeals to which the appeal is to be taken, see Code section 7482(b).

(d) Interlocutory Orders: For provisions governing appeals from interlocutory orders, see Rule 193.

RULE 191. PREPARATION OF THE RECORD ON APPEAL

The Clerk will prepare the record on appeal and forward it to the Clerk of the Court of Appeals pursuant to the notice of appeal filed with the Court, in accordance with Rules 10

and 11 of the Federal Rules of Appellate Procedure. In addition, at the time the Clerk forwards the record on appeal to the Clerk of the Court of Appeals, the Clerk shall forward to each of the parties a copy of the index to the record on appeal.

RULE 192. BOND TO STAY ASSESSMENT AND COLLECTION

The filing of a notice of appeal does not stay assessment or collection of a deficiency redetermined by the Court unless, on or before the filing of the notice of appeal, a bond is filed with the Court in accordance with Code section 7485.

RULE 193. APPEALS FROM INTERLOCUTORY ORDERS

(a) General: For the purpose of seeking the review of any order of the Tax Court which is not otherwise immediately appealable, a party may request the Court to include, or the Court on its own motion may include, a statement in such order that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation. Any such request by a party shall be made by motion which shall set forth with particularity the grounds therefor and note whether there is any objection thereto. Any order by a Judge or Special Trial Judge of the Tax Court which includes the above statement shall be entered upon the records of the Court and served forthwith by the Clerk. See Code sec. 7482(a)(2). For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure.

(b) Venue: For the circuit of the Court of Appeals to which an appeal from an interlocutory order may be taken, see Code section 7482(a)(2)(B) and (b).

(c) Stay of Proceedings: Unless so ordered, proceedings in the Tax Court shall not be stayed by virtue of any interlocutory order that is or may be the subject of an appeal. See Code sec. 7482(a)(2)(A).

TAB VI-K

Materials concerning this item may be distributed prior to the meeting.

TAB VI-L

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Draft of Best Practices Guide to Using Subcommittees

As detailed in the enclosed letter from Judge Rosenthal, the Executive Committee of the Judicial Conference has asked all committee chairs to comment on a draft "Best Practices Guide to Using Subcommittees of Judicial Conference Committees." Judge Rosenthal has asked that a draft of each Advisory Committee's response be submitted to her by November 24, 2008. It would therefore be advisable for the Committee to discuss the matter at the November 13-14 meeting.

I. Information requested by the Executive Committee

The Executive Committee asks each Judicial Conference committee "to report on each of its existing subcommittees, detailing the need for the subcommittee, its composition and mission, and its sunset date."

The Appellate Rules Committee's only existing subcommittee is the Appellate Rules Deadlines Subcommittee (listed in the attached materials as the "Subcommittee on Time Computation"). Judge Stewart created this Subcommittee in April 2006 with the concurrence of the Appellate Rules Committee. The Deadlines Subcommittee is chaired by Judge Sutton and includes Mark Levy, Douglas Letter and Maureen Mahoney. The Subcommittee was tasked with making recommendations to the Appellate Rules Committee on matters relating to the Time-Computation Project. The Deadlines Subcommittee's role included reviewing short time periods in the Appellate Rules and in relevant statutes in order to identify time periods that should be lengthened in the light of the Time-Computation Project's proposed shift to a days-are-days time-counting approach. The Deadlines Subcommittee also reviewed successive drafts of the proposed time-computation template and considered how best to adopt that template as a proposed amendment to Appellate Rule 26(a). And the Deadlines Subcommittee reviewed the public comments submitted on the proposed amendments to Appellate Rule 26(a) and to short deadlines in the Appellate Rules. In each instance, the Appellate Rules Deadlines Subcommittee reported its recommendations to the full Appellate Rules Committee for that Committee's review. The package of proposed time-computation amendments is slated to take effect December 1, 2009, if the amendments are approved by the Supreme Court and if Congress takes

no contrary action. Assuming that the proposed time-computation amendments take effect December 1, 2009, it would make sense for the Appellate Rules Committee to consider at that point whether there is any need for the Deadlines Subcommittee to continue in existence.

