ADVISORY COMMITTEE
ON
APPELLATE RULES

New Orleans, Louisiana
April 11-12, 2001

Agenda for Spring 2001 Meeting of
Advisory Committee on Appellate Rules
April 11-12, 2001
New Orleans, Louisiana

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

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

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Advisory Committee on Appellate Rules
Table of Agenda Items — Revised March 2001

FRAP Item	Proposal	Source	Current Status
95-03	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-05	Amend FRAP 24(a)(2) in light of Prison Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 09/97 Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 09/97 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1. (Related to No. 98-01.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office. (Related to No. 97-31.)	Standing Committee	Awaiting initial discussion Draft approved 04/98 for submission to Standing Committee in 01/00 04/98 draft withdrawn; discussed further and retained on agenda 10/99; will await action by other Advisory Committees on similar proposals
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
98-06	Amend FRAP 4(b)(5) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98 Draft approved 04/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
99-01	Amend FRAP 24(a)(3) to address potential conflicts with Prison Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00

FRAP Item	Proposal	Source	Current Status
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00
00-04	Add new FRAP 4.1 to explicitly authorize "indicative rulings."	Solicitor General Waxman	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting revised proposal from Department of Justice
00-05	Amend FRAP 3 to address notice of appeal filed on behalf of corporation but not signed by attorney.	Hon. Diana Gribbon Motz (CA4)	Awaiting initial discussion Discussed and retained on agenda 04/00
00-06	Amend FRAP 4(b)(4) to address failure of clerk to file notice of appeal when requested by defendant under FRCrP 32(c)(5).	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
00-08	Amend FRAP 4(a)(6)(A) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion
00-09	Amend FRAP 22 to clarify post-AEDPA treatment of certificates of probable cause.	Stuart Buck	Awaiting initial discussion
00-10	Add rule to require neutral assignment of judges to panels.	Hon. William R. Wilson, Jr. (E.D. Ark.)	Awaiting initial discussion
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General Waxman	Awaiting initial discussion
00-13	Amend FRAP 29 to empower court to preclude the filing of a particular private amicus brief, even if all parties have consented.	Hon. Michael Boudin (CA1)	Awaiting initial discussion
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General Waxman	Awaiting initial discussion

DRAFT

Minutes of Spring 2000 Meeting of
Advisory Committee on Appellate Rules
April 13, 2000
Washington, D.C.

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 13, 2000, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., and Mr. Sanford Svetcov. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge Phyllis A. Kravitch, the liaison from the Standing Committee; Prof. Daniel R. Coquillette, the Reporter to the Standing Committee; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. John K. Rabiej and Mr. Mark D. Shapiro from the Administrative Office ("A.O."); Ms. Marie C. Leary from the Federal Judicial Center; and Mr. Joseph F. Spaniol, Jr., consultant to the Standing Committee. (Judge Samuel A. Alito, Jr., member of the Advisory Committee, and Prof. Edward H. Cooper, the Reporter to the Civil Rules Committee, joined the meeting later in the day.)

II. Approval of Minutes of October 1999 Meeting

The minutes of the October 1999 meeting were approved.

III. Report on January 2000 Meeting of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meeting. The Reporter said that the package of amendments approved by this Advisory Committee at its October 1999 meeting had been approved for publication by the Standing Committee, with the sole exception of the proposed amendment to Rule 4(a)(7). The Reporter indicated that he would describe the Standing Committee's concerns about the amendment to Rule 4(a)(7) when the Advisory Committee took up the rule later today. The Reporter said that individual members of the Standing Committee made suggestions with respect to a couple of the other amendments, and that the Reporter would communicate those suggestions to the Advisory Committee next spring, when the Reporter summarized the public comments received on those amendments. Finally, the Reporter informed the Advisory Committee that the Standing Committee was continuing to press all of the advisory committees to draft new rules on the topics of electronic service and financial disclosure.

Judge Garwood then recognized Mr. Rabiej. Mr. Rabiej reported that the Supreme Court approved the amendments to the civil rules, criminal rules, and evidence rules that the Standing Committee and Judicial Conference had approved last year. Mr. Rabiej also described efforts being undertaken by the Judicial Conference and the A.O. to encourage federal courts to post local rules on their websites. According to Mr. Rabiej, the American Bar Association recently approved a resolution urging that all local rules be posted on the Internet. A member moved that this Committee express its support of such efforts. The motion was seconded. The motion carried (unanimously).

IV. Action Items

A. Item No. 98-02 (FRAP 4 — clarify application of FRAP 4(a)(7) to orders granting or denying post-judgment relief/apply one way waiver doctrine to requirement of compliance with FRCP 58)

Judge Garwood asked that discussion of this item be postponed until after the arrival of Prof. Cooper.

B. Item No. 97-33 (FRAP 3(c) or 12(b) — require filing of statement identifying all parties and counsel)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 3. Appeal as of Right — How Taken

(d) Serving the Notice of Appeal.

(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, of the representation statement filed under Rule 12(b), 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.

Committee Note

Subdivision (d)(1). Rule 12(b) has been amended to require that an attorney file a representation statement with a notice of appeal. Because representation statements will now be filed with the district clerk instead of with the circuit clerk, subdivision (d)(1) has been amended to direct the district clerk to send a copy of the representation statement to the circuit clerk at the same time that the district clerk sends copies of the notice of appeal and docket entries.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

(b) Filing a Representation Statement. ~~Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal~~ An attorney who files a notice of appeal must file a representation statement with the district clerk at the same time. In the representation statement, the attorney must identify:

(1) the parties that the attorney represents on appeal;

(2) the parties that are likely to participate in the appeal as appellees; and

(3) by name and last known address, the attorneys who are likely to represent each of the likely appellees.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that representation statements will be more helpful to circuit clerks in the docketing of newly filed appeals.

The representation statements currently required by subdivision (b) have two shortcomings. First, the representation statements contain too little information. An attorney

filing a representation statement is required to identify only the parties that the attorney represents on appeal; the attorney is not required to identify any other party or the attorneys for any other party. Second, the representation statements are filed too late. Under Rule 12(a), circuit clerks are required to docket cases "[u]pon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d)." Typically, circuit clerks receive copies of notices of appeals and docket entries within a couple of days after the notices of appeals are filed. Thus, the circuit clerks usually must docket cases before they receive representation statements.

Subdivision (b) has been amended to require that the representation statement be filed with the notice of appeal. (The representation statement, like the notice of appeal, must be filed with the district clerk.) This provision has been placed in Rule 12 — and not in Rule 3 — to make it clear that the representation statement is not part of the notice of appeal. The cases describing certain provisions of Rules 3 and 4 as "mandatory and jurisdictional" — *see, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978) — do not apply to representation statements.

Subdivision (b) requires the attorney who files the representation statement to identify the "likely" appellees and the attorneys who are "likely" to represent them. This may involve some guesswork on the part of the filing attorney, as in some cases it may not be clear who will participate in the appeal — or who will represent those parties — until the briefs are filed. Nevertheless, such guesswork is unavoidable at the time the appeal is docketed, and the attorney filing the notice of appeal is in a better position to do that guesswork than the circuit clerk.

The appellate clerks have two complaints about Rule 12(b), which requires an attorney who files a notice of appeal to file a representation statement in which he identifies himself and his client. First, the representation statement contains too little information; the attorney for the appellant does not have to identify any other attorneys or any other parties. Second, the representation statement comes too late to help the clerks with docketing. The clerks generally docket appeals within a day or two after they are filed, but the representation statement does not have to be filed until several days later.

At the October 1999 meeting, the Committee discussed an amendment to Rule 3(c) that had been proposed by the clerks and that would require a more complete representation statement to be filed with the notice of appeal. After the Committee balked at putting any such requirement in Rule 3(c) — because of the risk that the rules regarding representation statements would then be deemed "mandatory and jurisdictional," like the other requirements of Rule 3(c) — the Reporter agreed to draft an amendment to Rule 12(b) that would accomplish the clerks' goals. That amendment was now before the Committee.

Mr. Fulbruge informed the Committee that he had circulated the amendment drafted by the Reporter to the appellate clerks and had received nothing but positive comments in response.

Members of the Committee asked Mr. Fulbruge a number of questions about how appeals are docketed. Mr. Fulbruge explained that the problems that had led the clerks to request this amendment are caused to a substantial extent by the antiquated software used in the automatic docketing system. That software requires clerks to identify all of the parties to the appeal — and to classify each of them as either an appellant or appellee — at the time that the case is docketed. Thus, guesswork at the time of docketing is unavoidable. Also, the software makes it difficult to change these designations, once they are entered. For that reason, it is important that the guesswork that occurs at the time of docketing be as accurate as possible. Representation statements that were filed earlier and that contained more information would help the clerks cut down on docketing errors, while not affecting the substantive rights of any party.

Members of the Committee raised several objections to the proposal. First, members were skeptical that the guesswork that clerks would have to do under the proposal would be much more accurate than the guesswork that clerks have to do now. Second, members were concerned about problems that might arise from the new requirements. Appellees might start filing motions to strike inaccurate representation statements or arguing that appellants were foreclosed from making certain arguments on account of what was included in their representation statements. Third, members pointed out that some courts already use their local rules to require parties to provide docketing information that is not required by FRAP; this problem may best be left to such local rules. And finally, members felt that by the time these amendments could take effect, the antiquated software that is creating the problem will likely have been replaced.

A member moved that Rule 12(b) not be changed to require that more information be included in representation statements. The motion was seconded. The motion carried (unanimously).

A member moved that Rule 12(b) be amended to require that representation statements be filed with notices of appeal. The motion died for lack of a second. As a result, no change to Rule 12(b) was approved, and Item No. 97-33 will be removed from the Committee's study agenda, without prejudice to the clerks returning to the Committee in a couple of years if promised improvements in docketing software do not materialize.

C. Item No. 99-03 (electronic service rules)

Judge Garwood welcomed Prof. Cooper to the meeting.

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 25. Filing and Service

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel. If authorized by local rule, a party may use the court's transmission facilities to make electronic service under Rule 25(c).

(c) Manner of Service. Service may be personal, by mail, ~~or~~ by third-party commercial carrier for delivery within 3 calendar days, or, if consented to by the party served, by electronic means. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received.

(d) Proof of Service.

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mailing or electronic mail addresses or the addresses of the places of delivery.

Committee Note

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

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

Subdivision (c). Subdivision (c) has been amended to permit service to be made electronically. No party may be served electronically, either by the clerk or by another party, unless the party has consented to such service.

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

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

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

Rule 26. Computing and Extending Time

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. A paper served electronically under Rule 25(c) is delivered on transmission.

Committee Note

Subdivision (c). Rule 25(c) has been amended to provide that a paper that is served electronically will be considered *served* on the date of transmission, unless the party making service is notified that the paper was not received. Subdivision (c) has been amended to provide that a paper that has been effectively served by electronic means will also be considered *delivered* on the date of transmission. If a party is required or permitted to act within a prescribed period after a paper is served on that party, the prescribed period will begin running on the date of transmission; three days will not be added to the prescribed period, as typically occurs when service is by mail or by third-party commercial carrier.

Electronic service is treated like personal service, and not like service by mail or commercial carrier, for two reasons. First, electronic service (unlike mail or commercial carrier service) is virtually instantaneous, and a party who has been served electronically (unlike a party who has been served by mail or commercial carrier) has considerable control over when it will learn of that service. Second, extending the "three day rule" to electronic service would discourage its use, as parties would not want their adversaries to have three extra days to respond to a paper that is likely to be received instantaneously.

Rule 36. Entry of Judgment; Notice

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

Committee Note

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

Rule 45. Clerk's Duties

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

Committee Note

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

The Reporter began by reminding the Committee of the background of these proposed rules. For several years, the rules of practice and procedure — appellate, bankruptcy, civil, and criminal — have permitted the electronic *filing* of papers. The Standing Committee wants the advisory committees to take the next step and draft rules that would permit the electronic *service* of papers.

In February 1999, the Subcommittee on Technology met and made some tentative decisions about how electronic service rules should be drafted. The participants in that meeting agreed that the Civil Rules Committee would take the lead in drafting electronic service rules — and that, after public comment had been received on those rules, the other advisory committees would follow suit. The Civil Rules Committee approved electronic service rules in April 1999, those rules were approved for publication by the Standing Committee in June 1999, and the rules were published for comment in August 1999. Earlier this week, the Civil Rules Committee met, reviewed the public comments, and approved slightly revised electronic service rules. The Standing Committee is expected to give final approval to those rules in June. It is now the responsibility of this Committee — and the other advisory committees — to draft electronic service rules patterned after those approved by the Civil Rules Committee.

The Reporter said that, in almost every respect, the proposed amendments that he had drafted were identical in substance to the proposed amendments that had been approved earlier in the week by the Civil Rules Committee. Specifically:

- Like new FRCP 5(b)(2)(D), new Rule 25(c) permits electronic service only upon parties who consent.

- As is true under new FRCP 5(b)(2)(D), under new Rule 25(c) a court may not promulgate local rules that forbid electronic service to be used upon consenting parties. Nevertheless, as is true under new FRCP 5(b)(2)(D), under new Rule 25(c) courts will have considerable discretion to use local rules to *regulate* electronic service.

- Under the new civil rules, only "FRCP 5" service may be made electronically; "FRCP 4" service (the service of process that commences a lawsuit) must continue to be made manually. Likewise, under the new appellate rules, the notice of appeal will still have to be served personally or by mail (see Rule 3(d)(1)). Only service that occurs after the notice of appeal has been served may be made electronically.

- Like new FRCP 5(b)(2)(D), new Rule 25(c) provides that electronic service is complete upon "transmission."

- Like new FRCP 5(b)(3), new Rule 25(c) explicitly provides in the text of the rule that if a party attempting to serve a paper electronically is notified that the transmission did not go through, service has not been effected. Nothing is said, either in new FRCP 5(b) or in new Rule 25(c), about "bounced" service in other contexts (e.g., the return of mailed service as undeliverable).

- Like new FRCP 25(b)(2)(D), new Rule 25(b) makes it possible for a court, by local rule, to authorize the clerk to serve papers that have been electronically filed with the court.

- Like new FRCP 77(d), which permits the district court clerk to serve notice of the entry of an order or judgment electronically upon parties who have consented to electronic service, new Rules 36(b) and 45(c) permit the circuit court clerk to use electronic means to serve opinions, judgments, and notices of the entry of orders and judgments upon parties who have consented to such service.

The Reporter said that there was only one substantive difference between the rules that he had drafted and the rules that the Civil Rules Committee had approved earlier in the week. The Civil Rules Committee decided that the "three day rule" of FRCP 6(e) *should* apply to electronic service, whereas, consistent with this Committee's prior deliberations, new Rule 26(c) provides that its three day rule does *not* extend to electronic service.

The Reporter said that, to assist this Committee in deciding whether it wanted to make the appellate rules consistent in this respect with the civil rules, the Reporter had drafted the following alternative amendments to Rule 26(c):

Rule 26. Computing and Extending Time

Alternative One:

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

Alternative Two:

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

Committee Note to Either Alternative:

Committee Note

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

Prof. Cooper explained why the Civil Rules Committee had decided to apply the three day rule to electronic service, after initially deciding not to. First, the Bankruptcy Rules Committee strongly favored extending the three day rule to electronic service, and it is important

to maintain consistency between the civil rules and the bankruptcy rules. Second, the vast majority of those who commented on the proposed electronic service rules favored extending the three day rule to electronic service. Third, if the three day rule applies to electronic service, parties are more likely, at the outset of a case, to consent to the use of electronic service. Fourth, electronic transmissions are not always immediate; Prof. Cooper recently received an electronic transmission over two days after it had been sent. And fifth, the attachments to electronic messages often arrive in a garbled form, and it can take a day or two to "ungarble" them.

A member said that he thought the appellate rules and civil rules should be consistent on application of the three day rule to electronic service. He said that he had been persuaded that extending the three day rule to electronic service made sense. Other members concurred.

Mr. Fulbruge also concurred; he views consistency between the appellate and civil rules as important. Mr. Fulbruge went on to object to the statement in the Committee Note to Rule 25(b) that "[t]echnological advances will soon make it possible for a court to forward an electronically filed paper to all parties with the push of a button." Mr. Fulbruge said that he was concerned that this statement would create unreasonable expectations, as such software does not now exist and may not exist for some time. The Reporter said that the statement cited by Mr. Fulbruge was meant to be metaphorical; the point is simply that some day it may be easy for clerks to serve electronically filed papers. Moreover, no such service would be permitted — or expected — until a court's local rules authorized it. Mr. Fulbruge said that he appreciated the explanation, but would nevertheless be grateful if this statement in the Committee Note were softened.

A member pointed out that the draft electronic services rules seem to reflect an assumption that electronic service would generally be made party-to-party. However, under pilot projects now operating in a few federal courts, a party is required to file a paper electronically with the court and then to notify the other parties that they can retrieve the paper from the court. Parties do not actually transmit papers to each other. Committee members pointed out that nothing in the electronic service rules would prohibit local rules from authorizing such service.

A member moved that the electronic service rules be approved. The motion was seconded.

The Committee continued to discuss the draft rules, focusing in particular on the problem of the bounced transmission — that is, the situation in which a party attempts to serve a paper electronically and then learns, from the party's e-mail program or otherwise, that the transmission did not go through. Members were sympathetic to the notion that, if a party learns that electronic service failed, the party should try to serve the paper again. At the same time, members were concerned about abuse. What would happen if a party, the day before a motion was to be argued, informed its adversary that it had never received the electronically served motion?

Prof. Cooper described the Civil Rules Committee's deliberations on this issue. The electronic service rules that the Civil Rules Committee published attempted to address the

bounced transmission problem by inserting the following sentence in a Committee Note: "As with other modes of service, however, actual notice that the transmission was not received defeats the presumption that arises from the provision that service is complete upon transmission. The sender must take additional steps to effect service." But this statement turned out to be inaccurate. Additional research discovered that mail service has been held to be effective upon mailing, even when the paper was not delivered, and even when the sender was notified of the nondelivery by the Postal Service.

In preparation for the Civil Rules Committee's meeting earlier this week, Prof. Cooper drafted a revised rule, which provided that *any* kind of service is not effective when the party attempting service learns that the service was unsuccessful. The revised rule would have provided, inter alia, that when a party tried to serve a paper by mail, and the paper was returned by the Postal Service, the party would have to try to serve the paper again.

The Civil Rules Committee balked at the revised rule. Members were quite reluctant to tamper with the "mailbox rule." Millions of papers have been served by mail since enactment of the FRCP in 1938; the fact that only a handful of published cases address the failure of a serving party to re-serve a paper returned as undeliverable is compelling evidence that the system works well. Attorneys who learn that mail service was not successful will almost always try to serve again, both out of courtesy and out of a desire to protect their clients' interests.

The Civil Rules Committee concluded that electronic service is different, and thus that the rules should explicitly provide that failed electronic service is not effective, even though the rules will say nothing about failed personal or mail service. Because failed electronic transmissions are so common, attorneys who are contemplating whether to consent to electronic service will be concerned about the issue. Those attorneys will be more likely to consent to electronic service if they can be reassured that a failed transmission will not qualify as service.

Members of the Appellate Rules Committee agreed that neither this Committee nor the Civil Rules Committee should tinker with the rules on personal or mail service. However, on the issue of electronic service, the members struggled with how the rules can both (1) require a party whose e-mail program informs her that a service did not go through to try again, yet (2) not leave the system open to abuse. As written, the rule would permit one party to call another party on the morning of a hearing, claim that an electronic transmission was never received, and get the hearing postponed.

One member suggested that this problem might be addressed by providing in Rule 25(c) that "[s]ervice by electronic means is complete on transmission, unless the party making service is notified *within 3 calendar days after transmission* that the paper was not received *by the party served*." The members discussed this suggestion and agreed that it provided an effective, if somewhat rough, way of distinguishing between the situation in which a party's own e-mail program promptly notifies her that a transmission did not go through and the situation in which a party is not notified of a problem with the transmission until her opponent claims on the day of a hearing that the paper was never received. The member who had moved adoption of the

electronic service rules agreed to accept these proposed changes to Rule 25(c) as a friendly amendment to his motion.

A member suggested that Rule 25(c) also be amended to require that consent to electronic service be in writing, and that this requirement be mentioned in the Committee Note. Prof. Cooper pointed out that the civil rules provisions on electronic service require consent to be in writing. The Committee quickly reached a consensus that this suggestion was a good one, and it was accepted as a second friendly amendment to the motion to adopt the electronic service rules.

One member asked whether service "by electronic means" included service by fax. The Reporter replied that it did. The member asked that a few words be added to the Committee Note to clarify this issue. No member of the Committee objected to this request.

One member returned to the failed transmission issue and argued that, instead of providing that service is not effective if the serving party learns that the paper was not "received," the rule should instead provide that service is not effective if the serving party learns that the paper was not "delivered." Other members disagreed.

Before voting on the motion to approve the electronic service rules, the maker of the motion clarified that he intended to move adoption of the rules as drafted by the Reporter, with two exceptions. First, the friendly amendments that he had accepted to his motion should be incorporated. And second, draft Rule 26(c) should be replaced by "Alternative Two" of the draft circulated by the Reporter this morning.

The motion carried (unanimously).

The Reporter reviewed for the Committee the changes to the electronic service rules that had been suggested by the Subcommittee on Style. By consensus, the Committee agreed that the changes should be adopted, with the exception of the suggested changes to Rule 36(b).

A. Item No. 98-02 (FRAP 4 — clarify application of FRAP 4(a)(7) to orders granting or denying post-judgment relief/apply one way waiver doctrine to requirement of compliance with FRCP 58)

The Committee returned to this item, having earlier deferred consideration until after the arrival of Prof. Cooper.

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

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

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

Committee Note

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

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

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

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions that can toll the time to appeal

under Rule 4(a)(4)(A) do not have to be entered on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Rather, such orders are entered for purposes of Fed. R. Civ. P. 58 — and therefore for purposes of Rule 4(a) — when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Fed. R. Civ. P. 58(b).

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

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

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V*

Saramacca, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

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

[It should be noted that the time frame within which an appellant must decide whether to waive the separate document requirement has been dramatically shortened by amended Fed. R. Civ. P. 58. Under former Fed. R. Civ. P. 58, the time to bring post-judgment motions or to appeal a judgment did not begin to run if the judgment was not entered on a separate document. Thus, the appellant could, in theory, waive the separate document requirement and appeal many years after the judgment was entered in the civil docket. Under amended Fed. R. Civ. P. 58, a judgment that is supposed to be set forth on a separate document but is not will nevertheless be considered entered — and the time to bring post-judgment motions and to appeal will nevertheless begin to run — 60 days after the judgment is entered in the civil docket. Thus, the separate document requirement is essentially waived by operation of Fed. R. Civ. P. 58 on the 60th day after entry of the judgment in the civil docket.]

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

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been entered on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Clough v. Rush*, 959 F.2d 182, 186 (10th

Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

The Reporter said that at the Standing Committee's January 2000 meeting there was a great deal of discussion about the amendment to Rule 4(a)(7) that this Committee approved at its October 1999 meeting. The Standing Committee concluded that the problems that the amendment attempted to solve could be addressed more effectively if the Appellate Rules Committee and the Civil Rules Committee worked together to propose complementary amendments to their respective sets of rules. The Standing Committee directed Judge Garwood and the Reporter to work with Judge Paul Niemeyer (the Chair of the Civil Rules Committee) and Prof. Cooper to draft amendments for presentation to their respective committees in April. The two chairs and two reporters have done so.

The Reporter reminded the Committee that the amendment to Rule 4(a)(7) was intended to address four issues: (1) the widespread confusion over the extent to which orders that dispose of post-judgment motions must be entered on separate documents; (2) the "time bomb" problem — that is, the fact that every circuit except the First holds that when a judgment is required to be set forth on a separate document but is not, the time to appeal the judgment never begins to run; (3) the circuit split over whether the consent of all parties is necessary to waive the separate document requirement; and (4) the *Townsend* problem.

The Reporter said that the first and second issues had been addressed in proposed new Rule 4(a)(7)(**A**), while the third and fourth issues had been addressed in proposed new Rule 4(a)(7)(**B**). The Standing Committee raised no objection to proposed Rule 4(a)(7)(B). Thus, the draft Rule 4(a)(7)(B) being presented to the Committee today is identical to the draft Rule 4(a)(7)(B) approved by the Committee in October 1999 and considered by the Standing Committee in January 2000, except that the Committee Note has been shortened.

The Standing Committee's concerns were directed solely at draft Rule 4(a)(7)(A). The Standing Committee was supportive of the *goals* of draft Rule 4(a)(7)(A), but concerned about the *means* chosen to achieve those goals.

1. As to the time bomb problem: This Committee had proposed to amend Rule 4(a)(7) to impose a cap on the time that a party could wait to appeal a judgment that should have been set forth on a separate document but was not. Specifically, the amendment provided that such a judgment would be treated as entered for purposes of Rule 4(a)(7) — notwithstanding anything to the contrary in the FRCP — 150 days after the judgment was entered in the civil docket. On the 150th day, the time to appeal the judgment would begin to run, even if the judgment was one

that had to be set forth on a separate document under FRCP 58, and even if the judgment had not been so set forth.

The Standing Committee's main concern about this proposal was that it would decouple the running of the time to bring post-judgment motions from the running of the time to bring appeals. At present, both the time to bring post-judgment motions under the FRCP and the time to bring appeals under FRAP begin to run at the same time — when judgment is set forth on a separate document. But under the proposed amendment to Rule 4(a)(7), if a judgment was supposed to be set forth on a separate document but was not, the time to bring *post-judgment motions* would never begin to run under the FRCP, while the time to *appeal* would begin to run on the 150th day under FRAP.

The Standing Committee was uncomfortable with this decoupling. The Standing Committee also pointed out that it would create a substantial loophole in the 150 day cap. Under current Rule 4(a)(4)(A), the timely filing of certain post-judgment motions tolls the time to appeal, and, according to the rule, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Because the timeliness of post-judgment motions would be measured under the FRCP (not FRAP), and because the time to bring a post-judgment motion would not begin to run under the FRCP until the judgment was *actually* set forth on a separate document, a timely post-judgment motion could be filed under the FRCP long after the time to appeal the underlying judgment had theoretically expired under the proposed amendment to Rule 4(a)(7). Such a post-judgment motion would "revive" the time to appeal, and thus defeat the cap.

Although it might be possible for this Committee to close this loophole by amending Rule 4(a)(4)(A), the Standing Committee clearly wants this Committee to work with the Civil Rules Committee to find a solution that imposes an effective cap and does so without decoupling the running of the time to bring post-judgment motions from the running of the time to bring appeals.

The Reporter said that Judge Garwood, Judge Niemeyer, Prof. Cooper, and the Reporter had come up with such a proposal. Under the proposal, FRCP 58(b) would provide that, *if* entry of the judgment on a separate document was required by FRCP 58(a), the judgment would be considered entered upon the earlier of the following: (1) actual entry on a separate document, or (2) the passage of 60 days after entry in the civil docket. As part of this proposal, Rule 4(a)(7) would be amended to provide that a judgment will be treated as entered for purposes of Rule 4 (that is, for purposes of the running of the time to appeal) when it is treated as entered for purposes of FRCP 58 (that is, for purposes of the running of the time to bring post-judgment motions). In this way, a 60 day cap is imposed on judgments that should have been entered on separate documents but were not, and the running of the time to appeal continues to be coupled with the running of the time to bring post-judgment motions.

2. As to the confusion over the extent to which orders that dispose of post-judgment motions must be entered on separate documents: At present, there is at least a four-way circuit split on this issue. Some courts hold that Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement

that is imposed by the FRCP), while other courts hold that Rule 4(a)(7) merely incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former camp disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter camp disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

The amendment to Rule 4(a)(7) approved by this Committee in October 1999 would have made clear that FRAP simply incorporates the separate document requirement as it exists in the FRCP, and does not impose a separate document requirement of its own. However, under that amendment, the law would still be a mess. Whether an order disposing of a post-judgment motion would have to be entered on a separate document under FRCP 58 (and thus under Rule 4(a)(7)) would depend upon whether the order was appealable, and the circuits would remain all over the map on the issue of the appealability of such orders.

At its meeting earlier this week, the Civil Rules Committee approved for public comment a new FRCP 58(a). That provision retains the general requirement that judgments and amended judgments be entered on separate documents. However, the provision expressly exempts from the separate document requirement orders disposing of post-judgment motions. Thus, new FRCP 58(a) would resolve all of the conflicts over this issue by imposing a uniform national rule, and new Rule 4(a)(7)(A) would make clear that FRAP does not impose a separate document requirement of its own.

The Reporter concluded by noting that, when new FRCP 58 is published, commentators will be invited to address the question whether the separate document requirement should be abolished altogether. However, nothing about the drafting of Rule 4(a)(7) turns on this question. Whether or not the civil rules continue to impose a separate document requirement, Rule 4(a)(7) will simply incorporate the civil rules provisions by reference.

Judge Garwood mentioned that Judge Anthony J. Scirica, the Chair of the Standing Committee, was among those who had suggested that perhaps the separate document requirement should be abolished. Judge Garwood said that he personally thought that the requirement should be maintained to the extent that proposed new FRCP 58(a) does so.

Prof. Cooper pointed out that proposed new FRCP 58(a) would exempt *all* orders disposing of post-judgment motions from the separate document requirement — not just those that toll the time to appeal under Rule 4(a)(4)(A). Rule 4(a)(4)(A) qualifies which post-judgment motions can toll the time to appeal; for example, it provides that a FRCP 60 motion can toll the time to appeal only if it is brought within 10 days. Those qualifications, although important for appellate purposes, are not important for separate document purposes. It is better to have a simple rule — e.g., a rule that *no* order disposing of a FRCP 60 motion needs to be entered on a separate document.

Prof. Cooper also pointed out that the cap imposed by new FRCP 58(b) was 60 days, while the cap imposed under the earlier proposed amendment to Rule 4(a)(7) was 150 days. Several Committee members said that they did not object to the shorter cap.

A member moved that the amendment to Rule 4(a)(7) be approved. The motion was seconded. The motion carried (unanimously).

The Committee reviewed the suggestions of the Style Subcommittee and, by consensus, agreed that Rule 4(a)(7)(B) should be redrafted to provide, "A failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not affect the validity of an appeal from that judgment or order."

The Reporter asked about the bracketed paragraph in the draft Committee Note to Rule 4(a)(7)(B). The Reporter said that he did not believe that the paragraph was necessary, but wanted the Committee to have a chance to consider it. A member moved that the bracketed paragraph be deleted. The motion was seconded. The motion carried (unanimously).

Judge Garwood and several members of the Committee expressed appreciation for the work of Prof. Cooper and the Reporter on this complicated and difficult matter.

D. Item No. 99-07 (FRAP 26.1 — broaden financial disclosure obligations)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations, ~~and~~ listing any publicly held company that owns 10% or more of the party's stock, and providing any additional information that the Judicial Conference of the United States requires to be disclosed. Any other party to a proceeding in a court of appeals must file a statement providing any information that the Judicial Conference of the United States requires to be disclosed.

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

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

Committee Note

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

Rule 26.1 does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. However, using the Rules Enabling Act process to formulate more detailed financial disclosure requirements would be difficult. The Advisory Committees responsible for drafting the rules of practice and procedure do not have intimate knowledge of the Code of Judicial Conduct, periodic interpretations of the Code, or the ongoing experiences of judges, clerks, and parties under the Code. Moreover, the Advisory Committees cannot respond quickly as rapidly advancing technology changes the way that the Code is administered.

Rule 26.1(a) has been amended to authorize the Judicial Conference, with the assistance of the Administrative Office and others who have expertise in judicial conduct and court administration, to promulgate more detailed financial disclosure requirements, if and when the Judicial Conference decides that such requirements are advisable.

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

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

The Reporter reminded the Committee that the Standing Committee's concern about the financial disclosure issue was in part attributable to a series of articles in the *Kansas City Star* and the *Washington Post* that described several instances in which federal judges should have recused themselves from cases but did not.

At present, Rule 26.1 requires a nongovernmental corporate party to file a corporate disclosure statement, in which it identifies all of its parent corporations and all publicly held companies that own at least 10% of the party's stock. At the time that Rule 26.1 was enacted, this Committee expressly acknowledged that judges needed more information than that required by Rule 26.1 to meet their recusal obligations — and, in the Committee Note to Rule 26.1, this Committee expressly invited local rulemaking on this issue. The courts of appeals have accepted this invitation with a vengeance; most courts of appeals have enacted local rules on financial disclosure, some of which require disclosure far in excess of that required by Rule 26.1.

The Standing Committee's concern about Rule 26.1 is twofold. First, the Standing Committee is concerned that none of the other rules of practice and procedure contain anything like Rule 26.1. At a minimum, the Standing Committee would like the other rules of practice and procedure to incorporate a provision very much like Rule 26.1. Second, the Standing Committee is concerned that Rule 26.1 may not require broad enough disclosure.

Prior to the Standing Committee's January meeting, Judge Scirica and Prof. Coquillette met with the reporters to the advisory committees to attempt to reach a consensus on a financial disclosure proposal that could be presented to the advisory committees at their spring meetings. The participants in that meeting agreed that a proposal along the following lines would be presented to each advisory committee:

- Rule 26.1 would be amended to require that disclosure statements be supplemented when necessary.

- All of the rules of practice and procedure would incorporate a provision patterned after Rule 26.1. This would act as a "floor."

- All of the rules of practice and procedure would also include a provision that would give the Judicial Conference the authority to require *all* parties (not just nongovernmental corporate parties) to submit a financial disclosure form — a form that could require information in addition to that required by Rule 26.1.

- The financial disclosure rules would be silent on the issue of local rulemaking. Although the Committee on Codes of Conduct would like to preempt any local rulemaking on the topic of financial disclosure, such a goal is impractical at this time.

Earlier this week, the Civil Rules Committee approved for publication financial disclosure provisions that were consistent with this proposal. Likewise, at its spring meeting, the Bankruptcy Rules Committee approved this proposal in principle, although the Bankruptcy Rules Committee will need more time to draft implementing rules because of complications that arise in the bankruptcy context.

The Reporter said that his draft amendments to Rule 26.1 were intended to implement the proposal that the Civil Rules Committee and Bankruptcy Rules Committee had already accepted. He noted that there were two differences between his draft and the rules approved by the Civil

Rules Committee. First, the civil rules would require a "null" report — that is, they would require parties who do not have information that must be disclosed under Rule 26.1 to inform the court of that fact. Second, the civil rules specifically require the clerk of court to give the financial disclosure information to the judge. The Reporter's draft does not include any such provision. The Reporter said that the rules of practice and procedure assume that *everything* filed with a clerk is provided to a judge; he is afraid of the negative implication that might arise if the rules start specifying that certain information must be given to a judge while remaining silent about other information.

Prof. Cooper addressed the two differences between the provisions approved by the Civil Rules Committee and the provisions drafted by the Reporter. The requirement that a null report be filed was initially suggested by the Committee on Codes of Conduct. The Committee's staff now seems to be backpedaling on whether a null report should be required. The Civil Rules Committee thought that requiring such a report would be helpful, as a court could be assured that the reason it had received no Rule 26.1 information from a party is not because that party had erred, but because that party had no Rule 26.1 information to report. As to the requirement that clerks provide Rule 26.1 information to judges: One member of the Civil Rules Committee felt strongly that such a requirement should be in the rule. Although other members had their doubts, the requirement was included in the rule that was approved. Such a requirement may be more defensible in the civil rules than in the appellate rules, as in the in the district courts it is common for cases to be pending longer with more interim judicial actions before final resolution.

On the issue of local rules, Prof. Cooper said that the Committee on Codes of Conduct and several members of the Civil Rules Committee felt strongly that local rules should be forbidden — that there should be a uniform financial disclosure rule in all federal courts. But such a uniform rule is almost surely not attainable at this time; it also may not be wise, as it may be in everyone's interests to permit courts to continue to experiment with local rules. The Civil Rules Committee did not forbid local rulemaking, but it included language in the Committee Note that was intended to discourage it.

A member of the Committee agreed with Prof. Cooper that differences between the trial courts and the appellate courts might justify including in the civil rules, but not in the appellate rules, an explicit direction to clerks to convey Rule 26.1 information to judges. Other members of the Committee expressed reluctance to include such a direction in the appellate rules, in large part because of the negative implication described by the Reporter.

Mr. Rabiej said that the Committee on Codes of Conduct was adamant that courts should not use local rules to require more information than is required by Rule 26.1. The Committee on Codes of Conduct thought that such additional information was rarely helpful and often harmful, because inundating judges with too much information makes it *less* likely that judges will recuse themselves when appropriate. Mr. Rabiej pointed out that in the Committee Note accompanying the 1989 adoption of Rule 26.1, this Committee was encouraging — even inviting — of local rules. Mr. Rabiej wondered whether silence on the issue of local rulemaking now would be interpreted as a reaffirmation of that prior sentiment.

Mr. Rabiej also said that the Committee on Codes of Conduct favors the requirement of a null report. Apparently, the current practice of many clerks is to contact a party who does not file a Rule 26.1 statement to make certain that the omission was not inadvertent. Requiring a null report would reduce the burden on the clerks' offices. Several Committee members urged that Rule 26.1 be redrafted to include the requirement of a null report.

A couple of members expressed concern about some of the stylistic differences between the provisions approved by the Civil Rules Committee and the provisions drafted by the Reporter. For example, the Civil Rules Committee explicitly refers to a "form," whereas the word is not used in the new Rule 26.1. Prof. Coquillette responded that, at this point, these rules are being approved for publication only, and that, after publication, the rules can be made more consistent stylistically. Prof. Cooper asserted that there is a benefit to publishing rules that are drafted somewhat differently; it will give commentators a chance to compare the approaches and express their opinions on what works best.

The Committee came to a consensus that the language of the draft Rule 26.1 was acceptable, except that a requirement for a null report should be included in draft Rule 26.1(a) and the word "this" appearing immediately before the phrase "Rule 26(a) changes" in draft Rule 26.1(b) should be deleted. The Committee also agreed that several changes should be made to the Committee Note, including the following:

- The penultimate sentence of the second paragraph in the Committee Note to subdivision (a) should be changed, so that instead of focusing on the *disadvantage* of having the advisory committees address financial disclosure issues, the Note focuses on the *advantage* of having this work done by the Judicial Conference.

- The last sentence of the second paragraph in the Committee Note to subdivision (a) should be changed so that it refers to the inability of the "Rules Enabling Act process" to respond to technological changes, rather than to the inability of "the Advisory Committees."

- Explicit reference should be made in the Committee Note to the ability of the Judicial Conference to use its authority under amended Rule 26.1(a) to preempt local rulemaking on the subject of financial disclosure.

The Committee decided to adjourn for lunch. The Reporter was asked to use the lunch break to redraft the amendments to Rule 26.1 to incorporate these changes. The Committee adjourned for lunch at 1:00 p.m.

The Committee reconvened at 2:25 p.m. The Reporter distributed the following amendments and Committee Note:

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) Who Must File.

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

(a) identif~~ying~~ies all its parent corporations and list~~ings~~ any publicly held ~~company~~ corporation that owns 10% or more of the party's stock or reports that there are no such corporations, and

(b) provides any additional information that the Judicial Conference of the United States requires to be disclosed.

(2) **Other parties.** Any other party to a proceeding in a court of appeals must file a statement that provides any information that the Judicial Conference of the United States requires to be disclosed.

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

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

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is

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

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

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

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

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

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

Several members of the Committee expressed support for the redraft. A member moved that the amendments and Committee Note be approved. The motion was seconded. The motion carried (unanimously).

E. Item No. 98-11 (FRAP 5(c) — clarify application of FRAP 32(a) to petitions for permission to appeal)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 5. Appeal by Permission

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

Committee Note

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

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

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

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

Committee Note

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

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

Rule 5(c) currently provides that a petition for permission to appeal (as well as a cross-petition for permission to appeal and an answer to a petition or cross-petition) "must conform to Rule 32(a)(1)." This is a mistake. Rule 32(a)(1) addresses only how a paper must be reproduced; it says nothing about whether the paper needs a cover or a caption, what information must be contained in the cover or caption, how the paper must be bound, what size paper must be used, what type face must be used, and so on. In October 1999, the Committee addressed this error in Rule 5(c) by approving an amendment that would substitute a reference to "Rule 32(c)(2)" for the current reference to "Rule 32(a)(1)." At its January 2000 meeting, the Standing Committee approved this amendment for publication.

After the agenda book was distributed, Mr. Fulbruge brought two concerns about the amendment to Judge Garwood's attention. First, Mr. Fulbruge pointed out that the mistake that appears in Rule 5(c) also appears in Rule 21(d), which governs petitions for extraordinary relief. Second, Mr. Fulbruge pointed out that nothing in Rule 5 or in any other rule imposes any limitation on the length of a petition for permission to appeal or related paper. Likewise, no rule imposes any limitation on the length of a petition for extraordinary relief or related paper. Rule 32(c)(2) does not help, as it specifically exempts "other papers" from the page limitations imposed on briefs by Rule 32(a)(7).

The Reporter drafted two amendments for the Committee's consideration. The draft amendment to Rule 5(c) is identical to the amendment that the Committee approved in October 1999, except that it adds a page limitation. The draft amendment to Rule 21(d) substitutes "Rule 32(c)(2)" for "Rule 32(a)(1)" — as the amendment to Rule 5(c) does — and also adds a page limitation. The page limitations are patterned after Rule 27(d)(2), which imposes page limitations on motions and responses to motions. As a result of these amendments, all of the form requirements that apply to briefs will also apply to papers filed in connection with requests for permission to appeal and requests for extraordinary writs, except that covers will not be required and different page limitations will be imposed.

Several members expressed support for the amendments. No member objected, except that one member suggested that, in both Rule 5(c) and Rule 21(d), the phrase "[e]xcept by the court's permission" be inserted prior to "[a] paper must not exceed 20 pages." By consensus, the Committee agreed with the suggestion.

A member moved that the amendments to Rules 5(c) and 21(d), as modified by the suggestion, be approved. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

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

Prof. Coquillette gave the Committee a brief update on the Standing Committee's efforts to draft "Federal Rules of Attorney Conduct" or "FRAC." Specifically, Prof. Coquillette reported on a February 2000 meeting of the Subcommittee on Attorney Conduct, at which the Department of Justice and several other organizations were invited to share comments on how, if at all, the rules of practice and procedure should address the hundreds of conflicting and confusing local rules on attorney conduct.

Prof. Coquillette said that, although no decision had yet been made by the Subcommittee, much less by the Standing Committee, he thought that a consensus was emerging on at least a couple of points. First, there is widespread agreement that the appellate courts are not experiencing a problem in this area, and that Rule 46 should be left unchanged. Second, there is also widespread agreement that the best way to address the problems in the district and bankruptcy courts is through a "dynamic state conformity" rule embodied in a "FRAC 1" — that is, a rule that would essentially provide that state rules of professional responsibility govern the conduct of attorneys in federal court.

Two problems remain. First, there is sharp disagreement over whether an additional rule of attorney conduct — a "FRAC 2" — should exempt discrete subjects from regulation by state authorities. The most contentious issue is whether federal prosecutors should be exempt from state application of Model Rule 4.2. Second, there are special problems in the bankruptcy context that might have to be addressed in a "FRAC 3." However, the Bankruptcy Rules Committee is busy with more pressing matters, so work on a "FRAC 3" is not likely for some time.

Prof. Coquillette said that there will probably be another invitational meeting in the fall, and that the advisory committees will not be asked to act on rules of attorney conduct until spring 2001 at the earliest. Prof. Coquillette stressed again that this Committee will probably not be asked to take any action with respect to attorney conduct, given that Rule 46 appears to be working well.

Judge Garwood thanked Prof. Coquillette for his report.

B. Item No. 98-07 (FRAP 22(a) — permit circuit judges to deny habeas applications)

Rule 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F.

Ripple has suggested that Rule 22(a) be amended to permit circuit judges to deny habeas petitions. At the Committee's October 1998 meeting, Judge Garwood asked the Department of Justice to study this issue and make a recommendation to the Committee.

Mr. Letter said that, after struggling with this issue for over a year, the Justice Department has concluded that it is not an appropriate subject of rulemaking. The fact that Rule 22(a) requires habeas petitions to first be presented to district court judges is controversial only in the context of immigration. Rule 22(a) is controversial in the context of immigration because, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), a person who has been ordered deported is authorized in some circumstances to move in the court of appeals for a stay of deportation. In ruling upon such a motion, a circuit judge must review the merits of the case — that is, a judge must review the same evidence and arguments that are likely presented in an accompanying habeas petition.

Several difficult circuit splits have developed over the meaning of the IIRIRA and how it interacts with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Courts disagree even about such fundamental matters as whether district courts continue to have authority to rule on habeas petitions filed by aliens who have been ordered deported. It will likely take several years to work out the most important of these conflicts. That being the case, the Justice Department believes that this Committee would be ill-advised to intervene in this area through rulemaking. Mr. Letter recommended that Item No. 98-07 be removed from the Committee's study agenda.

Several members of the Committee concurred with Mr. Letter's recommendation. A member moved that Item No. 98-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

C. Item No. 99-05 (FRAP 3(c) — failure explicitly to name court to which appeal taken)

Rule 3(c)(1)(C) provides that a notice of appeal must "name the court to which the appeal is taken." Suppose that a notice of appeal does not *explicitly* name the court to which the appeal is taken. However, it is clear that only one court of appeals has jurisdiction over the appeal. Must the appeal be dismissed for failure to comply with Rule 3(c)(1)(C)?

The Sixth Circuit divided over this question in *Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en banc). The majority, citing the admonition in Rule 3(c)(4) that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal," held that such a notice of appeal "name[d] the court to which the appeal is taken" as a *practical* matter, as there was only one appellate court to which an appeal could lie. The dissenters, citing Supreme Court decisions characterizing the requirements of Rule 3 as "mandatory and jurisdictional," argued that the problem with such a notice of appeal is not *informality*, but rather that it does not "name the court to which the appeal is taken" *at all*.

At the Committee's October 1999 meeting, the Reporter introduced this matter and recommended that it be removed from the study agenda. The Reporter argued that the Sixth Circuit's decision was reasonable and did not conflict with the decision of any other court of appeals. Mr. Letter asked the Committee to postpone a decision on Item No. 99-05 to give the Department of Justice a chance to look at the issue and formulate a recommendation. The Committee agreed.

Mr. Letter reported that the Department of Justice had found that only three other circuits have addressed this issue, and all three agree with the approach taken by the Sixth Circuit in *Dillon*. For that reason, the Department of Justice concurred that this item should be removed from the Committee's study agenda.

A member moved that Item No. 99-05 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

D. Items Awaiting Initial Discussion

1. Item No. 99-06 (FRAP 33 — notice of bankruptcy settlements)

FRBP 7041 and 9019(a) provide special rules regarding settlements reached in bankruptcy actions. The rules require that all settlements be approved by the bankruptcy court after notice to the creditors and the trustee. The rules prevent the debtor from cutting a "sweetheart" deal with a favored creditor.