The Appellate Rules Committee does not appear to have made frequent use of subcommittees in the recent past. Based on my search of committee minutes in the "US-RULESCOMM" database on Westlaw, the most recent previous subcommittee established by the Appellate Rules Committee appears to have been one that was established in April 1998 "to discuss whether and how the Third, Fifth, and Eleventh Circuits might be encouraged to provide their unpublished opinions to LEXIS and Westlaw." That subcommittee was chaired by Judge Diana Gribbon Motz and included then-Judge Samuel A. Alito, Jr. and Michael J. Meehan; Judge Phyllis A. Kravitch was asked to work with the subcommittee as a liaison from the Standing Committee.[1] By fall 2002, that subcommittee was no longer in operation.[2]

Without forming an official subcommittee, the Appellate Rules Committee has on occasion asked some of its members to work with the Reporter to investigate certain matters informally, with a view to marshalling further information for the use of the Committee. The Committee has taken this approach, for example, with respect to Mark Levy's proposal concerning amicus briefs in connection with rehearing en banc. As another example, in November 2006 Judge Stewart appointed an informal subcommittee (led by Dean Stephen McAllister and including Douglas Letter and Mark Levy) to assist the Committee in gathering information concerning a 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. At its April 2007 meeting, the Committee considered the fruits of the research performed on this topic by Dean McAllister, Mr. Letter and Mr. Levy, and the Committee suggested to them some avenues for further inquiry. Pursuant to those suggestions, Dean McAllister wrote to Mr. Thro to mention the concerns and questions that had been discussed at the Committee's April meeting, and Dean McAllister also raised the matter in June at the the State Solicitors and Appellate

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[1] See Minutes of the Spring 1998 Meeting of the Advisory Committee on Appellate Rules, April 16, 1998.

[2] The minutes of the fall 2002 Appellate Rules Committee meeting state in part: "A member asked whether the Appellate Rules should be amended to force all circuits to make their non-precedential opinions available on-line or to Westlaw and LEXIS. The Reporter said that the former chair of the Committee, Judge Will Garwood, had appointed a subcommittee to look into this very issue a few years ago, but nothing had come of that. The Reporter also said that, although his recollection is vague, he believes that the reason nothing came of the subcommittee is that someone had concluded that the issue was more properly within the jurisdiction of the Committee on Court Administration and Case Management ('CACM'). Mr. Rabiej said that his recollection was similar." Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules, Nov. 18, 2002.

Chiefs Conference sponsored by the National Association of Attorneys General (NAAG). Based on these further inquiries, it appeared that the momentum behind Mr. Thro's proposal had dissipated. At the Committee's November 2007 meeting, the Committee asked Judge Stewart to write a letter (to be distributed through NAAG) noting that the Committee had had the proposal on its agenda for three meetings; that the Committee appreciated the states' input on the proposal and had studied it carefully; but that based on the information that the Committee had, the Committee was inclined not to take additional action. By consensus, the item was removed from the study agenda (and the informal subcommittee thus was, de facto, dissolved). As these examples indicate, such informal subgroups of Committee members have served an important information-gathering function but have not supplanted the decision-making role of the full Committee.

II. Possible comments on the draft Best Practices Guide

Judge Rosenthal has asked the advisory committees to consider concurring in a recommendation that the Director of the Administrative Office be authorized to act on behalf of the Chief Justice to designate one or more non-committee members to serve on subcommittees. For the reasons outlined in Judge Rosenthal's letter, such a recommendation sounds as though it would be useful, particularly for those advisory committees which have frequent needs for subcommittees to work in highly complicated, technical areas.

Under the heading "Mission and Authority," the draft Best Practices Guide offers as alternatives two possible directives: one, that "[u]se of AO staff and expenditures by subcommittees must be approved in advance by the chair," or two, that "[c]ommunication with AO staff should be through the chair." A preliminary suggestion might be that both these statements' references to the "chair" are ambiguous; presumably the reference is meant to denote the chair of the full committee, but that reading is not inevitable. A more substantive suggestion might be that it would be cumbersome for all communications with AO staff concerning a subcommittee matter to be through the chair of the full committee (assuming that is what is meant). For example, would such a policy preclude communications between the reporter and the AO staff?