The bankruptcy judges of the Fourth Circuit have raised a concern about Rule 33, which authorizes "appeal conferences" to try to settle cases and authorizes a court of appeals to "enter an order . . . implementing any settlement agreement" that results from such a conference. The concern of the Fourth Circuit bankruptcy judges is that the debtor and a favored creditor could cut a sweetheart deal on appeal and, under Rule 33, get an order implementing that deal, without notice to the other creditors or the trustee and without an opportunity for the bankruptcy judge to consider the fairness of the settlement.

The Reporter said that he had drafted an amendment to Rule 33 to address the concern of the Fourth Circuit bankruptcy judges, but both the former and current reporter to the Bankruptcy Rules Committee had raised objections to the Reporter's draft and described several questions that will have to be answered before anyone can try to solve this problem. The Reporter said that the Bankruptcy Rules Committee was in the best position to identify and answer those questions. Thus, this Committee will simply hold this matter in abeyance until it receives a specific proposal from the Bankruptcy Rules Committee. The Reporter concluded by pointing out that, to the best of his knowledge, the concern of the Fourth Circuit bankruptcy judges is purely theoretical. No one is aware of any party who has actually used Rule 33 in the manner feared by the bankruptcy judges.

A member of the committee agreed that this matter is extremely complicated and should first be addressed by the Bankruptcy Rules Committee. He said that even the logistics of trying to make certain that settlements reached on appeal be approved were complicated. Should the court of appeals remand the case to the bankruptcy court? Hold the appeal in abeyance until the bankruptcy court can consider the fairness of the settlement? Dismiss the appeal without prejudice? Constitute itself as a bankruptcy court and hear arguments on the fairness of the settlement?

Another member of the Committee pointed out that settlements must be approved in contexts other than bankruptcy — for example, in class actions and derivative actions. In those contexts, parties who are affected by a settlement may not be parties to the appeal in which the settlement is reached. The member said that if and when this Committee revisits this issue, it should explore whether changes to Rule 33 are needed — changes beyond those necessary to address the bankruptcy problem.

By consensus, the Committee agreed to leave Item No. 99-06 on the study agenda and await a specific proposal from the Bankruptcy Rules Committee.

2. Item No. 99-08 (FRAP 4 — give pro se litigants more time to appeal)

Mr. Howard Rich, who is incarcerated in Texas, has proposed a number of changes to FRAP, including giving pro se appellants more time to bring appeals. After a brief discussion of Mr. Rich's proposals, a member moved that Item No. 99-08 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

3. Item No. 99-09 (FRAP 22(b) — specify procedure for obtaining COA)

Before a party who has applied for a writ of habeas corpus in the district court can appeal the denial of his application, he must obtain a certificate of appealability ("COA") from "a circuit justice or a circuit or district judge." Rule 22(b)(1). Judge Scirica has pointed out that the circuits have different procedures for considering requests for a COA. In particular, circuits answer the following questions differently: (1) Should the court decide whether to grant a COA before or after it receives briefing on the merits of the appeal? (2) How many judges should be involved in deciding whether a COA should be granted? (3) When, if ever, should counsel be appointed for a party who seeks a COA? Judge Scirica has asked whether FRAP, the FRCrP, or both might be amended to bring about more uniformity.

The Committee briefly discussed the various procedures used by the courts of appeals. A couple of members said that the summary of procedures that had been prepared for Judge Scirica did not accurately describe the procedures used in their circuits. All members of the Committee agreed that the matter was worth studying.

By consensus, the Committee requested the Department of Justice to study this matter and to make a recommendation at a future meeting. In particular, the Committee would appreciate knowing whether the Justice Department believes that there is a serious problem and, if so, whether the problem is best addressed by Congress, by case law, by local rules, or by amending FRAP and/or the FRCrP. A couple of members suggested that the Justice Department call the clerk of each circuit to determine whether the circuit's day-to-day practices are consistent with its formal policies. One member asked that the Justice Department include in its study the procedures used by courts when parties seek permission to file a second or successive habeas application.

Mr. Letter said that the Department of Justice would be happy to study this matter for the Committee and would make a report and recommendation at a future meeting.

4. Item No. 00-01 (FRAP 15(b) — clarify whether private parties can file applications to enforce agency orders)

Item No. 00-01 arises out of a suggestion by Michael Powell, an attorney in Dallas.

Before it was restylized, Rule 15(b) stated that, if a petition for review of an agency order was filed, "*the respondent* may file a cross-application for enforcement." As then written, Rule 15(b) seemed to contemplate that only the agency — which is always "the respondent" to a petition for review — could file a cross-application for enforcement.

After being restylized, Rule 15(b)(1) now states that, if a petition for review of an agency order is filed, "*a party opposing the petition* may file a cross-application for enforcement." Apparently, in at least one case, the question arose whether Rule 15(b) now permits cross-applications for enforcement to be filed not only by the agency, but by *any* party who opposes the petition for review (whether or not the agency itself has chosen to file a cross-application for enforcement). Mr. Powell suggests that FRAP should be amended to clarify this ambiguity.

Mr. Powell also raises a second question: "whether under the first sentence of Rule 15(b)(1), a private party may file an original application for enforcement of an agency order." He notes that the first sentence of Rule 15(b)(1) — "[a]n application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order" — is written "in the passive" and "d[oes] not specify who may file an application."

At Judge Garwood's request, the Department of Justice consulted with several federal agencies about Mr. Powell's concern. The agencies said that they had not experienced a problem and did not expect to experience a problem in the future. The agencies stressed that Rule 15 does not give a court jurisdiction over any application for enforcement; such jurisdiction must come from an underlying statute, and no underlying statute permits a private party to file an application for enforcement.

A member moved that Item No. 00-01 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

5. Item No. 00-02 (FRAP 29 — restrict who may file amicus briefs)

At the Standing Committee's January 2000 meeting, Charles Cooper, a member of the Committee, told Judge Garwood and the Reporter that he was concerned about the frequency with which amicus briefs are filed in the courts of appeals by law professors and others who neither have a stake in the particular dispute nor represent a client who has a stake in the particular dispute. Mr. Cooper suggested that this Committee might want to consider amending Rule 29 to place restrictions on who may file amicus briefs.

Several objections were raised to Mr. Cooper's suggestion. First, members said that amicus briefs are designed to assist the courts, and the fact that a lawyer does not have a personal stake in a case does not mean that the lawyer cannot help the court. Second, this matter is best left to courts to decide on a brief-by-brief basis. Courts can always deny permission to file an amicus brief or ignore an amicus brief after it is filed. Finally, it would be extremely difficult to craft restrictions on amicus briefs; the energy that would have to be devoted to the task, and the controversy that the task would generate, would outweigh any potential benefits.

A member moved that Item No. 00-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

6. Item No. 00-03 (FRAP 26(a)(4)/45(a)(2) — description of holidays)

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

No member of the Committee thought that the differences regarding the King holiday and Veterans' Day warranted Committee action. Some members thought that the difference between "Presidents' Day" and "Washington's Birthday" might be substantial enough to justify amending Rules 26(a)(4) and 45(a)(2), but these members first wanted to know whether an executive order or other official source designates the third Monday in February as "Presidents' Day." Mr. McGough offered to look into this matter and report back to the Committee at its next meeting.

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

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

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

For several reasons, the Justice Department believes that FRAP should be amended to explicitly authorize the indicative ruling procedure. First, the procedure is not well known; if FRAP embraced the procedure, more parties would become aware of it. Second, the Second Circuit does not permit district courts to issue indicative rulings; the Ninth Circuit, unlike the other circuits, requires a remand for a *denial* (as well as for a grant) of a Rule 60(b) motion. An amendment to FRAP would resolve this circuit split. Finally, the circuits that do authorize indicative rulings use somewhat different procedures. An amendment to FRAP would promote uniformity.

In a March 14, 2000 letter to Judge Garwood, Solicitor General Waxman proposed adding a new Rule 4.1 on indicative rulings and suggested language for both the rule and the Committee Note. That letter was included in the Committee's agenda book. Mr. Letter highlighted two aspects of the draft rule. First, the rule would not apply in criminal cases or in cases under 28 U.S.C. §§ 2241, 2254, or 2255, which are technically civil in nature but are closely linked to criminal matters. Second, the rule would apply to interlocutory appeals, as some circuits hold that a district court loses jurisdiction over a preliminary injunction, even though it retains jurisdiction over the underlying case in which the injunction was issued.

The Committee discussed the proposal. Most of the discussion focused on the exclusion of habeas proceedings from the proposed rule. Some members opposed the exclusion, arguing that there was no principled reason for denying indicative rulings to those involved in habeas proceedings. These members pointed out that, in most circuits, those involved in habeas proceedings can *now* seek an indicative ruling, so this rule would deprive some litigants of a right that they now have. Other members supported the exclusion, arguing that habeas proceedings are numerous, often frivolous, and often brought pro se, and that any benefits that would be gained from approving the proposed Rule 4.1 would be outweighed by the many frivolous requests for indicative rulings that it would occasion.

A couple of members said that they would be inclined to support the proposal, if the exclusion of habeas proceedings were eliminated. Others expressed concerns about the proposal. All members agreed that the proposal deserved further consideration.

By consensus, the Committee agreed that Item No. 00-04 should remain on the Committee's study agenda. Committee members suggested that the Justice Department reconsider the exclusion of habeas proceedings from proposed Rule 4.1. If this Committee was unwilling to approve a rule that excluded habeas proceedings, would the Justice Department still want to go forward with its proposal? Also, Committee members suggested that the Justice Department be prepared to better explain how the indicative ruling procedure would work in the context of interlocutory appeals. Finally, Committee members recommended that the Committee Note be tightened up. For example, one member objected to the Committee Note's reference to a district court notifying the court of appeals that it would "seriously entertain a post-judgment motion."

Mr. Letter agreed that the Justice Department would give the matter further study.

8. Item No. 00-05 (notice of appeal for corporation signed by non-lawyer)

This matter was brought to the Committee's attention by Judge Motz after the agenda books were distributed.

If a party wishes to appeal a judgment or order of a district court, it must file a notice of appeal. A notice of appeal must be signed by the party's attorney or, if the party is proceeding pro se, by the party. *See* FRCP 11(a). Because a corporation cannot appear pro se in federal court, a notice of appeal filed on behalf of a corporation must be signed by an attorney. The question is: What if it is not? What if a notice of appeal is filed on behalf of a corporation, but, rather than being signed by an attorney, the notice is signed by one of the corporation's officers? Must the appeal be dismissed? Or can the court of appeals hold the appeal in abeyance and give the corporation an opportunity to hire counsel?

A 1999 decision of the Ninth Circuit — *Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999) — appears to be the only published decision of a court of appeals addressing this issue. In *Bigelow*, the Ninth Circuit held that a notice of appeal filed on behalf of a corporation but not signed by counsel was not a nullity "so long as a lawyer promptly thereafter enters a formal appearance on behalf of the corporation and undertakes the representation." *Id.* at 1165. This issue is now pending before the Fourth Circuit.

The Committee briefly discussed this issue. Most of the members who spoke argued that this issue may not warrant rulemaking, given that there is only a single published decision addressing the issue, and given that, as far as the Committee knows, the issue has arisen in only one other case. A member suggested that, given the brief amount of time the Committee had been given to consider this issue, Item No. 00-05 should not be removed from the study agenda

at this time. Rather, the Committee should await the Fourth Circuit's decision. If the Fourth agrees with the Ninth, the Committee should remove this item from its study agenda. If the Fourth disagrees with the Ninth, Committee action might be warranted.

By consensus, the Committee agreed with this suggestion.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Scheduling of Dates and Location of Fall 2000 Meeting

Judge Garwood informed the Committee that he was not certain whether a fall meeting would be necessary. He also said that, if a fall meeting is necessary, it might last no more than a half day. He suggested that the fall 2000 meeting be scheduled for Washington, D.C., which would allow much of the Committee to attend a half day meeting without having to spend a night away from home. The Committee agreed to reserve October 2 and 3, 2000, for the meeting. Judge Garwood said that he would inform the Committee later this summer whether it would have to meet in October and, if so, how long the meeting would probably last.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:15 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and Committee Notes approved by the Committee at this meeting.

APPENDIX

To the Minutes of the Spring 2000 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Committee Notes approved by the Advisory Committee on Appellate Rules at its April 2000 meeting.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

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

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

Committee Note

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

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

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

not entered for purposes of Rule 4(a) until it is so set forth. Similarly, if a judgment or order is entered for purposes of Fed. R. Civ. P. 58(b) even though not set forth on a separate document, that judgment or order is also entered for purposes of Rule 4(a).

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

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

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

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

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

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

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

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

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

Rule 5. Appeal by Permission

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

Committee Note

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

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

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

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

Committee Note

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

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

Rule 25. Filing and Service

(c) Manner of Service.

(1) Service may be any of the following:

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

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

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

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

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

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

(4) ~~Personal service includes delivery of the copy to a responsible person at the office of counsel.~~ Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified within 3 calendar days after transmission that the paper was not received by the party served.

(d) Proof of Service.

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

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

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

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

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

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

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified within 3 calendar days — by the sender's e-mail program

or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

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

Rule 26. Computing and Extending Time

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

Committee Note

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

Rule 36. Entry of Judgment; Notice

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

Committee Note

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

Rule 45. Clerk's Duties

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

Committee Note

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

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) Who Must File.

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

(a) identif~~ying~~ies all its parent corporations and list~~ing~~s any publicly held ~~company~~ corporation that owns 10% or more of the party's stock or reports that there are no such corporations, and

(b) provides any additional information that the Judicial Conference of the United States requires to be disclosed.

(2) **Other parties.** Any other party to a proceeding in a court of appeals must file a statement that provides any information that the Judicial Conference of the United States requires to be disclosed.

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

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

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10%

or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

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

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

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

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



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 7-8, 2000
Washington, D.C.

Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 7-8, 2000. The following members were present for the entire meeting:

Judge Anthony J. Scirica, Chair
Judge Michael Boudin
Judge Frank W. Bullock, Jr.
Charles J. Cooper
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte
Acting Associate Attorney General Daniel Marcus
Patrick F. McCartan
Judge J. Garvan Murtha
Judge A. Wallace Tashima

Chief Justice E. Norman Veasey and David H. Bernick each attended one day of the meeting. Roger A. Pauley, Director (Legal) of the Office of Policy and Legislation, also participated on behalf of the Department of Justice. In addition, Judge James A. Parker, former member of the committee and chair of its style subcommittee, attended the entire meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mark D. Shapiro, deputy chief of that office; Patricia S. Ketchum, senior attorney in the Bankruptcy Judges Division; and Lynn Rzonca, assistant to Judge Scirica. Abel J. Mattos, Chief of the Court Administration Policy Staff of the Administrative Office, also participated in part of the meeting.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Member
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Judge Tommy E. Miller, a member of the Advisory Committee on Criminal Rules, assisted in the presentation of the report of that advisory committee.

Also taking part in the meeting were: Joseph F. Spaniol, Jr. and Professor R. Joseph Kimble, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica thanked Judge Parker for his distinguished service as a member of the committee and as the chair of the style subcommittee. He pointed out that substantial progress had been achieved in restyling and improving the language of the federal rules, thanks to the excellent work of the style committee and the respective advisory committees. He noted that the revised, restyled body of appellate rules had been very well received by the bench and bar and that a complete set of restyled criminal rules was about ready for publication and comment.

Judge Scirica reported that no proposed rule amendments had been before the Judicial Conference at its March 2000 meeting for approval. He added that the Supreme Court had promulgated the rule amendments approved by the Conference in September 1999 — including the proposed changes to the discovery rules — and had forwarded them to Congress in accordance with the Rules Enabling Act. These amendments, he said, would take effect on December 1, 2000, unless Congress were to take action to reject them. He noted, however, that one lawyers' association had raised some objections to the discovery rules and that hearings might be convened in Congress to consider the amendments.

Judge Scirica pointed out that the committee and the Judicial Conference have an affirmative statutory responsibility to monitor and improve the federal rules. Nevertheless, he said, some proposed amendments to the rules have been controversial and have encountered opposition from parts of the bench or bar. As a result, he suggested, the rules process has become more visible, more political, and more difficult.

Judge Scirica reported that he and Professor Coquillette had met with the Chief Justice to keep him informed of on-going initiatives of the rules committees. He said that it

was also time for him to meet with the chairs of the advisory committees to take a fresh look at the rulemaking process and the future directions of the committees.

Judge Scirica reported that a provision in the omnibus bankruptcy legislation pending in Congress would provide for appeals — including interlocutory appeals — to be taken from the orders of bankruptcy judges directly to the courts of appeals as a matter of course. This would effectively eliminate the district courts from the bankruptcy appellate process. This provision, he said, was in conflict with the Judicial Conference's position that direct appeals to the court of appeals should be authorized only through a certification process limited to matters that raise important legal issues or questions of public policy. Judge Scirica reported that the Executive Committee of the Conference had been informed of the legislative problem and that negotiations with the Congress would be pursued.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2000.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the committee's two-year pilot program to receive public comments on proposed rule amendments electronically through the Internet had been successful. He said that the AO and the advisory committees would like to make the experiment permanent. Thus, all published amendments will continue to be posted on the Internet at the same time that they are distributed to the public in printed form. The bench and bar will continue to be invited to submit comments to the Administrative Office via the Internet.

The committee without objection approved making the pilot program permanent and continuing to accept public comments on proposed amendments in electronic form through the Internet.

Mr. Rabiej reported that the American Bar Association in February 2000 had passed a resolution calling for posting all local rules of court on a single Internet site maintained by the federal judiciary. He noted that the issue had been assigned to the Judicial Conference's Court Administration and Case Management Committee. That committee, he said, would expect input from the rules committees on the proposal.

Mr. Rabiej pointed out that more than half the federal courts had posted their local rules on their own, individual Internet sites. In addition, the judiciary's national web site, maintained by the Administrative Office, contains links to the sites of the individual courts.

He emphasized that the Standing Committee and the respective advisory committees had long supported the concept of posting all local court rules on the Internet as an effective means of providing prompt, accurate, and complete procedural information to the bar and public.

Mr. Rabiej reported that the advisory committees had discussed the proposal on several occasions and had reached a consensus that:

1. Individual federal courts should be encouraged to post their local rules on their own web sites.

2. Those courts without a web site should be encouraged to develop one, even if only to post their local rules.

3. Courts should be encouraged to post their local rules in a prominent location on their web site so that a user may readily locate them, such as by establishing a special icon designated for local rules information.

4. Courts should be encouraged to include a uniform statement immediately below the caption of the local rules to indicate that they are current.

5. Local court web sites should be directly linked to the national judiciary site maintained by the Administrative Office.

The committee approved the proposed actions outlined in Mr. Rabiej's presentation and asked that they be communicated to the Court Administration and Case Management Committee.

Mr. Rabiej pointed out that implementation of these recommendations would be voluntary for the courts, and inevitably not every rule of every court will be posted immediately. Judge Garwood added that the Advisory Committee on Appellate Rules had discussed on a preliminary basis the possibility of making local court rules ineffective until they are actually placed on the Internet or otherwise posted as prescribed by the Director of the Administrative Office.

One of the participants added that FED. R. CIV. P. 83(a) already requires the courts to send their local rules to the Administrative Office and to make them available to the public. He added that the rule could be used to mandate that every court establish an electronic link with the Administrative Office and keep its local rules up to date on its own site.

Another participant said that it was important to have two dates posted on the local rules web site: (1) the date of the most recent amendment to a particular rule; and (2) the date of the last general revision of the court's local rules as a whole.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary referred the members to a description of the list of various pending Federal Judicial Center projects, set out as Agenda Item 4.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Garwood's memorandum and attachments of May 11, 2000. (Agenda Item 5)

Judge Scirica reported that the Standing Committee at its January 2000 meeting had approved for publication proposed amendments to FED. R. APP. P. 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, 44 and FORM 6. But, he added, proposed amendments to FED. R. APP. P. 4(a)(7), defining the entry of judgment, had been withdrawn for further consideration at the June 2000 meeting. The amendments, he said, involved complicated and troublesome interfaces between the appellate and civil rules that needed to be addressed through the joint efforts of both the appellate and civil advisory committees.

Amendments for Publication and Comment

1. Electronic Service

FED. R. APP. P. 25(c) & (d), 26(c), 36(b), 45(c)

Professor Schiltz reported that the package of amendments to the appellate rules governing electronic service were identical to the proposed companion amendments to the civil rules (and companion amendments to the bankruptcy rules), except in one respect. He explained that under the proposed amendments to both the appellate rules and the civil rules:

- service by electronic means would be permitted, but only on consent of the parties;
- the document that initiates a case, *i.e.,* the complaint or notice of appeal, would be excluded from the electronic service provisions;
- electronic service would be complete upon transmission;
- the "three-day" rule, giving the party being served an additional three days to act, would be made applicable to service by electronic means;
- the court itself could use electronic means to send its orders and judgments to parties; and
- the court could choose to provide electronic service for the parties through court facilities.

Professor Schiltz said that the only difference between the proposals related to the issue of failed transmission. He noted that the appellate and civil advisory committees both agreed that if a serving party learns that its service is not effective, it must attempt to serve the appropriate document again. The appellate committee, however, was concerned about potential abuse of this provision. Therefore, it added a provision — not included in the proposed amendments to the civil rules — that would require a party being served to notify the serving party within three days after transmission that the paper was not in fact received.

Professor Cooper responded that the Advisory Committee on Civil Rules did not believe that the provision was needed. He added that there is a risk of unintended implication if the rules were to address failure of electronic service explicitly, but not failure of other types of service.

Professor Cooper was asked by the chair to describe the proposed amendments to the civil rules in further detail.

He reported that the electronic service proposal had been published in August 1999 and that some changes had been made in the amendments as a result of the public comments. He pointed out that the amended Rule 5(b)(1) makes it clear that electronic service will apply only to service under Rules 5(a) and 77(d), and not to the service that initiates a case.

Professor Cooper noted that new Rule 5(b)(2)(D) provides that electronic service — or service by means other than those specified in the current rule — must be consented to by the party being served. He added that the Department of Justice had commented that the rule should require that the consent be made in writing. Accordingly, the advisory committee had inserted new language in the amendment requiring explicitly that consent be made in writing. The committee note, though, makes it clear that the writing itself may be in electronic form.

Professor Cooper explained that the amendment specifies that service is complete on transmission. A party, moreover, may make service through the court's transmission facilities, as long as the court authorizes the practice by local rule.

Professor Cooper pointed out that paragraph 5(b)(3) had been added by the advisory committee following publication. It states that electronic service is not effective if the party making service learns that the attempted service failed to reach the person intended to be served.

He explained that the advisory committee had relied on the committee note to make the point that failed service is not effective service. Nevertheless, inclusion of an explicit statement in the text of the rule itself was prompted by consideration of the draft rule prepared by the Advisory Committee on Appellate Rules (FED. R. APP. P. 25(c)) and the desire to achieve uniformity in substance and language among the different sets of federal rules.

Professor Cooper explained that the draft paragraph 5(b)(3), as originally considered by the advisory committee, had not been limited to electronic service for fear that it might generate unintended negative implications as to the status of failed service by other means. But, he said, after reviewing the case law on the subject and considering the narrower scope of the proposed appellate rule, the Advisory Committee on Civil Rules had decided to limit the scope of the paragraph to failure of service by electronic means.

He added, however, that the advisory committee did not believe that it was necessary to include a specific time limit for notifying the serving party of a failed transmission. Several participants agreed that failed service is simply not a problem in district court practice because parties always re-serve a paper that does not reach the party being served. Thus, no time limits need be specified in the rules. They argued that paragraph 5(b)(3) was not necessary because the problems resulting from failed transmissions can readily be resolved through the exercise of judicial discretion and the development of case law.

Judge Scirica noted that the proposed amendments to the civil rules governing electronic service — as well as the companion amendments to the bankruptcy rules had been subjected to the public comment process and were ready for final approval by the Judicial Conference. On the other hand, the proposed amendments to the appellate rules had been presented to the Standing Committee only for authority to publish.

Judge Scirica said that the provisions in the two sets of rules should be the same. He pointed out, however, that paragraph (b)(3) of the proposed amendments to FED. R. CIV. P. 5 — specifying that electronic service is ineffective if the serving party learns that it did not reach the person to be served — was new material added by the advisory committee after publication. As such, it would normally have to republished for additional public comment.

The committee reached a consensus that there should be only one, uniform version of the proposed electronic service rules and that the appellate version should be altered to conform to the proposed civil version.

The Committee approved the proposed amendments to FED. R. CIV. P. 5(b) without objection.

Judge Boudin moved to conform the appellate rules to the civil rules by deleting the reference to three days in proposed new Rule 25(c)(4) and approving the other proposed electronic service amendments for publication, i.e., FED. R. APP. P. 25(c), 25(d), 26(c), 36(b), and 45(c). The motion was approved without objection.

Judge Scirica added that the reporters of the civil and appellate advisory committees should consult further with each other to make sure that the language of the proposed amendments was essentially identical.

2. Financial Disclosure

FED. R. APP. P. 26.1

The proposed amendments to Rule 26.1 *(corporate disclosure statement)* were addressed as part of the general discussion on financial disclosure, addressed later in these minutes at pages 28-31

3. Other Amendments

FED. R. APP. P. 5(c) and 21(d)

Judge Garwood reported that the proposed amendments to Rule 5(c) *(appeal by permission)* and Rule 21(d) *(writs)* would correct an inaccurate cross-reference in the current rules to FED. R. APP. P. 32. In addition, the amendments would impose a new 20-page limit on petitions for permission to appeal and petitions for a writ of mandamus, prohibition, or other extraordinary relief.

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

Professor Schiltz noted that the advisory committee had presented proposed amendments to Rule 4(a)(7) at the January 2000 meeting of the Standing Committee that would resolve case law splits among the circuits as to the finality of district court judgments and the time limit for filing a notice of appeal. He pointed out that members of the Standing Committee had expressed concerns about the amendments because, among other things, they would decouple the running of the time to file post-judgment motions (governed by the civil rules) from the running of the time to file appeals (governed by the appellate rules). Accordingly, the proposed amendments were deferred to the current meeting. In the interim, the advisory committee was asked to conduct further research into when judgments become effective for all purposes. It was also asked to work with the civil advisory committee and attempt to develop an integrated package of proposed amendments to the appellate rules and the civil rules.

Professor Schiltz reported that the two advisory committees had produced a set of proposed amendments that would resolve the concerns of the members. He said that FED. R. CIV. P. 58(b) would be amended to specify that when a judgment must be "set forth" on a separate document, it will be considered so entered when: (1) it is actually set forth on a separate piece of paper; or (2) 60 days after entry of the judgment on the civil docket, whichever is earlier. This provision, he said, would set a 60-day outer limit in determining the finality of a judgment for purposes of both a post-judgment motion and a notice of appeal. A companion amendment to FED. R. APP. P. 4(a)(7) would simply provide that a judgment is considered entered for purposes of the appellate rules when it is entered for purposes of the civil rules.

The proposed amendments would also clarify whether an order disposing of a post-judgment motion must itself be set forth on a separate piece of paper. FED. R. CIV. P. 58 would be amended to specify that orders that dispose of post-judgment motions do not have to be entered on a separate document. FED. R. APP. P. 4(a)(7), as revised, would simply refer to Civil Rule 58. Thus, the civil rules will govern, and there will be no separate appellate provision.

Judge Garwood and Professor Schiltz said that the proposed, companion amendments to FED. R. CIV. P. 58 and FED. R. APP. P. 4(a)(7) might not solve all the problems regarding the effectiveness of a judgment, but they would resolve the most serious and most frequent problems. They added that the public comment period would provide a good opportunity to discover any additional problems.

The committee approved the proposed amendments without objection.

Informational Items

Judge Garwood announced that Professor Schiltz would leave his position with the Notre Dame Law School to accept the position of associate dean of the newly established St. Thomas Law School in Minneapolis, Minnesota.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Morris presented the report of the advisory committee, as set forth in Judge Duplantier's memoranda and attachments of May 11, 2000, and May 24, 2000. (Agenda Item 6)

Judge Duplantier summarized that the advisory committee was seeking final approval of amendments to eight bankruptcy rules and one official form. He pointed out that four of the proposed amendments deal with providing adequate notice to parties affected by an injunction included in a chapter 11 plan, and two deal with giving notice to infants or incompetent persons. He noted that the public hearings scheduled for January 2000 in Washington had been canceled for lack of witnesses.

Judge Duplantier reported that the advisory committee was also seeking authority to publish proposed amendments to six rules and one official form for public comment.

Amendments for Final Approval

FED. R. BANKR. P. 1007(m)

Judge Duplantier explained that the proposed amendment to Rule 1007 *(lists, schedules, and statements)* would require a debtor who knows that a creditor is an infant or incompetent person to include in the list of creditors or schedules the name, address, and legal relationship of any representative upon whom process would be served in an adversary proceeding against the infant or incompetent person.

FED. R. BANKR. P. 2002(c) and (g)

Judge Duplantier reported that two amendments were proposed to Rule 2002 *(notices)*. New subdivision 2002(c)(3) would require that parties entitled to notice of a hearing on confirmation of a plan be given adequate notice of any injunction contained in the plan that would enjoin conduct not otherwise enjoined by operation of the Bankruptcy Code.

Subdivision 2002(g) would be revised to make it clear that when a creditor files both: (1) a proof of claim that includes a mailing address; and (2) a separate request designating a different mailing address, the last paper filed determines the proper address. In addition, a new paragraph (g)(3) would be added to assure that notices directed to an infant or incompetent person are mailed to the appropriate guardian or other legal representative identified in the debtor's schedules or list of creditors.

FED. R. BANKR. P. 3016(c)

Judge Duplantier said that a new subdivision (c) would be added to Rule 3016 *(filing of plans and disclosure statements)* to require that a plan and disclosure statement describe in specific and conspicuous language all acts to be enjoined by the provisions of a proposed injunction and to identify any entities that would be subject to the injunction.

FED. R. BANKR. P. 3017(f)

Judge Duplantier stated that a new subdivision (f) would be added to Rule 3017 *(court's consideration of a disclosure statement)* to assure that adequate notice of a proposed injunction contained in a plan is provided to entities whose conduct would be enjoined, but who would not normally receive copies of the plan and disclosure statement — or any information about the confirmation hearing — because they are not creditors or equity security holders in the case.

FED. R. BANKR. P. 3020(c)

Judge Duplantier said that subdivision (c) of Rule 3020 *(confirmation of a chapter 11 plan)* would be amended to require that the court's order confirming a plan describe in detail all acts enjoined by an injunction contained in a plan and identify the entities subject to the injunction. It would also require that notice of entry of the order of confirmation be mailed to all known entities subject to the injunction.

FED. R. BANKR. P. 9006(f)

The proposed amendment to Rule 9006 *(time)* is part of the package of proposed amendments authorizing service by electronic and other means in the federal courts. The companion amendments to FED. R. CIV. P. 5(b) were approved by the Standing Committee earlier in the meeting as part of the discussion of proposed amendments to the Federal Rules of Appellate Procedure. (See page 7 of these minutes.)

Judge Duplantier pointed out that Rule 9006(f), as amended, would explicitly authorize a party who is served by electronic means an additional three days to take any required action, just as if the party had been served by mail. Judge Duplantier added that the Advisory Committee on Bankruptcy Rules was very supportive of extending the "three-day rule" to all methods of service — including electronic service — other than service by personal delivery. He added, however, that the advisory committee was most concerned that the bankruptcy rules and the civil rules be uniform on this matter.

FED. R. BANKR. P. 9020

Judge Duplantier explained that the existing provisions of Rule 9020 *(contempt proceedings)* provide that the effectiveness of a bankruptcy judge's civil contempt order is: (1) delayed for 10 days; and (2) subject to *de novo* review by a district judge. The proposed amendment would delete the procedural provisions in the existing rule and replace them with a simple statement that a motion for an order of contempt made by the United States trustee or a party is governed by Rule 9014, which covers contested matters.

He pointed out that the amended rule does not address a contempt proceeding initiated *sua sponte* by a judge. The advisory committee, he said, noted that there is no provision in the civil rules dealing with contempt on a judge's own motion. It decided, therefore, not to include any provision in the bankruptcy rules on this point.

FED. R. BANKR. P. 9022(a)

Judge Duplantier stated that Rule 9022 *(notice of a judgment or order)* would be amended to authorize the clerk of court to serve notice of the entry of a bankruptcy judge's judgment or order by any method of service authorized by amended FED. R. CIV. P. 5(b),

including service by electronic means. He pointed out that the proposal — which mirrors the proposed amendment to FED. R. CIV. P. 77(d) — is part of the general package of amendments authorizing electronic service in the federal courts. (See the discussion above under FED. R. BANKR. P. 9006(f).)

OFFICIAL FORM 7

Judge Duplantier reported that the advisory committee would add four new questions to Official Form 7 *(statement of financial affairs)*, to solicit information from the debtor about community property, environmental hazards, tax consolidation groups, and contributions to employee pension funds. He pointed out that new Question 17, requiring information as to environmental hazards, represented a compromise because governmental agencies had wanted to require the debtor to disclose a good deal more information.

The committee approved the proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 without objection.

Amendments for Publication and Comment

FED. R. BANKR. P. 1004

Judge Duplantier and Professor Morris explained that subdivision (c) of Rule 1004 *(partnership petition)* would be deleted because it is substantive in nature. The amendments would make it clear that the rule merely implements § 303(b)(3)(A) of the Bankruptcy Code. They are not intended to establish any substantive standard for the commencement of a voluntary case by a partnership. The amended rule will deal only with involuntary petitions against a partnership.

FED. R. BANKR. P. 1004.1

Professor Morris stated that the proposed new Rule 1004.1 would fill a gap in the existing rules and address the filing of a petition on behalf of an infant or an incompetent person. He noted that it is patterned after FED. R. CIV. P. 17(c) and allows a court to make any orders necessary to protect the infant or incompetent person.

FED. R. BANKR. P. 2004(c)

Judge Duplantier reported that subdivision (c) of Rule 2004 *(examination)* would be amended to clarify that an examination may take place outside the district in which the case is pending. An attorney who is admitted to practice in the district where the examination is to be held may issue and sign the subpoena.

FED. R. BANKR. P. 2014

Judge Duplantier said that Rule 2014 deals with approval of the employment of a professional and with disclosure of the information necessary to determine whether the professional is "disinterested" under the Bankruptcy Code. He pointed out that the rule was being rewritten to make it conform more closely to the applicable provisions of the Code.

Professor Morris added that the revised rule might be controversial because it deals with employment standards and prerequisites for the payment of professionals. The current rule, he said, requires disclosure of the professional's connections with a broad range of persons and organizations. The revised rule would narrow the scope of the disclosures and leave the definition of disinterestedness exclusively to the Code.

FED. R. BANKR. P. 2015(a)(5)

Judge Duplantier said that paragraph (a)(5) of Rule 2015 *(duty to keep records, make reports, and give notice of case)* would be amended to provide that the duty of a trustee or debtor in possession to file quarterly disbursement reports will continue only as long as there is an obligation to make quarterly payments to the United States trustee. Professor Morris added that the change was technical in nature since it would merely conform the rule to 28 U.S.C. § 1930(a)(6), which was amended in 1996.

FED. R. BANKR. P. 4004(c)

Judge Duplantier explained that subdivision (c) of Rule 4004 *(grant or denial of discharge)* would be amended to postpone the entry of a discharge if a motion to dismiss a case has been filed under § 707 of the Bankruptcy Code. The current rule, he said, is narrower, as only motions to dismiss brought under § 707(b) postpone a discharge.

FED. R. BANKR. P. 9014

Judge Duplantier reported that the advisory committee recommended two changes in Rule 9014 *(contested matters)* that would address complaints voiced by the bar about the way that contested matters are handled in some districts.

Judge Duplantier explained that the first proposed amendment, set forth as new subdivision (d), would govern the use of affidavits in disposing of contested matters. He said that a number of bankruptcy courts now routinely resolve contested matters on the basis of affidavits alone. He added that the practice was controversial, and there was a split of opinion as to its legality and advisability.

Judge Duplantier stated that the proposed amendment would provide that if the court needs to resolve a disputed material issue of fact in order to decide a contested matter, it must

hold an evidentiary hearing at which witnesses testify. It may not rely exclusively on affidavits in those circumstances. Contested matters, thus, would be handled in the same manner as adversary proceedings and trials in civil cases in the district courts under FED. R. CIV. P. 43.

The second amendment would address complaints from the bar that some courts schedule contested matters for a hearing without informing the parties in advance as to whether evidence will be taken from witnesses at the hearing. Lawyers, therefore, bring their witnesses to court, only to learn that live testimony will not be allowed. Judge Duplantier said that the proposed amendment would require the courts to establish procedures giving parties advance notice of whether a scheduled hearing will be an evidentiary hearing at which witnesses may testify.

FED. R. BANKR. P. 9027

Judge Duplantier said that Rule 9027(a)(3) *(notice of removal)* would be amended to make it clear that if a claim or cause of action is initiated in another court after a bankruptcy case has been commenced, the time limits for filing a notice to remove that claim or cause of action to the bankruptcy court apply, whether or not the bankruptcy case is still pending. In other words, he said, if a state court action is filed after a bankruptcy discharge has been granted, the action should be removable, whether or not the bankruptcy case is still pending.

OFFICIAL FORM 1

Judge Duplantier reported that the advisory committee recommended amending Official Form 1 *(Voluntary Petition)* to require that the debtor disclose the ownership or possession of property that may pose a threat of imminent and identifiable harm to public health or safety. He noted that the change may be controversial because it could be seen as calling for self-incrimination. But, he said, the advisory committee had drafted the language carefully to avoid the problem by requiring disclosure only of property that "to the best of the debtor's knowledge, poses or is alleged to pose" a threat to public health or safety.

Professor Morris pointed out that the petition form itself will require the debtor to check a box declaring whether there is any property posing an alleged harm. If so, the debtor must also attach new Exhibit C setting forth more detailed information about the alleged harm. This information, he said, would be filed by the debtor at the beginning of a case, so it would be flagged early for the attention of affected government agencies.

The committee approved the proposed amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, proposed new Rule 1004.1, and proposed amendments to Official Form 1 for publication and comment without objection.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal, acting for Judge Paul V. Niemeyer, the chair of the advisory committee, and Professor Cooper presented the report of the advisory committee, as set forth in Judge Niemeyer's memorandum and attachments of May 2000. (Agenda Item 7)

Rules for Final Approval

1. Electronic Service

FED. R. CIV. P. 5(b) and 6(e)

Professor Cooper pointed out that the proposed amendments to Rule 5(b) *(making service)* authorizing service by electronic means had been approved by the Standing Committee earlier in the meeting during its consideration of the report of the Advisory Committee on Appellate Rules. (See page 7 of these minutes.)

Professor Cooper explained that the advisory committee, in its August 1999 request for public comments, had *not* recommended that Rule 6(e) *(additional time after service)* be amended. The proposed amendment would extend the "three-day rule" to electronic service. Nevertheless, he said, the committee included it in its publication as an alternative proposal.

After reviewing the public comments and considering the proposed companion amendments to the bankruptcy rules, the advisory committee agreed unanimously to approve the proposed amendment to Rule 6(e). Thus, when service is made electronically — or by any means other than personal service — the party being served will be allowed an extra three days to act. He pointed out that electronic service is not in fact always instantaneous, and transmission problems may need some time to be straightened out. In addition, he said, inclusion of the three-day provision may encourage consents. Finally, he added, the advisory committee was convinced that the provisions of the civil rules should be consistent with those of the bankruptcy rules, which adopt the three-day rule.

The committee approved the proposed amendment to Rule 6(e) without objection.

FED. R. CIV. P. 77(d)

Professor Cooper noted that the proposed amendments to Rule 77(d) *(notice of orders or judgments)* reflect the changes proposed in Rule 5(b) and would authorize the clerk of court to serve notice of the entry of an order or judgment by electronic or other means.

The committee approved the proposed amendments without objection.

2. *Abrogation of the Copyright Rules*

Professor Cooper reported that the Advisory Committee recommended abrogation of the obsolete Copyright Rules of Practice under the 1909 Copyright Act. He noted that the advisory committee had urged elimination of these rules as long as 37 years ago.

FED. R. CIV. P. 65(f)

Professor Cooper pointed out that a new subdivision (f) would be added to Rule 65 *(injunctions)* to make the rule applicable to copyright impoundment proceedings.

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

Professor Cooper said that Rule 81(a) *(proceedings to which the federal rules apply)* would be amended to eliminate its reference to copyright proceedings. In addition, the rule's obsolete reference to mental health proceedings in the District of Columbia would be eliminated, and its reference to incorporation of the civil rules into the Federal Rules of Bankruptcy Procedure would be restyled.

The committee approved abrogation of the copyright rules and the proposed amendments to Rules 65 and 81 without objection.

3. Technical Amendment

FED. R. CIV. P. 82

Professor Cooper reported that the proposed amendment to Rule 82 *(jurisdiction and venue not affected by the federal rules)* was purely a technical conforming change that could be made without publication. He said that the text of the current rule refers to 28 U.S.C. §§ 1391-1393. But Congress repealed § 1393 in 1988. Thus, the reference needed to be changed to 28 U.S.C. §§ 1391-1392.

The committee approved the proposed amendment without objection.

Amendments for Publication and Comment

1. Judgments

FED. R. CIV. P. 54(d) and 58

Judge Rosenthal noted that the Standing Committee had discussed the proposed amendments to Rules 54 *(judgments and costs)* and 58 *(entry of judgment)* earlier in the meeting as part of its consideration of the report of the Advisory Committee on Appellate

Rules and its approval of companion amendments to FED. R. APP. P. 4(a)(7). (See pages 8-9 of these minutes.)

She explained that Civil Rule 58(b) would be amended to provide that when the civil rules require that a judgment be set forth on a separate document, it will be deemed to have been entered for purposes of finality either: (1) when it is actually set forth on a separate document; or (2) when 60 days have run from entry on the civil docket, whichever is earlier.

Professor Cooper explained that under the rules a judgment is not effective until it is set forth on a separate document and entered on the civil docket. But, he said, in practice this requirement is ignored in many cases. Thus, failure to enter a final judgment on a separate document means that the time to file a post-judgment motion under the civil rules or a notice of appeal under the appellate rules never begins to run.

Professor Cooper added that the new Rule 58(b) is the central provision in the proposed amendments to integrate the civil and appellate rules. It would work in tandem with the proposed amendments to FED. R. APP. P. 4(a). As a result, a judgment would become final at the same time for purposes of both the civil and appellate rules.

Professor Cooper said that the proposed amendment to Rule 54(d) would delete the separate document requirement for an order disposing of a motion for attorney fees.

Professor Cooper suggested that the term "judgment," as used in the civil rules, is overly broad and may lead to a number of difficult theoretical problems. But, he said, the advisory committee had found no indication that the theoretical problems occur in practice. Thus, it saw no reason to reopen the definition of judgment in Rule 54(a). He added that the advisory committee had also decided not to reopen the separate document requirement of Rule 58.

The committee approved the proposed amendments for publication and comment without objection.

2. Financial Disclosure

The advisory committee's proposed new Rule 7.1 was discussed and approved by the Standing Committee later in the meeting as part of its consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

3. Applicability of the Rules to Section 2254 and 2255 Cases and Proceedings

FED. R. CIV P. 81(a)

Professor Cooper reported that Rule 81(a)(2) *(applicability of the rules in general)* would be amended to make its time limits consistent with the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

The committee approved the proposed amendment for publication and comment without objection.

Information on Pending Projects

Judge Rosenthal referred briefly to several projects pending before the advisory committee and pointed out that they were described in greater detail at Tab 7B of the agenda materials.

She noted that the advisory committee's discovery subcommittee was continuing to explore a number of discovery issues, particularly those flowing from discovery of computer-based information. She said that the subcommittee had conducted a mini-conference with lawyers, judges, and forensic computer specialists to hear from them about the problems they have encountered with discovery of information in automated form. She added that the subcommittee had identified and discussed in a preliminary way several problems cited by practitioners. The central questions, she said, are: (1) whether the current federal rules are adequate to deal with the impact of the new technology; and (2) whether any of the problems identified are subject to rule-based solutions.

Judge Rosenthal reported that a subcommittee of the advisory committee was continuing to look at Rule 23 *(class actions)* to determine whether any additional changes in that rule might be appropriate. She pointed out that the committee had been examining Rule 23 since 1991. It had collected a great deal of empirical information and opinions from the bar, which have been published in extensive working papers. She noted that the committee's earlier proposals to amend Rule 23 had stirred substantial controversy, and it had not been possible to reach consensus on key issues. In addition, she said, the substantive law of class actions had been addressed recently by the Supreme Court.

Judge Rosenthal said that the subcommittee's initial sense was that further "substantive" changes are not called for in Rule 23. But it would continue to explore such discrete areas as attorney fees, procedures for approving settlements, the terms of settlements, and providing protection for absent class members.

Judge Rosenthal reported that a subcommittee had been appointed to study the use of special masters. She noted that the current Rule 53 focuses on special masters as fact finders,

but courts are using masters increasingly for various pretrial management and post-judgment purposes. She pointed out that the Federal Judicial Center had presented the advisory committee with an excellent empirical report on the use and practices of special masters in the district courts.

Finally, Judge Rosenthal reported that a subcommittee had been appointed to study the feasibility of creating an alternative set of simplified civil procedure rules that would be appropriate for some cases as a means of reducing costs and delay. The draft proposal would incorporate such features as early and firm trial dates, shorter discovery deadlines, reduced amounts of discovery, and curtailed motion practice.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis, Judge Miller, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of May 8, 2000. (Agenda Item 8)

Amendments for Publication and Comment

Judge Davis reported that the advisory committee was seeking authority to publish three proposals for public comment:

1. a complete, restyled set of Criminal Rules 1-60, set forth in two separate packages;

2. proposed changes to the Rules Governing § 2254 Cases and § 2255 Proceedings; and

3. a new Criminal Rule 12.4, governing financial disclosure.

1. Comprehensive Review and Restyling of the Criminal Rules

Judge Davis said that the advisory committee had been working on restyling the entire body of Federal Rules of Criminal Procedure for more than a year. He noted, however, that several of the committee's proposed amendments had been under consideration before the restyling project began. And, as part of the restyling effort, the committee identified several amendments that might be considered substantive or controversial.

Therefore, he said, the advisory committee had decided to seek authority to publish the restyled body of rules in two separate packages. The first would consist of all the rules containing merely stylistic changes. The second would contain those rules in which the committee is proposing substantive changes, *i.e.,* Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41,

and 43. He added that these substantive changes had been deleted from the purely "style" package, and a reporter's note to the style package will explain that additional, substantive changes are being proposed and published simultaneously in a separate package.

Judge Davis noted that the revised Rules 1-31 had been approved for publication by the Standing Committee at its January 2000 meeting. He added that the advisory committee had considered the various suggestions made by members of the Standing Committee at that meeting, and it had incorporated them into a revised draft for publication. He proceeded to summarize the significant, non-style changes made by the advisory committee in Rules 1-31 following the January meeting.

Rules 1-31

FED. R. CRIM. P. 5

Judge Davis pointed out that the revised Rule 5 *(initial appearance)* would authorize an initial appearance to be conducted by video teleconferencing if the defendant waives the right to be present. He noted that the advisory committee would also publish an alternate version of the rule that would permit the court to conduct the appearance by video teleconferencing without the defendant's consent.

Judge Davis reported that the advisory committee had concluded that Rule 5 should be expanded to address all initial appearances. Thus, material currently located in Rule 40 *(commitment to another district)* would be moved to Rule 5. The revised rule also would provide explicitly that Rules 32.1 *(revoking or modifying probation or supervised release)* and Rule 40 *(commitment to another district)* apply when a defendant is arrested for violating the terms of probation or supervised release or for failing to appear in another district.

FED. R. CRIM. P. 10

Judge Davis reported that Rule 10 *(arraignment)* would be amended to allow video teleconferencing of arraignments upon the consent of the defendant. As with Rule 5, the advisory committee would also publish an alternate version of the rule permitting the court to conduct an arraignment by video teleconferencing without the defendant's consent.

FED. R. CRIM. P. 24

Judge Davis noted that the advisory committee had presented the Standing Committee in January 2000 with a proposed amendment to Rule 24 that would equalize the number of peremptory challenges at 10 per side. But, he said, the proposal would be controversial. Therefore, the advisory committee decided after further consideration to delete the proposed amendment from the restyling project and defer it for later consideration on the merits.

FED. R. CRIM. P. 26

Judge Davis reported that the proposed amendments to Rule 26 *(taking testimony)* would conform the rule in some respects to FED. R. CIV. P. 43. First, it would allow testimony from witnesses at remote locations. Second, it would delete the term "orally" from the current rule in order to accommodate witnesses who are unable to present oral testimony and may need a sign language interpreter.

Judge Davis noted that questions had been raised at the January 2000 meeting as to the possible impact of the amendments on FED. R. EVID. 804. He explained that the advisory committee had narrowed the proposed amendment to apply to those situations in which a witness is "unavailable" only within the meaning of paragraphs (4) and (5) of Evidence Rule 804(a).

Rules 32-60

Judge Davis reported that the advisory committee had considered proposed style revisions in Rules 32-60 at a special meeting in January 2000, at two subcommittee meetings, and at its regularly scheduled meeting in April 2000. He proceeded to discuss the rules that the advisory committee believed included one or more substantive changes or changes that warranted further elaboration.

FED. R. CRIM. P. 32

Judge Davis reported that Rule 32 *(Sentence and Judgment)* had been completely reorganized to make it easier to follow and apply. He pointed out that one proposed change in the rule may generate controversy. The current rule, he said, requires a court to rule on all unresolved objections to the presentence report. The revised rule would require the court to rule only on all unresolved objections to a "material" matter in the report.

Judge Davis noted that the Bureau of Prisons relies on the presentence report to make decisions about defendants in its custody. One member said that the current rule apparently requires judges to rule on matters that do not affect their sentence because the Bureau of Prisons may need the information for its own administrative purposes. During the discussion that ensued, various members offered the following points: (1) a court should not be burdened by having to decide matters not required for its sentencing decision because the Bureau of Prisons may need certain information; (2) defendants should not be penalized for non-essential information contained in the presentence report; (3) defense counsel have an obligation to ask the court to delete any objectionable information in the report; (4) the courts could ask probation officers to exercise greater discretion in keeping certain information out of the reports; and (5) the advisory committee could ask the Bureau of Prisons to reconsider some of its procedures.

Mr. Marcus said that the Bureau of Prisons needs and appreciates all the information it can obtain from the court. He pointed out that the Bureau has a difficult problem in obtaining relevant and accurate information from other sources, and it faces serious operational problems because of the volume of its caseload. He expressed concern about any effort that might restrict the Bureau from using any information that it currently receives from the court.

Judge Scirica recommended that the proposed rule be published for comment. He further suggested that the advisory committee take into account the various concerns expressed by the members and initiate discussions with the Bureau of Prisons. He said that the advisory committee should be prepared to address these matters when it returns to the Standing Committee for approval of the rule following publication.

Professor Schlueter reported that new paragraph (h)(5) would fill a gap in the current rules by requiring the court to give notice to the parties if it contemplates departing from the sentencing guidelines on grounds not identified either in the presentence report or in a submission by a party. He pointed out that this procedure is required by case law.

FED. R. CRIM. P. 32.1

Professor Schlueter said that Rule 32.1 *(revoking or modifying probation or supervised release)* had been completely restructured, but no significant changes had been made. He pointed out that language had been added that would govern an initial appearance when a person is arrested in a district that does not have jurisdiction to conduct a revocation proceeding.

FED. R. CRIM. P. 35

Judge Davis reported that Rule 35 *(correction or reduction of sentence)* would be amended to delete current subdivision (a), specifying district court action on remand, because it simply is not necessary.

Judge Davis said that subdivision (b) includes a substantive change that had been under consideration by the advisory committee before the restyling project. He pointed out that the amendment responds to the decision of the Eleventh Circuit in *United States v. Orozco,* 160 F. 3d 1309 (11th Cir. 1998), in which the court of appeals had urged an amendment to the current rule to address the unforseen situation in which a convicted defendant provides information to the government within one year of sentencing, but the information does not become useful to the government until more than a year has elapsed.

Concern was expressed by some of the members as to whether the proposed rule resolved all the issues raised by the *Orozco* case. Judge Davis and Professor Schlueter

suggested that the revised rule be published for comment and that the advisory committee consider the implications of *Orozco* further during the comment period.

FED. R. CRIM. P. 40

Judge Davis pointed out that much of the substance of Rule 40 *(commitment to another district)* would be relocated to Rule 5.

FED. R. CRIM. P. 41

Judge Davis reported that the advisory committee would make significant changes in Rule 41 *(search and seizure)*. First, he said, the revised rule had been substantially reorganized. Second, it would explicitly authorize "covert entry warrants" allowing law enforcement agents to enter property to obtain information, rather than to seize property or a person. He pointed out that two circuit courts of appeals had authorized this type of search warrant under the language of the current rule.

Judge Davis explained that the advisory committee would expand the definition of "property" in the text of the revised rule, at subparagraph (a)(2)(A), to include "information." Likewise, new paragraph (b)(1) would authorize a judge to issue a warrant, not only to search and seize, but also to "covertly observe," a person or property.

Judge Davis pointed out that new paragraph (f)(5) would require the holder of the warrant to notify the owner of the property by delivering a copy of the warrant within seven days. On the government's motion, the court could extend the time to deliver the warrant to the property owner on one or more occasions.

Judge Miller reported that he had used the Administrative Office's electronic list-server to ask all magistrate judges about their experience with covert searches. He said that the responses from the magistrate judges demonstrated that these searches were being used widely, especially in environmental cases. He added, though, that covert search warrants are a matter of general concern to magistrate judges because neither the rule nor a statute authorizes them explicitly. He added that magistrate judges were unanimous in asking the advisory committee for additional guidance and authority on the matter.

One member suggested that the proposed amendment may be inappropriate because it could be viewed as a substantive law. Professor Schlueter replied that the advisory committee had intended only to provide the procedures for a practice that has been in common use for years.

Judge Davis added that the advisory committee had agreed by a split vote to include covert entry warrants in the revised rule because it is better to have clear recognition of them in the rules, rather than to have judges rely on a limited body of case law. When asked to

elaborate on why some members of the advisory committee had opposed the provision, Judge Davis responded that the reasons cited included: (1) objections to covert entry searches as a matter of policy; (2) concerns over the adequacy of the notice provisions in the proposed rule; and (3) a sense that case law should be given additional time to develop.

FED. R. CRIM. P. 42

Judge Davis reported that revised Rule 42 *(criminal contempt)* sets out more clearly the procedures for conducting a contempt proceeding. It would also add language to reflect the holding of the Supreme Court in *Young v. United States ex rel Vuitton,* 481 U.S. 787 (1987), that the court should ordinarily request that a contempt be prosecuted by a government attorney. A private attorney should not be appointed unless the government first refuses to prosecute the contempt.

FED. R. CRIM. P. 43

Judge Davis said that Rule 43 *(defendant's presence)* requires the defendant to be present at various proceedings in a criminal case. But a new exception would be added to subdivision (a) to reflect the proposed amendments to Rules 5 and 10, allowing video teleconferencing of initial appearances and arraignments. Thus, the language of the revised rule would provide that the defendant must be present "(u)nless this rule, Rule 5, or Rule 10 provides otherwise."

FED. R. CRIM. P. 46

Professor Schlueter reported that subdivision (i) to Rule 45 *(release from custody)* had been difficult to restyle. It had been added to the rules by Congress and was awkwardly written. The advisory committee, he said, decided not to make any change in what appeared to be the intention of Congress.

FED. R. CRIM. P. 48

Professor Schlueter stated that Rule 48 *(dismissal)* gives a court authority to dismiss charges against the defendant due to government delay. He pointed out that it is a speedy trial provision that was in effect before enactment of the Speedy Trial Act. The advisory committee, he said, was concerned that if it merely restyled Rule 48, its action might have the unintended effect of overruling the Speedy Trial Act through the supersession clause of the Rules Enabling Act. 28 U.S.C. § 2072(b).

Professor Schlueter said that the advisory committee was of the view that the separate provisions of Rule 48 are still viable, as they cover pre-indictment delays. Therefore, it decided to state explicitly in the committee note that Rule 48 operates independently of the

Speedy Trial Act and that no change is intended in the relationship between the rule and the Act.

FED. R. CRIM. P. 49

Professor Schlueter reported that subdivision (c) of Rule 49 *(serving and filing papers)* would be broadened to reflect the changes being made in FED. R. CIV. P. 5(b) and 77(b) to permit a court to provide notice of its judgments and orders by electronic and other means.

FED. R. CRIM. P. 51

Professor Schlueter reported that the restyling of Rule 51 *(preserving claimed error)* raised another supersession clause issue. The advisory committee would add a new sentence at the end of the rule to state explicitly that any ruling admitting or excluding evidence is governed by the Federal Rules of Evidence. The committee, he said, was concerned that without the sentence an argument might be made that re-enactment of Rule 51 would supersede FED. R. EVID. 103.

FED. R. CRIM. P. 53

Professor Schlueter reported that the word "radio" would be deleted from Rule 53 *(courtroom photographing and broadcasting prohibited)*. In addition, he said, the advisory committee had been concerned as to whether other rules may allow video teleconferencing in light of Rule 53's blanket prohibition on broadcasting judicial proceedings from the courtroom. Therefore, it would add language to Rule 53 to recognize explicitly that the rules themselves may contain exceptions to the prohibition, such as the proposed amendments to Rules 5 and 10 authorizing video teleconferencing of initial appearances and arraignments.

The committee without objection approved for publication and comment:

1. **the package of proposed style revisions to Rules 1-60;**
2. **the separate package of proposed amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43.**

2. Rules Governing §§ 2254 and 2255 Proceedings

Judge Davis reported that the advisory committee had appointed an ad hoc subcommittee to review the Rules Governing § 2254 Cases and § 2255 Proceedings to determine whether any changes were required as a result of the Antiterrorism and Effective Death Penalty Act of 1996. In addition, he said, the subcommittee had tried without success to combine the two sets of rules.

RULE 1

Judge Davis said that advisory committee had recommended amending Rule 1 *(scope of the rules)* of both sets of rules to make them applicable to actions brought under 28 U.S.C. § 2241, which most commonly involve prisoners challenging the execution of their sentence. But, he said, a number of complications had been discovered recently, and the advisory committee decided to withdraw the proposed amendments to Rule 1.

RULE 2

Judge Davis explained that the language of Rule 2 *(petition)* of both sets of rules would be amended to conform to the usage of FED. R. CIV. P. 5(e). Thus, the reference would be to a petition "filed with" the clerk, rather than one "received by" the clerk.

RULE 3

Judge Davis said that Rule 3 of both sets of rules *(filing petition)* would also be amended to conform with the language of FED. R. CIV. P. 5(e). The first part of the rule would be deleted because it conflicts with the requirement of FED. R. CIV. P. 5(e) that the clerk must file any papers submitted, but may refer them to the court for consideration of any defects.

RULE 6

Judge Davis reported that Rule 6 *(discovery)* of the § 2254 Rules would be amended to correct a statutory reference to the Criminal Justice Act.

RULES 8 and 10

Judge Davis said that the only changes proposed in Rules 8 *(evidentiary hearing)* and 10 *(powers of magistrate judges)* would reflect the change in the title of United States magistrate to United states magistrate judge.

RULE 9

Judge Davis reported that the only substantive change proposed in the §§ 2254 and 2255 Rules was found in Rule 9 *(delayed or successive petitions)*. He said that both sets of rules would be amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act imposing limits on the ability of a petitioner to file successive habeas corpus petitions. The Act provides that a second or successive petition must first be presented to the court of appeals for an order authorizing the district court to consider it.

One of the participants suggested that the language of the proposed amendment, which would require the applicant to "move" for an order in the court of appeals, may be inadequate. He pointed out that petitioners will inevitably claim that they have in fact "moved" for an order authorizing the district court to consider the petition, whether or not the court of appeals has granted the order. Therefore, he suggested that the pertinent sentence be restructured to provide that a district court may not consider a petition until the court of appeals has authorized it to do so. Judge Scirica announced that there was a consensus on the committee to make the suggested change.

One of the members pointed out that there was a gender-specific reference on line 6 of Rule 3 of the § 2255 Rules that should be restyled. Professor Schlueter responded that the advisory committee had made only minimal changes in the rules, and it was not proposing any amendments to the part of the rule that contains the gender-specific reference. He added that the advisory committee had not attempted to restyle or modernize the §§ 2254 and 2255 Rules and had agreed to defer that project to a future date.

Some participants suggested that it would be very simple to take care of the specific reference in Rule 3. They added that all rules published for comment should be gender neutral as a matter of policy. Judge Scirica asked the chairs and reporters to work together to develop a uniform policy on this matter for all the rules.

The committee without objection approved for publication and comment the proposed amendments to the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

After the meeting, it was discovered that the materials before the committee contained the proposed corrections to the Criminal Justice Act references: (1) in Rule 6(a) of the § 2254 Rules, but not in Rule 8(c) of the § 2254 Rules; and (2) in Rule 8(c) of the § 2255 Rules, but not in Rule 6(a) of the § 2255 Rules. **The committee by mail vote approved correcting the Criminal Justice Act references in Rules 6(a) and 8(c) of both sets of rules.**

3. Financial Disclosure

The advisory committee's proposed new Rule 12.4 was discussed and approved separately, as part of the Standing Committees consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in Judge Shadur's memorandum and attachments of May 1, 2000. (Agenda Item 9)

Judge Shadur reported that he had informed the committee in January 2000 that the advisory committee had completed its review of all the evidence rules and it was now engaged in some specific projects. He pointed out, for example, that the advisory committee was looking at privileges, under the direction of a subcommittee chaired by Judge Jerry Smith. He added that the committee was very conscious of the controversial nature of attempting to do anything in the area of privileges.

Judge Shadur also pointed out that the advisory committee had considered proposed amendments to FED. R. EVID. 608 and 804, which might be brought to the attention of the Standing Committee at its next meeting.

Judge Shadur reported that Professor Capra had produced a study and report for the advisory committee on those rules of evidence in which the case law has diverged materially from either the apparent meaning of the rule or the committee note. The document, he said, would be very useful in avoiding traps for the unwary practitioner. He added that the Federal Judicial Center and others had agreed to publish it. He emphasized that the advisory committee makes it clear that the document had been prepared simply to assist the bar, and it does not constitute an official committee note.

FINANCIAL DISCLOSURE

Judge Scirica pointed out that the committee had spent a good deal of time on financial disclosure issues at its January 2000 meeting. He said that financial disclosure was not, strictly speaking, a procedural issue. Nevertheless, there had been some embarrassing incidents reported in the press, and the Codes of Conduct Committee was urging the rules committees to promulgate new federal rules on financial disclosure.

FED. R. APP. P. 26.1
FED. R. CIV. P. 7.1
FED. R. CRIM. P. 12.4

Judge Scirica said that the draft amendments to the appellate, civil, and criminal rules set forth in Agenda Item 11 of the materials were all based on current FED. R. APP. P. 26.1 *(corporate disclosure statement)*. Rule 26.1 requires a nongovernmental corporate party to file a statement with the court of appeals identifying all its parent corporations and listing any publicly held company that owns 10% or more of its stock.

Judge Scirica pointed out that there is currently no corresponding national rule requiring corporate disclosure in the district courts, although 19 district courts have adopted a version of FED. R. APP. P. 26.1 as a local rule. Moreover, many individual judges impose their own, additional disclosure requirements.

Judge Scirica said that the most recent proposal before the committee, submitted jointly by the reporters, contains a two-track proposal: (1) a national rule requiring minimal information; and (2) additional requirements that could be adopted by the Judicial Conference at a later date. He said that inclusion of this provision in the proposal would give the judiciary the flexibility to make adjustments promptly if circumstances change.

Thus, the proposed new FED. R. CIV. P. 7.1, and its counterparts in the criminal and appellate rules, would be based on the current FED. R. APP. P. 26.1, in that it would require a party to file two copies of either: (1) a statement that identifies its parent corporations and any publicly held company that owns 10% of more of its stock; or (2) a statement declaring that it has nothing to report under the rule. But a party would also have to file copies of any supplemental information required by the Judicial Conference. The statements would be filed by a party with its first appearance, pleading, petition, motion, response or request addressed to the court. A party would also be required to file a supplemental statement promptly upon any change in circumstances.

Professor Coquillette pointed that there was a fundamental difference of opinion between the Codes of Conduct Committee and the advisory committees. The Codes of Conduct Committee, he said, favored adopting civil and criminal rules that essentially just repeat FED. R. APP. P. 26.1. It contends that the provision allowing the Judicial Conference to require additional information is unnecessary.

On the other hand, the advisory committees believe that simply adopting the appellate rule is insufficient. They contend that authorizing additional requirements is necessary because it would give the Judicial Conference authority to make changes from time to time, without having to invoke all the formality and take all the time required by the rulemaking process. In addition, he said, additional requirements could be developed by Judicial Conference resolution and put in place very quickly — well before the two to three years that it would take for new federal rules to take effect. One member added that immediate Conference action would be more impressive for political and public reasons than adopting a rule that would take up to three years to take effect.

Some participants suggested that the whole subject involved an administrative matter that does not belong in the federal rules. They argued that it should be handled by Judicial Conference resolution alone. They added that the Conference could simply ask the Director of the Administrative Office to issue a standard form that parties would have to complete for the clerk, similar to the form that parties must now complete disclosing whether they are involved in any related cases.

Other members replied, however, that the Judicial Conference was not likely to approve a form without a rule, especially when the Codes of Conduct Committee is opposed to having a form and is urging adoption of a rule. Another participant said that if the Judicial Conference were merely to issue a form, it would likely not have the authority to preclude local variations. By acting through the rules process, there would be clear authority to require national uniformity.

Some members added that a federal rule on financial disclosure statements was both appropriate and beneficial because it would give direction to the bar and inform the parties of their obligations. It was also pointed out that FED. R. APP. P. 26.1 has been in place for more than a decade and has been very effective.

One member said that he would vote to approve both the new rule and the additional requirements, but he pointed out that the proposal was really unnecessary on the merits. He argued that it would not solve the real issues of recusal, nor would it address the kinds of problems that had generated the negative press reports. He argued that the matter was largely a political and media issue.

Professor Coquillette reported that the proposed new civil, criminal, and appellate rules on financial disclosure were identical, except in one respect. He explained that the Advisory Committee on Civil Rules was of the view that the rule should contain a specific requirement that the clerk of court actually deliver a copy of the disclosure statements to each judge acting in the case. Professor Cooper added that the advisory committee was convinced that the provision was justified by differences in district court practice from appellate practice. Judge Rosenthal commented that the issue was of concern to the district courts, as opposed to the courts of appeals, because district judges and magistrate judges cannot otherwise count on promptly receiving every piece of paper that is filed. Judge Davis added that the criminal rule should be the same as the civil rule. Judge Garwood pointed out, however, that the appellate rules committee saw no need for such a requirement in the courts of appeals.

Professor Coquillette said that another key issue was whether the new national rules should allow local court variations. He explained that FED. R. APP. P. 26.1 does not address the matter, but its accompanying committee note invites the courts of appeals to expand on the information that must be disclosed by corporate parties. He said that all but three of the circuits in fact do so, and they solicit information about such matters as subsidiaries, partnerships, and real estate holdings. He noted that the proposals now before the committee, like Rule 26.1, would not prohibit courts from expanding on the national disclosure requirements.

Judge Scirica added that there is no agreement among the courts themselves on what information should be disclosed, as illustrated graphically by the wide variety of local circuit court rules expanding on FED. R. APP. P. 26.1. He said that there might be strong opposition

within the Judicial Conference to any proposed amendment that would eliminate the current authority of courts to add local disclosure requirements. Therefore, he said, it makes good sense to present the Conference with proposals that allow some local variations.

Professor Cooper pointed out that FED. R. APP. P. 26.1 had been narrowed recently to eliminate the requirement that corporate parties disclose their subsidiaries, although some circuits continue to require this information through local rules. He said that there is a bewildering array of material contained in the local circuit rules that could be considered for inclusion in the future, but the matter would best be handled through additional requirements set forth by the Judicial Conference.

Judge Scirica and Professor Coquillette said that the Codes of Conduct Committee was opposed to allowing local court variations from the national requirement, but it had indicated that it would defer to the rules committee on this matter.

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

ATTORNEY CONDUCT

Judge Scirica reported that the special subcommittee on attorney conduct had conducted a superb conference with members of the bench and bar in February 2000 and had received many useful suggestions. He said that considerable progress had been made toward reaching a consensus on draft rules — if draft rules were to be promulgated — and that Professors Cooper and Coquillette had refined the earlier draft proposals. He pointed out that several alternatives were still under consideration, and that the subject matter of attorney conduct had been divided into three potential federal rules:

1. a suggested Federal Rule of Attorney Conduct 1 to govern attorneys generally;

2. a possible Federal Rule of Attorney Conduct 2 to address certain problems faced by federal government attorneys; and

3. a possible Federal Rule of Attorney Conduct 3 to address attorney conduct in bankruptcy practice.

Professor Coquillette said that the enabling statute requires the Judicial Conference to work towards procedural consistency in the federal courts. But, he said, attorney conduct is an area in which there is now virtually no consistency among the courts. He added that about 30% of the federal courts have not adopted local rules consistent with the conduct rules of their states.

Professor Coquillette said that the area in which the most progress can be made is with proposed Federal Rule of Attorney Conduct 1. He reported that there is now a clear consensus that attorney conduct should be governed generally by the states. He added that his research, and that of the Federal Judicial Center, had revealed that there were very few issues of exclusively federal conduct. Therefore, promulgation of a general federal rule requiring that a federal court to follow the attorney conducts rules of the state in which they are located would eliminate about 200 existing local federal court rules and restore vertical consistency to the system.

Professor Coquillette said that Federal Rules of Attorney Conduct 2 and 3 could be taken up after Rule 1. He pointed out that there are legitimate federal interests that need to be protected, and he recognized that the Department of Justice has real concerns that must be addressed. He noted that pending legislation in Congress, if enacted, would require the judiciary to propose specific solutions to government attorney problems within prescribed one-year and two-year time frames. With regard to bankruptcy practice, he said, the Advisory Committee on Bankruptcy Rules has the expertise to address attorney conduct issues, but it would prefer to wait until final decisions are made regarding proposed Federal Attorney Conduct Rule 1.

Professor Coquillette reported that Professor Cooper had prepared six variations of a proposed Federal Attorney Conduct Rule 1, set forth in Agenda Item 10 of the committee materials. The six versions vary in the level of detail, he said, but all share the common theme that federal courts should look to state law on matters of professional responsibility. They also recognize, however, that federal courts must retain control over their own practice and procedure, and they have a statutory responsibility to control who may appear before them as an attorney.

Chief Justice Veasey said that the Conference of Chief Justices would support the simplest of the six variations, *i.e.,* a single sentence specifying that state attorney conduct rules apply. He expressed concern about proposed Federal Rule of Attorney Conduct 2. Professor Coquillette responded that the proposed rules will not be approved by the Judicial Conference unless there is a clear consensus for them. Mr. Marcus added that the Department of Justice had no problems with Federal Rule of Attorney Conduct 1, but it needed to have its special concerns and problems addressed, either by legislation or by a new Federal Rule of Attorney Conduct 2.

One member emphasized that there were essential federal interests at stake beyond those of the Department of Justice. He said that states may go too far in attempting to regulate conduct, as local bars or other interest groups within a state may seek to leverage ethics rules for their own purposes. Thus, it would not be appropriate to declare that anything a state chooses to include in its ethics rules should necessarily be binding on a federal court.

One member said that it was unlikely that there would be a resolution of the Department's concerns until after the next national election. He pointed out that negotiations between the Department and the states had not produced a final agreement on the issue of contacts by government attorneys with represented parties. Moreover, he said, there were substantial differences in Congress, and between the two houses of Congress, on the appropriate roles of the Department of Justice and the states in controlling government attorney conduct. The McDade amendment, he said, is still law, although there is legislation pending to repeal or modify it. And the American Bar Association is in the process of actively considering these conduct issues as part of its Ethics 2000 project.

REPORT OF THE LOCAL RULES PROJECT

Professor Coquillette stated that the local rules project had three goals: (1) to identify inconsistent local rules, (2) to identify areas where there are subjects addressed in local court rules that should be addressed in the national rules; and (3) to encourage the courts to post orders and practices on the Internet in order to assist the bar. He noted that recent amendments to FED. R. CIV. P. 83(b), requiring an attorney to have actual notice of any procedural requirement not set forth in a local rule, had its genesis in the last local rules project.

Professor Squiers reported that she had been working on the new local rules project since the summer. She said that she had read all the local rules of the district courts and had entered them into a computer program, sorted by rule content and topic. She added that she had just started work on writing the report and would have substantial material to present to the committee at its January 2001 meeting.

Professor Squiers said that she had contacted the circuit executives to inquire about the activities of their respective circuit councils in reviewing local district court rules. She reported that the circuit executives had responded that neither they nor their circuit councils are directly involved in the rulemaking process for the district courts or in the actual promulgation of local district court rules. She added, however, that some circuits had on occasion suggested local rules for the districts to adopt.

Professor Squiers reported that all the circuit councils have some sort of review process in place to examine new local rules and amendments to existing local rules. But, she added, none of the circuits has written standards to determine what may constitute an "inconsistency" between a local rule and a national rule or statute. Rather, reviews of local rules and amendments are made by the councils on a case-by-case basis.

Professor Squiers also said that she had asked the circuit executives about the existence of standing orders, internal operating procedures, general orders, and other written directives that serve as the functional equivalent of local rules. She reported that there is

generally no review of these directives in most of the circuits, but that councils clearly would act if any of these devices were seen as an attempt to avoid the local rulemaking process.

Some members stated that local orders and practices are a serious problem for the bar and have taken on the character of local rules. They recommended that Professor Squiers obtain copies of standing orders and similar documents. Judge Scirica agreed, and he suggested that Professor Squiers write to the chief judges of the circuits on the matter.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that one of the most important policy issues currently facing the judiciary is to identify and protect appropriate privacy interests as part of its implementation of the new Electronic Case Files project. The project, which is finishing its pilot stage and is about to begin national deployment, places the documents in a case file in electronic form and makes them available to the public through the Internet. He said that there is a tension between: (1) the long-established policy and common law right of public access to court records; and (2) the privacy interests of litigants and third parties when court documents contain sensitive personal, medical, financial, and employment records. These records, he said, to date have been "practically obscure" in court files, but would now be placed on Internet for world-wide distribution.

Mr. Lafitte pointed out that the Court Administration and Case Management committee had appointed a special subcommittee on privacy to sort out the issues and that he was the liaison to that subcommittee from the rules committees. He reported that the subcommittee was considering several alternatives and was seeking feedback from the rules committees and other Judicial Conference committees. Eventually, he said, the subcommittee would circulate a draft document for public comment and present its views to the various Judicial Conference committees at their winter 2000-2001 meetings. Then the Court Administration and Case Management Committee would likely make appropriate recommendations to the Judicial Conference in March 2001.

Mr. Lafitte said that six alternatives were under consideration. He noted that they were summarized very effectively in Professor Capra's memorandum in Agenda Item 12 of the meeting materials. The alternatives, he said, were as follows:

1. Do Nothing – Under this alternative, privacy interests would be decided on a case-by-case basis, as litigants could seek protective orders and sealing orders from the court by way of motion.

2. "Public is public" – Under this alternative, everything now available to the public in the court's paper file would be made available in electronic form. This alternative, Mr. Lafitte said, would be similar to the "Do Nothing" approach.

3. "Public is Public," But Limit What is Public – This alternative would treat paper files and electronic files in the same way, but the public file would be refined. Thus, certain kinds of sensitive information now available at the courthouse would be excluded from the public file, such as social security numbers or medical information.

4. Limited Remove Electronic Access – This alternative would allow electronic access to all public information at the courthouse, but certain categories of information could not be accessed remotely through the Internet. Mr. Lafitte said that members of the privacy subcommittee had expressed concerns over this approach because it would result in different access policies for the same information.

5. Waiting Period – Under this alternative, a waiting period would be imposed between the electronic filing of a document and its posting on the Internet. The parties would have an opportunity during this period to ask the court for a protective order on a document-by-document basis.

6. Case File Archiving – A policy would be developed to archive documents and limit the life span of a case on the Internet. Mr. Lafitte observed that this action did not address the main issues at stake.

Professor Capra said that the only option that was likely to require a rule-based solution was Alternative 3, limiting what is included in the public file. He said, however, that this approach would be controversial, and it would be bound to encounter objections from news organizations, which have enjoyed full access to all paper records for years.

Professor Capra pointed out that the new electronic system is technically capable of providing different categories of users with different levels of access. Thus, for example, the parties to a case might be given greater electronic access to the source documents in a case than the general public.

Professor Capra reported that the President had established a working group in the executive branch to study the issues of privacy in consumer bankruptcy cases and that Administrative Office staff would coordinate with the working group. In addition, he noted that the technology subcommittee has been in contact with the Advisory Committee on Bankruptcy Rules regarding privacy issues.

Mr. Mattos said that the Court Administration and Case Management Committee had not reached any conclusions on the key privacy issues. But, he said, there is a consensus on the committee that: (1) parties in a case should be given notice that their documents are public and may be placed on the Internet; and (2) the bar should be educated as to the public nature of the documents they file.

Several members suggested that consideration be given to the administrative burdens of operating an electronic system in which some official case documents are included and some are not. They said that if electronic public access is to be limited, the focus should be placed on excluding categories of cases, rather than categories of documents.

Professor Capra noted that the proposed new amendments to the federal rules that authorize electronic service — together with the current rules that authorize electronic filing — contemplate the use of local rules to implement a court's electronic procedures. He said that the technology subcommittee thought that it might be useful to prepare sample local rules and orders to assist the courts as they implement the electronic case files system. In addition, he said, Administrative Office staff could serve as an effective clearing house of information to inform courts about the rules, orders, and procedures that have been adopted by other courts.

STATISTICS

Mr. Rabiej reported that the Administrative Office was seeking better statistical data and other information on district court proceedings, which could be captured through the new electronic case management and case file system being developed. This effort is part of the implementation of Recommendation 73 of the *Long Range Plan for the Federal Courts,* which calls for the courts to "define, structure, and, as appropriate, expand their data-collection and information-gathering capacity" to obtain better data for judicial administration, planning, and policy development.

Mr. Rabiej said that the Administrative Office was asking the committee to identify any types of new data and other information that it might need to assist in its mission, such as empirical data on the impact of various procedural requirements set forth in the rules. He pointed out that Administrative Office and Federal Judicial Center staff had prepared preliminary tables identifying and prioritizing various types of case events that might be useful in conducting future research for the committees. He recommended that the reporters review the materials and offer suggestions to the staff.

NEXT COMMITTEE MEETING

The next committee meeting had been scheduled for January 4 and 5, 2001.

Respectfully submitted,

Peter G. McCabe,
Secretary



MEMORANDUM

DATE: March 19, 2001

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Proposed Amendments to Federal Rules of Appellate Procedure Published for Comment in August 2000

Several proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") — as well as several complementary proposed amendments to the Federal Rules of Civil Procedure ("FRCP") — were published for comment in August 2000. The deadline for submitting public comments was February 15, 2001. As of today (March 19), we have received 19 comments. All of those comments — both those that were submitted before the February 15 deadline and those that were not — appear in "Appendix A" to this memorandum in the order in which they were received and numbered by the Administrative Office (00-AP-001, 00-AP-002, and so on). Also appearing in "Appendix A" are three comments that were received only by the Advisory Committee on Civil Rules but that are also relevant to the work of this Advisory Committee.

Any comments that are received after today, but before the agenda book is distributed, will appear in an "Appendix B" to this memorandum. I will not be able to summarize those comments in this memorandum, but the Committee will nevertheless be able to consider them at its April meeting. Any comments that are received after the agenda book is distributed will be sent to all Committee members under separate cover.

In this memorandum, I provide the following with respect to each proposed amendment: (1) a brief introduction; (2) the text of the rule and Committee Note, as published; (3) a summary of the public comments received as of March 19; and (4) my recommendation and comments. When commentators have made a strong argument for change — an argument that has not already been considered and rejected by this Committee — I have included with my recommendation suggested revisions to the text of the rule or Committee Note. I have tried to organize the proposed amended rules by number, except that I have grouped related proposals together.

With respect to each proposal, the Committee must first decide whether to approve the proposal as published, approve the proposal with modifications, devote further study to the proposal, or drop the proposal altogether. In those cases in which the Committee decides to approve the proposal with modifications, it must further decide whether the modifications are substantial (necessitating republication) or insubstantial (not necessitating republication). In my opinion, none of the changes that I recommend would require republication.

I. Rule 1(b)

A. Introduction

The Committee proposed to abrogate Rule 1(b), which provides that the rules of appellate procedure "do not extend or limit the jurisdiction of the courts of appeals." Rule 1(b) has been rendered obsolete by recent Congressional enactments that give the Supreme Court authority to use the federal rules of practice and procedure to define when a decision of a district court is final for purposes of 28 U.S.C. § 1291 and to provide for appeals of interlocutory orders that are not already authorized by 28 U.S.C. § 1292.

B. Text of Rule and Committee Note

Rule 1. Scope of Rules; Title

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

Committee Note

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) opposes the amendment. The Group argues that Rule 1(b) "is an appropriate reminder that the Rules are not intended to create, expand, or reduce the jurisdiction of the federal courts." As to the Committee's concern about §§ 1292(e) and 2072(c), the Group argues that rules enacted under § 2072(c) would not truly "extend" the jurisdiction of the federal courts, and, in any event, that Rule 1(b) should not be repealed "based on what the Rules Committee and ultimately the Supreme Court *might* do in the future." The Group argues that, if and when the Committee and the Supreme Court act under

§ 1292(e), they can simultaneously amend Rule 1(b). Finally, the Group suggests that, if the Committee is intent on acting at this time, it should not abrogate Rule 1(b), but instead add the following at the end of the rule: "except as authorized by an Act of Congress permitting the promulgation of rules affecting the jurisdiction of the courts of appeals."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal, because Rule 1(b) "has never been true, given Rule 4 (and a few others)."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not oppose the proposal, but warns that it would have serious reservations about any future attempt by any of the rules committees "to weaken the final-decision rule or to enlarge the categories in which interlocutory appeals now are allowed."

The **National Association of Criminal Defense Lawyers** (00-AP-019) regards the proposed abrogation of Rule 1(b) as "undesirable, because of the probability of unintended consequences in other areas." It suggests that, instead of abrogating Rule 1(b), the Advisory Committee should insert the phrase "Except as expressly authorized by statute" at the beginning of the rule.

The Association's particular concern is the alleged conflict between Rule 4(b)(1)(B) — which permits the government to file an appeal in a criminal case within 30 days after entry of the order being appealed — and 18 U.S.C. § 3731 — which requires the government to file an appeal in a criminal case within 30 days after the challenged order "has been rendered." Because "rendered" means "announced" rather than "entered," and because § 3731 is jurisdictional, Rule 4(b)(1)(B) is "presently invalid" as it extends the jurisdiction of the courts of appeals. The Association is concerned that "[r]epeal of Rule 1(b) could . . . be interpreted to mean that the Conference thinks Rule 4(b)'s timing language now extends the jurisdiction of the court of appeals."

D. Recommendation

I recommend that the proposal be approved as published.

No commentator disagrees that, as soon as the Advisory Committee acts under § 1292(e), the appellate rules will, in fact, "extend or limit the jurisdiction of the courts of appeals." Judge Easterbrook argues that, under Supreme Court precedent that characterizes some of the requirements of Rules 3 and 4 as "jurisdictional," the appellate rules *now* "extend or limit the jurisdiction of the courts of appeals." The bottom line is that if Rule 1(b) isn't false now, it will be false in a few years. It should be abrogated.

I disagree with the suggestion to add a clause such as "except as expressly authorized by statute." If a rule isn't authorized by a statute, then the rule is invalid — whether or not it affects

jurisdiction. If a rule is authorized by a statute, then the rule is valid — again, whether or not it affects jurisdiction. The suggested clause would only cause confusion and needless litigation.

The NACDL argues that Rule 1(b) should be retained because, as long as it is part of FRAP, 18 U.S.C. § 3731 (requiring the government to file an appeal within 30 days after an order is *rendered*) will control over Rule 4(b)(1)(B) (requiring the government to file an appeal within 30 days after an order is *entered*). If there is a conflict (and I am not convinced that there is), the conflict should be addressed directly by the Committee. In other words, if the Committee prefers the § 3731 deadline to the Rule 4(b)(1)(B) deadline, then the Committee should amend Rule 4(b)(1)(B), so that practitioners can find the "correct" deadline in FRAP. The Committee should not "smuggle" the § 3731 deadline into the rules through Rule 1(b).

II. Rule 4(a)(1)(C)

A. Introduction

The Committee proposed to add a new Rule 4(a)(1)(C) to provide that an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) and not by the time limitations of Rule 4(b) (which apply in criminal cases).

B. Text of Rule and Committee Note

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

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

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

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

Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496,

1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

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

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

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects that "[t]his new text . . . is not parallel to subsections (A) and (B) of Rule 4(a)(1)." He recommends eliminating subsection (C) and instead amending the first sentence of Rule 4(a)(1) to begin "In a civil case (including coram nobis) . . . ." More broadly, Judge Easterbrook objects to amending Rule 4 to specifically address coram nobis cases: "Why deal separately with a single kind of motion — and an abolished one at that! . . . Rule 4(a) is limited to civil cases; but Rule 60(b) abolishes coram nobis in civil cases. The Committee Note tries to deal with this incongruity, but unsuccessfully."

Finally, Judge Easterbrook believes that, if the coram nobis problem is to be addressed, it should be addressed as part of a general rule that classifies the many "post-judgment motions in criminal cases that might, or might not, be deemed 'civil' and thus afforded 30 days for appeal." He suggests adding to FRAP either a general rule for classifying motions made in criminal cases — e.g., "an order formally in a criminal case is treated as civil for purposes of this rule unless it is a sentence of imprisonment or a criminal fine" — or a rule that lists various motions and classifies them as either civil or criminal. Judge Easterbrook says that the Seventh Circuit has had "no trouble classifying coram nobis as civil, but *lots* of trouble" with other motions, such as forfeiture and post-judgment motions for return of property.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published.

I have some sympathy for Judge Easterbrook's view that we should not be amending Rule 4 at all to address coram nobis, but the Committee has already crossed that bridge. I am not persuaded by his stylistic suggestion. I would rather address coram nobis by adding a separate subdivision that most practitioners can ignore and that refers to "[a]n appeal from an order granting or denying an application for a writ of error *coram nobis*" than by inserting a cryptic reference to just "coram nobis" in a parenthetical in a part of the rule that is read by virtually every appellate lawyer in virtually every civil case.

I am also not persuaded that we should amend Rule 4 to catalog every post-judgment motion brought in a criminal case. Even if the Committee disagrees, this is a long-term project, and we should move forward with the amendment addressing coram nobis.

III. Rule 4(a)(5)(A)(ii)

A. Introduction

The Committee proposed to amend Rule 4(a)(5)(A)(ii) to provide that a district court may extend the time to file a notice of appeal upon timely motion of a party if the party shows either excusable neglect or good cause, regardless of whether the timely motion is filed within the unextended appeal time or within the next 30 days.

B. Text of Rule and Committee Note

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

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

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

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

Committee Note

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

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and

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

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

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

C. Summary of Public Comments

The **United States Postal Service** (00-AP-003) agrees that Rule 4(a)(5)(A) should be amended to resolve the circuit split, but argues that the rule should endorse the view of the majority of the courts of appeals — i.e., that the good cause standard should apply to motions brought prior to the expiration of the original deadline and the excusable neglect standard should apply to motions brought after the expiration of the original deadline. As the owner or leaser of large amounts of real estate in the United States, the Postal Service "is extremely concerned with state and federal rules and statutes that determine when adjudications of disputes over title have become final." The Postal Service believes that the Committee's proposal makes it too easy for litigants to get permission to file untimely notices of appeal and thus to lengthen judicial proceedings.

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, agreeing that it reinforces the current text of the rule and promotes harmony with Rule 4(b)(4).

Judge Jon O. Newman (2d Cir.) (00-AP-008) suggests revising the Committee Note to correct two instances in which, in Judge Newman's view, the Committee Note implies that a

motion for an extension can be filed *any* time after expiration of the original deadline, rather than just within 30 days. Judge Newman's suggested changes are as follows:

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

Committee on Federal Civil Procedure of the American College of Trial Lawyers (00-AP-010) agrees that the position of the majority of the circuits cannot be reconciled with the text of the existing rule. However, the Committee urges that "the Rule [be amended] to conform to existing practice, rather than requiring existing practice to change to conform to the amendment." The 30-day deadline for bringing appeals is extremely important, as it provides certainty to parties and attorneys. Few motions to extend brought after the deadline expires are successful, as the excusable neglect standard is "quite strict." To permit such motions to be granted on a mere showing of good cause — that is, a showing of "neglect [that] was *not* excusable" — would introduce uncertainty and delay into appellate proceedings. "The Advisory Committee Note does not explain why, if a party's failure to act in a timely fashion is inexcusable, the prevailing adversary should be subject to upsetting what would otherwise be a final, nonappealable judgment. Nor . . . does the Advisor[y] Committee explain just what good cause is intended to convey in a circumstance in which the party has inexcusably failed to file a motion to extend within the original 30-day period."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) does not object to the substance of the proposal, but finds it awkwardly worded. Judge Easterbrook complains that the rule, as drafted, takes the form: "The district court may extend the time if (a) a party so moves; and (b) regardless of whether the motion is filed at time T, then condition B holds." Such a structure — "A and, regardless whether T, then B" — is, Judge Easterbrook says, non-parallel and hard to follow. He suggests that the text of Rule 4(a)(5)(A) be left alone and that a new provision be added, either as an unnumbered paragraph or as a new subsection (B) (necessitating the renumbering of current subsections (B) and (C)).

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal, although it regrets that the proposal is necessitated by the failure of courts to apply the rule as written.

D. Recommendation

I recommend that we make the changes suggested by Judge Newman, but otherwise that we approve the proposal as published.

All of the commentators agree that we should resolve the circuit split, but they disagree about which side of the split we should endorse. I am comfortable with the Committee's decision. Endorsing the majority view, as some commentators urge, would create tension with Rule 4(b)(4). Also, what those commentators fail to recognize is that the 30-day deadline can be missed in situations in which there is *no* negligence — excusable or inexcusable — such as when the Postal Service fails to deliver a package. In those cases, it is unfair to require a party who moves after the original deadline has expired to prove that his or her "negligence" was "excusable"; he or she wasn't negligent *at all*.

Judge Easterbrook is correct that Rule 4(a)(5)(A)(ii), as amended, will not be the most elegant rule in FRAP; it's hard to find an elegant way to amend a clear rule to tell the courts of appeals to apply the clear rule as written. That said, the amended Rule 4(a)(5)(A)(ii) is readily understandable, and I don't think we should add unnumbered paragraphs or new subdivisions (necessitating the renumbering of existing subdivisions).

IV. Rule 4(a)(7)

A. Introduction

The Committee proposed to amend Rule 4(a)(7) to resolve several circuit splits over questions that arise when a party seeks to appeal a judgment or order that is required to be set forth on a separate document but is not. In conjunction with concurrently proposed amendments to FRCP 58, the amendment to Rule 4(a)(7) would provide the following: (1) Orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be set forth on separate documents. (2) When proposed FRCP 58 requires a judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 60 days after its entry in the civil docket, whichever occurs first. (3) An appellant may waive the separate document requirement and appeal an otherwise appealable judgment or order, even if the appellee objects. (4) An appellant may choose to waive the separate document requirement more than 30 days (60 days if the government is a party) after entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not.

B. Text of Rule and Committee Note

The proposed amendment to Rule 4(a)(7) must be considered in conjunction with the proposed amendments to FRCP 54(a) and 58. The text of all of these amendments, as well as all of the accompanying Committee Notes, is provided below.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

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

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

Committee Note

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

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

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

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

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be entered on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no."

The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

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

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

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

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to

when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

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

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

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend.*

Rule 54. Judgments; Costs

(d) Costs; Attorneys' Fees.

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

Rule 58. Entry of Judgment

~~Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.~~

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to [the provisions of] Rule 54(b):

(A) the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict, or

(ii) the court awards only costs or a sum certain, or denies all relief; and

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

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

(1) when it is entered in the civil docket under Rule 79(a), and

(2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:

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

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

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document

is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58(a) is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision aimed directly at the time for making post-trial and post-judgment motions. If judgment is promptly set forth on a separate document, as should be done, the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 60 days from entry of the judgment on the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

Rule 58(b) also defines entry of judgment for purposes of Rule 62. There is no reason to believe that the Rule 62(a) stay of execution and enforcement has encountered any of the difficulties that have emerged with respect to appeal time. It seems better, however, to have a single time of entry for motions, appeal, and enforcement.

This Rule 58(b) amendment defines "time of entry" only for purposes of Rules 50, 52, 54, 59, 60, and 62. This limit reflects the problems that have arisen with respect to appeal time periods, and the belief that Rule 62 should be coordinated with Rules 50, 52, 59, and 60. In this form, the amendment does not resolve all of the perplexities that arise from the literal interplay of Rule 54(a) with Rule 58. In theory, the separate document requirement continues to apply, for example, to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document — there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 60 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 60 days after entry on the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

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. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786.* 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.

C. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) opposes proposed Rule 4(a)(7)(B), as he believes that it creates "an open window for evasion and possible concealment."

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) commented only on the 60-day provision — that is, the amendment to FRCP 58 that provides that a judgment or order required to be set forth on a separate document will be deemed "entered" when it is so set forth or 60 days after it is entered in the civil docket, whichever occurs first. The Association believes that the current separate document requirement protects parties from inadvertently losing their rights to appeal "by putting the losing party firmly on notice that a final and appealable judgment had been entered." The Association opposes any weakening of the separate document requirement.