Under the heading "Subcommittee Records and Correspondence," the draft states that "[t]he chair of the full committee should sign any committee-related communication to recipients who are not members of the committee." This directive might be in some tension with some of the committee's current practices. For example, it is often very helpful to obtain the views of the circuit clerks on proposals that are under consideration. The usual means for obtaining those views has been to ask Fritz Fulbruge to survey his colleagues among the circuit clerks. Likewise, it is often useful to obtain the views of persons within the Department of Justice on issues before the Committee, and it has been customary to ask Doug Letter to make such inquiries. Perhaps the goal of this portion of the draft policy could be equally well served by providing that "any communication, on behalf of the committee or any subcommittee, with a nonmember of the committee must be expressly approved by the chair of the full committee."

Encl.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

October 7, 2008

Dear Committee Chairs and Reporters:

The Judicial Conference's Executive Committee has asked all committee chairs to comment on a draft of "Best Practices Guide to Using Subcommittees of Judicial Conference Committees." The Executive Committee also asks each committee to submit a written report "on each of its existing subcommittees, detailing the need for the subcommittee, its composition and mission, and its sunset date." Both the comments and report are due by January 16, 2009. For your convenience, I attach a copy of Chief Judge Scirica's memo to committee chairs with the draft "Best Practices Guide." I also attach the "official" listing of Conference-committee subcommittees, including for each of your committees.

Although each committee has different experience with subcommittees, the six Rules Committees have much in common. The Executive Committee's invitation provides a welcome opportunity for the Rules Committees to emphasize how the nature of our work of deciding whether and when to change the federal rules of procedure and evidence and how to draft rule and note language makes subcommittees particularly valuable and important. The invitation also allows us to explain how our use of subcommittees is consistent with the Judicial Conference policy that subcommittees be formed after careful consideration and not do work that should be done by the committee as a whole. A coordinated response from the Rules Committees will be the most helpful to the Executive Committee.

Some of the approaches taken in the draft "Best Practices Guide" do not seem to fit the Rules Committees well. For example, the alternative requirement under "Mission and Authority" that all communications with AO staff should be through the committee chair, and the prohibition under "Subcommittee Records and Correspondence" on subcommittee chairs communicating with non-committee members except in "rare instances," may be difficult or inefficient for Rules Committee subcommittees. And the statement in the "Meetings" section and the last paragraph of the draft, that in-person subcommittee meetings should "normally" be held in conjunction with meetings of the full committee may not work well if, as is often the case, the full committee needs time before its meeting to study the subcommittee's rules recommendations. These are offered merely as examples of the kinds of issues you and your committee may want to consider.

P:\Committees\Standing Committee Subcommittees\subcomm.memo.oct7.2.wpd

I also ask you to consider concurring in a recommendation that the existing Judicial Conference procedures be amended expressly to authorize the Director, acting on behalf of the Chief Justice, to designate an individual who is not a current committee member to serve on a subcommittee. The Rules Committees have found that such individuals can provide important assistance to subcommittees working on proposed rules changes involving highly specialized or technical areas. In recent years, for example, the Civil Rules Committee enlisted the help of admiralty lawyers and forfeiture experts on subcommittees studying proposed changes to the civil forfeiture rules. The Rules Committees have often needed to consult clerks of court and other court staff to understand the impact of proposed rule changes on their operations. Committee chairs can of course invite people who are not committee members to attend a meeting, but that does not meet the need for individuals with important expertise to work with a subcommittee over an extended period in developing proposals before they are presented to the full committee.

The Judicial Conference policy language states: "The approval of the Chief Justice, through the Conference Secretary, is required to appoint non-members." This language allows the Director to designate such individuals as subcommittee members, on behalf of the Chief Justice. But the AO interprets this language to mean that the Chief Justice must personally approve all such designations. This interpretation has caused problems. Obviously, committee chairs do not want to impose such a task on the Chief Justice, and there is no need to do so. It would be helpful to have the procedures revised to make clear that the Director may make such designations on the Chief Justice's behalf. This could easily be accomplished by stating: "The approval of the Director, acting on behalf of the Chief Justice, is required to appoint non-members."