The Association expressed sympathy with this Committee's desire to address the time bomb problem, but suggests that better alternatives exist: (1) Encourage district court judges and clerks to comply with the separate document requirement. If judges and clerks would simply enter judgments and orders on separate documents, the time bomb problem would disappear. (2) Amend the appellate and civil rules to provide that the prevailing party can start the time to appeal running on a judgment or order that was not entered on a separate document by serving notice of the entry of that judgment or order on the other parties. (3) Amend FRCP 58 as proposed, but lengthen the 60-day "safe harbor" to at least 180 days. A 6 month hiatus in court proceedings is sufficiently rare that it would provide fair notice to litigants that "the case is over at the District Court level and . . . the time for appeal has arrived."

The **Public Citizen Litigation Group** (00-AP-005) supports some of the proposed amendments to Rule 4(a)(7) and FRCP 58 and opposes others:

1. The Group supports Rule 4(a)(7). It agrees that Rule 4 should be amended to make clear that the appellate rules do not impose a separate document requirement of their own, but simply incorporate the separate document requirement of the civil rules.

2. The Group does not support amending FRCP 58 to provide that orders disposing of post-trial motions do not have to be entered on a separate document. The Group confesses that it finds this a "close question," as orders disposing of post-judgment motions "are generally discrete and imbued with finality" and thus provide notice to the losing parties that the time to appeal is running. However, in some complex cases involving multiple parties and claims and in some cases involving requests for attorneys' fees, the "finality" of a post-judgment order may not be as apparent. The Group urges that, even if the Committee goes forward with the proposed amendment, it should make clear that the separate document rule is retained for orders that dispose of motions other than those listed in proposed FRCP 58(a)(1). The Group would, however, support an amendment to FRCP 58 that would clarify that an order appealable under the collateral order doctrine does not need to be entered on a separate document.

3. The Group strongly disagrees with the 60-day provision, which, it says, "is at odds with the most valuable purpose of the separate-document rule" — it's "signaling function." The Group argues that the purpose of the separate document requirement is to give parties fair notice that the time to appeal has begun to run, so that parties will not inadvertently lose their rights to appeal. The Group believes that it makes no sense to "retain the separate-document requirement

and then allow it to evaporate at some point after an appealable order is entered." The Group argues that, "in the ordinary case where the losing party has notice of the relevant order (but no separate document has been entered), and does not appeal within 30 days of the entry of that order, the mere passage of an additional 60 days generally will not alert the losing party that an appeal is necessary if that party was unaware beforehand."

As to the time bomb problem, the Group makes several comments: (a) The easiest way to eliminate the time bomb problem is for district court judges and clerks to simply enter judgments and orders on separate documents, which is not difficult. (b) The time bomb problem can also easily be avoided by the winning party, who can move for entry of the judgment or order on a separate document. (c) Although the Group concedes that there are a large number of published decisions addressing the failure to enter a judgment or order on a separate document, it does not believe that the time bomb problem is significant and, in any event, it believes that the number of cases involving time bombs are dwarfed by the number of cases "in which potential appellants are well served by the signaling function of FRCP 58." (d) Cases in which appeals are not brought until long after the judgment or order is entered "generally are cases of genuine ambiguity as to whether the underlying order is 'final' for purposes of appeal."

4. The Group supports proposed Rule 4(a)(7)(B). It agrees that the decision whether to waive the separate document requirement should be the appellant's alone, and it agrees with the rejection of *Townsend*'s holding. The Group points out, though, that the rejection of *Townsend* will have only limited practical consequences if the 60-day provision is retained.

Prof. Bradley Scott Shannon (00-AP-007) submitted a lengthy and complicated comment. He acknowledges the seriousness of the problems addressed by the amendments to Rule 4 and FRCP 58; in fact, he argues that "[d]ramatic reform in this area is desperately needed."

The thrust of Prof. Shannon's comment is that the problems that concern the Advisory Committee are rooted not in the separate document requirement of FRCP 58, but in the manner in which "judgment" is defined in FRCP 54(a). FRCP 58 requires that every "judgment" be entered on a separate document. According to Prof. Shannon, district court judges and clerks are aware of this requirement and try to comply with it. The problem is in deciding when the court has issued a "judgment." Under FRCP 54(a), whether a court action is a "judgment" turns upon whether that action is appealable, and ascertaining the appealability of court actions is often extremely difficult. In short, the reason for the widespread non-compliance with FRCP 58 is that judges and clerks often guess wrong in trying to ascertain whether a court action is appealable, and thus a "judgment" for purposes of FRCP 54(a).

Prof. Shannon discusses other problems with the way FRCP 54(a) defines judgment. He argues, for example, that court proceedings can be terminated with orders that are final but are not appealable. In such cases, nothing denominated a "final judgment" is ever entered on a separate document.

The Committee Note to the amendment to FRCP 58 acknowledges that a literal application of FRCP 54(a) would create "many horrid theoretical problems" that could be solved only by "[d]rastic surgery on Rules 54(a) and 58." The Civil Rules Committee declined to undertake such "[d]rastic surgery," as it believes that these theoretical problems "seem to have caused no real difficulty" in practice.

Prof. Shannon disagrees with the Committee. As noted, he believes that, among other problems, the definition of "judgment" in FRCP 54(a) creates the time bomb problem. Although Prof. Shannon "understand[s]" the Committee's "caution" in employing an "incremental approach," he urges a wholesale revision of FRCP 54(a). In particular, he urges that whether an order is defined as a "judgment" under FRCP 54(a) — and thus must be entered on a separate document under FRCP 58 — should turn not on whether the order is *appealable*, but on whether the order is *final*. Prof. Shannon cites as among the advantages of this approach the fact that ascertaining finality would be easier than ascertaining appealability. He also argues that his approach would assure that the *conclusion* of every civil action (the entry of a separate document entitled "final judgment") would be as clearly delineated as the *commencement* of every civil action (the filing of a complaint).

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** (00-AP-011) expresses no opinion on Rule 4(a)(7) specifically, but recommends changes to the proposed amendments to FRCP 58. The Committee is concerned that, as drafted, new FRCP 58 will lead parties to believe that the time to appeal does not begin to run on an appealable order until the order is entered on a separate document. The Committee fears that this will result in the inadvertent loss of appellate rights by parties who believe that, as long as an order is not entered on a separate document, it does not have to be appealed. The Committee also fears that this will result in district courts being deluged by requests from winning parties to enter all orders on separate documents — even orders to which the separate document requirement does not apply — to ensure that the time to appeal begins to run.

The Committee proposes a redraft of FRCP 58. The redraft of FRCP 58(a) provides that only a judgment "that terminates a district court action" must be set forth on a separate document, and explicitly provides that "[a]ppealable interlocutory orders, partial judgments certified pursuant to FRCP 54(b), and appealable post-judgment orders do not require a separate document." The redraft of FRCP 58(b) adds language providing that, in cases in which a separate document is *not* required but nevertheless entered, the judgment will be deemed "entered" upon the later of (1) the entry date of the judgment or (2) the entry date of the separate document.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) seems to have two major concerns about the proposed revisions to Rule 4(a)(7)(B).

First, Judge Easterbrook objects to the use of the word "validity." He states that appeals can be "proper" or "effective," but not "valid." He also contends that "the point of this change is

not that notices of appeal are valid, but that particular decisions are deemed *final*, and it is finality that makes an appeal proper."

Second, Judge Easterbrook essentially opposes the 60-day provision and favors retaining the separate document requirement as it exists. He argues that, without the warning provided by a separate document, some litigants will fail to recognize that the time to appeal has begun to run and find themselves "hornswoggled out of their appeals." He argues that other litigants will "pepper courts of appeals with arguments that one or another decision marked the 'real' end of the case, so that the clock must be deemed to have started more than 30 days before the notice of appeal." Still other litigants will "bombard[] the court with notices of appeal from everything that might in retrospect be deemed a conclusive order."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-13) opposes the 60-day provision, because of the possibility that litigants could find themselves foreclosed from being able to appeal without the "readily defined trigger" provided by the separate document requirement. As to the time bomb problem that the 60-day provision eliminates, the Section has three comments: (1) the problem would not exist if district courts would simply comply with the separate document requirement; (2) winning litigants can always protect themselves against time bombs by moving to have the judgment or order entered on a separate document; and (3) the Section questions "whether there are actually enough 'problem' cases to justify adoption of a 60-day rule."

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) "heartily endorses" the proposal, which, it believes, will provide "greater certainty" in an area that is now "fraught with peril and confusion."

Michael Zachary, Esq. (00-AP-015), a supervisory staff attorney for the Second Circuit, does not object to the proposed changes to FRAP 4(a)(7), but has three concerns about the proposed changes to FRCP 58:

First, Mr. Zachary states that proposed FRCP 58(b) "appears to establish a new benchmark for determining a judgment's entry date: the date it is 'set forth' in a separate document, as opposed to the date of entry in the civil docket." He complains that "set forth" is ambiguous; it is "not defined anywhere" and it could be interpreted to refer to "the date the separate document is written, or the date it is signed by a judge or clerk of court, or the date it is filed or entered."

Second, Mr. Zachary argues that the use of the word "it" in proposed FRCP 58(b)(1) is ambiguous, as the word "appears to refer to a 'judgment' in a situation where no document labeled 'judgment' will exist. The relevant document will be an order, which the subsection then deems to be a judgment for judgment entry purposes."

To meet these two concerns, Mr. Zachary recommends that FRCP 58(b) be amended as follows:

(b) **Time of Entry.** Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:

(1) when ~~it~~ the order disposing of the motion is entered in the civil docket under Rule 79(a), and

(2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:

(A) when ~~it is set forth on a separate document~~ the separate document is entered in the civil docket under Rule 79(a), or

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

Finally, Mr. Zachary opposes the 60-day provision because "although it prevents reactivation of dormant cases, it will return us, in part, to the pre-1963 problem of litigants unfairly losing their right to appeal when the order terminating the case is not clear or when certain types of motions which do not affect finality are still pending." He also fears that the provision will give litigants an incentive to file a notice of appeal from every order that, although not entered on a separate document, might have been intended by the district court to terminate the case. Finally, he does not think that the time bomb problem is serious. He has not seen many time bombs in his work for the Second Circuit, and winning litigants can easily protect against time bombs by asking the court to enter judgment on a separate document.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) objects only to the 60-day provision. It has no objection to the remainder of the Rule 4(a)(7)/FRCP 58 proposal, including the provisions that would make clear that the appellant alone can waive the separate document requirement and that orders disposing of certain post-judgment motions need not be entered on separate documents. The Committee does note, though, that it would prefer that FRCP 58 instead provide that *all* orders disposing of post-judgment motions be entered on separate documents.

As to the 60-day provision, the Committee believes that it undermines the fundamental purpose of the separate document requirement, which is to provide litigants with a clear warning of when a judgment has been issued and the time to appeal has begun to run. The Committee concedes that the time bomb problem is "a real concern," but winning litigants can easily protect themselves from time bombs simply by asking the district court to enter judgment on a separate document.

The **Litigation Section and the Courts, Lawyers, and the Administration of Justice Section of the District of Columbia Bar** (00-AP-018) support proposed FRCP 58(a), which would make clear that orders disposing of certain post-trial motions need not be entered on separate documents. However, the Sections oppose the 60-day provision of proposed FRCP

58(b), which, they believe, would leave litigants without clear notice that judgment has been entered and the time to appeal has begun to run. The Sections argue that the solution to the time bomb problem is to clarify the separate document requirement so that district court judges and clerks will comply with it more often. Specifically, the Sections recommend that the following sentence be added to new FRCP 58(b): "If a separate document is required by Rule 58(a)(1), only entry of the separate document shall constitute entry of the judgment." The Sections also recommend that language be added to FRCP 58 making it clear that parties may move the court to set forth a judgment on a separate documents (when the court neglects to do so), and that the court must grant such a motion.

The Sections urge that proposed Rule 4(a)(7)(B) be deleted, based upon the Sections' understanding that it, like proposed FRCP 58(b), would "eliminate the requirement for entry of a separate document of judgment as a basis for appeal."

The **Conference of Chief Bankruptcy Judges of the Ninth Circuit** (00-CV-004) "wholeheartedly supports" the proposed amendments to FRCP 54 and 58.

The **Federal Magistrate Judges Association** (00-CV-006) supports the proposed amendments to FRCP 54 and 58, which would "help clarify requirements that have been ignored in many cases" and "establish[] a basis for insuring that appeal time does not go on indefinitely."

William J. Borah, Esq. (00-CV-012) opposes the proposed amendments to FRCP 54 and 58, which, he believes, would "make the whole issue even more confusing and complicated." He thinks it "would not be a bad idea" to abandon the separate document requirement altogether.

D. Recommendation

I recommend that the proposal be approved as published, except that one minor change be made to the Committee Note. I further recommend that this Committee urge the Civil Rules Committee to expand the 60-day safe harbor to 150 days.

None of the comments cause me to doubt the fundamental soundness of the proposal. The commentators are certainly correct that the 60-day provision will diminish the "signaling" effect of the separate document requirement. I think the comments exaggerate the effectiveness of the signal now provided by the separate document requirement, but there is no question that it does provide a signal, and there is no question that, if the 60-day provision is implemented, some litigants will inadvertently lose their appellate rights.

At the same time, without some type of "cap," the time bomb problem will continue to exist. The commentators are correct that the problem would disappear if the district courts would simply comply with the requirement, but the requirement has been on the books for almost 40 years and the circuit courts have repeatedly asked district courts to comply with it, and yet it continues to be widely ignored. The commentators are also correct that a winning litigant can protect against a time bomb by asking the district court to enter judgment on a separate

document, but ignorance of the requirement continues to be widespread among litigants, and sometimes (as is true in many prisoner cases) the winning litigant isn't even before the court.

A reasonable compromise, it seems to me, is to extend the safe harbor from 60 days to 150 days. To solve the time bomb problem, we need *a* cap, but it really doesn't make much difference whether the time to appeal begins to run after 60 days or 150 days or even 365 days — just so that the time to appeal starts to run at *some* point. This Committee originally recommended a 150-day safe harbor; the 60-day provision was substituted by the Reporter to the Civil Rules Committee, Prof. Ed Cooper, who tells me that the comments have persuaded him of the merits of this Committee's original proposal.

A 180-day cap (the 150-day safe harbor before the time to appeal begins to run plus 30 days (in most cases) to appeal) would go a long way toward meeting the concerns of the commentators. A litigant who has heard *nothing* about a case for six months and yet does nothing to ascertain whether the time to appeal has begun to run can hardly complain about being "hornswoggled." Indeed, under Rule 4(a)(6)(A), litigants have only 180 days after a judgment is entered to move to reopen the time to appeal when they received no notice whatsoever of the judgment.

If the Civil Rules Committee does agree to expand the 60-day safe harbor, Judge Garwood and I will have to make some minor conforming changes to the Committee Note to Rule 4(a)(7) prior to the Standing Committee's June meeting. Also, Judge Garwood recommends that the Committee now approve a minor revision to the Note. Specifically, Judge Garwood recommends the following change:

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

This amendment would make the Committee Note to Rule 4(a)(7) more precise. As the Committee Note to FRCP 58 indicates, new FRCP 58(a)(1) exempts from the separate judgment requirement not only orders that dispose of motions that toll the time to appeal under Rule 4(a)(4)(A) (e.g., a FRCP 60 motion filed within 10 days), but also some orders that dispose of motions that do not toll the time to appeal (e.g., a FRCP 60 motion that is not filed within 10 days).

No compelling objection was made to the other aspects of the Rule 4(a)(7)/FRCP 58 proposal — making it clear that the appellate rules do not impose their own separate document requirement, clarifying that orders disposing of post-judgment motions need not be entered on

separate documents, giving the appellant the right to waive the separate document requirement, and rejecting the *Townsend* rule. To respond to just a few of the other comments:

I do not agree with Prof. Shannon that the reason that the separate document requirement is so widely ignored is that judges and clerks have difficulty figuring out which orders are appealable and therefore "judgments" under FRCP 54(a). The vast majority of separate document cases involve the failure to enter routine and unquestionably appealable judgments on separate documents. Prof. Shannon is correct that the perfect solution to the problem would involve a rewriting of the definition of "judgment" in FRCP 54(a), but such a rewriting would be nightmarishly complicated. The word "judgment" appears throughout the FRCP, not just in the separate document provision. To tinker with the definition of "judgment" is to invite chaos. Moreover, I am skeptical that a definition of judgment based upon finality would be any easier to administer than one based upon appealability. The "incremental" approach that we are taking is preferable to what Prof. Shannon suggests.

It is difficult to respond to the comments of the Ninth Circuit and Judge Easterbrook, as the comments seem to be premised upon a misunderstanding of the separate document requirement, either as it now exists or as it would exist under the proposal. The Ninth Circuit seems not to realize that under *current* FRCP 54(a) and 58, every appealable order is a judgment and must be set forth on a separate document before the time to appeal begins to run. The amendments to FRCP 58 proposed by the Ninth Circuit are not workable. Judge Easterbrook notes that he did not have time to read the amendments to FRCP 58; as a result, he understandably appears to have missed the significance of the change to Rule 4(a)(7)(A) and to believe that all of the changes described in the Committee Note will be wrought by Rule 4(a)(7)(B) alone.

Mr. Zachary seems to fear that, under the rule, a judgment will be issued (and noted in the civil docket) and then, sometime thereafter, that same judgment will be set forth on a separate document. He complains that, because "set forth" is ambiguous, it will not be clear when this latter event occurs, and thus it will not be clear when the time to appeal begins to run. He suggests that we address this problem by amending FRCP 58 to refer to the entry of the *separate document* in the civil docket rather than to entry of the *judgment* in the civil docket.

The concerns that Mr. Zachary expresses about the amended rule apply with just as much force to the current rule. After all, the current rule uses the expression "set forth" and under the current rule the time to appeal a judgment does not begin to run until it is both set forth on a separate document and entered in the civil docket. Yet, to my knowledge, the problem described by Mr. Zachary virtually never arises. (I've read more separate document cases than anyone, and I don't recall this problem being addressed.) Under the current rule, compliance with the separate document requirement (when there is compliance with the separate document requirement) is quite routine: judgment is set forth on a separate document, the clerk notes that fact in the civil docket, and the time to appeal begins to run from the date on which that judgment (and not any prior judgment) is entered in the docket. The same should be true under the revised rule.

Mr. Zachary's suggestion about replacing the word "it" in FRCP 58(b)(1) is puzzling. The word "it" in FRCP 58(b)(1) refers to the judgment from whose entry the time to bring post-judgment motions begins to run; it does not refer to the order that later disposes of those post-judgment motions. In other words, the rule is meant to say precisely what Mr. Zachary understands it as saying; I do not understand why he believes that the rule should be changed.

V. Rule 4(b)(5)

A. Introduction

The Committee proposed to amend Rule 4(b)(5) to provide that the filing of a motion to correct a sentence under FRCrP 35(c) does not toll the time to appeal the judgment of conviction.

B. Text of Rule and Committee Note

Rule 4. Appeal as of Right — When Taken

(b) Appeal in a Criminal Case.

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(c) does not suspend the time for filing a notice of appeal from a judgment of conviction.

Committee Note

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

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes

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

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

C. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) does not oppose the proposal in substance, but he thinks that Rule 4(b)(5) — which "breaks up a single thought into three long phrases" — should be restyled in its entirety. He suggests: "Neither the filing of a motion under Fed. R. Crim. P. 35(c) nor the disposition of such a motion affects the proper time to file a notice of appeal, and the filing of a notice of appeal does not affect the district court's power to act on such a motion." Judge Easterbrook concedes that his proposal "leaves open the question whether a new (or amended) notice of appeal is necessary if the district court modified the judgment under Rule 35(c)" and "may leave an unintended negative implication about the status and effect of other post-judgment motions in criminal cases."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) supports the proposal. However, the Section requests that Rule 4(b) be further amended to give prosecutors and defendants the same amount of time — 30 days — to bring appeals in criminal cases.

The **National Association of Criminal Defense Lawyers** (00-AP-019) agrees that Rule 4(b)(5) should be amended to resolve the circuit split, but urges that the split be resolved differently. "Rule 35(b) motions should be treated the same way the rules treat other motions to amend a judgment — as terminating the appeal time, with a new ten days commencing upon entry of the order on the motion. . . . At the least, the rule should provide that if a timely motion to correct a sentence is filed under Rule 35(c), the time to appeal does not commence until the later of (i) the date the motion is ruled upon, or seven days afer imposition of sentence (when the court's power to act expires under that rule), whichever comes first, or (ii) the entry of judgment." The Association argues that, in some cases, a defendant may not file a notice of appeal if his or her concern can be addressed through a FRCrP 35(c) motion; the defendant should not have to decide whether or not to appeal "until the final contours of the sentence are settled." Also, as the last paragraph of the Committee Note acknowledges, the revised Rule 4(b)(5) would require two notices of appeal to be filed in some cases.

The Association further urges that Rule 4(b)(1)(B)(i) be amended to resolve a conflict between the rule and 18 U.S.C. § 3731. That conflict is described above, in the summary of the Association's comments about the proposed abrogation of Rule 1(b).

D. Recommendation

I recommend that the proposal be approved as published.

The substantive objections have already been considered and rejected by the Committee. Judge Easterbrook's suggested restyling of the entire Rule 4(b)(5) would not result in a marked improvement and, as he acknowledges, would create new ambiguities.

VI. Rule 5(c)

A. Introduction

The Committee proposed to amend Rule 5(c) to correct a typographical error in a cross-reference and to impose a 20 page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal.

B. Text of Rule and Committee Note

Rule 5. Appeal by Permission

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

Committee Note

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

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, although it urges that the limitation on the length of Rule 5 papers be expressed in words rather than pages. It suggests that Rule 5 papers be limited to 5,600 words. (Dividing the old 50 page limit for briefs into the new 14,000-word limit for briefs results in a calculation of 280 words per page; 20 pages multiplied by 280 words is 5,600 words.) The Group suggests that typeface requirements (similar to those applied to briefs in Rule 32(a)(5)) be imposed on Rule 5 papers.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) urges that any limit on the length of Rule 5 papers be expressed in words rather than pages, to remove the incentive for counsel to play games with type size and line spacing. He suggests 5,600 words (for the same reason as the Public Citizen Litigation Group) "or, to be generous, 6,000 words"

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose placing a limit on Rule 5 papers, but believes that the limit should be expressed in words, rather than in pages.

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) does not oppose placing limits on Rule 5 papers, but stresses that 20 pages will be insufficient in some complex cases, and recommends that the circumstances under which a court will grant permission to exceed the 20 page limit should be specified. At present, the proposal says only that the limit can be exceeded with "the court's permission"; it says nothing about when such permission should be granted. The Committee suggests that a "good cause" standard be incorporated into the rule — "including a list of factors that might warrant relief from the 20-page limit."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published.

I think there is merit to the suggestion that the limit be expressed in words rather than in pages. However, I think that this suggestion should be considered as part of a proposal that the Committee convert *all* of the (few) remaining page limits in FRAP to word limits. *See, e.g.*, Rule 27(d)(2) (page limits on motions, responses to motions, and replies to responses to motions), Rule 35(b)(2) (page limits on petitions for hearing or rehearing en banc), and Rule 40(b) (page limits on petitions for panel rehearing). I recommend that this proposal be added to the study agenda.

VII. Rule 21(d)

A. Introduction

The Committee proposed to amend Rule 21(d) to correct a typographical error in a cross-reference and to impose a 20 page limit on petitions for extraordinary relief (such as mandamus) and answers to those petitions.

B. Text of Rule and Committee Note

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

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

Committee Note

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

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, although it urges that Rule 21 papers be limited to 5,600 words instead of 20 pages.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** opposes the proposal, insofar as it limits Rule 21 papers to 20 pages. "Twenty pages is not enough for extraordinary writs," which are submitted "in extraordinary situations" and "under extreme time pressure without the luxury

of close editing." The Committee recommends that, if Rule 21 papers are to be limited, they be limited to 14,000 words, as are principal briefs under Rule 32(a)(7)(B).

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) urges that any limit on the length of Rule 21 papers be expressed in words rather than pages, to remove the incentive for counsel to play games with type size and line spacing. He suggests 5,600 words.

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose placing a limit on Rule 21 papers, but believes that the limit should be expressed in words, rather than in pages.

The **Los Angeles County Bar Association Appellate Courts Committee** (00-AP-014) is "greatly concerned" about the proposed 20 page limit on Rule 21 papers. Petitions for extraordinary relief often must "set[] forth a complicated factual or procedural background" or "survey[] a voluminous body of cases in a rapidly evolving and complex area of law." In addition, some circuits require counsel petitioning for extraordinary relief "to address a whole list of independent factors required to justify extraordinary relief." Given that 20 pages will often be insufficient, the Committee urges that the circumstances under which a court should grant permission to exceed the limit should be set forth in detail.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not oppose placing a limit on Rule 21 papers but urges that, because such papers are similar to principal briefs filed in ordinary appeals, the limits expressed in Rule 32(a)(7) should apply.

The **National Association of Criminal Defense Lawyers** (00-AP-019) does not oppose placing a limit on Rule 21 papers, but argues that the 20 page limit is "too short," and that the limit should be stated in words, not in pages. It recommends a limit of 9,500 words, "about 35 pages of traditional 12 point Courier type." "A mandamus petition has more in common with a brief on the merits than it does with most appellate motions," and therefore the limit should be longer than that applied to motion papers. At the same time, "it is the rare mandamus petition that involves more than one issue," and therefore the limit should be shorter than that applied to briefs. The Association believes that 9,500 words is "a reasonable compromise."

D. Recommendation

I recommend that the proposal be approved as published, except that the page limit be increased.

Having filed several mandamus petitions as a practitioner, I am sympathetic to the argument that 20 pages is an unreasonably short limitation. I suggest that the limit be raised to 30 pages.

As to the suggestion that the limit be expressed in words rather than in pages, I again recommend that this suggestion be considered as part of a proposal that *all* of the page limits in FRAP be converted to word limits.

VIII. Rule 15(f)

A. Introduction

The Committee proposed to add a Rule 15(f) to provide that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing or similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition. The proposed Rule 15(f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions.

B. Text of Rule and Committee Note

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

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

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, agreeing that it would eliminate a trap for litigants and harmonize the treatment of petitions to review agency orders with the treatment of notices to appeal civil judgments.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) questions use of the phrase "non-final and non-appealable." He asks: What about a petition for rehearing that *either* renders an agency action "non-final" *or* "non-appealable" but not both? He does not cite any examples of such a petition for rehearing, and concedes that none may exist. In that case, though, he recommends that the phrase "and non-appealable" be deleted as not adding anything. He also objects to the use of "non-appealable" on the grounds that agency decisions are not "appealed" to the courts of appeal; a party files a petition for review.

D. Recommendation

I recommend that both the amendment and the Committee Note be redrafted to address Judge Easterbrook's concerns.

I agree with Judge Easterbrook that, in the administrative context, we should talk of the "reviewability" of an agency order rather than its "appealability." I also agree that the addition of "non-final" is unnecessary, and may lead to needless confusion and litigation. In short, I recommend that, in the text of the rule, "non-final and non-appealable" be replaced by "non-reviewable," and that conforming changes be made to the Committee Note. I suggest the following:

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

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

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-reviewable (typically, if not always, because it renders the agency order non-final). That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-reviewable order will be held in abeyance and become effective when the agency disposes of the last such review-blocking petition.

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

IX. Rule 24(a)

A. Introduction

The Committee proposed to amend Rule 24(a) — which governs the ability of parties to proceed in forma pauperis on appeal — to eliminate apparent conflicts with the Prison Litigation Reform Act of 1995.

B. Text of Rule and Committee Note

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

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

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

(B) claims an entitlement to redress; and

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

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

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an

adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

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

(B) the law requires otherwise.

Committee Note

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

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

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

but must seek permission. *See, e.g., Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) has two objections to this proposal. First, he does not agree that the PLRA and Rule 24(a) conflict, and he complains that "[t]he Committee Note does not cite the portion of the PLRA that it perceives to be in conflict with Rule 24(a)(2)." Second, he argues that, even if there is a conflict, it is not necessary to amend Rule 24(a). The PLRA was enacted after the pre-restylized Rule 24(a), and thus the PLRA "trumps" anything in Rule 24(a). The enactment of the restylized Rule 24(a) in 1998 should not change this result, as "all of the non-substantive changes made in 1998 contain Committee Notes with a no-change-intended clause, which should be enough to keep § 2072(b) out of the picture." Finally, he objects to the phrase "the law requires otherwise." He argues that the clause should instead read "a statute requires otherwise" (as the appellate rules are themselves "laws") and, in any event, that the clause is unnecessary — again because "[a] more recent statute always overrides the rules."

The **National Association of Criminal Defense Lawyers** (00-AP-019) has several comments:

1. In Rule 24(a)(1)(A) (which is not affected by the proposed amendments), a comma should be inserted after "shows" or the comma that appears after "Forms" should be deleted.

2. In Rule 24(a)(2), "an introductory 'Except as otherwise expressly provided by statute,'" should be substituted for the "unnecessarily imprecise" phrase "unless the law requires otherwise." The Association points out that "the law" might be "understood to include circuit precedent, for example."

3. The Association argues that Rule 24(a)(3) — both as it now exists and as amended — conflicts with the Criminal Justice Act ("CJA"). The present version of Rule 24(a)(3) provides that a party who was permitted to proceed IFP in the district court "or who was determined to be financially unable to obtain an adequate defense in a criminal case" may automatically proceed IFP on appeal, with two exceptions: The party may not proceed IFP on appeal (a) if the district

court finds that the appeal is not taken in good faith, or (b) if the district court finds that the party is no longer indigent. The proposed amendment to Rule 24(a)(3) would add a third exception — if "the law requires otherwise" — a reference to the fact that the PLRA does not permit "automatic" IFP status on appeal in the cases to which the PLRA applies.

The Association argues that, in the context of *direct appeals from criminal cases*, these exceptions conflict with the CJA. Under 18 U.S.C. § 3006A(d)(7), defendants who are "determined to be financially unable to obtain an adequate defense in a criminal case" (to quote Rule 24(a)(3)) are permitted to appeal "without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." The CJA does not give district courts any authority to disallow IFP status in direct appeals in criminal cases when the courts deem the appeals "not taken in good faith." If a district court finds that a defendant is no longer indigent, it can terminate the appointment of counsel under 18 U.S.C. § 3006A(c). And the PLRA does not apply at all to criminal cases. In other words, the first exception in Rule 24(a)(3) conflicts with the CJA, the second exception is unnecessary, and the third exception is inapplicable. Thus, Rule 24(a)(3) should be amended to make it clear that it does not apply to direct appeals in criminal cases; "[e]ither a new Rule 24(a)(4) reflecting the applicable provisions of the CJA should be inserted, or the matter of criminal cases should be entirely removed from the rule and left to statutory regulation."

D. Recommendation

I recommend that the proposal be approved as published, except that the phrase "the law requires otherwise" in both Rule 24(a)(2) and 24(a)(3)(B) be replaced by "a statute requires otherwise." I also recommend that we correct the typo in Rule 24(a)(1)(A) by inserting a comma after the word "shows."

The commentators' concerns about the use of the word "law" are well taken. Substituting "a statute" for "the law" will fully address those concerns.

I do not understand Judge Easterbrook's comment that "[t]he Committee Note does not cite the portion of the PLRA that it perceives to be in conflict with Rule 24(a)(2)." The Committee Note both cites and describes the conflicting provisions. I also do not agree with Judge Easterbrook's argument that amending the rule is unnecessary. As a technical matter, he may be right that, given that enactment of the PLRA followed enactment of the original Rule 24 and preceded enactment of the restylized Rule 24, the PLRA "trumps" the restylized rule. But I think we ought to say that in the rule, rather than make attorneys research the issue.

The alleged conflict between Rule 24(a)(3) and the CJA exists now and will continue to exist whether or not the rule is amended as proposed. If the Committee deems this issue worthy of further consideration, it should be placed on the study agenda, but we should not hold up the proposed amendment to Rule 24(a)(3).

ELECTRONIC SERVICE PACKAGE: RULES 25(c), 25(d), 26(c), 36(b), AND 45(c)

X. Rule 25(c)

A. Introduction

The Committee proposed to amend Rule 25(c) to authorize parties to use electronic means to serve other parties who have consented to electronic service, to permit parties to use the court's transmission facilities to make electronic service (when authorized by local rule), and to define when electronic service is complete. In addition, the Committee proposed to reorganize and subdivide Rule 25(c) to make it easier to understand.

B. Text of Rule and Committee Note

Rule 25. Filing and Service

(c) Manner of Service.

(1) Service may be any of the following:

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

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

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

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

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

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

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

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

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

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

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

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) generally supports the electronic service rules, but raises three concerns:

1. What does it mean to say that a party must consent "in writing"? Does an exchange of e-mail suffice? Must there be a "hard-copy" writing with an original signature? Does the consent, in whatever form, have to be filed with the court?

2. Parties should be required to serve and file a hard copy of every document that is served electronically. A document that is attached to an e-mail will be paginated differently for every recipient who opens and prints it, due to differences among e-mail and word processing programs and printers. Thus, if the parties and the court are to be able to refer to the particular page of a document, hard copies of that document will have to be served and filed.

3. There is an inconsistency between the proposed rules — which seem to envision that electronic service can serve as the sole means of serving a document — and Rule 31(b) — which requires that two copies of briefs be served on every party. The Committee should either require that parties serve hard copies of every electronically served document (as suggested above) or amend Rule 31(b) to eliminate the two-copy requirement when electronic service is used.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** (00-AP-011) believes that several issues need to be clarified: (1) The Committee suggests that the proposed rule should "explain the difference between non-receipt of a message (it never got there) as opposed to a message that has yet to be read (the automated 'I'm out of the office' messages)." (2) The Committee also seeks clarification about "what a litigant is required to tell the court; if a party notified the court that he served a document by e-mail and then found out it didn't get there, is he required to provide the court with that update or tell the court what he did thereafter?" (3) The Committee asks what "steps or obligations" are triggered when "a document is served by e-mail, but it cannot be read by the recipient due to formatting or other problems?"

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) is "enthusiastic" about the electronic service rules, but he objects to requiring consent "in writing." "The implication of Rule 25(c)(1)(D) that agreement must be recorded on paper before the parties may move forward electronically is incompatible with [the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., which permits people to make and "sign" agreements electronically]. Let people signify their agreement in whatever way they find satisfactory."

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) generally supports the electronic service rules, but urges that "the proposed amendment [be] modified to require that electronic service be accompanied by traditional service of a hard copy of the document." The Section is concerned that, unlike service by mail or hand, electronic service will "generally go straight to an attorney's computer" rather than be "channeled through support staff." If an attorney is away from the office for several days, no one may discover that a document has been served, and a deadline to respond to the document may pass. The Section concedes that attorneys could avoid this problem by, for example, forwarding their e-mail to support staff or activating an automatic reply feature which informs senders that their e-mails will not be read until a particular date. However, "not all attorneys have access to this technology or know of its availability." The Section also is concerned about the pagination problem described by the Public Citizen Litigation Group.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the electronic services rules, but stresses that it is critical that electronic service only be allowed if the recipient consents in writing. Electronic service will raise many issues, such as what happens when an attachment can't be opened or when each recipient's copy of a brief is paginated differently. For these reasons, "[a]dvance consent is essential."

D. Recommendation

I recommend that the proposal be approved as published.

Our instructions from the Standing Committee are clear: Barring a significant problem, the electronic service provisions of the appellate rules should be virtually identical to the electronic service provisions of the civil rules, which have already taken effect. No such significant problem was identified.

The questions raised by the commentators are good ones, but the Committee Note expressly acknowledges that the courts of appeals (and district courts) should first try to deal with these questions in their local rules before this Committee (and the Civil Rules Committee) embarks upon further rulemaking. The strong sentiment of the Standing Committee is that the courts should experiment with electronic service for a few years before FRAP and the FRCP are amended again.

Also, any party who is uncomfortable with electronic service because of the questions that have been raised can either refuse to consent to electronic service or, as the NACDL recognizes, can reach agreements about these questions with their adversaries. A thousand flowers should bloom.

As to the Rule 31(b) problem, similar problems already exist in the rules: Rule 25(a)(2)(D) authorizes the electronic *filing* of briefs, even though Rule 31(b) requires that 25 copies of each brief must be filed with the clerk. And Rule 25(a)(2)(D) authorizes the electronic filing of motions, even though Rule 27(d)(3) requires the filing of "[a]n original and 3 copies."

The rules don't address any of these discrepancies, perhaps because none of them causes any harm. Electronic filing is permitted only "by local rule," and any such rules presumably will address the question of how many hard copies must be filed in addition to the electronic copy. And electronic service will be permitted only upon consent, so parties can decide for themselves whether service of hard copies is necessary. Some parties will undoubtedly not think to address this issue in their consent agreements, but, even if they don't, all parties will receive at least an electronic copy of everything. A party who is disappointed when a hard copy doesn't follow, or a party who serves a hard copy upon an opponent who doesn't expect it, has not suffered any real harm.

For the time being, I would leave this issue to be addressed by courts in their local rules or by parties in their agreements.

XI. Rule 25(d)

A. Introduction

The Committee proposed to amend Rule 25(d) to require that a proof of electronic service must state the e-mail address of the party served.

B. Text of Rule and Committee Note

Rule 25. Filing and Service

(d) Proof of Service.

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

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

Committee Note

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

C. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects to the phrase "mail or e-mail addresses." He points out that "[e]-mail is just one means of exchanging information." Litigants may, for example, "post information on each other's web or FTP sites." Judge Easterbrook suggests substituting "physical or electronic addresses."

D. Recommendation

I recommend that the proposal be approved as published, except that "e-mail" should be changed to "electronic" in the text of the rule, and conforming changes should be made to the Committee Note.

XII. Rule 26(c)

A. Introduction

The Committee proposed to amend Rule 26(c) to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period after service, 3 calendar days are added to the prescribed period.

B. Text of Rule and Committee Note

Rule 26. Computing and Extending Time

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

Committee Note

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Roy H. Wepner, Esq. (00-AP-006) did not take a position on the proposed amendment to Rule 26(c), but, in commenting on the proposed amendment to Rule 26(a)(2), described an ambiguity in the way the two rules intersect. (See Mr. Wepner's comments on Rule 26(a)(2), summarized below.)

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) objects to extending the 3-day rule to electronic service, which, he says, will "slow[] litigation down." He argues that one of the

reasons cited in the Committee Note — the possibility of "technical problems" — can also occur in hand delivery (e.g., a law firm's receptionist or mail room may fail to get a hand-delivered package to a lawyer). The 3-day rule does not apply to hand delivery, and Judge Easterbrook believes that electronic service should be treated likewise.

Even if the 3-day rule is to be applied to electronic service, Judge Easterbrook suggests that the last sentence of Rule 26(c) be rewritten to state simply: "For purposes of this Rule 26(c), electronic service is treated the same as service by mail." As drafted, Judge Easterbrook says, the last sentence of Rule 26(c) "is phrased in the negative and will leave many readers scratching their heads."

D. Recommendation

I recommend that the proposal be approved as published.

Judge Easterbrook's substantive objection has already been debated at length and rejected. His stylistic suggestion would, I think, leave just as many readers "scratching their heads" as the present version of the proposal.

XIII. Rule 36(b)

A. Introduction

The Committee proposed to amend Rule 36(b) so that the clerk may use electronic means to serve a copy of an opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to electronic service.

B. Text of Rule and Committee Note

Rule 36. Entry of Judgment; Notice

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

Committee Note

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published.

XIV. Rule 45(c)

A. Introduction

The Committee proposed to amend Rule 45(c) so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to electronic service.

B. Text of Rule and Committee Note

Rule 45. Clerk's Duties

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

Committee Note

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published.

TIME CALCULATION PACKAGE:
RULES 26(a)(2), 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4), AND 41(b)

XV. Rule 26(a)(2)

A. Introduction

The Committee proposed to amend Rule 26(a)(2) to provide that, in computing deadlines under FRAP, intermediate Saturdays, Sundays, and legal holidays should be excluded when computing deadlines under 11 days but should be counted when computing deadlines of 11 days and over. At present, time is computed one way under the appellate rules and another way under the rules of civil and criminal procedure; the amendment would eliminate that disparity.

B. Text of Rule and Committee Note

Rule 26. Computing and Extending Time

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

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

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

Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

C. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the proposal.

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Roy H. Wepner, Esq. (00-AP-006) "heartily concur[s]" with the proposal, but urges the Committee to address an ambiguity in the way Rule 26(a)(2) interacts with Rule 26(c). Under amended Rule 26(a)(2), the question whether intermediate Saturdays, Sundays, and legal holidays are counted in calculating a deadline will turn on whether the deadline is less than 11 days. The ambiguity is this: In deciding whether a deadline is less than 11 days, should the court first count the 3 days that are added to the deadline under the 3-day rule of Rule 26(c)? (Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.") Or should the court add those 3 days only after it first calculates the deadline under Rule 26(a)(2)?

A lot turns on the issue. Suppose that, on the face of a rule, a party has 10 days to respond to a paper that has been served by mail. If the 3 days are added to the deadline before asking whether the deadline is less than 11 days for purposes of Rule 26(a)(2), then the deadline is not less than 11 days, intermediate Saturdays, Sundays, and legal holidays do count, and the party has 13 calendar days from the date of service to respond (unless the 13th day falls on a weekend or holiday). If the 3 days are not added to the deadline before asking whether the deadline is less than 11 days for purposes of Rule 26(a)(2), then the deadline *is* less than 11 days, and intermediate Saturdays, Sundays, and legal holidays do *not* count. The party would have at least 14 calendar days to respond to the motion. If the 3 days are then added on top of that deadline, the party would have no less than 17 days to respond.

Mr. Wepner reports that there has been extensive litigation over this question. Mr. Wepner urges that any change made to Rule 26 to address this ambiguity also be made to FRCP 6, so that time is computed similarly under both sets of rules.

Judge Jon O. Newman (2d Cir.) (00-AP-008) supports the proposal, except that he "suggest[s] that this process be carried to its logical conclusion by eliminating from the appellate rules the concept of 'calendar days,' which now appears in the appellate rules, but not in the civil or criminal rules." Judge Newman expresses the belief that deadlines expressed in "calendar days" now appear "only [in] Rule 25(c) and Rule 26(c), both of which concern three-day additions for service by mail." He argues that "[s]ince the three-day provisions of civil Rule 6(e) and criminal Rule 45(e) have no 'calendar day' exception, the appellate rules also should have none."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) gives his "unqualified approval" to the proposed change to Rule 26(a)(2) and the related changes, which, he says, "are nicely done and long overdue."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports this "long overdue" change to Rule 26(a)(2). The Committee believes that FRAP could be "further improve[d]" if the concept of "calendar days" was eliminated.

The **National Association of Criminal Defense Lawyers** (00-AP-019) "strongly supports" the proposal. Given that the time for a criminal defendant to appeal is 10 days — a deadline that is currently calculated one way in the criminal rules and another way in the appellate rules — the proposal is particularly welcome to criminal defense attorneys. The proposal will "remove a source of confusion and inadvertent error . . . for some inexperienced practitioners" and "will also have the welcome effect of extending by at least two days the time for defendants to appeal in a criminal case."

D. Recommendation

I recommend that the proposal be approved as published.

Judge Newman's recommendation that the concept of "calendar days" be removed entirely from the appellate rules has already been considered and rejected. It is also based upon a mistaken understanding of the rules. Judge Newman is not correct that deadlines expressed in "calendar days" now appear "only [in] Rule 25(c) and Rule 26(c), both of which concern three-day additions for service by mail." Such a deadline also appears in Rule 25(a)(2)(B)(ii), and, of the three uses of "calendar days," only Rule 25(c)'s involves a "three-day addition[] for service by mail." The other two uses of calendar days are references to the time within which a third-party commercial carrier must deliver a document.

I would put Mr. Wepner's concern on our study agenda.

XVI. Rule 4(a)(4)(A)(vi)

A. Introduction

The Committee proposed to amend Rule 4(a)(4)(A)(vi) to delete a parenthetical that will become superfluous in light of the amendment to Rule 26(a)(2) (described above).

B. Text of Rule and Committee Note

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

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

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

Committee Note

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published.

XVII. Rule 27(a)(3)(A)

A. Introduction

The Committee proposed to amend Rule 27(a)(3)(A) to change the time within which a party must file a response to a motion from 10 days to 7 days. This amendment was proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days.

B. Text of Rule and Committee Note

Rule 27. Motions

(a) In General.

(3) **Response.**

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

Committee Note

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

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10-day deadlines (such as that in subdivision (a)(3)(A)) have

been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) has "no objection in principle" to shortening the time to respond to a motion in light of the proposed amendment to Rule 26(a)(2). However, it points out that, under the current 10-day rule, litigants always have at least 10 actual days, whereas under the proposed 7-day rule, litigants will sometimes have only 9 actual days. The Group objects to this 1-day reduction in the time to respond to motions, particularly since "the time periods under FRAP 27 can be quite difficult to meet, especially as they apply to certain substantive motions, such as those relating to complex issues of appellate jurisdiction." The Group urges that the Committee reduce the deadline to 8 days, rather than to 7. The Group also recommends that the current 10-day rule — calculated under the amended Rule 26(a)(2) — be retained for *dispositive* motions.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) does not oppose abbreviating the time to respond to a motion in light of the change in the manner in which deadlines will be calculated under amended Rule 26(a)(2). However, it urges that the deadline be reduced to 8 days, rather than 7 days, for the reasons described by the Public Citizen Litigation Group. The Section argues that busy practitioners already have difficulty meeting the current deadline of at least 10 actual days and that reducing the deadline to at least 9 actual days would create a hardship.

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal, but urges that Rule 27(a)(3)(A) be clarified "to say that the response time can be shortened by order in a particular case, or by local rule with respect to a class or type of motion . . ., but not by local rule applicable to all motions."

The Association also points out that Rule 27(d)(2) now limits motions and responses to motions to "20 pages" and limits replies to "10 pages." It urges that Rule 27(d)(2) be amended to express the limits in words, rather than in pages. It also suggests that a cross-reference to Rule

32(c)(2) should be inserted into Rule 27(d)(1)(D), to remind practitioners that the typeface and type style provisions of Rule 32 apply to motion papers.

D. Recommendation

I recommend that the proposal be approved as published, except possibly that the response time should be increased from 7 days to 8 days.

The one-day increase in the response time would have the following effect: Parties would have 10 calendar days instead of 9 calendar days to respond to motions served on Mondays or Tuesdays, 12 calendar days instead of 9 calendar days to respond to motions served on Wednesdays, and 12 calendar days instead of 11 calendar days to respond to motions served on Thursdays or Fridays. (This calculation does not take into account legal holidays, which could lengthen all of these periods.)

As to the suggestion of the NACDL that limits on motions be stated in words rather than in pages, as noted above, I recommend that a proposal to replace all page limits with word limits be added to the Committee's study agenda.

XVIII. Rule 27(a)(4)

A. Introduction

The Committee proposed to amend Rule 27(a)(4) to change the time within which a party must file a reply to a response to a motion from 7 days to 5 days. This amendment was proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days.