Some of you have already placed the Executive Committee's request for comment and report on your fall meeting agendas. Some of you may be able to draft the response without such discussion, particularly if your committee does not have subcommittees. Before your response is sent to the Executive Committee, I ask that you first send it to me (before November 24) so that I can circulate it to the other Advisory Committee chairs and reporters to give them the benefit of your thoughts. If you will send me your final response (before December 19), I can send it to the Executive Committee together with the responses of the other Advisory Committees and the Standing Committee.

Please call me if you have any questions or want to talk about this. The fall meetings are a welcome opportunity to see you all. I hope you are all well and thank you for your work on this as well as all the matters we will be talking about in the months ahead.

Best regards,

Lee H. Rosenthal

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIRMAN, EXECUTIVE COMMITTEE

(215) 597-2399
(215) 597-7373 FAX
ascirica@ca3.uscourts.gov

August 26, 2008

MEMORANDUM TO ALL COMMITTEE CHAIRS

SUBJECT: USE OF SUBCOMMITTEES

As you know, it has been the policy of the Judicial Conference, as reflected in *The Judicial Conference and Its Committees*, that the work of its committees be done by each committee as a whole as much as possible. To assure that this policy is advanced to the greatest degree possible consistent with efficient operation of the committees, the Executive Committee has been looking at the extent to which subcommittees are being used. The attached draft best practices guide has been developed, using input from committee staff, to assist committees in the management of subcommittees. The Executive Committee requests that you review it with your committee and provide any comments to the Judicial Conference Executive Secretariat. In addition, the Executive Committee asks that no further subcommittees be created until it has completed its review of this subject.

To further assist in this effort, the Executive Committee would like each committee, no later than January 16, 2009, to report on each of its existing subcommittees, detailing the need for the subcommittee, its composition and mission, and its sunset date.

We look forward to your comments and hope that this process will assure that policy formulation is both as broad-based and as efficient as possible.

Anthony J. Scirica

Attachment

cc: Committee Staff

DRAFT

BEST PRACTICES GUIDE TO USING SUBCOMMITTEES OF JUDICIAL CONFERENCE COMMITTEES

INTRODUCTION

In recent years, it has become apparent that subcommittees can be an important tool in the accomplishment of the business of the Judicial Conference committees. Chairs have established subcommittees for a variety of reasons, such as to address complex or technical issues, to increase oversight of a particular program, to address emergencies, or to prepare to implement a specific statute. However each subcommittee created can cause additional bureaucratic complications, call on staff resources and expense. Approximately 81 subcommittees have been created, sometimes without careful consideration of the benefits and burdens.

The Judicial Conference policy quoted below seeks to accommodate these practical realities while assuring that subcommittees are used in a focused manner to support the collegial decision making of, and not as a surrogate for, the full committee.

This guide is designed to help in maximizing the effectiveness of subcommittees, while maintaining appropriate accountability and resource constraints. It is not comprehensive. We welcome any and all suggestions for improving it and for keeping it relevant as the work of committees evolves.

CURRENT CONFERENCE POLICY ON SUBCOMMITTEES

> It is the Conference's preference that work be performed by full committees, and *standing* subcommittees are discouraged. Chairs may appoint subcommittees composed of committee members to consider specific topics as necessary, but the number of subcommittees and meetings should be held to the minimum needed to accomplish the work of the committee. The approval of the Chief Justice, through the Conference Secretary, is required to appoint non-members [*i.e.*, persons who are not already members of any Judicial Conference committee] to subcommittees, ... The Conference Secretary maintains a list of all existing subcommittees, and chairs should notify the Secretary when one is established.

The Judicial Conference of the United States and Its Committees, p. 4 (Sep. 2007) (parenthetical and emphasis added).

ROLE OF COMMITTEE CHAIR

The chair of the full committee may establish a subcommittee and designate its members and chair. At the time the chair of a subcommittee is designated, the committee chair should discuss with the chair of the subcommittee such subjects as subcommittee procedures, the relationship of the subcommittee with the full committee, and how best to coordinate with the committee chair. The chair of the full committee should consider the impact on committee staffing resources when creating and assigning tasks to subcommittees.