B. Text of Rule and Committee Note

Rule 27. Motions

(a) In General.

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

Committee Note

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

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

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

C. Summary of Public Comments

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published.

XIX. Rule 41(b)

A. Introduction

The Committee proposed to amend Rule 41(b) to provide that the mandate of a court must issue 7 *calendar* days after the time to file a petition for rehearing expires or 7 *calendar* days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. This amendment was proposed in conjunction with the proposed amendment to Rule 26(a)(2) (described above), under which intermediate Saturdays, Sundays, and legal holidays will no longer be counted when computing deadlines under 11 days, unless the deadline is stated in "calendar days."

B. Text of Rule and Committee Note

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

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Committee Note

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

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

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Jon O. Newman (2d Cir.) (00-AP-008) opposes the proposal. Judge Newman believes that the concept of "calendar days" should be eliminated entirely from the appellate rules. (See the summary of Judge Newman's comments about the proposed amendment to Rule 26(a)(2).) Judge Newman argues that, "[i]f 'calendar days' cannot be eliminated entirely, at least they should not be added, as is now proposed for Appellate Rule 41(b)." As to the rationale for that change — that leaving the period at "7 days," calculated under new Rule 26(a)(2), would mean that mandates would not issue until 9 to 13 days after a triggering event — Judge Newman has three responses: (1) The harm of the added delay is not as great as the harm that would be caused by "the added confusion of 'calendar days.'" (2) The court of appeals can always shorten the time for issuing the mandate in a particular case. (3) If the 7-day period is too long, it should be shortened to 5 days, not stated in "calendar days."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) opposes the proposal. It doubts that delaying mandates for 9 or more days would cause any real harm and points out that courts always retain authority to order that their mandates issue whenever they want.

D. Recommendation

I recommend that the proposal be approved as published.

XX. Rule 26.1

A. Introduction

The Committee proposed to amend Rule 26.1 to require a nongovernmental corporate party not only to file a disclosure statement in which it identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock (as a nongovernmental corporate party is required to do under existing Rule 26.1), but also to file a statement indicating that there are no such corporations if that is true, to include in any disclosure statement any additional information that may be required by the Judicial Conference of the United States, and to supplement any disclosure statement when circumstances warrant. The Committee also proposed to amend Rule 26.1 to require parties other than nongovernmental corporate parties to file a disclosure statement in which they disclose any information that may be required by the Judicial Conference of the United States and to supplement any disclosure statement when circumstances warrant.

B. Text of Rule and Committee Note

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File.

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

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

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

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

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

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

Committee Note

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

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1(a).

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

Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

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

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

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

C. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the amendment, which, he says, "will strip away a veil of concealment."

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) sympathizes with the practical considerations that led to the proposal that the Judicial Conference have authority to modify disclosure requirements without going through the Rules Enabling Act process, but the Association fears that "the necessary contents of a disclosure statement may be less accessible to the bar and to the public if they are not set forth in the rules themselves."

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

The **Committee on Federal Civil Procedure of the American College of Trial Lawyers** (00-AP-10) supports expanding the obligation to file disclosure statements to non-corporate parties, as Rule 26.1(a)(2) does. However, the Committee opposes granting authority to the Judicial Conference to modify disclosure obligations without going through the Rules Enabling Act process. Lawyers will not be able to know the nature of their obligations without contacting the Judicial Conference directly before every case, which will create an administrative burden for the staff of the Conference and waste the time of attorneys. "It is difficult to see the merit of referencing a set of requirements that are not included in the Rules, may not exist and are not readily available."

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) strongly supports two aspects of the proposal — extending the disclosure obligation to non-corporate parties and requiring supplementation — but is "appalled" by a third — giving authority to the Judicial Conference to modify the disclosure obligation without going through the Rules Enabling Act process. Judge Easterbrook's objections to the Judicial Conference provision are several: (1) The provision short-circuits the Rules Enabling Act. The judicial branch keeps telling Congress not to short-circuit the process; the judicial branch impairs its credibility when it short-circuits the process itself. (2) The provision would weaken the role of the Standing Committee. "Other Committees of the Conference will see (and use) an opening into rules-related issues, and the ability of the Standing Committee to coordinate matters of practice and procedure will be undermined." (3) The provision would create a hardship for lawyers, as the Judicial Conference does not publish its standards in any central, readily accessible location. Judge Easterbrook recalls that some years ago the Advisory Committee on Appellate Rules proposed that the Judicial Conference be given authority to set technical standards for briefs, and that the proposal was rejected by the Standing Committee on the grounds described above. He urges that the Judicial Conference provision of proposed Rule 26.1 suffer a similar fate.

Judge Easterbrook also questions the assertion in the Committee Note that standards on disclosure issued by the Judicial Conference could preempt local rules. He points out that Rule 47(a)(1) provides that local rules "must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Judge Easterbrook interprets Rule 47(a)(1) to provide that "[o]nly statutes, rules, and one *particular* Judicial Conference action supersede local rules."

D. Recommendation

I recommend that the proposal be approved as published, with one possible exception.

It is important to note that Rule 26.1 and its intended counterparts in the civil and criminal rules — FRCP 7.1 and FRCrP 12.4 — were drafted jointly by the reporters to the respective committees, under the direction of Judge Scirica and Prof. Coquillette. The Standing Committee has insisted that the three provisions not only be identical in substance, but, to the extent possible, identical in language.

Everyone seems to agree that requiring a null report and requiring reports to be supplemented is a good idea. I agree. The one real dispute is over the "Judicial Conference" provision. I sympathize with some of the comments, but I also sympathize with the motivation behind the provision: The Advisory Committees are poorly suited to fine-tune disclosure requirements. It should not be difficult for the Judicial Conference or the Administrative Office to come up with a way to make the disclosure requirements well known and easily accessible to lawyers, and that will eliminate much (but not all) of the force behind the objections to the Judicial Conference provision. Also, I note that there is precedent for this; Rule 25(a)(2)(D) authorizes local rules on electronic filing, as long as the rules "are consistent with technical

standards, if any, that the Judicial Conference of the Untied States establishes." Finally, this issue has been debated at length within the Standing Committee, and Rule 26.1 (and its counterparts in the civil and criminal rules) represent the Standing Committee's resolution.

In response to Judge Easterbrook's point, I think it would be wise to amend the text of the rule to state explicitly that the Judicial Conference has the authority to provide that, with respect to the requirements that it promulgates pursuant to Rule 26.1, those requirements will preempt local rules on the topic of financial disclosure (whether or not those local rules "conflict" with the requirements). As noted, though, any change to Rule 26.1 will have to result from a joint drafting exercise, involving not just this Committee, but the Civil Rules Committee and Criminal Rules Committee. Presumably, if all three Advisory Committees agree with the substance of this recommendation, Judge Scirica, Prof. Coquillette, and the three reporters will get together prior to the Standing Committee's June meeting to draft implementing language.

COVER COLORS PACKAGE: RULES 27(d)(1)(B), 32(a)(2), AND 32(c)(2)(A)

XXI. Rule 27(d)(1)(B)

A. Introduction

The Committee proposed to amend Rule 27(d)(1)(B) to provide that, if a cover is voluntarily used on a motion, response to a motion, or reply to a response to a motion, the cover must be white.

B. Text of Rule and Committee Note

Rule 27. Motions

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

(1) **Format.**

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

Committee Note

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals. (See Judge Easterbrook's comments on Rule 32(a)(2).)

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal, which, it notes, reflects what "is currently the general practice in the Courts of Appeals."

D. Recommendation

I recommend that the proposal be approved as published.

XXII. Rule 32(a)(2)

A. Introduction

The Committee proposed to amend Rule 32(a)(2) to provide that the cover on a supplemental brief must be tan.

B. Text of Rule and Committee Note

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

(a) Form of a Brief.

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

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

(B) the name of the court;

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

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

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

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

Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals — which, he says, are "more fiddly changes that will lead courts to reject documents without promoting any important interest." He argues that the lack of uniformity among circuits "poses no practical problems for lawyers," as it is no worse than the lack of uniformity on other matters. If a lack of uniformity is the problem, he suggests simply providing that "lawyers [may] choose their own colors."

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) does not object to the proposal, but it doubts the seriousness of the problem that the proposal is intended to address. "The rationale for the colored covers is to allow the court to pick out a brief by seeing the color. Because supplemental briefs often are filed after argument (or submission) picking them out is no problem." The Committee added that "a good case can be made" for requiring that a supplemental brief be the same color as the principal brief it supplements.

The Committee urged that the Advisory Committee on Appellate Rules consider further changes to Rule 32 to address the colors of briefs filed in cases involving cross-appeals. It noted conflicting practice within the circuits and asked "that the Advisory Committee . . . impose some uniformity in covers on cross-appeals."

D. Recommendation

I recommend that the proposal be approved as published.

The New York State Bar Association's suggestion about the colors of briefs in cases involving cross-appeals has already been placed on our study agenda at the request of the Justice Department.

XXIII. Rule 32(c)(2)(A)

A. Introduction

The Committee proposed to amend Rule 32(c)(2)(A) to provide that, if a cover is voluntarily used on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, or response to a petition for hearing or rehearing en banc, the cover must be white.

B. Text of Rule and Committee Note

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

(c) Form of Other Papers.

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

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

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

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

Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on

petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) opposes the proposal — and the other "cover color" proposals. (See Judge Easterbrook's comments on Rule 32(a)(2).) If Rule 32(c)(2)(A) is to specify colors, then Judge Easterbrook urges "different colors for petitions and responses," just as different colors are used for appellants' and appellees' briefs. He points out that the Supreme Court requires tan covers on petitions and orange covers on responses, and suggests that Rule 32 do likewise, so as to achieve "vertical as well as horizontal uniformity." Alternatively, he suggests the Seventh Circuit's approach of requiring that the colors of the petitions and responses be the same as the colors of the filing parties' briefs on the merits.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published.

XXIV. Rule 28(j)

A. Introduction

The Committee proposed to amend Rule 28(j) to eliminate the prohibition on "argument" in letters that draw the court's attention to supplemental authorities and to impose a 250-word limit on such letters.

B. Text of Rule and Committee Note

Rule 28. Briefs

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Committee Note

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

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

C. Summary of Public Comments

The **Committee on Federal Courts of the Association of the Bar of the City of New York** (00-AP-004) strongly supports the amendment, as the prohibition on argument in the current version of Rule 28(j) "is regularly and blatantly flouted." In order to prevent similar disregard of amended Rule 28(j), the Association proposes that the penultimate sentence be rewritten as follows: "The letter (including all contents, footnotes, and attachments other than the supplemental authorities which are the subject of the letter, but excluding the address, salutation, signature, and copy recipients) must not exceed 250 words, and the number of such words shall be set forth at the foot of the letter." The Association further recommends that Rule 25(a)(4) be amended to instruct clerks to refuse to accept letters that do not comply with Rule 28(j).

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal, except that it urges that Rule 28(j) letters be limited to 400 words, instead of 250 words. The Group argues that "a 250-word limit . . . will be unduly restrictive in some circumstances," such as in "complex cases [when] it is often difficult to state the holding of the new authority and its relationship to the arguments made in the briefs . . . in fewer than 250 words, even without argument." The Group also expresses concern about imposing a word limit — whether it be 250 words or 400 words — to Rule 28(j) letters that address multiple authorities. The Group is concerned that counsel, finding that 250 or 400 words is insufficient to discuss multiple authorities, will instead submit a separate letter on each authority, which will be burdensome for all involved. The Group recommends that the word limit "be imposed on a per-issue basis."

Eric A. Johnson, Esq. (00-AP-009) opposes the proposal. He believes that permitting parties to argue in Rule 28(j) submissions would "exacerbate the unfairness that often arises from inequality of resources." He recommends retention of the prohibition on argument.

The **Advisory Committee on Rules of Practice & Internal Operating Procedure of the United States Court of Appeals for the Ninth Circuit** raises a number of concerns about the proposal. Some members of the Committee oppose any change to the rule; they fear that courts may be "inundated" with Rule 28(j) letters "because the new language contemplates a response to a [Rule 28(j)] letter" and because "[t]he proposed rule places no limitation on the number of 250-word letters any party would be entitled to submit." Other members believe that the 250-word limit is too low, especially when the party seeks to bring several new cases to the attention of the court. These members suggest that, at a minimum, the amendment provide that the words and numerals contained in the citations themselves not count toward the 250-word limit. The Committee also suggests that consideration be given to requiring that Rule 28(j) letters be accompanied by a certificate of compliance.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) views the proposal as "sound in principle."

The **Appellate Practice Section of the State Bar of Michigan** supports the proposal, except that it recommends that "case names and citations" not count toward the 250-word limit.

The **Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association** (00-AP-017) supports the proposal. It agrees that the current prohibition on "argument" is violated in "almost all letters to Courts of Appeals."

The **National Association of Criminal Defense Lawyers** (00-AP-019) supports the proposal.

D. Recommendation

I recommend that the proposal be approved as published, except that I suggest that the Committee consider increasing the word limit to 350.

I do not have a strong objection to amending the rule to provide that the words and numerals within citations should not count toward the 250-word limit, but I wonder whether such an exception would be worth the hassle it would cause. (First question: Are the words within a parenthetical immediately following a citation — such as "disagreeing with the Fourth Circuit" or "affirming that the right to appeal is waived under these circumstances" — part of the citation or not?) I think it would be better simply to increase the word limit to, say, 350 words, and continue to provide that everything in the letter counts toward that limit.

As to the other comments: No limit on the number of Rule 28(j) submissions exists now, and imposing such a limit would be difficult and unwise. It would be almost impossible for clerks to enforce a word limit imposed on a "per-issue basis." This Committee has been firm in resisting suggestions that Rule 25(a)(4) be amended to instruct clerks to refuse to accept documents. And it isn't the new language that "contemplates a response to a [Rule 28(j)] letter"; that language is in the existing rule, and, as far as I know, it has not resulted in courts being "inundated."

XXV. Rule 31(b)

A. Introduction

The Committee proposed to amend Rule 31(b) to clarify that briefs must be served on all parties, including those not represented by counsel.

B. Text of Rule and Committee Note

Rule 31. Serving and Filing Briefs

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

Committee Note

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

C. Summary of Public Comments

The **Public Citizen Litigation Group** (00-AP-005) supports the proposal. It recommends that Rule 31(b) be further amended to require service of one copy of each brief on each known amicus. (At present, the rule requires service only on parties.)

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) believes that the proposal represents "[a]n improvement."

D. Recommendation

I recommend that the proposal be approved as published.

XXVI. Rule 32(a)(7)(C) and Form 6

A. Introduction

The Committee proposed to amend Rule 32(a)(7)(C) to provide that the filing of a new Form 6 must be regarded as sufficient to meet the obligation imposed by Rule 32(a)(7)(C) to certify that a brief complies with the type-volume limitation of Rule 32(a)(7)(B). The Committee also proposed to add a new Form 6 as a suggested form of a certificate of compliance with the type-volume limitation of Rule 32(a)(7)(B).

B. Text of Rule and Committee Note

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

(a) Form of Brief.

(7) **Length.**

(C) **Certificate of compliance.**

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

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

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

Committee Note

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

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

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

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

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

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

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

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

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

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

(s)_____

Attorney for _____
Dated: _____

C. Summary of Public Comments

No comments were received on the proposed amendment to Rule 32(a)(7)(C) or on the proposed addition of Form 6.

D. Recommendation

I recommend that the proposal be approved as published.

XXVII. Rule 32(d)

A. Introduction

The Committee proposed to amend Rule 32(d) to provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

B. Text of Rule and Committee Note

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

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

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

Committee Note

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

C. Summary of Public Comments

Jack E. Horsley, Esq. (00-AP-002) supports the proposal.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) calls the proposal "a thoroughly bad idea" and raises numerous objections: (1) The signature requirement is pointless. It is not necessary to require a signature in order to "ensure[] that a readily identifiable attorney or party takes responsibility for every paper." Right now, "[e]very lawyer whose name appears on a brief or other paper . . . is responsible." (2) The signature requirement would not work. Papers are

most likely to be signed not by the lawyer who truly is responsible, but by "some junior associate." (3) The signature requirement would create a hardship for counsel. Lawyers will have to visit printers or duplicators (such as Kinko's) to sign briefs, or printers or duplicators will have to ship briefs back to the law firm for signing, rather than shipping the briefs directly to the clerk for filing. (4) The signature requirement would be "retrograde." We live in the electronic age; "the world is moving in the direction of dispensing with manuscript signatures."

Judge Easterbrook further suggests that if the Advisory Committee wants to fix responsibility for a paper on a particular attorney, it should follow Supreme Court practice, and require that every paper must designate the "counsel of record." That fixes responsibility without requiring anyone to waste time signing papers.

Finally, Judge Easterbrook argues that, if there is to be a signing requirement, Rule 32(d) should be rewritten to make two things clear: (1) Only one copy of any document must be signed. (2) The signature must be of the lawyer principally responsible for the substance (not necessarily the drafting) of the document.

The **National Association of Criminal Defense Lawyers** (00-AP-019) does not oppose the proposal, but raises several questions: "Does the committee mean that the original of each must be personally signed manually, in ink, although some or all of the rest may be conformed? Or would it comply to sign the brief before copying, so that all copies would bear a copy of counsel's signature, but none would have an original ink signature? May counsel delegate the right to sign his or her name to a secretary . . . or must the signature be affixed personally?"

The Association also suggests that a reference to 28 U.S.C. § 1927 should be added to the discussion of sanctions in the Committee Note. Finally, the Association suggests that a reference to new Rule 32(d) be added to Rule 28, which lists the contents of briefs.

D. Recommendation

I recommend that the proposal be approved as published.

None of the complaints persuades me. The signature requirement in Rule 32(d) is substantively identical to the signature requirement that has long existed in FRCP 11(a) — and that applied to appellate proceedings before the appellate rules were split from the civil rules. To my knowledge, FRCP 11(a) has not created any of the problems feared by the commentators.

XXVIII. Rule 44(b)

A. Introduction

The Committee proposed to add a Rule 44(b) to require a party to give written notice to the clerk if the party questions the constitutionality of a state statute in a proceeding in which the state is not a party, and to require the clerk to notify the state's attorney general of that challenge. Rule 44(b) is intended to implement 28 U.S.C. § 2403(b).

B. Text of Rule and Committee Note

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

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

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

Committee Note

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

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

C. Summary of Public Comments

Judge Barbara B. Crabb (W.D. Wis.) (00-AP-001) supports the proposed amendment as a helpful reminder to judges. She suggests that something akin to Rule 44 be added to the FRCP.

Jack E. Horsley, Esq. (00-AP-002) suggests that the following clause be added to Rule 44(b): "Absent certification and/or failure to raise a constitu[t]ional question at the outset precludes asserting a[] [c]onstitutional violation on appeal."

Public Service Litigation Group (00-AP-005) supports the proposal. It notes that § 2403(b) refers only to statutes "affecting the public interest," but agrees that the rule should not be so restricted, given the uncertain scope of that clause.

Judge Frank H. Easterbrook (7th Cir.) (00-AP-012) supports the proposal — "[a] genuine improvement, nicely executed."

The **National Association of Criminal Defense Lawyers** (00-AP-019) recommends that the phrase "in a proceeding" be replaced by the phrase "in any civil or criminal case" to highlight the fact that the constitutionality of state statutes sometimes is challenged in federal criminal

cases. State criminal statutes are often incorporated into federal criminal statutes (e.g., the Assimilative Crimes Act), and state statutes sometimes govern the legality of an arrest or search by state law enforcement officers. The change suggested by the Association would highlight the fact that Rule 44(b) may have some application in criminal cases.

D. Recommendation

I recommend that the proposal be approved as published.

General Comments

Jack E. Horsley, Esq. (00-AP-002) said that the "work product of [the] Committee is so good" that "[i]t is a challenge to submit viable suggestions."

The **United States Postal Service** (00-AP-003) agrees with many of the proposals and believes that the others will not have a substantial effect on the Postal Service. It opposes only the amendment to Rule 4(a)(5)(A)(ii).

The **Appellate Practice Section of the State Bar of Michigan** (00-AP-013) supports all of the proposed amendments, save the amendments on which it specifically commented.

Sidney Powell, Esq. and **Deborah Pearce Reggio, Esq.** (00-AP-016) fully endorse the "thorough and considered comments" of the Public Citizen Litigation Group.

Appendix

2000 APPELLATE COMMENT CHART

00-AP	NAME OF NDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLL OW UP
001 (Also 00-CV-G)	Judge Barbara B. Crabb	10/5	44	11/2	
002 (Also CR Sub-stantive & CR Style)	Jack E. Horsley, Esq.	10/18	4, 26, 26.1, 44	11/6	
003	William R. Gilligan, Deputy General Counsel, U.S. Postal Service	11/17	4	11/21	
004 (Also 00-CV-001)	Guy Miller Struve, on behalf of the Association of the Bar of the City of New York	11/17	4, 25, 26.1, 28	11/21	
005 (Also 00-CV-002)	Brian Wolfman, on behalf of Public Citizen Litigation Group	11/22	All rules	12/7	
006 (Also 00-CV-H)	Roy H. Wepner, Esq.	11/30	26	12/6	
007 (Also 00- CV-003)	Prof. Bradley Scott Shannon	12/28	4	1/10	
008	Judge Jon O. Newman	1/5	4, 26, 41	1/10	
009	Eric A. Johnson	1/5	28	1/10	
010 (Also 00-CV-005)	Gregory P. Joseph, Esq., on behalf of the American College of Trial Lawyers (ACTL)	2/9	4, 26.1	2/21	

00-AP	NAME OF NDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLL OW UP
011 (Also 00-CV-007)	Cathy A. Catterson, Clerk, & Miriam A. Krinsky, Esq., Chair of Advisory Committee on Rules of Practice & Procedure, on behalf of the Ninth Circuit Court of Appeals	2/12	21, 25, 28		
012	Judge Frank H. Easterbrook	2/15	All rules	2/21	
013 (Also 00-CV-008)	Gary L. Field, Esq., on behalf of the Appellate Practice Section of the State Bar of Michigan	2/15	4, 5, 21, 25, 27, 28		
014 (Also 00-CV-009)	James C. Martin, Esq., on behalf of the Los Angeles County Bar Assn. Appellate Courts Committee	2/15 via Internet	4, 5, 21		
015 (Also 00-CV-010)	Michael Zachary	2/16	4		
016 (Also 00-CV-011)	Sidney Powell, Esq. & Deborah Reggio, Esq.	2/16 via Internet	All rules		
017	Brian C. Eckman, Esq., & Patricia Taylor, Esq., on behalf of the Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Assn.	2/23 via Internet	1, 4, 5, 21, 25, 26, 27, 28, 32, 41		

00-AP	NAME OF NDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLL OW UP
018 (Also 00-CV-013)	Nicholas H. Cobbs, on behalf of the District of Columbia Bar Litigation Section and the Courts, Lawyers & Administration of Justice Section	3/5 via Internet & U.S. Mail	4		
019 (Also 00-CV-014, 00-CR Style 014, 00-CR Substantive 055)	William J. Genego and Peter Goldberger, on behalf of the National Association of Criminal Defense Lawyers (NACDL)	3/1	1, 4, 21, 24, 25, 26, 27, 28, 32, 44		

00-CV-6

Author: "Barbara Crabb" <Barbara_Crabb@wiwd.uscourts.gov> at ~Internet
Date: 10/5/00 1:40 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Fed. R. App. P. 44 (b)

00-AP-001

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The proposed amendment is a helpful solution to the pesky problem for courts of remembering to notify the United States Attorney when the constitutionality of a federal statute is challenged in a case in which the United States is not a party. My suggestion is that a rule similar to present Rule 44 be added to the rules of civil procedure, to assist district courts in remembering to make the requiring notification.

P.S. When I went onto the web site to make my comment and got to the portion showing the text of Rule 44, I tried to check the box for submit comments as directed (I thought) by the introductory instructions, but all that happened was that I was bounced to the introductory sheet. Are others having a similar problem?

Barbara B. Crabb, District Judge, W.D. Wis.

10/18/00

Jack E. Horsley, J.D.
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See Who's Who In America

October 13, 2000

00-AP-002
00-CR-007
Substantive
00-CR-003
Style

Peter J. McCabe, Esq.
Secretary
Committee on Rules of Practice and
Procedure of The Judicial Conference
Of The United States
Washington D. C. 20544

Dear Mr. McCabe:

On October 7th when I acknowledfged your letter and the booklets constituting the preliminary drafts of the proposed amendments, it was thought my trial calendar, involving several back to back cases, wouild preempt my time longer than it has, for I went to verdict last night and my next case will be Monday, October 16th. Consequently I was able to set aside today to work on the review you so kindly requested.

It is a challenge to submit viable suggestions. The present work product of your Committee is so good. But I have some reactions which it may be desired to consider.

Looking first at the pamphlet which came with your letter. I note with special favor the comment speaking to make it mandatory for a party not connstituing a governmentsl coporation to disclose its parent corporation in addition to aand/or require discovery release of the fact that there is none if that is true. This will strip away a veil of concealment which may well identify with the discovery process unless the suggested modification is adopted. I also like the requirement that every document related to any given dispute be signed by the attorney or, if the litigant is representing himself personally, by the litigant.

Addresing the booklet styled "Preliminary Draft, ertc.", paragraph 7, (B) appears to resonate the common law rule fallsus in unus falsus in omni . I suggest modifcation of the material to cause it provide that failure described should affect the validity of an appeal. Otherwise it appears to me there would be an open window for ev asion and possible concealment.

ON computing time (page 35) it appears to me to hearken to the venerable common law princile that time must be calculated not beginnkng with the date itself, but with the day following. This is good. Otherwise, the time to file notice of appeal might be held to require 19 days instead of 20, or whatever period of time is prescribed in any given jurisdiction. The "exclusion of the firat day" rule is well supported and should be retained. And it well taken to apply it to work days and not Saturdays, Sundays and legal holidays. I like the substance and effect of this approach throughout.

I found nothing about which to comment until I reached page 57, Rule 44 (b). Would it be suppported to add in substance something like this:

> Absent certification and/or failure to raise a constituional question at the outset precludes asserting and vonstituional violation on appeal.

I encountered this is Darling vs Charleston Hospital, 211 N.E. Reporter, 2d (Ill) 253. I lost the case but prevented the attempt of opposing litigant from relying on a constitutional effective violation

Although I have never handled much criminal litigation, Ihave had enough contacts with such actions to make what might be a helpful comment speaking to Rule 5, etc., section (d), Procedure, etc. I think it would be well taken to add, after referring to "any affidavit" this, in subsgtance: " * * * or any other document * * * " preceding "filed with it".

On the discussion of mental examinations,(page 177) I sugest conskderation be given to adding : " * * * or any other rekevabt examination * * *". If a person charged with a crime seeks evasion of responsbility bvecause of some physical limitation which might have prevented his accomplishing the offense, it appears to me it would be a proper thing for the court to order this additional featgure.

Passing to Rule 26 on taking testimony in criminal cases. instead of "compelling" would it not better to say something like "compelling and unavoidable"? Simple to use "compelling" seems to me to be too narrow an appraoch; there could be other things within the ambit of the modification I have suggestged you and your CXommittee consider.

I am afraid my second lead paragraph was too narrow; the present work product is so good and thorough that I have been unable, notwithstnaind studying the entire materials, to make any myriad of suggestions. It is my hope those I have made may be of some interest and possible help.

Again, as I remarked in my letter of October 7th, it is an honor to be invited by you and your Committee to make suggestions about this important project and I am mindful of the fact that you have conferred on me much pleasure by so honoring me.

Respectfully,

Jack E Horsley

JACK E. HORSLEY, J. D.

JEH:mm

WILLIAM R. GILLIGAN
DEPUTY GENERAL COUNSEL

11/17/00

UNITED STATES
POSTAL SERVICE

00-AP-003

November 16, 2000

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Rules Committee Support Office
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

This responds to your August 28, 2000 request for comments the Postal Service might have with respect to the preliminary draft of the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. We agree with many of the proposed changes and believe the others are unlikely to affect the Postal Service in any substantive way.

The one exception is the proposed change to Appellate Rule 4(a)(5), as amended by the underscored language, the rule will read:

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

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

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

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

We understand from the Committee Note that the current rule has been read by the courts to mean that motions filed before the 30 day period has expired require a showing of good cause and that motions filed after the 30 day period will require a showing of excusable neglect, and that the Committee seeks to provide that either showing will suffice to justify a motion, whether filed during the 30 day period or after.

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The Postal Service, which owns and leases large amounts of real estate across the nation, is extremely concerned with state and federal rules and statutes that determine when adjudications of disputes over title have become final. In its view, the current practice is preferable, as reflected by the court decisions the Committee refers to. There are few things easier than filing a notice of appeal, and litigants who draw out the time for doing so *should* be required to show excusable neglect, if they are to be permitted to proceed. They have already had their day in court, and it does not seem unreasonable to ask them to act with dispatch if they want another.

More importantly, however, we think it imperative that a rule setting out the time for bringing an appeal be very clear, so as to leave no room for arguments as to when the time for bringing the appeal expires. We think the Rule should forthrightly say when motions for extensions of time can be filed, and the proposed Rule does not. It forces litigants to tease that information out of the proposed addition to subsection (ii), and those already familiar with the current case law may see something in it that the draftsmen did not mean. We would therefore suggest something along the lines of:

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

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

(i) a party so moves during the 30 period prescribed by this Rule 4(a) and shows good cause; or

(ii) a party so moves during the 30 days after the time prescribed by this Rule 4(a) expires and shows excusable neglect.

I want to thank you for this opportunity to comment on the proposed revisions.

Sincerely,

William R. Gilligan

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11/17/00

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00-AP-004
00-CV-001

November 14, 2000

Re: **Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure**

Peter G. McCabe, Esq.
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Secretary McCabe:

On behalf of The Association of the Bar of the City of New York, we are pleased to submit the following comments on the proposed amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure. Because the proposed amendments to the Appellate and Civil Rules are interrelated, this letter will address both sets of proposed amendments.

The Association of the Bar of the City of New York was organized in 1870 "for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice, elevating the spirit of integrity, honor and courtesy in the legal profession, and cherishing the spirit of collegiality among the members thereof." Ass'n of the Bar of the City of N.Y. Const. Art. II.

The Association's Federal Courts Committee is directed "to observe the practical working of [all federal] courts and . . . to make such reports or recommendations as the Committee may deem advisable for the purpose of improving the administration of justice in such courts." Ass'n of the Bar of the City of N.Y. By-Law XVI(a). The Committee's membership is broadly representative, including two Federal Magistrate Judges, lawyers employed by the Federal, State, and City Governments, lawyers from large, medium-sized, and small firms, and lawyers primarily representing both plaintiffs and defendants.

the Federal Rules of Civil and Appellate Procedure could be amended to provide that, where a judgment has been entered that does not comply with the separate document requirement of Rule 58, the prevailing party must serve a notice of entry of that judgment on the other parties in order to start the time to appeal running. This would serve to give the other parties clear notice of the entry of an appealable judgment, comparable to the notice that the separate document requirement is intended to provide.

(3) *Lengthen the Waiting Period for the Deemed Entry of Judgments That Violate Rule 58.* If it is determined that it is necessary to allow judgments that violate the separate document requirement of Rule 58 to be deemed to have been entered after the lapse of a period of time, the Committee believes that the waiting period should be significantly longer than the 60 days provided in the proposed amendment. Specifically, the Committee believes that the waiting period should be at least six months, rather than just 60 days. A hiatus of 60 days in the court docket of an ongoing proceeding is far from unusual, while a hiatus of six months or more (although not impossible) is considerably less frequent. Requiring a six-month waiting period before a judgment can be deemed to have been entered without satisfying the separate document requirement is thus more likely to give actual notice to would-be appellants that the case is over at the District Court level and that the time for appeal has arrived.

Federal Rule of Appellate Procedure 26.1 and Federal Rule of Civil Procedure 7.1. The Committee understands the practical reasons that have led the Advisory Committees to propose that the information required to be set forth in a disclosure statement should be left to be prescribed by the Judicial Conference, instead of being set forth in the rules. The Committee is concerned, however, that the necessary contents of a disclosure statement may be less accessible to the bar and to the public if they are not set forth in the rules themselves.

Federal Rule of Appellate Procedure 28(j). The Committee applauds the proposal to allow argument in letters advising the Court of Appeals of supplemental authorities, and to limit such letters to 250 words. The prohibition of argument contained in the present Rule 28(j) has proven unenforceable in practice, and is regularly and blatantly flouted. Because of the frequency with which the letter and spirit of Rule 28(j) have been violated in the past, the Committee suggests that the penultimate sentence of the proposed rule be strengthened to read as follows: "The letter (including all contents, footnotes, and attachments other than the supplemental authorities which are the subject of the letter, but excluding the address, salutation, signature, and copy recipients) must not exceed 250 words, and the number of such words shall be set forth at the foot

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Comments of Public Citizen Litigation Group on the Proposed Amendments to the Federal Rules of Appellate Procedure and Related Amendments to the Federal Rules of Civil Procedure

November 21, 2000

Introduction

Public Citizen Litigation Group ("PCLG") is filing these comments on the proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") that were published for comment by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States on August 15, 2000. In addition, on the same date, the Committee proposed several amendments to the Federal Rules of Civil Procedure ("FRCP"), most of which relate to the proposed appellate amendments.

PCLG is a 10-lawyer public interest law firm located in Washington, D.C. It is a division of Public Citizen, Inc., a non-profit advocacy organization with over 150,000 members nationwide. Since its founding in 1972, PCLG has worked toward improving the administration of justice in the courts. It has submitted proposals to amend the civil and appellate rules and has frequently commented on proposed amendments to those

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rules.

Collectively, PCLG's lawyers have litigated hundreds of cases in the federal courts of appeals and have appeared before every federal circuit (in most of them, on many occasions), as well as in the appellate courts of approximately 20 states. As a result, PCLG's lawyers have considerable experience with the Rules and issues that are the subject of the proposed amendments.

We consider below the proposed FRAP amendments in numerical order, as they appear in Part I of the Committee's August 15 "Request for Comments." We do not consider the proposed FRCP amendments separately, but rather comment on them in conjunction with the related FRAP proposal (*e.g.*, FRAP 4(a)(7), considered together with FRCP 54(d) and FRCP 58).

* * *

Rule 1(b)

PCLG opposes the proposed complete repeal of FRAP 1(b), which states that the Rules do not extend or limit the jurisdiction of the courts of appeals. FRAP 1(b) is an appropriate reminder that the Rules are not intended to create, expand, or reduce the jurisdiction of the federal courts, a power that, under our constitutional scheme, is accorded the legislative branch. The stated purpose of the repeal is to acknowledge

statutes that were enacted at the beginning of 1990's that gave the Supreme Court the power, through rules of procedure, to define "finality" within the meaning of 28 U.S.C. 1291 and to allow interlocutory appeals beyond those already permitted by 28 U.S.C. 1292.

The Committee's purpose can be achieved by noting that Congress has given the Supreme Court the power, through the rulemaking process, to alter the court of appeals' jurisdiction in certain circumstances. Thus, the Committee could retain the current text of the Rule, and then achieve its goal by deleting the period after "appeals," and adding ", except as authorized by an Act of Congress permitting the promulgation of rules affecting the jurisdiction of the courts of appeals." In this way, the Rules would retain the general admonition that they are to be interpreted as not extending or limiting the jurisdiction of the courts of appeals.

We note, however, that the appellate rulemakers have not acted to date on these Congressional authorizations and that, therefore, the best course may be to leave FRAP 1(b) alone. It strikes us as unusual to repeal FRAP 1(b) based on what the Rules Committee and ultimately the Supreme Court **might** do in the future, when the Committee could easily amend FRAP 1(b) when and if it promulgates a rule that in fact extends the jurisdiction of the courts of appeals. Moreover, we do not believe that a rule promulgated pursuant to 28 U.S.C. 2072(c) — the provision authorizing the Supreme Court through rules of procedure to define "finality" under 28 U.S.C. 1291 — would in

fact "extend or limit the jurisdiction of the court of appeals." In section 1291, Congress has already determined that "final" decisions are appealable as of right. Therefore, a rule stating the types of orders that are final operates within the interstices of the Congressionally-sanctioned realm of final appeals.

In this regard, two provisions of the Federal Rules of Civil Procedure are illustrative. FRCP 82, like FRAP 1(b), states that the civil rules "shall not be construed to extend or limit the jurisdiction of the United States district courts ...." In FRCP 54(b), however, the Rules effectively define "finality" for appeal purposes under 28 U.S.C. 1291, by allowing the district judge to enter a final judgment as to certain claims or certain parties, even though the entire action is not final. *Cf. Digital Equipment Corp v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (the collateral order doctrine is not a judicially-created exception to finality under section 1291, but rather a construction of it).

On the other hand, 28 U.S.C. 1292(e), authorizing the promulgation of rules providing for additional types of interlocutory appeals, would "extend" the jurisdiction of the courts of appeals. Leaving aside the question whether Congress can so broadly delegate legislative authority over the courts' jurisdiction, *see Bolin v. Sears, Roebuck & Co.*, ___ F.3d ___, 2000 U.S. App. Lexis 27326, *4-*10 (5th Cir. Oct. 27, 2000), the fact remains (as noted above) that no such appellate rules have been promulgated (or even proposed) since section 1292(e)'s enactment in 1992, making the repeal of FRAP 1(b) premature. *But cf.* FRCP 23(f) (allowing appeals from orders granting or denying class

certification under authorization of 28 U.S.C. 1292(e)).

Rule 4(a)(1)(C)

PCLG agrees with this new provision treating appeals from orders granting or denying applications for writs of *coram nobis* as civil cases for purposes of FRAP 4(a).

Rule 4(a)(4)(A)(vi)

PCLG agrees that the reference to FRCP 6(a) can be deleted as superfluous if the proposed amendment to FRAP 26(a)(2) is approved.

Rule 4(a)(5)(A)(ii)

PCLG supports the Committee's proposal to allow either "excusable neglect" or "good cause" to serve as the basis for extending the time to file a notice of appeal, regardless of whether the motion is filed before or after the time prescribed by FRAP 4(a) expires. We agree that this proposal is consistent with the current text of the Rule (despite judicial interpretations to the contrary) and promotes harmony with the analogous rule for criminal appeals (FRAP 4(b)(4)).

Rule 4(a)(7) (and related amendments to FRCP 54(d)(2)(C) and FRCP 58)

The proposed amendments concerning the "separate-document" rule are multi-

faceted, and we take them up in the four-pronged approach set out in the proposed Committee note. When applicable, we also comment on the related proposed changes to FRCP 54(d)(2)(C) and FRCP 58.

(1) PCLG agrees that the separate-document rule should be seen as emanating from FRCP 58 alone, and that the Committee's proposal to eliminate confusion as to whether FRAP 4(a)(7) itself imposes such a requirement is sensible. Thus, we agree with the proposed language changes to FRAP 4(a)(7)(A) that would eliminate the confusion.

That is a different question, however, from the scope of the separate-document requirement. The Committee proposes to eliminate that requirement for certain post-trial and similar motions (those listed in proposed FRCP 58(a)(1) and FRCP 54(d)(2)). Although we believe it a close question, we oppose the amendments to FRAP 4(a)(7), FRCP 54(d)(2)(C), and FRCP 58 that would eliminate the separate-document requirement for rulings on certain post-judgment motions. On the one hand, these kinds of post-judgment rulings are generally discrete and imbued with finality (*e.g.*, a motion to alter or amend the final judgment in a case), such that a separate document evidencing the judgment usually is not necessary to alert the losing the party to the appealability of the order. However, that is not always true in complex cases involving multiple parties and claims (where, for instance, a ruling on a post-trial motion might concern only liability, but not damages), or with respect to attorney's fees (where the court might deal with liability but leave open the amount of fees). Thus, the separate-document

requirement would serve its intended purpose by signaling to the losing party that "you had better appeal soon or be barred later."

To be sure, retaining this requirement imposes some burden on courts and clerks both to draft judgment orders and to remember to do it (although perhaps not as great a burden as that imposed on the courts of appeals in sorting out appealability questions down the road in the absence of such a requirement). In any event, as the Committee indicates elsewhere in the note, the separate judgments themselves are short, formulaic documents for which there are standard forms. Moreover, the party seeking to cut off the time for appeal can always request the issuance of a separate document if the court has failed to issue one. *See* proposed FRCP 58(d).

One other point bears mention. In complex litigation particularly, there are many post-judgment orders other than those listed in proposed FRCP 58(a)(1). For instance, after class action settlements or other consent orders are approved, disputes often arise over their interpretation or implementation. Sometimes there are post-judgment requests for discovery in conjunction with motions regarding settlement implementation, and presumably rulings on such discovery requests are not appealable under 28 U.S.C. 1291 until the court rules on the overall implementation issue **and issues a separate document (i.e., judgment)**, signaling that the time for appeal is ticking (assuming the court is correct as to finality). Thus, it makes sense, at the very least, to retain the separate-document rule for all appealable post-judgment orders other than those listed in

proposed FRCP 58(a)(1).[1]

(2) PCLG disagrees strenuously with proposed FRCP 58(b)(2)(B), which would allow the time for appeal to begin to run 60 days after an appealable order is entered on the docket, even though no separate document has been entered. With all respect, we do not understand why the Rules would retain the separate-document requirement and then allow it to evaporate at some point after an appealable order is entered. As the Supreme Court has noted, one of the purposes of the separate-document rule — in our view, its most important purpose — is "to provide a greater degree of certainty as to when a judgment has been rendered....." *United States v. Indrelunas*, 411 U.S. 216, 221 (1973) (quoting 6A J. Moore, Federal Practice ¶ 58.04 [4.-2], at 58-180 (1972)). Thus, when a judge issues an opinion that arguably is an appealable order under current FRCP 58, the judge signals her belief that the order is in fact appealable by issuing a separate document (typically labeled "judgment").

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[1] PCLG does not believe that a separate judgment must accompany a so-called collateral order. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Although a collateral order is final, and hence appealable, as to a particular issue, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) ("the order must conclusively determine the disputed question"), it is not final in the sense that it concludes the entire litigation on the merits. Thus, the prospective appellant need not appeal after the issuance of a collateral order to preserve her appellate rights; rather, an appeal would still be available after the case is finally resolved on its merits. If a party wishes to appeal from a collateral order, then, it is incumbent on that party to determine whether a collateral order has been issued and then decide whether it makes sense to appeal now rather than later, just as it is incumbent on district court litigants to seek a right, under FRCP 54(b), to appeal certain district court orders, even though those orders are final only as to certain claims and certain parties. Therefore, PCLG would support an amendment to FRCP 58 stating that a separate document need not accompany an appealable collateral order.

As the Committee is aware, this signaling function is quite important because frequently an order is ambiguous as to whether it constitutes a "judgment," *i.e.*, whether it is an "order from which an appeal lies." Fed. R. Civ. P. 54(a). Put differently, the principal problem that current FRAP 4(a)(7) and FRCP 58 seek to resolve is **not** that the losing party is unaware of what has occurred in the litigation; indeed, the Rules have another provision to deal with that problem. *See* FRAP 4(a)(6) (allowing district court to reopen time to file appeal in certain circumstances where moving party did not have notice of entry of judgment). Rather, the principal problem that current FRAP 4(a)(7) and FRCP 58 address is that the losing party, although aware of the issuance of an order, may be unaware that an **appealable** order has been entered. Since it is this signaling function that is the core purpose of the separate-document rule, we fail to see how allowing 60 days has anything to do with the problem. Put otherwise, in the ordinary case where the losing party has notice of the relevant order (but no separate document has been entered), and does not appeal within 30 days of the entry of that order, the mere passage of an additional 60 days generally will not alert the losing party that an appeal is necessary if that party was unaware beforehand. In sum, we do not believe that the proposed 60-day extension will serve as a compromise between the present rule and having no separate-document rule at all (as the Committee apparently believes). Rather, the proposal is at odds with the most valuable purpose of the separate-document rule and its proper interpretation in *Indrelunas*, and should be rejected for that reason.

We recognize that opponents of the separate-document rule are concerned about the possibility that appealable orders will remain appealable for indefinite periods of time where a separate document has not been entered. There are three answers to this contention. First, this problem is easily resolved by district courts, which need only follow the current Rule, and by the winning party (the prospective appellee), who can always trigger commencement of the appeal period by moving for (and drafting) a separate judgment. Indeed, separate judgments are entered in the great majority of cases, in which the possibility of a limitless time for appeal remains only theoretical, because the current combination of FRCP 58 and FRAP 4(a)(7) have their intended (and beneficial) effect.

Second, and related to the first point, based on our own experience litigating many appeals in circuit courts around the country, we challenge the assumption that there are many "problem" cases, despite the number of reported decisions on the topic. Although we realize that the Committee has reviewed a large number of separate-document cases, we urge the Committee to consider, on a relative basis, whether in fact there is a significant problem to be solved, and then to contrast its finding with the very large number of cases in which potential appellants are well served by the signaling function of FRCP 58, particularly in cases in which the underlying order is ambiguous as to its finality.

Third, and related to the second point, in our experience, cases involving

significant delay generally are cases of genuine ambiguity as to whether the underlying order is "final" for purposes of appeal. Two Supreme Court cases illustrate our point. In *Indrelunas*, without doubt the government's ultimate appeal was filed far more than 60 days after the entry of a final order within the meaning of 28 U.S.C. 1291. However, the order that the Second Circuit below viewed as being a final order from which the government **should have appealed** was, at best, ambiguous as to its finality. Indeed, in reversing, the Supreme Court noted that the order relied on by the Second Circuit was **not** in fact final (nor an order for which the district court had entered a separate Rule 58 judgment). *Indrelunas*, 411 U.S. at 221.

Shalala v. Schaefer, 509 U.S. 292 (1992), is also illustrative. That case involved the timeliness of an attorney's fees request in a disability benefits case arising under the Social Security Act. The government argued that the fee-seeking plaintiff had failed to file his fee application within the statutory deadline—30 days from when the judgment on the merits was no longer appealable. *See* 28 U.S.C. 2412(d)(1)(B), (d)(2)(G). The district court's final order was one that, at the time of its issuance, neither party believed was appealable in light of then-current case law characterizing such an order as interlocutory. *Id.* at 300-02 & n.3; *id.* at 304 (Stevens, J., joined by Blackmun, J., concurring in the judgment). The Court ruled that, although the district court's decision on the merits was a final appealable order, the fee request was not time-barred because a separate Rule 58 judgment had not been entered and thus the plaintiff had not been

notified of its finality. *Schaefer*, 509 U.S. at 302-03. However, if the proposed version of FRCP 58 had been in effect, the decision in *Schaefer* would have come out the other way, despite both parties' understandable ignorance that an appealable order had been entered.

For all of these reasons, we urge the Committee not to adopt the 60-day cap and to retain the current separate-document requirement of FRCP 58.

(3) We support the proposal to allow waiver of the separate-document requirement by the appellant alone. Once an appeal from a final order has been filed, and all agree it has not been filed too late, it makes no sense to send the case back for the entry of a separate judgment that will simply result in another appeal on the same issues. This proposal is consistent with the spirit and purpose, if not the literal holding, of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978).