MEMBERSHIP

It is preferable that the chair of a subcommittee have at least one year of service on the full committee before being designated. The chair might consider committee members' special interests, experience, or expertise when selecting subcommittee members. Membership should be balanced in terms of points of view, experience, etc. The size of the subcommittee should be as small as is consistent with the requirements imposed by workload, deadlines, and need for expertise. Experience has shown that it is beneficial for the chair of the full committee to participate in as many teleconferences and meetings of the subcommittee as possible.

DURATION OF SUBCOMMITTEE

All subcommittees (unless institutionally permanent, such as the Budget Committee's Economy Subcommittee and the Judicial Resources Committee's Judicial Statistics Subcommittee) should have a sunset date, subject to renewal, and be reviewed periodically to see if disbanding is appropriate; the chair of the full committee may dissolve a subcommittee whenever deemed appropriate. Some committees establish subcommittees to enable quick responses to emergencies and to maintain focus on recurring matters, such as long-range planning, and these may have a longer existence. Appointment of a new committee chair and the five-year committee jurisdictional review are also good times to review the need for each subcommittee.

MISSION AND AUTHORITY

The mission of each subcommittee should be clearly defined in the records of the committee. Subcommittees are creatures of the full committee and generally do not have independent authority, unless it is granted by the Conference or the Executive Committee. Use of AO staff and expenditures by subcommittees must be approved in advance by the chair. [Alternative: Communication with AO staff should be through the chair.]

MEETINGS

Telephonic meetings are encouraged, as is use of other technologies, such as collaborative electronic workplaces, and the like. It is occasionally appropriate for more than one subcommittee, either of the same or different full committees, to meet jointly on matters of common interest. In-person subcommittee meetings should normally be held in conjunction with meetings of the full committee. Out-of-cycle, in-person subcommittee meetings in venues other than Washington, D.C. must be approved by the chair of the Executive Committee of the Judicial Conference. *The Judicial Conference of the United States and Its Committees*, p. 4 (Sep. 2007).

SUBCOMMITTEE RECORDS AND CORRESPONDENCE

The chair of the full committee should sign any committee-related communication to recipients who are not members of the committee. In those rare instances when it is appropriate for the chair of a subcommittee to communicate with recipients who are not members of the committee, the communication must be expressly approved by the chair of the full committee.

Information considered by the subcommittee should be available to interested members of the full committee.

Subcommittees often complete the majority of their work between meetings of the full committee using telephonic meetings, e-mail, and other means to generate a report to the full committee. This enables the subcommittee report to be prepared in the same way as, and included in, other agenda materials for the full committee, giving the committee sufficient time to consider the issues. When the subcommittee chooses to hold an in-person meeting contiguous to the full committee meeting, this preparatory technique minimizes last-minute demands on the subcommittee and staff and enables the subcommittee to focus on final deliberations and fine tuning of its recommendations.

JUDICIAL CONFERENCE OF THE UNITED STATES — COMMITTEES AND SUBCOMMITTEES

July 2008

Executive Committee
- Long-Range Planning Process Subcommittee

Committee on the Administrative Office
- *none*

Committee on the Administration of the Bankruptcy System
- Executive Subcommittee
- Subcommittee on Automation
- Subcommittee on Estate Administration
- Subcommittee on Fees and Revenue Enhancement
- Subcommittee on Judgeships
- Subcommittee on Long-Range Planning and Budget

Committee on the Budget
- Economy Subcommittee*
- Congressional Outreach Subcommittee

Committee on Codes of Conduct
- Subcommittee on Long-Range Planning

Committee on Court Administration and Case Management
- Case Management Statistics Subcommittee
- Civil Litigation Management Manual Subcommittee
- CM/ECF and Privacy Implementation Subcommittee
- Courtroom Usage Subcommittee
- Design Guide Review Subcommittee
- Hyperlinks Subcommittee
- Jury Subcommittee
- Legislative Review Subcommittee
- Libraries Subcommittee
- Long Range Planning Subcommittee
- Records Management Subcommittee
- Translated Forms Subcommittee