(4) Similarly, we agree with the Committee's rejection of the rationale of *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984). Under *Townsend*, when an appellant files a notice of appeal after entry of an appealable order, the separate-document requirement is waived if the notice is filed within the time period for filing an appeal, measured from entry of the appealable order. On the other hand, *Townsend* holds that the separate-document requirement cannot be waived when the notice of appeal is filed after that time period. In that situation, according to *Townsend*, the appeal must be dismissed and the appellant must return to the district court to seek entry of a separate

judgment from which an appeal may be taken. We agree with the Committee that both situations constitute waiver of the separate-document requirement and that both appeals should go forward on the merits. Any other result wastes the resources of the parties and the courts with no countervailing benefit. We note however, that, if the Committee's amendment erecting a 60-day cap in cases where a separate judgment has not been entered is approved, this proposal would have a very limited period of operation.

Rule 4(b)(5)

PCLG takes no position on this rule concerning criminal appeals, which is outside our areas of experience and expertise.

Rule 5(c)

PCLG generally supports the "volume" limitations for briefs and other documents and has no concerns about the Committee's effort to limit the length of Rule 5 papers as well. However, in light of the word-counting capability of word processing programs, and zealous counsel's never-ending efforts to cram in words by adjusting fonts and margins and by single-spacing blocked quotes and footnotes, we disagree with the Committee's proposal to limit Rule 5 papers to 20 **pages**. We suggest 5600 words, which is 20 "pages," assuming 280 words per page. We arrived at this figure by taking the old FRAP page limit for principal briefs (50 pages) and dividing it into the current

word limit (14,000 words), and then applying the result (280 words per page) to the Committee's desired page limit for Rule 5 papers. For readability purposes, the Committee may wish to adopt a font requirement (say, 14-point type), as it has for briefs. This word-based, rather than page-based, approach is consistent not only with the rule for briefs, but also with the pending proposal that Rule 28(j) letters should not exceed 250 words.[2]

Rule 15(f)

PCLG agrees with the proposal to make a petition for review of an agency order, filed during the pendency of an administrative request for review, rehearing, or reopening of the order, effective upon administrative disposition of that request. We agree that this proposal would eliminate a trap for unwary litigants and conforms to the rule for civil appeals under FRAP 4(a)(4)(B)(i).

Rule 21(d)

For the reasons stated in our comments to proposed FRAP 5(c), PCLG believes that papers filed in support of extraordinary writs should be limited to 5600 words, rather

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[2] Regardless of whether a word-based or page-based limit is chosen, the Rule should state that certain portions of the petition do not count toward the limit (*e.g.*, corporate disclosure statement, statutory addendum), as is the case for briefs. *See* FRAP 32(a)(7)(B)(iii).

than 20 pages.

Rule 24

PCLG agrees that to the extent that a valid statute conflicts with the rules governing *in forma pauperis* status, the statute governs. Thus, we have no opposition to the proposed amendment to FRAP 24.

Rule 25(c) and (d)

PCLG supports the option to serve by e-mail, if the party being served consents "in writing." Therefore, we generally support the electronic service provisions of proposed FRAP 25(c)(1)(D), (c)(2), (c)(4), and (d)(1)(B)(iii). In reviewing the proposal, three issues arise: First, we do not know what the Committee means when it says that a party can be served electronically, if that party consents "in writing." Does a "writing" consist of an e-mail exchange, or must there be a hard-copy writing that bears an actual signature? Moreover, does the proposal anticipate that the consent be filed with the court? We have no strong views on these points, but believe that they should be clarified.

Second, at this time, the principal benefits of electronic service are the increased speed with which one's opponent receives documents and the increased ease in searching those documents, not in avoiding copying and mailing costs. This is true, because, as

explained below, hard-copy service is still necessary even where e-mail service is used. (However, for papers other than briefs and appendices, which are deemed filed and served if placed in regular mail on the due date, electronic service would be a significant economic benefit, because it would eliminate the need for expensive overnight mail service). The pagination of briefs, motions, and other legal papers that are received by e-mail attachment sometimes differs from the pagination of those same documents when they are printed out by the sending party. These pagination differences arise because of differences among e-mail and word processing programs and, most often, among the printers used to print the documents. (For instance, in our office, the pagination of a document can differ significantly depending on which of our printers we use). To allow the parties and the court to have identically paginated documents — which is important when cross-referencing one's opponents' arguments in briefs and at oral argument — the receiving party must have a hard copy prepared by the sending party that will serve as the "official" copy of the brief. Until these pagination differences can be eliminated, we see e-mail serving as a useful form of service, but not one that will supplant traditional mail service. Therefore, we recommend that the Rule state explicitly that e-mail service be combined with hard-copy service by mail or otherwise.

Third, because the proposed rule appears to allow electronic service as the sole means of service, there is an inconsistency between the proposed changes to FRAP 25 and current FRAP 31(b), which requires that two copies of briefs be served on each

separately represented party. E-mail service reasonably can be construed as the service of one copy of a brief, *see* FRAP 25(b) ("a copy" of papers other than briefs must be served on other parties to the appeal), but it cannot reasonably be construed as the service of two copies. Thus, if the Committee retains the changes to Rule 25, without requiring additional hard-copy service, the Committee should also propose a conforming amendment to FRAP 31(b), omitting the two-copy requirement when electronic service is used. Instead, the Rule should state that when e-mail service is used, one hard copy also should be served by mail or otherwise.

Rule 26(a) and (c)

PCLG supports the proposed amendment to FRAP 26(a), to exclude intermediate Saturdays, Sundays, and holidays in calculating time periods that are 11 days or less. We agree that this amendment makes sense because it conforms to the method for calculating time under the civil and criminal rules. For the reasons stated in the Committee note, we also support the proposed amendment to FRAP 26(c), which treats e-mail service the same as mail service for the purpose of calculating "additional time after service."

Rule 26.1 (and related proposed FRCP 7.1)

PCLG supports the proposed amendments to FRAP 26.1 regarding corporate disclosure for the reasons stated in the Committee note. For those same reasons, PCLG

supports proposed FRCP 7.1, which imposes the same disclosure requirements in civil cases in the district courts. Proposed FRCP 7.1(b)(1) properly requires parties to file disclosure statements when they file their first pleading or other paper in the case. That raises the question whether FRCP 7.1 is meant to apply retroactively to cases in which the parties have already filed their first pleadings. We believe that it should. Thus, we recommend that the Committee state in its notes that parties in pending cases must file the disclosure statement within some reasonable time, such as 60 days, after the Rule is promulgated, and that the district court should notify all parties of the requirement.

Rule 27(a)(3)(A) and (a)(4)

PCLG partially opposes the proposed changes concerning the time in which to respond to motions and to reply to responses. We have no objection in principle to adjusting the time for a response or reply to take into account the proposed amendment to FRAP 26, which would exclude intermediate weekends and holidays in calculating time periods less than 11 days. However, in our experience, the time periods under FRAP 27 can be quite difficult to meet, especially as they apply to certain substantive motions, such as those relating to complex issues of appellate jurisdiction, and they certainly should not be shortened. Under proposed FRAP 27(a)(3), the time for a response to any motion has been reduced nominally from 10 days to seven days. Even after adding back in intermediate weekends and holidays, litigants could have as few as nine days to

respond to a motion, which is one day less than the minimum 10-day response period under the current rule. Thus, at least, the time for a response should be reduced from ten days to **eight** days to achieve parity with the current rule.[3]

Rule 28(j)

PCLG agrees with the proposal to allow argument in Rule 28(j) letters for the reasons stated in the Committee note. We also agree with the Committee's desire to keep Rule 28(j) letters short; however, we believe that a 250-word limit (or about a half page of text on a single-spaced, letter-sized page) will be unduly restrictive in some circumstances. In our experience, in complex cases it is often difficult to state the holding of the new authority and its relationship to the arguments made in the briefs (with the appropriate page references) in fewer than 250 words, even without argument. Although there is no magic number, we suggest a 400-word limit, which is more realistic and would allow litigants to properly explain the relevance of new authority without unduly burdening the court.

We have one other concern. The 250-word limit applies to any Rule 28(j) letter,

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[3] PCLG believes that the time for responding to **dispositive** motions, such as those involving standing and appellate jurisdiction, is too short under current FRAP 27. For such motions, we urge the Committee to retain the current number of days, plus the proposed exclusion of intermediate weekends and holidays. Although that would modestly extend the effective time for a response, such a change is appropriate because many dispositive motions are very difficult to brief in the time allowed under the current rule.

whether it seeks to bring one authority **or** more than one authority to the court's attention. In situations involving more than one new authority, counsel will seek to "comply" with the 250-word limit by filing multiple letters over a period of time, which may be justified if the authorities come to counsel's attention over a period of time. In any event, a small word limit may not be sufficient to explain and provide brief argument when there are several new authorities, each of which relate to different issues in the case. On the other hand, sometimes multiple authorities are so related to each other as to allow them to be described together with an economy of words. Therefore, we suggest that the word limit, whatever its size (250 words, 400 words, as we believe appropriate, or some other number of words), be imposed on a per-issue basis, allowing the litigant to devote a particular number of words to new authorities that pertain to a particular issue in the appeal.

Rule 31

PCLG supports the clarifying amendment concerning service of briefs on unrepresented parties.[4]

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[4] Current FRAP 31 requires service of briefs only on "parties." PCLG believes that the Rule should be amended to require service of **one** copy of briefs on each known amicus as well.

Rule 32

PCLG supports all of the proposed amendments concerning the form of briefs and other papers because they promote uniformity. No purpose would be served by continuing to allow each circuit to have differing rules on these topics.

Rule 36 (and related Rule 45)

For the reasons stated in the Committee note, PCLG supports these proposed changes concerning service of opinions and providing notice of entry of judgment.

Rule 41

PCLG supports this proposed change, which, in light of the proposal to exclude intermediate weekends and holidays in time calculations, is necessary to maintain the current time period for issuance of the mandate.

Rule 44

PCLG supports this proposal, which would facilitate notification to state attorneys general of challenges to the constitutionality of their states' statutes, as required by 28 U.S.C. 2403(b). Section 2403(b) applies only to state statutes "affecting the public interest," although the proposed Rule applies to challenges to the constitutionality of all

state statutes. However, because of the uncertain meaning of "affecting the public interest," we agree that state attorneys general should be notified of all constitutional challenges to state statutes where the state is not already a party to the appeal, allowing the attorney general to decide whether the state should become involved.

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November 27, 2000

Mr. Peter G. McCabe
Secretary of The Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

00-AP-006

00-CV-H

Re: Proposed Amendments to the Federal Rules
Of Appellate Procedure

Dear Mr. McCabe:

In accordance with the request for comments published in the November 1, 2000 advance sheet of West's Supreme Court Reporter, I am writing to comment on the proposed amendments to Rule 26 of the Federal Rules of Appellate Procedure.

I heartily concur with the notion of amending Fed. R. App. P. 26 so that it is congruent with Fed. R. Civ. P. 6. However, it is unfortunate that the Committee has not seen fit to take this opportunity to remove an ambiguity in these rules which has spawned extensive and needless litigation and which has still left the issue without a definitive resolution. *See generally* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1171 at 516-21 (Supp. 2000).

The problem is this: when in the calculation process does one add the three calendar days where service has been made by mail? The answer to that question can and does impact on the ultimate calculation, as a simple example will illustrate.

Suppose an adversary serves a paper by mail, and the recipient is obligated to respond within ten days. If you add the three days for service by mail first, we are now above the 11-day threshold, which would suggest that we do not exclude intermediate Saturdays, Sundays and holidays. The final tally, then, is 13 calendar days.

Alternatively, one can first look at the original 10-day deadline, conclude that it is less than the 11-day threshold, and thereby first determine that intermediate Saturdays, Sundays and holidays do not count. This will provide a tentative time period which would typically be 10 business days or 14 calendar days. If we *now* add the three extra days for mailing, we are up to a

total of 17 calendar days. This four-day discrepancy is significant, and can become even more so if the 17th day is a Saturday, Sunday or holiday, which could then result in a final tally of 19 calendar days or even more.

I take no position on which interpretation leads to the proper result. But I do believe that the rule should be clear so that everyone can readily calculate the correct amount of time. To that end, here are two alternative suggested rewrites of the existing first sentence of Fed. R. App. P. 26(c):

> [1] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period before making of the determination set forth in Rule 26(a)(2) as to whether the period is less than 11 days, unless the paper is delivered on the date of service stated in the proof of service.
>
> [2] When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period after the deadline has been determined pursuant to Rule 26(a)(2), unless the paper is delivered on the date of service stated in the proof of service.

Should the Committee believe that one of these proposed changes to Fed. R. App. P. 26(c) is desirable, it would obviously make sense to make a similar change in Fed. R. Civ. P. 6, since failing to do so would defeat one object of the present amendment, which was to conform the two rules. If it is too late in the amendment process to make a similar change in Fed. R. Civ. P. 6, perhaps the foregoing proposal could be considered for a separate set of rule changes in the future.

The Committee's consideration of these comments is very much appreciated.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,
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December 27, 2000

00-AP-007

00-CV-003

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: Proposed Amendments to Federal Rule of Appellate Procedure 4 and Federal Rules of Civil Procedure 54 and 58

Dear Mr. McCabe:

I am writing in response to the amendments to Federal Rule of Appellate Procedure 4 and Federal Rules of Civil Procedure 54 and 58 recently proposed by the Advisory Committees on Appellate Rules and on the Federal Rules of Civil Procedure.

Before I begin, I would like to give you a little of my background. I am a former law clerk to the United States District Court for the Eastern District of Washington. While with that court, I had the privilege of working with judges serving in a visiting capacity to most of the districts in the Ninth Circuit. I also worked for several years as a federal court litigator. Currently, I am a Visiting Associate Professor at the University of Idaho College of Law. I have spent considerable time studying the Federal Rules of Civil Procedure, as well as the particular problems that have led to the most recently proposed amendments thereto.

The Problem

"Civil Rule 58 requires that a judgment be set forth on a separate document." Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 100 (August 2000). But as the Civil Rules Advisory Committee observed, "district courts frequently ignore the separate document requirement." *Id.* at 100-01. Beyond the systemic problems always inherent in the widespread disregard of any rule of procedure, the disregard of the separate document requirement had led to other problems, as "Appellate Rule 4 sets appeal time from the entry of judgment," and thus a "[f]ailure to enter the final judgment on a separate document means that appeal time never starts to run." *Id.* The timing of a number of district court motions likewise is dependent upon the entry of judgment. *See id.* at 101.

I believe that the primary reason district courts fail to comply with the separate document requirement stems from the definition of "judgment" found in Rule 54(a), a definition that is based on the appealability of a district court's order. The difficulties inherent in this definition

are several. First, discerning appealability, though perhaps seemingly simple, is often, in fact, a difficult task. This is most evident in those actions involving appealable interlocutory orders and claims disposed of by motion (particularly with respect to motions to dismiss granted without prejudice). Moreover, appellate courts seem to care not at all how the district courts resolve those questions. Thus, one can find numerous cases in which appellate courts have accepted jurisdiction of appeals in actions where Rule 58 was not complied with, as well as cases in which such courts have rejected jurisdiction notwithstanding the preparation and entry of a separate paper denominated "Final Judgment." Perhaps this is due in part to the notion that district courts are generally in the business of resolving disputes; they are not often called upon to declare the possible consequences of their decisions regarding those disputes. *Cf.* Preliminary Draft at 113 ("there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals"). Accordingly, I respectfully disagree with the Advisory Committee's statement that the "many horrid theoretical problems" caused by the Rule 54(a) definition "seem to have caused no real difficulty" in practice (*id.* at 101). To the contrary, the practical problems caused by this definition of "judgment" are equally horrid.

Another reason I believe that judgments are not properly entered relates to the provision in Rule 58 that directs the clerk (rather than the district court) to prepare the judgment in certain instances, including those instances in which the court has ordered that all relief be denied. As discussed above, such orders frequently lead to some of the more difficult questions as to appealability, and it seems certain that questions considered difficult for judges would be even more so for clerks.

Incidentally, the widespread failure to comply with the separate document requirement is but one of the problems caused by the current Rule 54(a) definition of judgment. There are others. For example, Rule 54(a) seems to imply that some form of judicial action also is a prerequisite to the entry of a judgment (i.e., that a "judgment" may consist only of an appealable order or decree). Yet, some voluntary dismissals by notice or by stipulation of the parties (i.e., dismissals that are effective without a court order) have been deemed appealable, particularly where they dispose of less than all of the claims in the action. Rules 54 and 58 are currently unclear as to whether and when a separate judgment should be prepared and entered in these actions.

Conversely, there also appear to exist actions involving the dismissal of claims by court order from which no appeal lies. From a theoretical standpoint, it strikes me as somewhat odd that an action could come to an end absent any judicial declaration that it has indeed come to an end or any formal determination that each of the various claims have in fact been disposed of (and how), but that appears to be possible under the current scheme. The fact that an action can end without the preparation and entry of a final judgment undoubtedly also contributes to the confusion as to whether such a judgment should be prepared and entered in any action.

In sum, though I agree that courts and clerks frequently fail to comply with the separate document requirement (and probably far more often than most lawyers realize, as many actions consist of a great many appealable orders), and that those failures have led to a variety of

problems, I do not believe that the requirement has been "ignored," as I believe that district court judges and clerks generally try very hard to understand and comply with the Civil Rules. I also disagree that "[a]dherence to the separate judgment requirement" as it now stands is "simple" (Preliminary Draft at 102). Rather, I believe that the current scheme is unworkable. Indeed, any other rule so frequently misapplied would be termed ridiculous. Dramatic reform in this area is desperately needed.

The Solution

The caution employed by the Advisory Committee in the drafting of what might be considered an incremental approach to the problems presented is understandable. Nonetheless, I believe that the proposed amendments will not solve the problems raised. Specifically, the proposed amendments fail to address the definitional problems currently associated with the term "judgment." (The proposed Advisory Committee Notes acknowledge this; *see* Preliminary Draft at 112 ("the amendment does not resolve all of the perplexities that arise from the literal interplay of Rule 54(a) with Rule 58").) The proposed amendments also fail to address the problems associated with the vesting of authority for the preparation of judgments in clerks, rather than courts, and continue to allow for the termination of certain actions without the entry of any judgment whatsoever. And contrary to the assertion found in the proposed Advisory Committee Notes (*see id.*), the proposed amendments arguably do make matters worse. For the proposed amendments weaken the force of the separate document requirement (a requirement that I believe has some utility), in that they except a large number of orders from the effects of this requirement, and essentially excuse the failure to comply with respect to a number of others. Moreover, as a collateral consequence of the proposed amendments, it appears likely that in many actions, the last "judgment" denominated as such would not be at all reflective of the relief ultimately awarded.

I propose instead the following:

1. The current definition of "judgment" contained in Rule 54(a) must be amended. Rather than basing judgments on the concept of *appealability*, judgments instead should be based on the concept of *finality*. Accordingly, Rule 54(a) should refer only to "final" judgments, which should be defined as orders summarizing the claims disposed of in the action, regardless of the manner of disposition (i.e., whether by notice or stipulation, by motion, by trial, etc.); the nature of the disposition (i.e., whether with or without prejudice); and the precise relief awarded to the prevailing party.

2. The separate judgment requirement currently found in Rule 58 should be retained without exception. But (subject to the provisions of Rule 54(b)), Rule 58 should be amended to refer only to "final judgments" as defined in amended Rule 54(a). In other words, *in every action*, a paper denominated a "final judgment" should be separately prepared and entered, *by the court* (and *not* by the clerk), very shortly (perhaps 10 days) after the disposition of the last remaining claim or claims (but without respect to the filing of motions for attorney's fees and the like (not included as an element of damages to be proved at trial) or any other post-final judgment motions, the filing of which, being in a sense discretionary with the parties, cannot be

anticipated with certainty by the court). *Moreover*, should any post-final judgment order alter the effect of the final judgment in any way, the court should separately prepare and enter an *amended* final judgment (perhaps within 10 days of the entry of the relevant post-final judgment order) that accurately reflects the final disposition of the claims in the action (as it makes little sense for the last judgment entered to be inaccurate).

3. Appellate Rule 4 (as well as any other impacted Civil or Appellate Rules) should be amended to reflect the foregoing.

I believe the advantages of this proposed scheme are several. First, I believe that my revised definition of "judgment" probably comports more closely with most lawyer's understanding as to the meaning of this term (at least insofar as this term is used at the district court level). It would differ from the current definition of "judgment" only in that it would exclude orders appealable on an interlocutory basis; would include a small handful of appealable, voluntary dismissals that apparently do not meet the current definition of "judgment" due to the absence of a court order; and would include those final dispositions (certain voluntary and involuntary dismissals) that are not appealable. With respect to the first group, in most instances, there are already mechanisms in place for informing the parties of possible immediate appealability. *See, e.g.*, 28 U.S.C.§ 1292(b); Rule 54(b). Though there remain a small number of other orders possibly appealable on the interlocutory basis, little would be lost as a result of an abandonment of the separate document requirement. For one thing, it is probably with respect to this group that the separate judgment requirement is most often not applied currently. Moreover, a failure to appeal an interlocutory order generally results only in a delay, and not a loss, of any right to appeal that a party might have. (I also do not have a problem with requiring counsel to be a little more attentive in this area, and I do not believe that the appellate courts are looking for ways to make interlocutory appeals more prevalent.)

The inclusion of non-appealable final dispositions (and, apparently, appealable voluntary dismissals by notice or stipulation) would be a change from current practice. But I believe that any short-term confusion that might result from that inclusion would be far outweighed by the advantages. For one thing, I presume that there are already administrative mechanisms in place for determining when every action, including these sorts of actions, has come to an end. The preparation of a "final judgment" in every action would more clearly memorialize this occurrence. (Indeed, the Civil Rules already provide a clear starting point for every action. *See* Rule 3 ("A civil action is commenced by filing a complaint with the court."). Why not provide for a clear ending point?) The preparation of a court-prepared summarization of the disposition of all claims also would help clarify the terms of such dispositions (something that is often lacking in dismissals by notice or by stipulation), and would help ensure that all claims in fact have been accounted for. This might prove particularly useful in actions involving cross-claims, counterclaims, and/or third-party claims, or involving claims disposed of in more than one manner.

Finally (and perhaps most importantly), a requirement that a final judgment be separately prepared and entered in *all* actions, by the court, following the disposition of the last remaining claim or claims, would virtually guarantee that such a judgment would in fact be prepared and

entered. Equally important, the final judgment as proposed would consist only of a recitation of the disposition of claims (something the district court should be able to do), rather than a discernment of appealability (something district court judges and clerks are ill-equipped and ultimately unable to do). As a result, formal compliance with Rule 58 (though not necessarily a jurisdictional prerequisite; *see* proposed Appellate Rule 4(a)(7)(B)) could remain a "safe harbor" for purposes of calculating the time for appeal (at least in those instances where an appeal is allowed).

The proposed Advisory Committee Notes state that "[d]rastic surgery on Rules 54(a) and 58 would be required" in order to fully address the problems relating thereto (Preliminary Draft at 113). I agree, and though drastic changes in the federal rules generally should not be favored, continued "pragmatic disregard" of these problems (*id.*) can no longer be tolerated. Though the changes I propose would be significant, they would be less significant than the changes made in recent years to the rules governing discovery. In any event, they are changes that must be made.

If the Appellate and/or Civil Rules Advisory Committees believe that my testimony at the January 29 hearing in San Francisco would be helpful, I would be more than happy to appear. My direct telephone number is (208) 885-7842, and my e-mail address is <bshannon@uidaho.edu>.

Thank you for your consideration.

Respectfully submitted,

Bradley Scott Shannon

Bradley Scott Shannon
Visiting Associate Professor

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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RECEIVED 1/5/01

January 2, 2001

00-AP-008

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Mr. McCabe:

Concerning the proposed amendments to the Federal Rules of Appellate Procedure, I have two matters to raise.

1. The Committee Note to Subdivision (a)(5)(A)(ii) might benefit from a slight revision. In the first full paragraph on page 16 (page 9 of the Appellate Rules section), the last sentence reads:

> Both Rule 4(b)(4) and the Advisory Committee Note to the 1988 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether the motion for an extension of time is filed before or after the time prescribed by Rule 4(b) expires. (emphasis added)

The words "or after" are misleading. The motion cannot be filed at anytime "after" the original 30 days but only during the 30-day extension period. I suggest deleting "after the time prescribed by Rule 4(b) expires" and substituting "during the 30 days following the expiration of the original deadline" or "during the 30 days of the allowable extension period." This would conform the language to the last sentence of the next paragraph in the Committee note, which states the matter correctly.

The same problem occurs in the last paragraph on page 15 (page 8 of the Appellate Rules section), where the first sentence refers

to courts of appeals that have held "that the excusable neglect standard applies only to motions brought after the expiration of the original deadline" (emphasis added). I suggest replacing the quoted words with "that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline" or ". . . during the allowable extension period."

2. Proposed Rule 26(a) takes the commendable step of substantially conforming the time computation provision of the appellate rules to the time provisions of the civil and criminal rules. I suggest that this process be carried to its logical conclusion by eliminating from the appellate rules the concept of "calendar days," which now appears in the appellate rules, but not in the civil or criminal rules. The proposed Rule 26(a)(2) changes the time period from 7 to 11, but leaves the exception for a time period stated in "calendar days." In the current appellate rules, that exception now applies only to Rule 25(c) and Rule 26(c), both of which concern three-day additions for service by mail. Moreover, the proposed Rule 41(b) adds the "calendar day" exception to the seven-day period for issuance of the mandate.

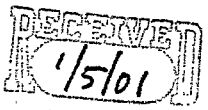
Uniformity would be achieved by deleting the concept of "calendar days" entirely from the appellate rules. Since the three-day provisions of civil Rule 6(e) and criminal Rule 45(e) have no "calendar day" exception, the appellate rules also should have none. If "calendar days" cannot be eliminated entirely, at least they should not be added, as is now proposed for Appellate Rule 41(b). The proposed addition of "calendar days" to Appellate Rule 41(b) is sought to be justified on the ground that, without the addition, the current seven-day period for issuance of the mandate might sometimes be extended to nine days or even thirteen days, a period said to be unacceptable. There are three answers to this concern. First, an occasional extension to nine or even thirteen days for issuance of a mandate is not worth the added confusion of "calendar days." Second, a Court of Appeals is always empowered by existing Rule 41(b) to shorten the time for issuing the mandate. Third, if the seven-day period, without the "calendar day" exception, is considered too long, the better response is just to shorten the period to five days. But it is inadvisable to risk confusion among Clerk's Office personnel by introducing to them for

the first time the unfamiliar concept of "calendar days," a concept that up until now has not affected any time limit that they administer.

Sincerely,

Jon O. Newman
U.S. Circuit Judge

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Date: 1/4/01 3:32 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Submission from http://www.uscourts.gov/rules/comment2001/we
---------- Message Contents



Via Internet

00-AP-009

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Comments:

I am writing to comment on the proposed change to Appellate Rule 28(j), governing citation of supplemental authorities. As Alaska's criminal appellate chief, I deal routinely with federal appeals in habeas cases. In my opinion, permitting parties to argue the significance of supplemental authorities will exacerbate the unfairness that often arises from inequality of resources. Parties with unlimited resources will be able to submit multiple 250-word letter briefs, thereby forcing the opposing parties to respond in kind. For this reason, I recommend retention of the existing prohibition on argument. Thank you for considering my views.

submit: Submit Comment

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American College of Trial Lawyers

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2/9/01

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00-AP-010
00-CV-005

Committee Chair for:
Federal Civil Procedure

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February 8, 2001

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

RE: Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure

Dear Mr. McCabe:

This letter sets forth the views of the Committee on Federal Civil Procedure (the "Committee") of the American College of Trial Lawyers (the "College") pertaining to certain proposed amendments to the Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure. The College is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the legal profession. The Committee is charged by the College with monitoring the operation of the Federal Rules of Civil Procedure and other federal civil procedural developments generally, to determine the adequacy of the operation of the rules and procedures in federal civil cases, and to evaluate proposed changes. We submit these comments with the hope that they may prove useful in the rulemaking process.

The Committee's comments are confined to proposed Fed.R.App.P. 4(a)(5)(A)(ii) and 26.1, and proposed Fed.R.Civ.P. 7.1. The latter two rules are substantially identical, and the Committee's views as to both are combined below.

Fed.R.App.P. 4(a)(5)(A)(ii). Proposed Fed.R.App.P. 4(a)(5)(A)(ii) deals with motions to extend the time to file a notice of appeal. Currently, if a non-governmental party has missed its 30-day deadline for filing a notice of appeal (as provided for in Rule 4(a)(1)), the district judge may extend the time to file the notice if: (1) that party files a motion to extend within the next 30 days (*i.e.*, during days 31 to 60) and (2) under prevailing law, the moving party shows excusable neglect for its failure to appeal within the original 30-day period.

The proposed amendment would permit the motion to extend to be granted if the party belatedly seeking to extend its time to appeal shows *either* "excusable neglect or good cause." This proposal would thus change existing law, under which the good-cause standard applies only to motions to extend filed during the original 30-day period, and the excusable-neglect standard applies to motions filed during days 31 to 60.

The proposed Advisory Committee Note to Rule 4(a)(5)(A)(ii) explains that this amendment is intended to change existing law to conform to the text of the existing Rule. It observes that, while all Circuit decisions require a showing of excusable neglect — and do not apply the good-cause standard — they do so in reliance on an outdated 1979 Advisory Committee Note, which referred to a draft amendment to the Rule that was ultimately rejected.

We agree that the text of the Appellate Rules and the law as applied by the Circuits must be in conformity, and we consider the Advisory Committee's attention to this disparity to be highly salutary. It is imperative that practitioners and litigants be able to consult the Rules to learn their respective rights and responsibilities quickly and with certainty. Few procedural matters are more important than the time constraints that apply to potential courses of action under contemplation, and the applicable standard of review that will apply to each. We have some concerns, however, about the specific approach taken by Rule 4(a)(5)(A)(ii) to achieve this desired harmony.

Currently, it is well-understood by members of the Bar that the time to appeal in a civil action is generally 30 days. It is equally well understood that this 30-day period is jurisdictional and will not easily be extended after it has expired. This rule of law provides some certainty to litigants and lawyers alike. The excusable-neglect standard that is currently applied is quite strict, and its parameters are well-defined.

The new good-cause standard, when introduced disjunctively with excusable-neglect, clearly suggests that a belated motion to extend may succeed — and thus a belated appeal may be taken — even if the movant/appealing party's

neglect was not excusable. The Advisory Committee Note does not explain why, if a party's failure to act in a timely fashion is inexcusable, the prevailing adversary should be subject to upsetting what would otherwise be a final, nonappealable judgment.

Nor, we note, does the Advisor Committee explain just what good cause is intended to convey in a circumstance in which a party has inexcusably failed to file a motion to extend within the original 30-day period. The current good-cause standard in use during the original 30-day period does not carry with it this heavy baggage of inexcusable neglect because, by definition, there has been no neglect.

We also observe with some concern that this amendment will have an impact on certain types of settlements, which are contingent on expiration of the time for a notice of appeal to be filed. This contingency is common, for example, in class and derivative settlements, where individuals not represented by counsel who have appeared in the action may seek to appeal a court-approved settlement. The proposed amendment to Fed.R.App.P. 4(a)(5)(a)(ii) is likely have the effect of delaying, for an additional 30 days, consummation of settlements in these and similar settings. We see little apparent benefit from this delay.

Consequently, while we strongly endorse the motivation animating this proposal, we suggest that uniformity might better be obtained by amending the Rule to conform to existing practice, rather than requiring existing practice to change to conform to the amendment. It is, we suggest, preferable in this instance to move the sidewalk to where the people are walking, than to require them to walk another way.

Fed.R.App.P. 26.1, and proposed Fed.R.Civ.P. 7.1. These substantially-identical proposals address the important topic of nongovernmental disclosure statements. Proposed Civil Rule 7.1 is drawn from Appellate Rule 26.1, which sets forth the particulars that nongovernmental parties must disclose to permit judges to assess the potential need for recusal. We agree that it is sensible to include such a provision in the Civil Rules so that there is a uniform national standard. We also agree that these disclosure statements ought not be limited to corporations, but extended to nongovernmental parties generally, as contemplated by these proposals. For purposes of convenience, we will refer only to subdivisions rather than Rule numbers, since the subdivisions are substantively the same in both Rules.

Our concerns arise out of subdivisions (a)(1)(B) and (a)(2). These provide that — in addition to the information specified to be disclosed in

subdivision (a)(1)(A) — parties must also disclose any *additional* "information that may be required by the Judicial Conference of the United States." We see this as a trap for the unwary, and a needless consumption of time and effort for all involved.

There is no place specified in either the Rules or the respective Advisory Committee Notes for lawyers or litigants to look for this additional information that may or may not be required by the Judicial Conference. Nor does it appear to us that there is any certain, up-to-date source of these referenced, but unincluded, potential requirements, other than contacting the Judicial Conference directly. This will, at a minimum, impose a burden on the administrative staff of the Judicial Conference.

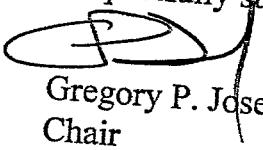
It is difficult to see the merit of referencing a set of requirements that are not included in the Rules, may not exist and are not readily available. This prospect is likely to give rise to unnecessary litigation and has significant sanctions potential. It also strikes us as an unfortunate precedent to have the Rules incorporate by reference possible, but uncertain, requirements of other bodies without, at a minimum, specific reference as to where they may be found (*e.g.*, the United States Code).

We note that all amendments to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure must be approved by the Judicial Conference before they are sent to the Supreme Court for promulgation. Accordingly, it would seem that the Judicial Conference is in a position to ensure that all disclosure requirements it deems important become a part of the Rules. Therefore, while we endorse the inclusion of disclosure statements in the Appellate and Civil Rules, we believe that the requirements should be set forth in the Rules and not simply alluded to.

Finally, the Request for Comments to Fed.R.Civ.P. 7.1, states at page 117 (p. 21 in the Civil Rules pagination) that: "It would be helpful to have suggestions about practical means of making it easy for all litigants to comply with additional [disclosure] requirements" that the Judicial Conference may impose. While our first preference would be to have these disclosure requirements in the Rules, one alternative would be to place them in the Civil Cover Sheet that must be completed and filed in all civil cases. This would, of course, provide no notice in the Courts of Appeals.

On behalf of the American College of Trial Lawyers, the Federal Civil Procedure Committee wishes to express its gratitude to the Appellate and Civil Rules Committees for the opportunity to present our views. It is our goal to be of assistance and we look forward to the opportunity to do so in the future.

Respectfully submitted,



Gregory P. Joseph
Chair

Cc: Earl J. Silbert, Esq., President, ACTL
Stuart D. Shanor, Esq., President-Elect, ACTL
Executive Committee & Board of Regents, ACTL
Robert A. Young, Executive Director, ACTL

GPJ:jmp/340956

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February 7, 2001

DISCLOSED
2/12/01

Revised

00-AP-011
00-CV-007

Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

To Whom It May Concern:

We write on behalf of the Ninth Circuit's Advisory Committee on Rules of Practice and Procedure to note some of the concerns expressed by members of our Committee and endorsed by the Court's Executive Committee in regard to the proposed amendments to the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure.

Our first comment is addressed to the proposed changes to Fed. R. Civ. P. 58. Our main concern is that a lack of clarity in the proposed language could result in the inadvertent loss of appeal rights by someone reading the language of the rule in conjunction with the committee note to mean that the time does not start to run in any case until a district court enters a separate piece of paper. The confusion engendered by the proposed rule could also result in the district courts being deluged by requests for entry of separate judgements when in fact there is no such requirement. In short, while we agree with the rule's stated purpose, we are concerned that practitioners will not readily glean what is or is not required by the proposed language and as a result will have even less certainty than under the current rules regarding when to file a notice of appeal. This holds doubly true for pro se litigants. If your Committee wishes to go forward with the proposed change, we ask that you consider as an alternative the attached draft language prepared by court staff in our circuit.

Our next comment concerns the proposed changes to Fed. R. App. P. 28(j). As an initial matter, some members of our Committee expressed the concern that because the new language contemplates a response to a citation letter, courts might well be inundated with these satellite briefs. Indeed, the proposed rule

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places no limitation on the number of 250-word letters any party would be entitled to submit. Based on these and other concerns, some members of our Committee would prefer that no change be made to the rule. More importantly, we worry that the 250-word limitation does not adequately account for instances where a ground breaking decision issues and many new cases that a party seeks to cite to the court result. To account for those and other instances where numerous citations are to be included in a letter, we urge the Committee at a minimum to modify the rule to make clear that the 250-word limitation is exclusive of the citations themselves. Finally, you may want to consider whether any letter need be accompanied by a certificate of compliance confirming the length of the submission.

Next, we urge the Committee to reconsider the proposed change to Fed. R. App. P. 21. Twenty pages is not enough for extraordinary writs. These arise, by definition, in extraordinary situations and the pleadings are more often than not written under extreme time pressure without the luxury of close editing to reduce the document's size. Setting any overly restrictive length limitation will simply result in the filing of many oversized writs with accompanying motions. Accordingly, we suggest that if you feel compelled to impose a limitation on extraordinary writs, you employ that used for a principal brief under Fed. R. App. P. 32 -- 14,000 words of 14 point type.

Finally, we suggest that further clarification of the proposed changes to Fed. R. App. P. 25(c) are necessary to explain the difference between non-receipt of a message (it never got there) as opposed to a message that has yet to be read (the automated "I'm out of the office" messages). It is also less than clear what a litigant is required to tell the court; if a party notified the court that he served a document by e-mail and then found out it didn't get there, is he required to provide the court with that update or tell the court what he did thereafter? Another problem may arise in situations where a document is served by e-mail, but it cannot be read by the recipient due to formatting or other problems. It is unclear what steps or obligations are triggered under these scenarios.

As always, we appreciate your consideration of these comments.

Sincerely,

Cathy A. Catterson

Cathy A. Catterson, Clerk
U.S. Court of Appeals for the Ninth Circuit

Miriam A. Krinsky by CAC

Miriam A. Krinsky, Esq.
Chair, Ninth Circuit Advisory
Committee on Rules of Practice & Procedure

Note: Judge Tashima, Professor Marcus, and Mr. Svetcov did not participate in this matter.

Fed. R. Civ. P. 58 – proposed alternative language

(a) Separate document

(1) A judgment that terminates a district court action must be set forth on a separate document. Appealable interlocutory orders, partial judgments certified pursuant to Rule 54(b), and appealable post-judgment orders do not require a separate document.

(2) [unchanged except, for clarity, the word "judgment" should be changed to "separate document" (two places)]

(b) Time of entry. A judgment is "entered" when it is entered on the civil docket pursuant to Rule 79(a) except

(1) if a separate document *is* required, a judgment will be deemed entered upon the earlier of these events:

(A) entry of the separate document; or

(B) when 60 days have run from entry of the judgment on the docket;

or

(2) if a separate document *is not* required but is nevertheless entered by the district court, a judgment will be deemed entered upon the later of these events:

(A) the entry date of the judgment; or

(B) the entry date of the separate document .

(c) [strike the words "and has become effective"]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
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CHAMBERS OF
FRANK H. EASTERBROOK
CIRCUIT JUDGE

RECEIVED 2/15/01

February 14, 2001

00-AP-012

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Dear Peter:

Here are some comments on the proposed amendments to the Federal Rules of Appellate Procedure. I regret that I have not had time to comment on the other proposals in this cycle, but for the appellate rules I could at last combine my experience as a former member of the Standing Committee with knowledge gleaned as the current chairman of the Seventh Circuit's procedures committee.

Rule 1(b): Good riddance! This disclaimer of jurisdictional effects has never been true, given Rule 4 (and a few others), and it is well to avoid fibs in federal rules.

Rule 4: The change to Rule 4(a)(4)(A)(vi), and all of the related changes that synchronize the counting principles of the civil and appellate rules, are nicely done and long overdue. These changes, which will avoid traps for practitioners, earn unqualified approval.

The changes elsewhere in Rule 4, however, are problematic. Some of the principal changes are awkwardly phrased, and a few are substantively questionable as well. I'll take the changes in order within Rule 4.

Rule 4(a)(1)(C): This new text, dealing with coram nobis, is not parallel to subsections (A) and (B) of Rule 4(a)(1). It would be better to make the change by amending Rule 4(a)(1) to begin: "In a civil case (including coram nobis)...". Beyond this stylistic problem, however, is a semi-substantive one. Why deal separately with a single kind of motion—and an abolished one at that! See Fed. R. Civ. P. 60(b). Rule 4(a) is limited to civil cases; but Rule 60(b) abolishes coram nobis in civil cases. The Committee Note tries to deal with this incongruity, but unsuccessfully.

Put that to one side, however. What's so special about coram nobis that it deserves its own subsection? The problem for appellate jurisdiction concerns post-judgment motions in criminal cases that might, or might not, be deemed "civil" and thus afforded 30 days for appeal. Instead of putting coram nobis on the civil side of the line, why not either devise a rule for classifying the many

motions or give a list. A rule could be something simple like "an order formally in a criminal case is treated as civil for purposes of this rule unless it is a sentence of imprisonment or a criminal fine." That would put restitution orders on the civil side (properly so, since they are functionally civil). A list approach would require the classification of orders one at a time. The orders that have given trouble in my court include forfeiture (which could be criminal or civil, but which ought to be treated as civil for the time to appeal), post-judgment motions for the return of property, and a variety of ancillary matters. We have had no trouble classifying coram nobis as civil but *lots* of trouble with these other motions. The amendment won't do much good if it addresses the simple case while omitting provision for the more numerous hard cases.

Rule 4(a)(5)(A), as amended, would take the form: "The district court may extend the time if (a) a party so moves; and (b) regardless of whether" the motion is filed at time T, then condition B holds. "A and, regardless whether T, then B" not only is non-parallel but also is hard to follow. It would be much better to leave the text of Rule 4(a)(5)(A) alone and add a new provision—either as an unnumbered paragraph if Bryan Garner can be appeased, or as a new sub-(B)—adding the thought that in applying sub-(A) it does not matter whether the motion is filed before or during the 30 days after the time otherwise available for filing a notice of appeal.

Rule 4(a)(7)(B) would provide, as amended, that "[f]ailure to enter a judgment or order on a separate document ... does not affect the validity of an appeal from that judgment or order." Can appeals be "valid"? "Proper," maybe, or "effective," but not "valid." Anyway, the point of this change is not that notices of appeal are valid, but that particular decisions are deemed *final*, and it is finality that makes an appeal proper.

Perhaps, however, the Advisory Committee spoke of "validity" rather than "finality" because defining "finality" (using the power in 28 U.S.C. §2072(c)?) would mean that an appeal is *mandatory* rather than just *permissive*. Under current law, see *United States v. Indrelunas*, 411 U.S. 216 (1973), and *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978), a party aggrieved by a decision may appeal either when the district court makes it clear that the litigation is over (the point of *Mallis* and, e.g., *Otis v. Chicago*, 29 F.3d 1159 (7th Cir. 1994) (en banc)), or when the district judge at last enters a final judgment meeting the standards of Rule 58 (the holding of *Indrelunas*). The text of the proposed amendment would preserve *Indrelunas*, but the Committee Note implies (at page 19) that *Indrelunas* is to be discarded (though without citing that case), so that once the district court announces a disposition the time for appeal is running. If the Committee wants to alter the result of *Indrelunas*, then the text of the proposed Rule 4(a)(7)(B) should be changed to refer to "finality" rather than "validity." But if the Committee thinks that *Indrelunas* should be retained, then some different rephrasing of the rule's text is best.

I do not think that *Indrelunas* should be altered. Both the text of any amended rule and the text of the Committee Note should make it clear that an appeal lies from either practical finality or formal finality. The reasons for this are given in *Indrelunas* itself, and the Committee Note explaining the amend-

ment to Fed. R. Civ. P. 58 that *Indrelunas* discussed. If a decision by a district judge that does not include a Rule 58 judgment irrevocably starts the clock for appeal, then some litigants are bound to be hornswoggled out of their appeals. Appellees will pepper courts of appeals with arguments that one or another decision marked the "real" end of the case, so that the clock must be deemed to have started more than 30 days before the notice of appeal. Cautious would-be appellants will respond by bombarding the court with notices of appeal from everything that might in retrospect be deemed a conclusive order. That to-and-fro would be an unproductive exercise. A litigant always should be safe in waiting for a proper judgment.

Rule 4(b)(5): The new proposed final sentence seems awkward, and Rule 4(b)(5) as a whole breaks up a single thought into three long phrases. Why not amend the rule to say something like: "Neither the filing of a motion under Federal Rule of Criminal Procedure 35(c) nor the disposition of such a motion affects the proper time to file a notice of appeal, and the filing of a notice of appeal does not affect the district court's power to act on such a motion." This is more compact, though like the proposed text it leaves open the question whether a new (or amended) notice of appeal is necessary if the district court modified the judgment under Rule 35(c). Cf. Rule 4(a)(4)(B)(ii). But even this revision may leave an unintended negative implication about the status and effect of other post-judgment motions in criminal cases.

Rule 5(c): A length limit is sensible, but why one expressed in pages? Rule 32 uses words (or lines), and even the amended Rule 28(j) now includes a word limit. If we can use long limits (14,000 words in Rule 32) and short ones (250 words in Rule 28(j)), why switch to pages in Rule 5? The draft could instead say "5,600 words" (two-fifths of 14,000 words, which was designed to approximate the old 50-page brief) or, to be generous, 6,000 words. The problem with "pages" that led to the type-volume limit in Rule 32 is that lawyers will fiddle with type size and line spacing (and thus readability) if put under page limits. Those appellate rules that lack any page limit do not create that incentive. I have no trouble reading motions. But once we create page limits, we create powerful inducements to play typographic games, and the documents will become harder to read. Please spare us typographic monstrosities! Either leave the rule alone (no limit) or set word limits.

Rule 15(f): The thought is sensible, but the proposed amendment sets a trap (or perhaps just an ambiguity). It specifies the effect of a petition that renders an agency's decision "non-final and non-appealable" but not the effect of a petition that does just one of these things. Maybe, however, it is impossible to do just one of these things, and in that event the phrase "and non-appealable" should be deleted as not adding anything.

There is also a formal matter: "non-appealable" does not fit. Agencies' decisions are not "appealed" to a court; the party files a petition for review. There may be appeals within the agency's hierarchy, but the concept "non-final" handles the thought "further administrative appeals are possible." The phrase "and non-appealable" needs to be revised if it is not deleted.

Rule 21(d): My reaction is the same as to Rule 5(c).

Rule 24(a)(3): The premise of this amendment is that the PLRA and Rule 24(a)(2) are in conflict. I don't see how. The PLRA defines what IFP status means and affects when it may be granted; it does not conflict with the rule as now written. The Committee Note does not cite the portion of the PLRA that it perceives to be in conflict with Rule 24(a)(2), so it is hard to evaluate the need for change. But even if there is a conflict, why is it necessary to amend the rule? The new clause—"(B) the law requires otherwise"—not only is odd (for the Rules of Appellate Procedure are themselves "laws"; the draft should say "a statute" rather than "the law"—but also is unnecessary. A more recent statute always overrides the rules. This exception is implied in *every* rule of procedure; why state it only in this subsection?

True enough, the supersession clause in 28 U.S.C. §2072(b) says that the rules trump non-substantive statutes in effect at the time a rule is adopted. That's not a problem with the PLRA, which post-dates Rule 24(a)(2). I assume that the 1998 amendments do not reset the clock for purposes of §2072(b). Is the point of the new language to Rule 24 merely to ensure that Rule 24(a)(2) does not supersede the PLRA and other statutes enacted after the most recent substantive amendment to the rules and before the 1998 stylistic revision? I don't think this necessary, however; all of the non-substantive changes made in 1998 contain Committee Notes with a no-change-intended clause, which should be enough to keep §2072(b) out of the picture.

Rule 25: I'm enthusiastic about this change and others that allow service electronically. Some of the language may need revision, however. Consider, for example, the references to "writing" in Rule 25(c)(1)(D) and "signature" in Rule 32(d). Under legislation enacted last year, people may make agreements electronically, and "sign" electronically too. Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 *et seq*. The implication of Rule 25(c)(1)(D) that agreement must be recorded on paper before the parties may move forward electronically is incompatible with this statute. Let people signify their agreement in whatever way they find satisfactory. The reference in Rule 25(d)(1)(B)(iii) to "their mailing or e-mail addresses" is another potential problem. E-mail is just one means of exchanging information. Perhaps people will post information on each other's web or FTP sites, or use means of electronic exchange yet to be invented. Why limit the options to e-mail? "Mailing" also may be anachronistic in a few years. It would be better to be general. Instead of "mailing or e-mail addresses", how about "physical or electronic addresses"?

Rule 26: I've already praised the harmonization of time-counting under the appellate and civil rules. Thus the change in Rule 26(a)(2) is fine. But the last sentence of Rule 26(c) is puzzling. It equates electronic service to mail service, adding three days and slowing litigation down. The reason given in the Committee Note—that "technical problems" sometimes prevent instantaneous delivery—is inadequate as a justification. Sure, "technical problems" sometimes occur, but one could say the same for hand delivery. The mail room sometimes fails to get packages to the lawyers. I doubt that "technical problems" in electronic service are worse than administrative problems in managing a large system for the distribution of internal mail, and the average delivery of

an item of e-mail is much faster than the average delivery by the Postal Service. Thus I favor equating electronic service to physical service by direct delivery.

If, however, electronic service must be assimilated to snail mail, it is possible to state this more directly in the rule. The new sentence tacked onto the end of Rule 26(c) is phrased in the negative and will leave many readers scratching their heads. Why not be positive? You could say: "For purposes of this Rule 26(c), electronic service is treated the same as service by mail."

Rule 26.1: Extending this rule beyond corporate parties, and requiring updating, are both excellent ideas. My court found the current national rule inadequate and adopted the following local rule:

Circuit Rule 26.1. Disclosure Statement

(a) *Who Must File*. Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a statement under this rule. A party or amicus required to file a corporate disclosure statement under Fed. R. App. P. 26.1 may combine the information required by subsection (b) of this rule with the statement required by the national rule.

(b) *Contents of Statement*. The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court.

Even this rule, which calls for disclosure of counsel so that judges can know when they should not sit, has not been wholly satisfactory, and the court has circulated for comment the following proposed replacement:

Circuit Rule 26.1. Disclosure Statement

(a) *Who Must File*. Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a statement under this rule. A party or amicus required to file a corporate disclosure statement under Fed. R. App. P. 26.1 may combine the information required by subsection (b) of this rule with the statement required by the national rule.

(b) *Contents of Statement*. The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court. If any litigant is using a pseudonym, the statement must disclose the litigant's true name. A disclosure required by the preceding sentence will be kept under seal.

(c) *Time of Filing*. The statement under this rule and Fed. R. App. P. 26.1 must be filed no later than 14 days after docketing the appeal, with a party's first motion or response to an adversary's motion, or when di-

rected by the court, whichever time is earliest. A disclosure statement must accompany any petition for permission to appeal under Fed. R. App. P. 5 and must be included with each party's brief. See Fed. R. App. P. 28(a)(1), (b).

(d) *Duty to Update.* Counsel must file updated disclosure statements under this rule and Fed. R. App. P. 26.1 within 7 days of any change in the information required to be disclosed.

The amendments, if adopted, would specify when the statement must be filed, ensure that a disclosure statement is filed in connection with motions and petitions (such as requests for leave to appeal under §1292(b) or Fed. R. Civ. P. 23(f)), require updating, and obtain information about anonymous litigants who may turn out to carry disqualifications. The more the national Rule 26.1 can move in the direction of Circuit Rule 26.1, the happier my colleagues will be. And, I suspect, the happier the bar will be, because then we could rescind our local rule and curtail lawyers' need to consult two sets of rules.

But for much the same reason that I (and my colleagues) are happy with the expansion of Rule 26.1, we are appalled by the draft Rule 26.1(a)(1)(B) and 26.1(a)(2). The problem is not simply that promulgation of standards by the Judicial Conference short-circuits the process under the Rules Enabling Act—though that is serious. The judicial branch keeps telling Congress not to short-circuit the process, and we impair our credibility by bobtailing the process when that suits our own purposes.

The principal drawbacks as I see them are two: First, standards set by the Judicial Conference pose serious problems for practitioners, who no longer can safely rely on the rules. At least local rules are published (often in helpful packages where national and circuit rules are integrated). Standards promulgated by the Judicial Conference, by contrast, are not published in any central location. Lawyers will be hard put to determine whether their statements comply with all requirements.

Second, putting this matter in the hands of the Judicial Conference will weaken the role of the Standing Committee. Other Committees of the Conference will see (and use) an opening into rules-related issues, and the ability of the Standing Committee to coordinate matters of practice and procedure will be undermined.

In years past various sets of rules have invited the Judicial Conference to set technical standards for faxing, videoconferencing, and so on. I do not think that the Standing Committee viewed these experiments as a success. But success or not they did not entail the direct regulation of practice in the court of appeals, as standards under Rule 26.1(a)(1)(B) and 26.1(a)(2) would do. Some years back the Advisory Committee on Appellate Rules proposed that Rule 32 be amended to provide that technical standards for briefs (what fonts are acceptable, and so on) be set by the Judicial Conference. This proposal was rejected by the Standing Committee on essentially the same grounds that I think Rule 32(a)(1)(B) and 26.1(a)(2) defective—it would make it needlessly hard for lawyers to know what to do, and it would curtail the Standing Committee's au-

thority in matters important to practice. I strongly suggest that the draft additions to Rule 32(a)(1)(B) and 26.1(a)(2) should meet the same fate.

By the way, the statement in the Committee Note at page 40 of the Preliminary Draft that standards issued by the Judicial Conference under the proposed Rule 26(a)(1)(B) and 26.1(a)(2) would preempt local rules is not correct. Under Rule 47(a)(1), local rules "must be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Only statutes, rules, and one *particular* Judicial Conference action supersede local rules. If the Advisory Committee and Standing Committee want to preempt Circuit Rule 26.1 (and its equivalents in other circuits), that requirement must go into the text of Rule 26; a delegation to the Judicial Conference won't do the trick.

Rule 27: The time changes are commendable. The white cover: Who Cares? I'm inclined to think that fewer pointless requirements are better. Why not let counsel use tan covers, or puce, if they want?

Rule 28(j): This is sound in principle.

Rule 31(b): An improvement. No other comments.

Rule 32: The amendments to Rule 32(a)(2) (tan covers for supplemental briefs) and Rule 32(c)(2)(A) (white covers for petitions for rehearing) are more fiddly changes that will lead courts to reject documents without promoting any important interest. Do we *need* uniform colors for these covers?

I appreciate that courts of appeals have different practices on petitions for rehearing. This is no worse than any other local supplement to the national rules and poses no practical problems for lawyers. But, if regional variation is baleful, why not either (a) let lawyers choose their own colors, or (b) pick different colors for petitions and responses? In the Supreme Court a petition for rehearing must be tan, and any (generic) response orange. See S. Ct. Rule 34.1(g). If uniformity of practice is desirable, let's follow that Court and get vertical as well as horizontal uniformity among appellate tribunals. (In the Supreme Court, white is for cert. petitions only.)

My own preference is for the seventh circuit's approach, in which the petition for rehearing and any answer are the same color as the party's merits brief; then it is possible to scan a set of documents quickly, knowing which side is responsible for which. But I can see the merit of a system in which every petition for rehearing is the same color, no matter who files it. What I can't see is the merit of a system in which both the petition and the response are the same color, though this is where the draft of Rule 32(c)(2)(A) would leave us. Would it be good if both appellants' and appellees' briefs were white?

The new Rule 32(d), which would require a signature in every brief, motion, or other paper, seems to me a thoroughly bad idea. What function would a signature serve? The suggestion in the Committee Note that it would fix responsibility on a particular lawyer is unconvincing. Every lawyer whose name

appears on a brief or other paper now is responsible. If Rule 32(d) is adopted, then most likely some junior associate will sign (the associate's time is least valuable, and signing is tedious), but we don't want to hold junior members of the team solely responsible. Signing a brief may mean a lawyer visiting a printer (or Kinko's), or requiring the printer to send the briefs to the law firm for signing and reshipment, rather than sending the briefs directly to the clerk for filing. That's a waste (and may take a day out of the time available for preparation). Moreover, as I have already observed (see my comment to Rule 25), the world is moving in the direction of dispensing with manuscript signatures. Appellate practice should not be retrograde.

If ascertaining responsibility is the Advisory Committee's objective, it would be best once again to follow Supreme Court practice. Every paper filed in that Court must designate the "counsel of record"—that is, the lawyer chiefly responsible. S. Ct. R. 9.1, 29.3. Cf. Seventh Circuit Rule 3(d). That allocates blame without wasting anyone's time wielding a pen. The Supreme Court does not require signatures on briefs or other printed, pamphlet-sized documents such as petitions for certiorari. Other documents must be signed, but only on the original copy. See S. Ct. R. 34.2(a). There is a separate signature requirement for the statement that must accompany a petition for rehearing under S. Ct. R. 44.2, parallel to Fed. R. App. P. 35(b), but the Court is trying to emphasize the seriousness of the statement rather to require signing in general.

If there is to be a "signature" requirement of any kind, the text of Rule 32(d) should be amended to make two things clear: First, only *one* copy of any document need be signed; second, the signature must be that of the lawyer *principally* responsible for the content of the document (not the lawyer responsible for its drafting—that's the associate again—but taking responsibility for its substance.) Maybe Rule 35(b) should have a signature requirement to set it *apart* from other documents, as S. Ct. R. 44.2 does, but this would be a proposal quite different from the one in the draft Rule 32(d).

Rule 36: This is fine.

Rule 41(d): Ditto.

Rule 44(b): A genuine improvement, nicely executed.

Rule 45(c): This is fine.

I hope these comments prove helpful to the Advisory Committee and the Standing Committee.

Sincerely,

Frank H. Easterbrook

APPELLATE PRACTICE SECTION

STATE BAR OF MICHIGAN

RECEIVED 2/15/01

00-AP- 013

FEBRUARY 14, 2001

00-CV- 008

VIA OVERNIGHT DELIVERY

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Peter G. McCabe, Secretary
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Dear Mr. McCabe,

The Appellate Practice Section of the State Bar of Michigan ("the Section") wishes to comment on the proposed amendments to the Federal Rules of Appellate Procedure that were published for comment on August 15, 2000. The Section would also like to comment on proposed amendments to the Federal Rules of Civil Procedure that would affect appellate procedure.

The Appellate Practice Section of the State Bar of Michigan is comprised of 700 practitioners and judges, including a large contingent of experienced attorneys with active federal appellate practices. The Section is devoted to improving the administration of justice in the state and federal appellate courts. To accomplish that goal, the Section often provides comments and analysis on proposed rule changes, and often proposes rule changes addressing perceived shortcomings in existing rules.

In the interest of brevity, the Section offers commentary only on those proposed amendments that it opposes in whole or in part, believes to be incomplete, or which raise concerns. The Section supports the remaining proposed amendments – not addressed in this letter – for the reasons stated in the Committee Notes.

FRAP 4

The Section believes that the proposed amendments concerning the timing of appeals of right should harmonize the time frames in which the government and defendants can take appeals and cross appeals in criminal cases, so that both would have 30 days.

The current time period for defendants to appeal in criminal cases is 10 days. This is often not enough time to decide whether to appeal. Consequently, criminal defense attorneys often "automatically" file a notice of appeal just to avoid waiving the right to appeal. While client and counsel will already know if there are issues to be raised concerning trial matters, arguably the most fertile area for appeals is

sentencing. After an in-custody sentence, an attorney often needs more than 10 days to work in a jail visit to discuss the matter with the client.

If the client ultimately decides not to appeal, a motion dismissing the appeal must be filed. This generates more paper and more unnecessary work for the attorney and the clerk's office.

If the time for filing a notice of appeal in criminal cases were increased to 30 days, there would be fewer "false" claims of appeal, and it might also cut down on the filing of motions to extend the time within which to file the appeal.

Under the present system, while the defense must file the notice of appeal within 10 days, the government is allowed 30 days. See FRAP 4(b)(1)(A), (B). It is commonly assumed that the government gets extra time because there are department heads who must be consulted in making this decision. The FRAP should also recognize the logistical problems involved on the defense side of the equation, and increase the time period for criminal defendants.

Similarly, the dichotomy in the timing of cross appeals in criminal cases should be eliminated so that criminal defendants also have 30 days in which to cross appeal.

FRAP 4(a)(7) (and related proposed amendments to Fed. R. Civ. P. 58).

The Section opposes the proposed amendment to FRAP 4(a)(7), and the corresponding proposed amendment to Fed. R. Civ. P. 58, which would partially abandon the separate document requirement. The new rules would provide that a judgment is "entered" – so as to trigger the 30-day civil appeal period -- upon the earlier of two possible events: (1) when it is set forth on a separate document *or* (2) "when 60 days have run from entry on the civil docket under Rule 79(a)." See Proposed Fed.R.Civ.P. 58(b). The 60-day rule in proposed Fed. R. Civ. P. 58(b)(2)(B) would only permit a party to wait 60 days from the date the order or judgment to be appealed is entered on the civil docket to begin counting the 30-day appeal deadline. The order is still deemed "entered" upon expiration of the 60-day time frame even if the trial judge fails to issue a separate document setting forth the order.

This proposed 60-day rule would create a potential pitfall for litigants where the appealability of the order in question is ambiguous. This is inconsistent with the Committee's oft-stated goal of eliminating procedural traps for unwary litigants and avoiding potentially harsh results where the case law on a particular point of procedure is unsettled.

The primary rationale for the separate document rule is to create certainty as to when a judgment has been entered, which also provides a readily defined trigger for the 30-day appeal period. The 60-day rule could trap a litigant where there is legitimate uncertainty as to whether an order is appealable. If the district court fails to enter a judgment on a separate document in the manner required by the rules, and a litigant concludes that the order is not appealable, the passage of 90 days could deprive that litigant of its right to appeal if it is later determined that the ruling in question was "final" for purposes of appeal

The Section is aware of the Committee's belief that the current rules "created a problem because district courts frequently ignore the separate document requirement,"

and the "[f]ailure to enter the final judgment on a separate document means that [the] appeal time never starts to run." The Committee was "concerned that the judicial landscape is littered with many 'time bombs' in the form of years-old judgments that could at any time explode into an appeal, shattering the victors' repose and potentially burdening the courts with further proceedings in disputes that have become stale, if not petrified." But a victorious litigant need only submit a proposed "separate" judgment to the district judge for entry to avoid this potential problem. Moreover, as the Civil Rules Advisory Committee has observed, adherence to the separate document requirement by district courts "is simple." Finally, the question arises whether there are actually enough "problem" cases to justify adoption of a 60-day rule that could give rise to a great many problems in its own right.

FRAP 5(c) and 21(d)

The Section does not oppose the designation of a limit to the volume of petitions for permission to appeal and Rule 21(d) writs, but believes that the limits should be based on the number of words used instead of the number of pages. A word-based volume limit would be consistent with FRAP 32, and would prevent litigants from using smaller fonts, reduced margins, or other artifice to technically "abide" by the page limit while in reality frustrating the purpose of the page limit. Word-processing programs are capable of counting words to determine compliance with a word-based volume limitation, and this should not present a significant burden to practitioners or litigants.

FRAP 25

The Section generally supports the proposed amendments to FRAP 25 that would allow electronic service if the party being served has consented to electronic service in writing. The Section does, however, have concerns about problems that might arise if the proposed amendment is not modified to require that electronic service be accompanied by traditional service of a hard copy of the document.

One area of potential concern is that e-mails generally go straight to an attorney's computer, and are not channeled through support staff as are documents sent by traditional mail or courier. If an attorney is, for example, on vacation and receives service via electronic means, it is unlikely that the document will be discovered before the attorney returns from vacation. If the deadline for responding to the document is a short one, this could be problematic. If the same document were mailed by traditional means, a clerk and/or secretary would note what file it concerned, could ascertain its importance, and could channel the document to another attorney immediately (or contact the vacationing attorney working on the case). There are precautions that can be taken to avoid these problems, such as activating an automatic reply to incoming e-mails indicating that the attorney to whom the message is directed is out of the office or on vacation. E-mails might also be automatically forwarded to another attorney's computer for immediate review. But not all attorneys have access to this technology or know of its availability.

Another potential problem presented by e-mail service is that individual computers and copiers vary in how they paginate documents. The same document is

often paginated differently depending on which printer or computer is used. The lack of consistency could cause some problems in citing to briefs with precision where electronic service was used.

Requiring that parties serve at least one hard copy of motions and briefs on opposing counsel should address these concerns. The advantage of immediate service via e-mail will still be realized in, for example, avoiding last-minute hand delivery or expensive overnight mail.

FRAP 27(a)(3)(A) and (A)(4)

The Section does not oppose amendments modifying the time to respond to motions, and to reply to responses, to reflect the proposed amendments to FRAP 26 changing the manner in which deadlines are computed. The Section is concerned, however, that a new 7-day deadline could result in less time to respond than under the current 10-day deadline, which is already a tight deadline for most busy practitioners. In circumstances where only a single Saturday and Sunday are added to the 7-day deadline, this could result in only 9 days to respond. To maintain the status quo of at least 10 actual days to respond, the base deadline should be 8, not 7, days.

FRAP 28(j)

The Section supports proposed amendments limiting the length of Rule 28(j) letters, and eliminating the ban on argument in those letters. The Section believes, however, that the proposed amendments should include language exempting the case citations of the new authorities from the 250-word limit. The rule should provide that the body of the letter is limited to 250 words, "not including case names and citations."

Thank you for considering these comments.

Very truly yours,

Gary L. Field, Chair

cc: Prof. Evelyn Tombers, Chair-elect
Mark Cooney, Chair, Federal Practice Committee

Author: "Jim Martin" <JCMartin@chrm.com> at ~Internet
Date: 2/14/01 6:24 PM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Appellate Rules

RECEIVED
2/15/01
Via Internet

00-AP-014

---------- Message Contents

Attached please find the comments of the Los Angeles County Bar Association Appe
llate Courts Committee concerning proposed rule amendments.

00-CV-009

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February 14, 2001

VIA E-MAIL

Peter G. McCabe, Secretary
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Dear Mr. McCabe:

As Chair of the Los Angeles County Bar Association Appellate Courts Committee, we thank the Judicial Conference's Advisory Committees on Appellate Rules, Bankruptcy rules, Civil Rules and Criminal Rules for their efforts in proposing rule amendments and for the opportunity to comment on the proposals. The members of our Appellate Courts Committee include a broad cross-section of experienced appellate practitioners in the Southern California area who closely monitor matters of appellate practice and procedure. As such, the Committee offers the following observations and suggestions related to the proposed appellate rules changes recently circulated for public comment.

Rule 5(c) (form of papers; number of copies): Except by court permission, the proposed amendment to this rule would impose a 20-page limit on petitions for permission to appeal, cross-petitions for permission to appeal, and answers to petitions or cross-petitions for permission to appeal. Our Committee understands that, in most instances, a 20-page limit should be sufficient to permit an explanation of an issue's importance rendering it worthy of appellate review. We question only whether the rule should add any reference to the availability of an extension of that page limit on a more specifically defined showing of "good cause" – as opposed to the more vaguely worded "permission of the court" -- including a list of factors that

might warrant relief from the 20-page limit. This would help cover cases involving multiple certified issues, or those where the factorial analysis under section 1292(b) is more complex because of circumstances in which the issue (or issues) arises and/or the number of cases giving rise to the difference of opinion. More specificity in defining the exception also would allow counsel to better gauge whether permission to exceed the page limit would be granted.

Rule 21(d) (Form of papers; number of copies): Except by court permission, the proposed amendment to this rule also would impose a 20-page limit on petitions for extraordinary relief (such as mandamus) and answers to those petitions. Our Committee is greatly concerned by this proposal. Frequently, issues suitable for extraordinary relief are very discrete and simply described, requiring little explanation of the factual or procedural details of the case. But based on the collective experience of the members of our Committee, we believe that many cases cannot be presented so easily or economically. Of course, as a matter of briefing strategy, we believe counsel are well served to winnow their presentation of the case and legal arguments to the bare minimum necessary to persuade the court of the magnitude of the trial court's challenged ruling. But to memorialize this practice in a rule fails to appreciate that some of the most important issues may arise in cases where a clearly erroneous ruling will result in manifest injustice if interlocutory relief is not granted and where the error cannot properly be described without first setting forth a complicated factual or procedural background, or without surveying a voluminous body of cases in a rapidly evolving and complex area of law. In such a case, 20-pages would not be adequate, particularly given the additional need – in many Circuits – to address a whole list of independent factors required to justify extraordinary relief. Here too, more specificity on the factors that will be considered in granting additional pages would be a welcome addition for the reasons noted above. The failure to provide such specificity will not, we believe, serve the interests of the parties, counsel, or the courts.

Rule 4(a)(7) and related proposed amendments to Federal Rules

of Civil Procedure, Rules 54 and 58: Our Committee heartily endorses the proposed amendments addressing the timing of an appeal where separate judgment has not, for whatever reason, been entered. Prior to the amendments, this was an area fraught with peril and confusion. The amendments provide greater certainty on the triggering events for this key jurisdictional issue.

We thank the Judicial Conference for the opportunity to express our views on the proposed rule changes.

Very truly yours,

James C. Martin
Chair
Los Angeles Committee
on Appellate Courts

15221130.1

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

RECEIVED 2/16/01

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February 14, 2001

Peter G. McCabe
Secretary, Committee on Rules of
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Administrative Office of the U.S. Courts
Washington, D.C. 20544

**Re: Proposed Fed. R. App. P. 4(a)(7)(A)
and Proposed Fed. R. Civ. P. 58(b)**

Dear Mr. McCabe:

I am writing to comment on three aspects of the proposed amendments to Rule 4(a)(7)(A) of the Federal Rules of Appellate Procedure and Rule 58(b) of the Federal Rules of Civil Procedure. My comments are directed specifically at the proposed changes to Rule 58(b), which are incorporated by reference into Rule 4(a)(7)(A).

I base my comments on my experience as a supervisory staff attorney in the Second Circuit and, prior to my current position, as temporary supervisor of the Pro Se Office for the Southern District of New York, a staff attorney for the Eleventh Circuit, and a litigator in private practice. Furthermore, I have done extensive research on the relevant issues, which is reflected in my 1996 law review article, Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements, 40 N.Y.L. Sch. L. Rev. 409 (1996).

I believe that the Committee should (a) alter the wording of proposed Rule 58(b)(2)(A) to provide that a judgment reflected in a separate document is deemed entered when the separate document is entered on the civil docket, not when "set forth on a separate document"; (b) reconsider proposed Rule 58(b)(2)(B), which I believe not only creates ambiguity which may lead to the unfair loss of appellate rights, but also is unnecessary to cure the perceived problem with the current rule; and (c) replace the word "it" in Rule 58(b)(1) with "the order disposing of the motion."

Proposed Rule 58(b)(2)(A)

It is unclear what is meant by the requirement that a judgment requiring a separate document be deemed entered "when it is set forth on a separate document." The proposed rule appears to establish a new benchmark for determining a judgment's entry date: the date it is "set forth" in a separate document, as opposed to the date of entry in the civil docket as described in Fed. R. Civ. P. 79(a). While entry in the civil docket is clearly defined in Rule 79(a), the phrase "set forth" is not defined anywhere, and it is easy to imagine it being defined differently by different people; e.g., as referring to the date the separate document is written, or the date it is signed by a judge or clerk of court, or the date it is filed or entered. I suggest that subsection (b)(2)(A) be reworded as follows: "when the separate document is entered in the civil docket under Rule 79(a)." This suggested language parallels the language of proposed subsection (b)(1).

Proposed Rule 58(b)(2)(B)

I understand that proposed subsection (b)(2)(B) is intended to eliminate ambiguity as to the time to take an appeal or make post-judgment motions, and to avoid appeals or motions being filed long after a case is over. However, I believe that the change would do more harm than it cures and, in the end, is actually unnecessary.

The separate document requirement was introduced in 1963 to eliminate uncertainties as to the date on which an action was concluded and when the time to appeal or file post-judgment motions started. See Advisory Committee Notes on 1963 Amendment to Rule 58, ¶¶ 3-4. Both the case law and my experience have shown that such uncertainties are common since it is often difficult to determine whether a district court order concludes a case. The separate judgment requirement, when followed, eliminates that uncertainty.

Proposed Rule 58(b)(2)(B) seeks to eliminate the uncertainty created when a district court fails to enter a separate judgment, as required by current Rule 58, by stating that a judgment is deemed entered in such instances "when 60 days have run from entry on the civil docket." However, the change does more harm than good -- although it prevents reactivation of dormant cases, it will return us, in part, to the pre-1963 problem of litigants unfairly losing their right to appeal when the order terminating the case is not clear or when certain types of motions which do not affect finality are still pending. As the Supreme Court has noted, "[t]he undesirability of useless delays in litigation is more than offset by the hazards of confusion or misunderstanding as to the time for appeal." Jung v. K. & D. Mining Co., 356 U.S. 335, 337 (1958). Among other sources of confusion, some litigants may assume that the district court's failure to enter a separate judgment indicates the court's belief that the case is not yet concluded. In such cases, the proposed change may constitute a trap for unsophisticated litigants. See, e.g., Advisory Committee Notes on 1993 Amendment to Fed. R. App. P. 4(a)(4) (noting that proposed amendment was

intended to eliminate trap for unsuspecting litigants created by prior amendment). It also punishes appellants for the error of the district court.

Conversely, under the proposed rule, where a litigant does recognize that an order might terminate a case, the litigant may file a premature notice of appeal simply to insure against loss of the right to appeal. Thus, the proposed rule will likely increase the number of improper notices of appeal that are filed and add to the burden of the courts of appeals.

Moreover, it has not been my experience that many delayed appeals are filed beyond a few months after the usual time for appeal or that prejudice resulted from the delay in those cases. If this is true of other circuits, then there is no urgent need for the proposed changes.

Finally, the harm addressed by the proposed change has at least two cures under the current system: (i) the prevailing party can request, or the district court sua sponte can order, entry of judgment to clarify that the case is over, and (ii) if an appeal is taken in a long-closed case, the appellee can move to dismiss the appeal under the laches doctrine.

In conclusion, the change introduces a new ambiguity, and will unfairly deprive some litigants of their appellate rights in instances where there is no real harm or where any harm can presently be addressed. The Supreme Court, in the context of interpreting the current Rule 58 separate judgment provision, stated that "the rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss." Bankers Trust Co. v. Mallis, 435 U.S. 381, 386 (1978) (internal quotes omitted). I believe that this should also be the policy when altering Rule 58's separate judgment provision.

Proposed Rule 58(b)(1)

The word "it" in subsection (b)(1) should be replaced by "the order disposing of the motion" since the word "it" may lead to confusion. In the context of subsection (b)(1), "it" appears to refer to a "judgment" in a situation where no document labeled "judgment" will exist. The relevant document will be an order, which the subsection then deems to be a judgment for judgment entry purposes. Using the language suggested above should reduce such confusion.

Thank you for the opportunity to comment on these proposed provisions. If you have any questions about my comments, please feel free to call me at the above telephone number.

Very truly yours,

Michael Zachary

RECEIVED 2/16/01

Via Internet

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Normal
TO: Rules Comments at AO-OJPPO
Subject: Comments on Rules of Practice & Procedure
---------- Message Contents

Please see the attached letter which contain our comments.
Sidney Powell

00-AP-016

00-CV-011

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NUMBER 369

February 15, 2001

Secretary of the Committee on Rules of Practice & Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Committee Members:

We write in support of the Comments of Public Citizens Litigation Group on the Proposed Amendments to the Federal Rules of Appellate Procedure and Related Amendments to the Federal Rules of Civil Procedure.

Powell & Reggio is a law firm that handles only federal appeals. Ms. Powell alone has been lead counsel in more than 450 federal appeals. She has served as President of the Bar Association of the Fifth Federal Circuit, and she is President-Elect of the American Academy of Appellate Lawyers.

We have carefully reviewed Public Citizens' thorough and considered comments and endorse them in full.

We, too, strongly opposed eliminating the requirement of a separate judgment. It serves not only the function of signaling the time to appeal, but it also serves as a single document for purposes of bonding or execution.

We thank the Committee for its work and for its consideration of our comments.

Sincerely,

Sidney Powell

Deborah Reggio

Author: "Eckman Brian" <BEckman@nixonpeabody.com> at ~Internet
Date: 2/23/01 2:28 PM
Normal

RECEIVED 2/23/01 Via Internet

00-AP-017

TO: Rules Comments at AO-OJPPO
CC: "Eckman Brian" <BEckman@nixonpeabody.com> at ~Internet,
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JSAFER@LLGM.COM at ~Internet, lms@pipeline.com at ~Internet
Subject: Comments on the Proposed Amendments to the Federal Rules of
---------- Message Contents

Committee on Rules of Practice and Procedure:

Attached are the comments of the Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association regarding the Proposed Amendments to the Federal Rules of Appellate Procedure. We received permission from your Committee to submit these comments on February 23, 2001. The attached comments were formally adopted by the Commercial and Federal Litigation Section on February 22, 2001.

Thank You for your patience, and if you have any questions or problems receiving the attached document, please let us know.

Very Truly Yours,

Brian C. Eckman, Co-Chair
Patricia Taylor, Co-Chair
On behalf of the Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association.

Appellate Practice Committee
of the Commercial and Federal Litigation Section of the New York State Bar Association

February 23, 2001

Re: Comments on Proposed Amendments to the Federal Rules of Appellate Procedure

The Honorable Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20054

Dear Mr. McCabe:

On behalf of the Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association (the "Appellate Practice Committee"), we write in response to request of the Advisory Committee on Appellate Rules (the "Advisory Committee") for comments on the proposed amendments to the Federal Rules of Appellate Procedure. On February 22, 2001, these comments were approved by the Executive Committee of the Commercial and Federal Litigation Section of the New York State Bar Association.

FRAP 1(b)

Page 1, Lines 2-3

Text of Proposed Amendment:

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

Comments:

While the members of the Appellate Practice Committee did not have reservations about the Advisory Committee's proposal to abrogate FRAP 1(b) because it is inconsistent with 28

U.S.C. 1292(e), some reservations were expressed about wholesale changes in the jurisdiction of the Courts of Appeals to review interlocutory decisions of United States District Courts under the Supreme Court's rule-making power. Thus, while the Appellate Practice Committee generally had no problems with the proposed amendment to Rule 1, it was noted that no words of encouragement were offered to the rule-making committees to weaken the final-decision rule or to enlarge the categories in which interlocutory appeals now are allowed.

FRAP 4(a)(5)(A)

Page 11, lines 34-36

Text of Proposed Amendment:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case

* * * *

(5) Motion for Extension of Time.

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

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

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

* * * * *

Comments:

While the members of the Appellate Practice Committee did not think that the amendment to Rule 4(a)(5)(A) should be necessary because the text of the rule provides that an extension of time can be granted for either excusable neglect or good cause shown, it was felt that a desire to clarify the rule was understandable in light of decisions of the Courts of Appeals applying the good-cause standard only to applications made before the expiration of the 30-day period and applying the excusable-neglect standard to motions made after the 30-day period has expired. Accordingly, the Appellate Practice Committee agreed with the proposed amendment because it has the laudable purpose of clarifying existing law.

FRAP 4(a)(7)(A)

Page 11, line 41 to Page 12, line 49

Text of Proposed Amendment:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case

* * * *

(7) Entry Defined.

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

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

Comments:

Members of the Appellate Practice Committee felt that the addition of 4(a)(7)(B) was unobjectionable. It was noted that the separate-document requirement is for the benefit of the appellant and is designed to make sure that the appellant's time to appeal does not begin to run until some appealable paper is issued from the court. That being so, the Appellate Practice Committee felt that an appellant who appeals before a separate document is signed, prejudices no one and there should be no room for arguing that an appeal is premature when the only thing left for the district court to do is to enter a separate document.

It was further noted that the Advisory Committee's proposal that orders deciding post-judgment motions are themselves not judgments and thus need not be on separate documents was also unobjectionable but the better practice would be for the district court to prepare separate documents and enter them. This is so because the time to appeal runs from the order denying the post-judgment motion. If the order is on a separate document, the losing party more likely will see that the time to appeal has begun to run (if the document is entered). The Appellate Practice Committee understood clarifying the rule (actually FRCP 58) so that things are clear, but felt that District Courts should not be encouraged to dispense with separate documents when deciding post-judgment motions, especially when drawing such a separate document with a computer takes only minutes.

The strongest objection was to the amendment to Rule 58(b) (and thus to FRAP 4) that provides that judgments required to be set forth on a separate document are deemed to be so set forth 60 days after the judgment is entered on the court's docket sheet. If the purpose of the separate-document requirement is to put some certainty in whether a judgment is issued, the amendment to Rule 58 frustrates that purpose. One member of the Appellate Practice Committee noted that when he served as a law clerk to a circuit judge, they looked for those separate

documents, saw the date that those separate documents were entered on the docket sheet, and then measured the 30 days within which to appeal. He noted that there is a fairness to the system because the separate document itself – often labeled a judgment – triggers the duty to check when it is entered and makes a clear starting point for when the time to appeal begins to run.

Under The Advisory Committee's proposal the time to appeal could run without a separate document styled a judgment being issued by the court. The separate-document requirement came into being because there had been so much confusion over when a judgment was set forth. A district court could decide a case in a memorandum opinion or in findings of fact and never issue any other paper. The losing party then would have to appeal (prematurely) just to make sure that the last paper issued was not the court's final word. This led to too many premature appeals and the move to enforce a separate-document requirement for judgments. And this also led to losing parties' not appealing and thus losing their right to appeal. The expressed preference was to leave well enough alone.

Finally, it was noted that the Advisory Committee's concern that the time might never begin to run in cases in which a separate document is not issued is, of course, a real concern. But there is no need for a 60-day cap from when a judgment is entered on the docket. The prevailing party in the District Court can always make sure that the time to appeal has begun to run by drawing up a separate-document judgment and getting the district clerk to enter it.

FRAP 5(c)

Page 23, lines 3-6

Text of Proposed Amendment:

Rule 5. Appeal by Permission

* * * *

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

* * * *

Comments:

The Appellate Practice Committee supports the amendment to FRAP 5(c).

FRAP 21(d)

Page 26, lines 3-6

Text of Proposed Amendment:

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

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

Comments:

The Appellate Practice Committee did object to limiting petitions for mandamus to 20 pages, noting that such petitions are sufficiently similar to an appellant's brief that the FRAP 32(a)(7) length limitations should apply. Because it is the unusual case that triggers a petition for extraordinary relief, a hard and fast 20-page limit should not apply. The opinion was expressed that the better approach would be to incorporate the Rule 32(a)(7) length limits in Rule 21(d), and if the petitioner submits a petition that is overlong the ultimate sanction – an unread petition – will result.

FRAP 25(c)

Page 31, line 3 to page 32, line 25

Text of Proposed Amendment:

Rule 25. Filing and Service

(c) Manner of Service.

(1) Service may be any of the following:

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

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

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

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

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

(3) When reasonable considering such factors as the

immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

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

* * * * *

Comments:

The Appellate Practice Committee approved of the Advisory Committee's inclusion of the use of electronic service on consent of the party being served FRAP 25(c). It was noted that the purpose of the rules is to get the parties served, and if a party consents to electronic service, there is "no good reason to fell more trees to send two copies of the brief."

FRAP 26(a)

Page 35, line 7

Text of Proposed Amendment:

Rule 26. Computing and Extending Time

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

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

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

* * * * *

Comments:

The Appellate Practice Committee approved of the proposal to change FRAP 26(a)(2) from "less than 7 days" to "less than 11 days," noting that it was "long overdue." There is no

good reason why the deadlines should be calculated differently under the FRCP and the FRAP. One experienced federal practitioner recalled that the last effort to harmonize these civil and appellate provisions happened in the late 1980s when the standing committee proposed a uniform period of "less than 8 days" in both sets of rules. That proposal went nowhere, perhaps because 8 days was too short. The Appellate Practice Committee felt that using a uniform "less than 11 days" is a better approach because 10 days is such an easy number to remember. It was noted, however, that the Advisory Committee could further improve on the rule by deleting "unless stated in calendar days."

FRAP 27(d)(1)(B)

Page 42, line 22 to page 43, line 28

Text of Proposed Amendment:

Rule 27. Motions

* * * *

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

(1) Format.

* * * * *

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

* * * * *

Comments:

The Appellate Practice Committee supported amending Rule 27(d)(1)(B) to provide that covers on motions must be white. It was noted that this is currently the general practice in the Courts of Appeals, and there is no harm in making explicit what is expected.

FRAP 29(j)

Page 45, line 7 to page 46, line 11.

Text of Proposed Amendment:

Rule 28. Briefs

* * * *

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed - or after oral argument but before decision- a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Comments:

Members of the Appellate Practice Committee supported the proposed amendment to FRAP 28(j). It was noted that almost all letters to Courts of Appeals citing supplemental authorities contain "argument." Therefore, it was felt that deleting that restriction from Rule 28(j) is a good idea. Members also felt that imposing a 250-word limit on letters is a good way to make sure that the letter does not turn into a brief.

FRAP 32(a)(2), FRAP 32(c)(2)(A)

Page 42, lines 6-7;
Page 44, lines 51-52

Text of Proposed Amendment

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

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

* * * * *

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

* * * *

(c) **Form of Other Papers.**

* * * *

(2) **Other Papers.** Any other paper, including a petition For panel rehearing and a petition for hearing or rehearing en banc, and any response to such a

petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

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

* * * *

Comments:

The Appellate Practice Committee did not object to the amendment to Rule 32(a)(2) to provide that the cover of a supplemental brief must be tan but noted that the amendment is addressing a problem that hardly exists. The rationale for the colored covers is to allow the court to pick out a brief by seeing the color. Because supplemental briefs often are filed after argument (or submission) picking them out is no problem. And a good case can be made for putting the same color cover on a supplemental brief as is on the principal brief (i.e. blue for the appellant).

It was felt, however, that the Advisory Committee should address the color sequence on briefs in cross-appeals. One member noted that because cross-appeals involve four briefs, the blue-red-gray sequence in the usual appeal does not work so well. He further commented that some circuits – the Fifth and Eleventh – provide for a blue-red-red-gray sequence, but this defeats the purpose of having a separate color for the covers of briefs aligned on each side of the appeal. The Sixth Circuit provides by local rule for a blue-red-yellow-gray sequence, which he felt makes more sense. But whatever sequence is decided on, members of the Appellate Practice Committee felt that it should be uniform and that the Advisory Committee should impose some uniformity in covers in cross-appeals.

Members of the Appellate Practice Committee approved of the Advisory Committee's proposed amendment to FRAP 32(c)(2)(A) to require that covers on petitions for rehearing be white.

FRAP 41(b)

Page 55, lines 3-4

Text of Proposed Amendments

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

* * * * *

(b) When Issued. The court's mandate must issue

7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en bane, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
* * * * *

Comments:

The Appellate Practice Committee felt that inserting "calendar days" into FRAP 41(b) was not justified. Members doubted that "delaying mandates for 9 or more days would introduce significant and unwarranted delay in appellate proceedings." Members further noted that a Court of Appeals has the power under the rule to issue its mandate whenever it so chooses and that adding "calendar days," and thus making an exception to the Rule 26 scheme, hardly seems justified.

Respectfully submitted,

Brian Eckman, Co-Chair
Patricia Taylor, Co-Chair
On behalf of the Appellate Practice Committee
of the Commercial and Federal Litigation Section
of the New York State Bar Association

cc: Sharon M. Porcellio, Esq.
Chair of the Commercial and Federal Litigation Section
of the New York State Bar Association

Jay G. Safer, Esq.
Chair-Elect of the Commercial and Federal Litigation Section
of the New York State Bar Association

Cathi A. Hession, Esq.
Executive Vice-Chair of the Commercial and Federal Litigation Section
of the New York State Bar Association

Brian J. Bocketti, Esq.
Secretary of the Commercial and Federal Litigation Section
of the New York State Bar Association

Lewis M. Smoley, Esq.
Treasurer of the Commercial and Federal Litigation Section
of the New York State Bar Association

DISTRICT OF COLUMBIA BAR
Sections

3/5/01
Via Internet + U.S. mail

00-AP-018

00-CV-013

March 2, 2001

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Request for comments to proposed amendments to the Federal rules of Civil Procedure and the Federal Rules of Appellate Procedure.

Dear Sir/Madam:

I enclose comments to proposed amendments to the Federal rules of Civil Procedure and the Federal Rules of Appellate Procedure from the Litigation Section and the Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar. Please bring these comments to the attention of the Secretary of the Committee on Rules of Practice and Procedure.

Sincerely yours,

Nicholas H. Cobbs

NHC:jmw
enclosure
cc: Carol Ann Cunningham, D.C. Bar

A:\LTRTOSECRETARY.DOC

LITIGATION SECTION AND THE COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION OF THE DISTRICT OF COLUMBIA BAR

COMMENTS OF THE LITIGATION SECTION AND THE COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF APPELLATE PROCEDURE

Teresa A. Howie, Co-Chair
John Moustakas, Co-Chair
Robin E. Jacobsohn
John M. Mott
Melissa G. Reinberg
Bonnie I Robin-Vergeer
Richard A. Seligman

Steering Committee
Courts, Lawyers and the
Administration of Justice Section

Abbey Hairston, Co-Chair
Kirk K. Van Tine, Co-Chair
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Barry Coburn
Christine M. Cooper
Diana Nowezki
Jerry P Roscoe
Joseph M. Sellers
Paul M. Smith

Steering Committee
Litigation Section

March 2, 2001

These comments were principally prepared by Nicholas H. Cobbs, D.C. Bar Litigation Section.

Standard Disclaimer: The views expressed herein represent only those of the Litigation Section and the Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar and not those of the Bar or its Board of Governors.

SUMMARY OF THE COMMENTS OF THE LITIGATION SECTION AND THE COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF APPELLATE PROCEDURE

The Litigation Section and the Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar intend to submit comments to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States concerning proposed amendments to Rule 58 of the Federal Rules of Civil Procedure and Rule 4 of the Federal Rules of Appellate Procedure. The Sections take no position on other amendments proposed by the Committee.

FEDERAL RULES OF CIVIL PROCEDURE: The Sections support the restructuring of Rule 58 to clarify the procedure for entering judgment. The Sections oppose the proposal to institute entry of judgment on the civil docket as an alternative event that can render a judgment effective for purposes of appeal in cases where a separate document of judgment is required. The Sections believe that the alternative proposed by the Committee creates a confusing situation in which attorneys would not have clear notice of when to measure the time for appeal.

FEDERAL RULES OF APPELLATE PROCEDURE: The Committee's proposed change to Fed. R. Civ. Pro. 58 is paralleled by a proposed amendment to Fed. R. App. Pro. 4 that would dispense with the requirement for entry of a separate document of judgment as a prerequisite for an appeal. The Sections oppose the proposed amendment of Fed. R. App. Pro. 4 for the same reasons that they oppose the proposed changes to Fed. R. Civ. Pro. 58.

COMMENTS OF THE LITIGATION SECTION AND THE COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF APPELLATE PROCEDURE

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has solicited comments on proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The Litigation Section of the District of Columbia Bar and the Courts, Lawyers and the Administration of Justice Section submit these comments on the proposals concerning the procedure for entry of judgment and the requirements for taking an appeal. The Sections do not take any position with respect to other proposed rules changes that are not addressed in these comments.

The Litigation Section and the Courts, Lawyers and the Administration of Justice Section of the District of Columbia Bar are voluntary groups comprising more than 2,500 attorneys who are members of the District of Columbia Bar. Most of the members of the Litigation Section and the Courts, Lawyers and the Administration of Justice Section are active trial or appellate attorneys, or court employees. The views expressed herein are not necessarily those of individual members of the respective sections and are not those of the D.C. Bar or its Board of Governors.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 58. Entry of Judgment.

The Sections approve of the restructuring of Rule 58 to clarify the procedure for issuing and entering judgments and for eliminating the requirement for entry of a separate document of judgment in situations where it is unnecessary. But the Sections believe that the proposed amendment to Rule 58 (b), which allows alternative events to constitute entry of judgment, will create more problems than it will cure. Accordingly, the Sections recommend that this proposed amendment be deleted. In its place, the Sections propose an amendment to Rule 58(b) that provides that where a separate document is required under Fed. R. Civ. Pro. 58(a)(1), only entry of the separate document shall constitute entry of the judgment.

The proposed amendment, as it now stands, would create uncertainty in many situations as to when a judgment is effective and, therefore, when the time for appeal begins to run. Under the present rules, where a separate document of judgment is required, attorneys know that the entry of that document marks the time that the judgment

is effective for purposes of execution and appeal. Although confusion may arise in situations where the judge or clerk fails to follow the rule by preparing a separate document, the remedy is not to sap the rule. The remedy is to clarify the requirement for entry of a separate document so that failures to follow the rule are less common.

The attached proposed amendment to Rule 58 (b) that the Sections submit would clarify the requirement for entry of a separate document. In addition, the amendment we propose would clarify both the obligation of attorneys to request entry of a separate document of judgment when one is not forthcoming, and the obligation of judges to issue such a document promptly upon receipt of a valid request.

The proposed amendment as it now stands creates a situation in which attorneys may not know when a judgment becomes effective. While a document of judgment is almost always sent to the attorneys, courts normally do not give attorneys notice of docket entries. The proposed amendment now imposes on attorneys an obligation to inspect the court's docket at regular intervals whenever the court issues a ruling that might be entered as a judgment. Moreover, even in circumstances where the judge does issue a separate document of judgment, an appeal might be barred under the proposed amendment if the judgment was entered more than 90 days previously on the court's docket.