Committee on Criminal Law
- Subcommittee on Budget
- Subcommittee on Legislation
- Subcommittee on Program and Administration
- Subcommittee on Sentencing Issues

Committee on Defender Services

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* Subcommittee established or recognized by the Judicial Conference

Defender Services Budget Subcommittee
Long-Range Planning and Budgeting Subcommittee
Quality and Training Subcommittee

Committee on Federal-State Jurisdiction
none

Committee on Financial Disclosure
Subcommittee on Public Access and Security*
Subcommittee on Compliance
Subcommittee on Forms and Instructions
Subcommittee on Technology

Committee on Information Technology
Subcommittee on Applications Evaluation
Subcommittee on Budgeting and Planning
Subcommittee on Calendaring
Subcommittee on Local Initiatives
Subcommittee on Network Management
Subcommittee on Security
Subcommittee on Service Delivery Alternatives
Subcommittee on Training

Committee on Intercircuit Assignments
none

Committee on International Judicial Relations
none

Committee on the Judicial Branch
Subcommittee on Benefits
Subcommittee on Travel Regulations

Committee on Judicial Conduct and Disability
none

Committee on Judicial Resources
Subcommittee on Judicial Statistics*
Subcommittee on Benefits
Subcommittee on Communications
Subcommittee on Court Compensation Study Implementation

* Subcommittee established or recognized by the Judicial Conference

Committee on Judicial Resources (continued)
- Subcommittee on Diversity
- Subcommittee on Law Clerk Recruitment
- Subcommittee on Staffing Resources for Senior Judges
- Subcommittee on Work Measurement
- Subcommittee on Workforce Analysis

Committee on Judicial Security
- Subcommittee on Off-Site Security
- Subcommittee on On-Site Security
- Subcommittee on Strategic and Long-range Planning

Committee on the Administration of the Magistrate Judges System
- *none*

Committee on Rules of Practice and Procedure
- Subcommittee on Sealing
- Subcommittee on Style
- Subcommittee on Time Project

Advisory Committee on Appellate Rules
- Subcommittee on Time Computation

Advisory Committee on Bankruptcy Rules
- Subcommittee on Attorney Conduct and Health Care
- Subcommittee on Business Issues
- Subcommittee on Consumer Issues
- Subcommittee on Forms
- Subcommittee on Privacy, Public Access, and Appeals
- Subcommittee on Style
- Subcommittee on Technology and Cross Border Insolvency

Advisory Committee on Civil Rules
- Subcommittee on Rules 26(a) and 30(b)(6)
- Subcommittee on Rule 56 – Pleading
- Subcommittees on Time Counting (A & B)

Advisory Committee on Criminal Rules
- Subcommittee on Crime Victims Rights Act
- Subcommittee on Electronically Stored Information
- Subcommittee on Extraordinary Writs
- Subcommittee on Forfeiture

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* Subcommittee established or recognized by the Judicial Conference

Advisory Committee on Criminal Rules (continued)
- Subcommittee on Rule 6(f)
- Subcommittee on Rule 12(b)
- Subcommittee on Rule 15
- Subcommittee on Sentencing
- Subcommittee on Time Computation

Advisory Committee on Evidence Rules
- *none*

Committee on Space and Facilities
- Subcommittee on Rent Management
- Subcommittee on Space Planning
- Subcommittee on Space Standards

* Subcommittee established or recognized by the Judicial Conference

TAB VII

Calendar for March–May 2009 (United States)

March

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

April

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

May

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

Holidays and Observances:

Mar 9 Prophet's Birthday (Islamic)
Apr 9 First day of Passover (Jewish)
Apr 10 Good Friday (Christian)
Apr 12 Easter Sunday (Christian)
Apr 13 Easter Monday (Christian)
Apr 15 Tax Day
Apr 16 Last day of Passover (Jewish)
May 1 Law Day
May 1 National Day of Prayer
May 1 Loyalty Day
May 10 Mother's Day
May 15 Peace Officers Memorial Day
May 15 National Defense Transportation Day
May 22 National Maritime Day
May 25 Memorial Day

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