The Litigation Section and the Courts, Lawyers and the Administration of Justice Section of the D.C. Bar believe that it would be better to clarify and enforce the current provision for entry of a separate document of judgment, where required, than to create an uncertain situation in which deadlines for execution of judgment and appeal could be fixed by a docket entry that was entered without notice to the attorneys. The amendment to Rule 54(b) proposed by the Sections address this issue.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4(a)(7) Entry Defined.

For reasons that we discuss above in connection with the proposed amendments to Fed. R. Civ. Pro. 58, the Sections propose to delete the proposed amendment to Fed. R. App. Pro. 4(a)(7), which would add a new subsection 4(a)(7)(B). The proposed amendment would eliminate the requirement for entry of a separate document of judgment as a basis for appeal. The Sections believe that it is important to maintain and enforce the current requirement for entry of a separate document of judgment so that attorneys will have a single, clear marker with which to measure the time for appeal in cases where a separate document of judgment is required.

District of Columbia Bar
Litigation Section and
Courts, Lawyers and the Administration of Justice Section

PROPOSED CHANGE TO PROPOSED AMENDMENT TO RULE 58 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Proposed Rule 58(a): No changes proposed.

Proposed Rule 58(b):

> **(b) Time of Entry.** Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when it is entered in the civil docket under Rule 79(a). If a separate document is required by Rule 58(a)(1), only entry of the separate document shall constitute entry of the judgment.

Proposed Rule 58(c): No changes proposed.

Proposed Rule 58(d):

> **(d) Request for Entry.** If a separate document is required by Rule 58(a) but is not prepared or not entered, a party may request that judgment be set forth on a separate document and be entered. The court must comply promptly with any legitimate request.

PROPOSED CHANGE TO PROPOSED AMENDMENT TO RULE 4 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Proposed Rule 4(a)(1): No changes proposed.

Proposed Rule 4(a)(4): No changes proposed.

Proposed Rule 4(a)(5): No changes proposed.

Proposed Rule 4(a)(7)(A): No changes proposed

Proposed Rule 4(a)(7)(B): Delete in its entirety.

3/1/01

LAW OFFICE OF PETER GOLDBERGER

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*Also admitted in Connecticut
†Also admitted in Ohio

Peter Goldberger*
Pamela A. Wilk
James H. Feldman, Jr.†

February 28, 2001
VIA UPS OVERNIGHT

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E.
Washington, DC 20544

00-AP-019
00-CV-014
00-CR-055 Substantive
00-CR-014 Style

Att'n: John Rabiej, Esq.

Dear John Rabiej:

NACDL's comments on the appellate, habeas and criminal style proposals are enclosed. You should be receiving our committee's substantive criminal rules comments under separate cover today from Carol Brook in Chicago. Thank your for accommodating our schedules and allowing us an extension of time.

This is to confirm that the National Association of Criminal Defense Lawyers does intend to present live testimony at the hearing in D.C. in April. Please confirm the date, time, and location. Speakers will probably be me and Carmen Hernandez, Esq., of the Federal Public Defender's Office, co-chair of NACDL's Sentencing Committee.

Very truly yours,

Peter Goldberger

enc.
cc: Kyle O'Dowd, Esq., NACDL staff

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February 28, 2001

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Changes in Federal Rules of Appellate Procedure, Rules Governing Habeas Corpus, and Style Revision of Criminal Rules: Request for Comments Issued August 2000

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit the following comments with respect to the proposed changes in the Federal Rules of Criminal Procedure on behalf of the over 10,000 members of our association, and its 80 affiliates in all 50 states, with an additional membership of some 28,000. The comments of NACDL on the proposed substantive changes in the rules of criminal procedure are being submitted separately.

COMMENTS ON FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1(b). Scope of Rules.

The committee's proposal to repeal Fed.R.App.P. 1(b) in response to the enactment of 28 U.S.C. §§ 2072(c) and 1292(e) is undesirable, because of the probability of unintended consequences in other areas. Instead, Rule 1(b) should be retained and amended to insert the phrase "Except as expressly authorized by statute," at the beginning. For example, the court of appeals' jurisdiction over government appeals in criminal cases is conferred by 18 U.S.C. § 3731. The fifth paragraph of that statute provides that the appeal must be taken within 30 days after the challenged order "has been rendered," which means announced, orally or in writing (as the case may be). The statute does not say, and does not mean, "has been entered." See Black's Law Dictionary 1296 (6th ed.

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1990) (definition of "render judgment": emphasizing it is "not synonymous with 'entering,' 'docketing,' or 'recording' the judgment"). Rule 4(b)(1)(B)(i), to the extent it says otherwise, is presently invalid because it conflicts on a jurisdictional matter with § 3731. (See also our comment on proposed amended Rule 4(b).)

Repeal of Rule 1(b) could thus be interpreted to mean that the Conference thinks Rule 4(b)'s timing language now extends the jurisdiction of the court of appeals, excusing the government from taking any appeal promptly as consistently required by Congress in statutes dating to 1907. New ambiguities about the time to appeal should be avoided. Inserting our proposed language would accomplish the Committee's purpose while avoiding new problems under the Rules Enabling Act.

Rule 4. Appeal of Right -- When Taken

We support the proposed addition of new Rule 4(a)(1)(C), providing that an appeal from the final order on a petition for a writ of error coram nobis shall be treated as a civil appeal, with a 60 day filing rule, like other proceedings against the federal government in the nature of habeas corpus, including motions under 28 U.S.C. § 2255. Many coram nobis applicants are prisoners, who need this extra time to learn of the court's decision and to communicate with counsel.

NACDL also appreciates the desirability of clarifying the relationship between Rule 4(b)'s restriction on the time to appeal in a criminal case and the district court's power under Fed.R.Crim.P. 35(c) to correct a sentence. It would be better, however, to resolve the circuit split differently. Rule 35(b) motions should be treated the same way the rules treat other motions to amend a judgment -- as terminating the appeal time, with a new ten days commencing upon entry of the order on the motion. Tolling is the wrong term (implying that the time stops running and then picks up again where it left off) and should not be used in the notes, and "suspending" is worse, as it has no settled legal meaning in this context. At the least, the rule should provide that if a timely motion to correct a sentence is filed under Rule 35(c), the time to appeal does not commence until the later of (i) the date the motion is ruled upon, or seven days after imposition of sentence (when the court's power to act expires under that rule), whichever comes first, or (ii) the entry of judgment. A defendant contemplating a sentencing appeal may choose not to appeal if the issue can be resolved by motion, and should not have to make that decision until the final contours of the sentence are settled. This would also avoid the necessity, in some cases, of filing two notices of appeal in the same case from what is really the same judgment, as required by the Committee's approach (as recognized in the final paragraph of the advisory committee note).

Finally, as discussed in our comment to Rule 1(b) the drafting error in Rule 4(b)(1)(B)(i) should be immediately corrected. See United States v. Sasser, 971 F.2d 470, 472-75 (10th Cir. 1992); United States v. Eliopoulos, 158 F.2d 206 (2d Cir. 1946) (dismissing government appeals brought in compliance with Rule 4(b) but after the time allowed under 18 U.S.C. § 3731). The Committee might, at most, want to revise the rule to reflect the decisions in such cases as United States v. St. Laurent, 521 F.2d 506, 511 (1st Cir. 1975), and United States v. Lee, 501 F.2d 890, 891 n.1 (D.C.Cir. 1974), holding that the time for a government appeal runs from entry where the orally rendered order was followed during the 30 day appeal period by the entry of a written order. Arguably, these cases merely fill a gap or resolve an ambiguity, like the Rule's provision of a deadline for defendants to appeal, which has had no statutory support at all as a jurisdictional matter since the 1988 repeal of former 18 U.S.C. § 3772. But even this modification might breach the Rules Enabling Act limitation against substantive rules, 28 U.S.C. § 2072(b), such as those purporting to extend appellate jurisdiction.

Rule 21. Writs of Mandamus, etc.

The proposed page limit for mandamus papers is too short. A limit of 20 pages implies that a mandamus petition is no more complex than the most complicated motion. See Fed.R.App.P. 27(d)(2). A mandamus petition has more in common with a brief on the merits than it does with most appellate motions. On the other hand, it is the rare mandamus petition that involves more than one issue. We think a reasonable compromise is therefore to put a limit of 9500 words (about 35 pages of traditional 12 point Courier type) on a mandamus petition or response, absent court permission. For all the reasons that led the committee to go to a word-count rather than a page-limit approach for briefs, we suggest that a "20 pages" rule is far too ambiguous and will cause enormous headaches for clerks' offices. (The same is true of present Rule 27(d)(2), which has the same limit for motions.) If the committee does not decide to increase the presumptively allowable length, we note that 20 pages is the approximate equivalent of 5500 words, and could be so expressed, using the ratio that underlies the current Rule 32(c)(7).

Rule 24. Proceedings IFP

This revision still needs some work. First, in proposed 24(a)(1)(A), there is either a comma missing after "shows," or the comma should be deleted after "Forms." Rule 24(a)(2) should substitute an introductory "Except as otherwise expressly provided by statute," for the proposed "unless the law requires otherwise," which is unnecessarily imprecise. ("The law" might be understood to include circuit precedent, for example.)

More important, the proposed language of Rule 24(a)(3) on judicial approval of continued IFP status contradicts the Criminal Justice Act for the many defendants who have been "determined to be financially unable to obtain an adequate defense in a criminal case." (We realize that to a large extent this contradiction exists in the present rule as well, but this is a good time to correct the problem.) Under 18 U.S.C. § 3006A(d)(7), such defendants may appeal or petition for certiorari "without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." A district court simply should not be able to deny an IFP appeal in a criminal case, after appointing counsel under the CJA, by certifying the appeal is "frivolous." The court's authority to terminate the appointment if the defendant is no longer indigent (or obtained appointed counsel inappropriately) is covered by 18 U.S.C. § 3006A(c). The PLRA does not apply at all to criminal cases, and certainly not to criminal appeals. The reference to criminal defendant-appellants should be entirely removed from Rule 24(a)(3). Either a new Rule 24(a)(4) reflecting the applicable provisions of the CJA should be inserted, or the matter of criminal cases should be entirely removed from the rule and left to statutory regulation.

Rule 25. Filing and Service

We agree that service by electronic means should be allowed only if the recipient consents in writing. All of us have received far too many attachments to e-mail messages that were composed in a word processor that our system could not read, or which took forever to download, or which had the effect of turning the recipient into the (unpaid) clerical employee of the sender. Moreover, formatting is often distorted in electronic transmission, so the ability to answer a brief intelligibly may be impeded because of uncertainty about page numbering. Advance consent is essential.

Rule 26. Computing and Extending Time

NACDL strongly supports making the appellate rules consistent with the criminal and civil rules on computation of time. We note that the extension to 11 days from 7 of the minimum time that is unaffected by weekends and holidays will also have the welcome effect of extending by at least two days the time for defendants to appeal in a criminal case (because that is a ten-day period under Rule 4(b)), and will thereby remove a source of confusion and inadvertent error that presently exists in that computation for some inexperienced practitioners.

Rule 27. Motions.

We agree that the amendment to Rule 26 would make desirable a parallel change in the presumptive response time for motions from ten days to seven. Rule 27(a)(3)(A) should be clarified, however, to say that the response time can be shortened by order in a particular case, or by local rule with respect to a class or type of motion (such as 3d Cir. LAR 9.1(b), which provides a three-day response time for bail motions), but not by local rule applicable to all motions.

We also reiterate here our suggestion with respect to the 20-page limit for motions presently found in Rule 27(d)(2). See comment to Rule 21 above. A 5500-word rule would be more understandable and clear, given the wide variety of formats readily available in word processing software. The Committee might also want to incorporate into Rule 27(d)(1)(D) a cross-reference reminding practitioners that under Rule 32(c)(2), the type-size and style requirements of Rule 32(c)(5) and (6) do apply to motions.

Rule 28(j). Briefs - Supplemental Authority

NACDL supports the amendment allowing counsel some latitude, in a short letter, to explain the significance of new authority.

Rule 32(d). Form of Briefs

We do not disagree with the proposal to add a signature requirement like that of Fed.R.Civ.P. 11. The proposed new rule requiring "every" brief and motion to be signed is unclear and should be rewritten, however. Briefs often require signatures in three of more places, on various certificates. The Rule should not require counsel to sign up to 25 briefs several times each. Does the committee mean that the original of each must be personally signed manually, in ink, although some or all of the rest may be conformed? Or would it comply to sign the brief before copying, so that all copies would bear a copy of counsel's signature, but none would have an original ink signature? May counsel delegate the right to sign his or her name to a secretary, paralegal or other employee, or must the signature be affixed personally? These questions are not clarified by the advisory committee note either. (In its list of statutes authorizing sanctions, the note should also mention 28 U.S.C. § 1927.) A cross-reference should perhaps be added to Rules 28(a)(10) and 28(b), which list the required contents of briefs.

Rule 44(b). Constitutionality of State Statutes

The applicability of 28 U.S.C. § 2403(b) in criminal cases is very rare, although not unheard of. See Maine v. Taylor, 477 U.S. 131 (1986) (state allowed to intervene in federal prosecu-

tion under § 2403(b) and then to pursue appeal when Solicitor General declined). State criminal statutes are often incorporated into federal criminal statutes, however, such as the Assimilative Crimes Act (18 U.S.C. § 13), the Gun Control Act (id. §§ 922, 924), the Travel Act (18 U.S.C. § 1952), RICO (id. § 1961), and the Controlled Substances Act (21 U.S.C. §§ 801(44), 841(b), 851). The constitutionality of the state statute may sometimes be challenged in such cases; the same may occur, for example, where the legality of an arrest or a search and seizure by state law enforcement officers is at issue. It therefore might be helpful to add, "in any civil or criminal case," or at least to mention this in the advisory committee note.

COMMENTS ON CIVIL RULE 81 AND THE HABEAS CORPUS RULES

The National Association of Criminal Defense Lawyers believes that the rules of habeas corpus and 2255 procedure need more of an overhaul than this year's proposals would give. The related amendment to Fed.R.Civ.P. 81(a)(2) is premature until the habeas rules are more fully reconsidered. The proposal to delete time limits for the return is apparently based on an error which appears in the Advisory Committee Note on proposed Civil Rule 81. The 2254 habeas and 2255 rules do not "govern as well habeas corpus proceedings under § 2241." See 2254 Rule 1(b) (application of any of these rules in other habeas cases is "at the discretion of the United States district court"). Deletion of these provisions therefore eliminates important rules governing § 2241 petitions (such as those challenging Bureau of Prisons and Parole Commission actions, as well as military custody and some immigration challenges) which are not provided for elsewhere.

Many of the procedural provisions of the AEDPA are so impractical, counterproductive, or poorly drafted that the Committee should use its authority under the Rules Enabling Act to supplant them. Cf. Lindh v. Murphy, 521 U.S. 320, 336 (1997) (discussing "silk purses and pigs' ears" in legislative drafting; acknowledging AEDPA is "not a silk purse"). A perfect example and opportunity is Rule 9(b), which should be amended to replace (rather than to implement) the absurd and wasteful statutory requirement of obtaining a certification from a three-judge panel of the court of appeals before presenting a second or successive petition to the district court. The substantive limitations on successive petitions created by 28 U.S.C. § 2244 (to the extent they may be constitutional under the Suspension Clause) can be enforced quite adequately by district judges on preliminary review of such petitions or motions. Until that time, however, we offer the following comments on the proposals issued this fall:

Rule 2 - Petition.

Because of the AEDPA's addition of a statute of limitations, Rule 2(e) should be made more explicit about the Clerk's duty to protect the prisoner's filing date. The Rule should clearly state the Clerk's duty to mark "filed" any paper received from or on behalf of a prisoner which may be intended as a petition for a writ of habeas corpus, as of the date received at the Clerk's office or, in the case of an incarcerated person proceeding without counsel, as of the date that the petitioner indicates s/he placed it in the prison mail system for delivery to the court. Because of the change requiring nonconforming papers to be filed, it might be better to move this provision to Rule 3. This comment applies to 2255 Rule 2(d) as well.

The form which Rule 2(c) requires prisoners to use should be revised in at least two ways. First, questions 11(e) and 13 should be deleted. These seek to force the petitioner to go forward with a showing on the potential issue of procedural default, when the Supreme Court has recognized that default is an affirmative defense which the respondent must plead to put it in the case and which the respondent waives by failing to do so. See Trest v. Cain, 522 U.S. 87, 89-90 (1997), quoting Gray v. Netherland, 518 U.S. 152, 165-66 (1996). The state and federal governments have so many unfair advantages already in habeas corpus procedure that it is hardly necessary for the court to demand that the petitioner anticipate and try to refute an affirmative defense that the state or the government may or may not raise. Also, Rule 2(c) simultaneously requires the petitioner to use the form and also to "state the relief requested," while the form itself seems to tell the petitioner not to state the relief requested. This inconsistency should be fixed. This comment applies fully to 2255 Rule 2(b) as well.

Rule 9(b) - Successive petitions

See introduction to these comments.

Section 2255 Rule 2 - Motion.

See comments under habeas Rule 2 above. In addition, Rule 2(a) should be amended to make explicitly clear that the proper caption of a 2255 motion is the caption of the criminal case out of which it arises. The practice of some district court and court of appeals clerks and judges of reversing the caption to make it read like a civil case brought by the prisoner against the United States, like a Federal Tort Claims action, is inconsistent with the view taken in the Rules that § 2255 authorizes a post-conviction motion in the criminal case, not a new civil action. An amendment would promote national uniformity on this fundamental matter of form.

COMMENTS ON STYLE REVISION FOR CRIMINAL RULES

As an original matter, the Committee on Rules of Procedure of the National Association of Criminal Defense Lawyers does not think the complete rewrite project can achieve enough improvement to the intelligibility of the federal rules to justify the risks of making numerous inadvertent changes of substance. The criminal rules are simply more "quasi-substantive" in nature than the appellate rules and possibly even more than the civil rules. We assume, however, that "Just don't do it," is not advice the Standing Committee is really open to hearing. That said, we noted a few changes that should not be allowed and also some existing errors in the rules that should not be unnecessarily perpetuated. What follows should not by any means be taken as a comprehensive list of every question raised by the style revision; it should serve more as a warning that for every slip-up we located, there may be four more we missed.

1. **Rule 6(e).** (a) The style revision seems to omit without comment one important provision of current Rule 6(e) on grand jury secrecy -- the penultimate sentence of current Rule 6(e)(2). This provision states, "No obligation of secrecy may be imposed on any person except in accordance with this rule." This protects witnesses and their counsel, inter alia, from being commanded to keep secret their own appearance before the grand jury. It should not be deleted in a "style" revision.

(b) The current rule is awkwardly phrased, but appears to be intended, and properly so, to limit disclosure of "matters occurring before the grand jury" to an attorney for the government "for use in the performance of such attorney's duty ... to enforce federal criminal law." Rule 6(e)(3)(A). The revision seems to remove the "federal criminal law" restriction and apply that restriction only to disclosures to non-attorney government personnel. Even if the attorney for the government has duties in civil law enforcement, that attorney should not be able to obtain grand jury information to assist in fulfilling those other duties. We believe it was always the intendment of the Rule that grand jury information only be available to "enforce federal criminal law," and that restriction should be clearly stated in revised Rule 6(e)(3)(A)(i).

2. **Rule 7(c).** The last sentence of Rule 7(c)(1) requiring a citation in each count would be better placed as the first sentence under what is designated Rule 7(c)(3), which should then be restyled simply "Citation." What the committee has designated as 7(c)(2) should be (c)(3) and vice versa. Rule 7(c)(2) (criminal forfeiture), as recently amended, by virtue of omitting any requirement that the indictment aver the facts

which establish the identity, and extent or value, of the items alleged to be forfeitable, is unconstitutional under the June 2000 decision in Apprendi v. New Jersey, 530 U.S. 466, because each such forfeiture increases the applicable statutory maximum punishment for the offense in the sense that the Supreme Court in that case used the concept "applicable statutory maximum."

3. **Rule 11.** It would clarify Rule 11(a) to add that the defendant may plead guilty or not guilty "to each count." The same clarification should be added to Rule 11(b)(1)(B). In new Rule 11(e), replacing current Rule 32(d) regarding withdrawal of guilty pleas, it would be more cautious to replaced "motion under 28 U.S.C. § 2255" with "appropriate collateral attack." Under some circumstances, a § 2255 motion may be inadequate or ineffective to test the constitutionality of a defendant's conviction on a plea of guilty, requiring use of a § 2241 habeas corpus petition or a petition for coram nobis, for example.

4. **Rule 12.** In revised Rule 12(e), the reference to "Rule 12(b)(1)" should read "Rule 12(b)(3)." In revised Rule 12(h), the phrase "suppression hearing" should be changed to "hearing on a suppression motion"; it is the motion, not the "hearing," which is "under Rule 12(b)(3)(C)."

5. **Rule 16.** By changing the word "introduce" to the word "use" in Rule 16(b)(1)(A)(ii), the Committee has inappropriately made a substantive change, which increases the defendant's duty of disclosure. Such items as evidentiary summary charts, materials that a witness will need to refresh recollection, and learned treatises that an expert will endorse may be "used" during the defendant's case in chief without being "introduced" in evidence. NACDL longs for the opportunity to engage with the committee in a discussion about how discovery under Rule 16 should be broadened, but a style revision is not that occasion. This is certainly not the occasion to smuggle in one little change to further aid the prosecutor at the defendant's expense. This proposed alteration must be reversed.

6. **Rule 30.** The deletion of the "no party may assign as error" language from Rule 30 is appropriate and welcome.

7. **Rule 31(b).** The way the restyled rule deals with attempts is erroneous, apparently based on a misreading or misunderstanding of the current rule. There is no general attempt provision in federal criminal law. Current rule 31(c) therefore permits a verdict for an attempt to commit an offense, when the offense itself is charged, or a verdict for an attempt to commit a lesser included offense, only "if the attempt is an offense." Under the revision, the qualification that a conviction for attempt is permissible only "if the attempt is an

offense" is mistakenly assigned only to Rule 31(c)(3), which refers to verdicts for an attempt to commit an included offense. Rule 31(c) should have only two subsections, stating "(1) an offense necessarily included in the offense charged, or an attempt to commit a necessarily included offense, if the attempt is an offense in its own right, or (2) an attempt to commit the offense charged, if the attempt is an offense in its own right."

8. **Rule 32.** See our comments to proposed revised Rule 32, many of which would apply even if no substantive change is made.

9. **Rule 32.2.** NACDL adheres to its position that Rules 32.2(b)(1) and (b)(4) violate the Rules Enabling Act by calling upon the court and/or jury to make a different determination from that allowed by the statutes defining the property which is forfeitable. The statutes allow criminal forfeiture only of the defendant's interest in a specific item of property; the court or jury must therefore determine what that interest is and forfeit only that much. This rule instead calls upon the court or jury to declare a forfeiture of the entire item of property, subject to third party claims, thus giving the government a windfall transfer of property not belonging to it in the large number of cases where the innocent third parties lack the resources or knowledge to intervene as claimants. The rule also improperly refers to forfeiture of a "money judgment," when the statutes authorize no such thing.

10. **Rule 35.** The Committee should add a sentence to Rule 35(a) providing that a court may, at any time, correct a sentence it determines to be in excess of the applicable statutory maximum. Such gross illegalities and miscarriages of justice must be subject to correction, regardless of any limitation on the scope of § 2255 or other traditional means of collateral attack. As to Rule 35(b), see our comments on the substantive revision, some of which apply regardless of what version is adopted.

11. **Rule 38(b)(2).** The reference to "the Attorney General" should be changed to "the Bureau of Prisons" to reflect the current wording of 18 U.S.C. § 3621(b).

12. **Rule 43(c)(2).** NACDL adheres to its continuing objection to the 1995 provision, contradicting 600 years of legal wisdom, see Ball v. United States, 140 U.S. 118, 129-31 (1891), allowing a fugitive defendant to be sentenced in absentia.

NACDL appreciates the opportunity to offer our comments on the Standing Committees' proposals. We look forward to working with you further on these important matters.

Very truly yours,

William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA
Co-Chairs, National Association
of Criminal Defense Lawyers
Committee on Rules of Procedure

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00-CV-004

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

JACOB WEINBERGER UNITED STATES COURTHOUSE
325 WEST "F" STREET
SAN DIEGO, CALIFORNIA 92101-6989

LOUISE DE CARL ADLER
BANKRUPTCY JUDGE

PH. (619) 557-5661
FX: (619) 557-6975

January 9, 2001

Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: *Proposed Amendments to the Federal Rules of Civil Procedure*

Dear Mr. Secretary:

At the request of the Conference of Chief Bankruptcy Judges of the Ninth Circuit, I write to comment upon the proposed changes to the Federal Rules of Civil Procedure. By way of background, the Conference of Chief Bankruptcy Judges consists of thirteen chief judges from the various districts with the Ninth Circuit. At our most recent meeting (December 2000), the judges discussed these proposed changes and have authorized me to transmit their comments:

1. **Proposed Rule 7.1:** The Report of the Civil Rules Advisory Committee recognizes that financial disclosure rules are particularly knotty for bankruptcy judges since we frequently hear disputes which do not fit the traditional adversarial model. For example, when the court hears a claims objection treated as a "contested matter" under FRBP 9014, the judge may, but is not required to, apply the Federal Rules of Civil Procedure. Nevertheless, financial disclosure rules may require recusal. This situation would not be covered by the proposed rules change.

It is our understanding that the Advisory Committee on Bankruptcy Rules is presently working on a rule applicable to contested matters as well as adversary matters arising in bankruptcy which would target the special problems of financial disclosure for judges in bankruptcy cases. It is the suggestion of the Conference of

Chief Bankruptcy Judges that there be an express exemption from application of proposed Rule 7.1 to cases and proceedings in bankruptcy, pending the development of a rule by the appropriate committee. Obviously, Code of Conduct requirements will continue to apply in the interim to deal with the obvious situation of a direct financial interest in the litigation before the judge.

2. **Proposed Rules 54 and 58**: The Conference of Chief Bankruptcy Judges wholeheartedly supports the solution proposed. Failure to timely submit a final judgment is frequently a problem faced by litigants in bankruptcy court and the proposed rules changes will solve it.

Sincerely,

LOUISE DE CARL ADLER, Judge

2/15/01

00-CR-044
Substantive

00-CR-011
Style

00-CV-006

DRAFT COMMITTEE REPORT

OF THE

FEDERAL MAGISTRATE JUDGES ASSOCIATION

ON

PROPOSED CRIMINAL RULES AMENDMENTS

(SUBJECT TO BOARD RATIFICATION)

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE AND HABEAS RULES (§§ 2254 AND 2255)

I. PROPOSED STYLE REVISIONS OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

COMMENT: The Committee supports the proposed style revisions of the Federal Rules of Criminal Procedure.

DISCUSSION: The proposed style revisions of the Federal Rules of Criminal Procedure lend significant benefit and improvement to the clarity, understanding and use of the Federal Rules of Criminal Procedure. The new format will be of great benefit to judges, lawyers and the public in their use and reference to these rules. It is the collective opinion of the members of the FMJA Rules Committee that the restyled rules should be supported as amendments to the current criminal rules. With regard to specific rules, we offer the following additional comments:

(A) PROPOSED RESTYLED F. R. CRIM. P. 1.

COMMENT: The Committee supports the proposed style revision of F. R. Crim. P. 1, which would incorporate the provisions of Rule 54 and provide consistent definitions for use throughout the Rules.

DISCUSSION: The Committee members support the proposed restyling to Rule 1. The concept of incorporating Rule 54 is both logical as well as helpful. The incorporation of Rule 54, relative to the application of the Rules and definitions, also is an improvement on the current organization.

The elimination of the provisions in current Rule 54(b)(2)(3)(4) is supported based upon the comments provided in the Advisory Committee notes of the draft. Streamlining wherever possible, should be encouraged, as long as substance is not lost. Simplifying, and consolidating the various definitions and references to attorneys and judges is also a welcomed improvement. It is noted, that the Rule will also lend a definition to the term

"the Court" which was not previously defined. The definition is important as it affects many of the other rules, including, for example, Rule 6, 7 and 9.

The members of the Committee are also very pleased to see the consolidation of definitions as to magistrate judges, and the inclusion of magistrate judges under the "federal judge" definition.

(B) **PROPOSED RESTYLED F. R. CRIM. P. 3.**

COMMENT: The Committee supports the proposed style revision to F. R. Crim. P. 3, which would change the Rule to state a prevailing practice and a desired outcome of first presenting a complaint to a federal judicial officer, if one is reasonably available.

DISCUSSION: The amendment specifies that the complaint should be presented to a magistrate judge first. Specifically, it reads "if none(magistrate judge) is reasonably available, before a state or local judicial officer," as a back up. The Committee supports this concept. Where reasonably available, every federal case should commence with a federal judicial officer attuned to the practice, procedures and substantive law of the federal court.

(C) **PROPOSED RESTYLED F. R. CRIM. P. 5.**

COMMENT: The Committee supports the proposed style revision of F. R. Crim. P. 5, which would eliminate provisions related to the preliminary examination in favor of placing those in Rule 5.1 and incorporate portions of Rule 40 regarding initial appearances for arrests regarding alleged violation of terms of probation or supervised release.

DISCUSSION: The members of the Committee support the proposed restyled Rule 5. As with the other restyled rules, the revised presentation of the rules is a substantial improvement. The members of the Committee also support moving the material from Rule 5(c) to Rule 5.1 where it more logically belongs. Including Rule 40(a), 40(b) and 40(c) into the proposed Rule 5 is also a valuable change, so

that initial appearances of all kind are covered under a single rule.

There is a concern, however, that paragraph (c)(2)(D) of Restyled Rule 5 ("the judge must conduct a preliminary hearing...")may be read as eliminating a defendant's right to waive a preliminary hearing in the district of arrest in traditional Rule 40 proceedings. While paragraphs (a)(1)and (b) of Restyled Rule 5.1 seem to address that, an inconsistency could be inferred. The concern here is that an interpretation of the rule literally, and to the exclusion of an ability to waive the hearing, will subject defendants and courts to proceed with hearings that are currently routinely waived. Not only would the defendant be potentially subjected to a longer stay in the district of arrest, but the court would be burdened with additional proceedings and use of limited resources unnecessarily.

Therefore, this committee would recommend that a "Committee Note" be incorporated to Restyled Rule 5 to state something on the order of the following: that "Paragraph (c)(2)(D) is not intended nor should it be read to foreclose waiver of the Preliminary Hearing in the district of the defendant's right to elect a preliminary hearing in the charging district are preserved in Restyled Rule 5.1(a)(1) and (b), respectively.

(D) PROPOSED RESTYLED F. R. CRIM. P. 5.1.

COMMENT: The Committee supports the proposed style revision to F. R. Crim. P. 5.1, which would rename a "preliminary examination" as a "preliminary hearing", include all provisions formerly in Rule 5 with regard to the preliminary hearing and eliminate the reference to a finding of probable cause based on hearsay evidence.

DISCUSSION: The Committee supports the inclusion of the portions of Rule 5 and Rule 40, respectively, into Rule 5.1. The Committee also believes that the phrase "preliminary hearing" is more accurate than "preliminary examination" and that "preliminary hearing" is far more descriptive and typical from the public's perspective.

Since federal law is now clear on the proposition that probable cause may be based upon hearsay evidence, in whole or in part, the reference in Rule 5.1 in this regard is no longer necessary. Its deletion is supported since Rule 1101(d)(3) of the Federal Rules of Evidence addresses the matter.

Finally, this Committee supports the utilization of the term "court" to define the various federal judicial officers performing this function.

We submit that some clarification in the rule or in the Advisory Committee notes should be provided concerning the reference to "promptly require the defendant to appear for further proceedings." Some use note or reference as to the charging document would be helpful. While preliminary "hearings" are rare in many districts, anyone looking to Rule 5.1 for guidance will find little direction. The Criminal Rules Advisory Committee might improve the use of the rules by providing clarification here as part of the Advisory notes.

(E) **PROPOSED RESTYLED F. R. CRIM. P. 32.1.**

COMMENT: The Committee supports the proposed style revision to F. R. Crim. P. 32.1, which would include portions of Rule 40 related to the procedural steps in dealing with revocation or modification of probation or supervised release and add procedures for initial appearances in these matters.

DISCUSSION: The Committee finds that the completely revised and expanded Rule 32.1 is a substantial improvement over the former rule. A more complete list of the various procedural steps in dealing with revocations or modifications of probation or supervised release will be of significant benefit. The inclusion of language formerly located in Rule 40 is also helpful in this regard. To the extent that single or related subjects can be combined in a single rule will help in actual use.

The new material in 32.1(a)(1-4) is an efficient clarification of the proceedings to follow in these cases. While the

Committee members collectively utilize the provisions of Rule 5 in dealing with these proceedings, the distinction from a Rule 5 appearance is significant, and this guidance is helpful. To have included this proceeding under Rule 5 would only confuse the issue with regard to application of the Bail Reform Act (18 U.S.C. § 3142) where 18 U.S.C. § 3143 is more appropriate.

(F) PROPOSED RESTYLED F. R. CRIM. P. 40.

COMMENT: The Committee supports the proposed style revision to F. R. Crim. P. 40, be streamlined to deal with arrests for failing to appear in another district, only, with its former provisions A, B and C being moved to Rule 5 and former sub-paragraph D being relocated to Rule 32.1.

DISCUSSION: Relocation of portions of the current Rule 40 into Rule 5 (initial appearance), 5.1 (preliminary hearings) and 32.1 (revocation or modification of probation or supervised release) is a significant improvement on the rules. The retained language in Rule 40, specific to failure to appear in another district, will help court and counsel by specific reference to the appropriate proceedings for these matters.

II. PROPOSED AMENDMENT TO FEDERAL RULES OF CRIMINAL PROCEDURE.

(A) PROPOSED AMENDMENTS TO F. R. CRIM. P. 5.

COMMENT: The Committee supports the amendment to F. R. Crim. P. 5, which would include the style changes previously discussed and would allow for video conferencing as an alternative for personal appearances at the "initial appearance".

DISCUSSION: As set forth in Item I, above, the Committee supports the restyling of Rule 5 as indicated. In this proposed amendment, alternate provisions are set forth for initial appearance via video teleconferencing either with or without the defendant's consent.

The Committee supports video conferencing as an alternative for the initial appearance, and as stated later herein, arraignment (Rule 10) or other appearance (Rule 43). With specific reference to the initial appearance, the use of videoconferencing would serve as a meaningful and emminently practical reform to the initial appearance practices. Rather than inhibit the defendant's access to a judicial proceedings, video conferencing would increase the speed in which a judicial officer could address the defendant at this stage of the proceeding. Clearly, there are many districts across the country that are either not major metropolitan areas, or are so large that some predictable delay occurs between the arrest and the initial appearance. This is due to the logistics of distance and the number of judicial officers available. Many districts, particularly in the Southwest, house arrestees at some distance from the nearest judicial officer. In those circumstances, the prisoners are transported to the court, but that transportation does take time and tax payer dollars to complete. In other parts of the country, judicial officers "ride circuit" and travel from one facility to the other. On the days where a judicial officer is absent from a particular locale to serve another, a predictable delay occurs. The advent of video conferencing would help spread the precious and limited judicial resources more effectively. If defendants could be brought "before" a judicial officer by video conferencing, the time associated with transportation of the defendant, the judge or both would be removed. The modest cost associated with video conferencing equipment would be well off set by the cost associated with prisoner and judicial officer security and travel. Clearly, the historic under pinnings of the in person appearance date back to a different time and are based out of a concern of providing due process to a defendant. Little is lost when the advisement of rights comes from the judge face to face versus video conferencing, and a proceeding like an initial appearance would not be severely impacted or impaired. The advent of facsimile or computer dispatched documents would allow the defendant to have access to a copy of the charging documents even at a remote location.

Another practical application for videoconference initial appearances would involve defendants who are hospitalized

ill or a substantial danger to themselves or others. In those matters, a videoconferenced initial appearance would provide for prompt disposition of the Rule 5 requirements in a controlled setting where the Defendant from the hospital, infirmary, or secure lock-up could participate. This would avoid exposing the judicial officers, staff, marshals, and other inmates to infectious disease and/or physical danger. It would also have a practical application in preserving taxpayer dollars by avoiding the necessity of special transportation circumstances for either the Defendant or the Court, it's staff and other necessary personnel.

A significant factor in these regards is whether or not consent is required. In these circumstances, this Committee would support the use of video conferencing at the initial appearance without the defendant's consent. While consent would be more important for more critical stages of the proceeding, like arraignment or trial, the nature of these proceedings, and the great benefit to the defendant would swing the balance in favor of dispensing with the consent requirement in the interest of expeditiously proceeding with this aspect of the case.

Some concern has been expressed that video teleconferencing may not be appropriate to conduct criminal proceedings in federal court because of the inherently intimidating atmosphere created by a detention facility. Indeed, the committee note to new Rule 5(f) specifically states that in amending Rules 5, 10 and 43 (which generally require the defendant's presence at all proceedings), the committee was very much aware of the argument that permitting a defendant to appear by video teleconferencing might be considered an erosion of an important element of the judicial process. The court may want to limit the coercive effect of having a defendant appear by teleconferencing before the court while being confined in a detention facility by establishing minimum standards applicable to teleconferenced hearings. For example, the court may want to visit the detention facilities in each district authorized to house federal prisoners to determine if the facility has a room suitable for

teleconferencing, a private telephone line for attorney-client communication between the defendant and his attorney, and a room where the defendant can consult privately with his attorney without being overheard by law enforcement officials. In the event that the court determines that a particular detention facility does not meet minimum standards established by the court for teleconferenced hearings, the court may want to refuse to allow teleconferenced hearings from that particular facility.

(B) **PROPOSED AMENDMENT TO F. R. CRIM. P. 5.1.**

COMMENT: The Committee supports the amendment to F. R. Crim. P. 5.1, which would include the style changes previously discussed, and confirms the authority of a magistrate judge to grant a continuance of a preliminary hearing even when the Defendant does not consent.

DISCUSSION: As previously indicated, the Committee supports the restyling of Rule 5.1. With regard to the substantive proposal presented, the Committee fully supports the proposed amendment to Rule 5.1(d). This is the rule that would confirm the authority of a United States Magistrate Judge to grant a continuance for preliminary hearing conducted under the rule. The Federal Magistrate Judges Association has supported an amendment along these lines since 1996. The reasoning is simple.

While a magistrate judge can continue a preliminary examination with a defendant's consent, the matter must be brought before a district judge where consent is withheld. This presents a significant anomaly, since the magistrate judge has the preliminary examination on his or her calendar, and is the judicial officer rendering the determination of probable cause resulting in the defendant's release or requirement that the defendant proceed toward trial in the case. While the magistrate judge is empowered to hear and determine probable cause, as well as other liberty interests (i.e., bail), the same judicial officer cannot make the decision with regard to the extraordinary circumstances or the interest of justice in an issue where the need for the continuance of a proceeding on this judicial officer's calendar is disputed. Like the preliminary

examination itself, a magistrate judges order continuing a preliminary examination would be reviewable by a district judge. Therefore, authority should be invested in the United States Magistrate Judge to resolve this issue at this stage. Not only would this afford a more prompt disposition of the issue from the defendant's stand point, but it would provide an economy in the expenditure of very limited judicial resources in many districts.

(C) PROPOSED AMENDMENT TO F. R. CRIM. P. 10.

COMMENT: The Committee supports the proposed amendment to F. R. Crim. P. 10, which would allow a defendant to waive appearance at arraignment under certain circumstances and provide for a video teleconferenced arraignment.

DISCUSSION: The Committee supports the amendment to allow a defendant to waive appearance at arraignment under the conditions set forth in the rule. It is important to distinguish that the arraignment itself is not waived, just the in person appearance by the defendant. The waiver of appearance is subject to certain conditions, including that the defendant be charged by indictment or misdemeanor information, and that a written waiver be signed. Arraignment on a felony information would still be required in court, following the waiver of indictment. Defendants make knowing and intelligent waivers of rights all the time. Examples include waiver of indictment, waiver of a detention hearing, waiver of removal hearing, (Rule 40) and waiver of various constitutional rights is part of a Rule 11 guilty plea. There is no logic to suggest that the defendant could not equally waive appearance at arraignment on an indictment or misdemeanor information where the defendant acknowledges receipt of the charging document, and is pleading not guilty. In actual time, these proceedings last a matter of minutes, and where counsel is in place, the defendant is adequately protected.

The Committee also supports the concept that video teleconferencing be used to arraign a defendant without the necessity of defendant's consent. An arraignment proceeding is typically done on a large calendar which devotes, at best, several minutes to each defendant as the

charges are read and the plea is entered. Nothing is lost in substance, and the court is always at liberty to set additional hearings if substantive issues must be addressed. In the typical case, however, districts dealing with a high volume of arraignments of defendants who are in custody at great distance, must be transported long distances. This presents security issues, significant cost factors, and an impact upon limited resources of law enforcement and court personnel. The significant benefits of video teleconference arraignments would be lost if defendant's consent was required. Certainly, unreasonable withholding of consent could occur as was demonstrated in the pilot programs referenced in the Advisory Committee notes.

Since the proposed amendment would leave to each court the decision to permit video arraignments and the procedures to be used, courts could address the issues on a

needs basis and a particularized procedure beneficial to the interests of justice involved.

(D) **PROPOSED AMENDMENT TO F. R. CRIM. P. 26.**

COMMENT: The committee supports the proposed amendment to F.R.Crim. P. 26, which would allow a court to receive video transmission of an absent witness if certain conditions are met.

DISCUSSION: The amendment would change the current rule that only testimony given in an open court will be considered. Permitting the use of video transmission of testimony in circumstances where deposition testimony could be otherwise used is a prudent and practical concept. There is precedent in Rule 15 for preserved testimony under exceptional circumstances. Allowing a proponent to establish the necessary compelling circumstances for a video transmission would be consistent with that approach. As the advisory committee points out, the use of transmitted testimony would be superior to other means of presenting testimony in the courtroom since witness demeanor and testimony in the witnesses own words can be appreciated.

With the trial court being positioned to impose appropriate safeguards and procedures, the defendant's right to fair trial would be preserved. In requiring "unavailability", a defendant's confrontation clause rights are certainly not infringed. Videotape presentation of unavailable witnesses exists in many districts in actual practice. This is particularly true with material witnesses under 18 USC §3144 where the exception rather than the rule, is to present their testimony by videotape as opposed to holding them in custody to testify in person. The experience of the courts in these regards certainly supports the value of a videotransmission where the necessary compelling circumstances exist.

(E) **PROPOSED AMENDMENT TO F.R.CRIM. P. 41**

COMMENT: The Committee supports the proposed amendment to F.R. Crim. P. 41, which provides procedural guidance for

conducting covert entries and observations, requires that law enforcement personnel first attempt to obtain a warrant from a federal judicial officer and minor change with regard to the issuance and return of a warrant.

DISCUSSION: This rule as amended will be of great assistance to law enforcement officers in providing procedural guidance for conducting covert entries and observations. Covert entries to observe and record information are allowable by law already. Currently, however, Rule 41 only deals with more traditional searches where the objective is to seize tangible property. This amendment will conform Rule 41 to existing law and incorporate a more complete reference with regard to search warrant proceedings.

This committee also supports the mandate that law enforcement personnel first attempt to obtain a warrant from a federal judicial officer. It is important for the rule to state a clear preference that in the general situation, federal judicial authority should be involved in the pretrial processing of federal prosecutions. The other aspects of the proposed amendment with regard to the deletion of the reference to hearsay evidence and matters regarding the issuance and return of a warrant are similarly supported.

(F) **PROPOSED AMENDMENT TO F. R. CRIM. P. 43.**

COMMENT: The Committee supports the proposed amendment to F. R. Crim. P. 43, which would provide exceptions to the requirement that a defendant be present in court for all proceedings, in recognizing that a defendant need not present in court when a permitted video conference procedure is available under other rules.

DISCUSSION: The proposed amendment to Rule 43 is consistent with the principals advanced in the proposed amendments for Rules 5 and 10, respectively. For all the reasons set forth in discussing those amendments, the FMJA Rules Committee supports the proposed amendment to Rule 43.

III. PROPOSED AMENDMENT TO FEDERAL RULES OF CIVIL PROCEDURE

(A) PROPOSED AMENDMENT TO F. R. CIV. P. 7.1.

COMMENT: The committee supports the proposed amendment to F. R. Civ. P. 7.1, which would require a disclosure statement by a non-governmental party reflecting "financial interest".

DISCUSSION: This amendment addresses a significant concern over the "financial interest" standard of Canon 3(C)(1)(c) of the Code of Conduct for United States Judges. The information provided will help judicial officers make informed decisions concerning disqualification in situations that do require automatic disqualification. This is consistent with the practice in many district courts currently which has been provided General Order or Local Rule, but certainly should be addressed on a nationwide basis through the federal rules.

(B) **PROPOSED AMENDMENT TO F. R. CIV. P. 54.**

COMMENT: The committee supports the proposed amendment to F. R. Civ. P. 54 which would delete the requirement that a judgment on a motion for attorney's fees be set forth in a separate document.

DISCUSSION: This amendment is designed to complement the amendment to Rule 58(a)(1) which deletes the separate document requirement for an order disposing of a motion for attorney's fees under Rule 54. This is an important change in making it clear by the Court when it intends an order to be a final disposition of a motion for attorney's fees.

(C) **PROPOSED AMENDMENT TO F. R. CIV. P. 58.**

COMMENT: The committee supports the proposed amendment to F.R. Civ. P. 58 which would help clarify requirements that have been ignored in many cases and which has resulted in the failure to enter judgment which would begin to toll the time for the filing of some motions under Rule 60 and for the time to appeal. The Rule establishes a basis for insuring that appeal time does not go on indefinitely. The core requirement of a separate document remains.

DISCUSSION: The committee supports this amendment for the same reasons set forth in the discussion concerning Rule 54.

(D) **PROPOSED AMENDMENT TO F. R. CIV. P. 81.**

COMMENT: The committee supports the proposed amendment to F. R. Civ. P. 81, which brings the rule into consistency with the provisions of the rules governing sections 2254 and 2255. The proposed amendment is necessary to bring consistency into the framework of the federal rules.

DISCUSSION: This amendment would bring Rule 81 (a)(2) into accord with the Rules governing Section 2254 and Section 2255 proceedings. Currently, Rule 81(a)(2) includes return-time provisions which are inconsistent with the provisions in the Rules governing Sections 2254 and 2255. The amendment

would remove the inconsistency. The advisory committee submits that it is not necessary to duplicate the content of the habeas rules in Rule 81. This committee agrees.

IV. PROPOSED AMENDMENTS TO HABEAS RULES

(A) PROPOSED AMENDMENT TO HABEAS RULES (2e), (3b), (6a), (8), (9b) and (10) RE: §2254.

COMMENT: The committee supports the proposed amendments to the above stated rules.

DISCUSSION: The proposed amendments are designed to conform the language of the rules governing proceedings in Section 2254 matters with language in the Federal Rules of Civil Procedure. They were also designed to avoid conflicts with the Federal Rules of Civil Procedure and conform to current practices in many instances. The changes are not controversial and are only substantive to the extent that they conform with existing statutes or federal rules.

(B) PROPOSED AMENDMENT TO HABEAS RULES (2), (3b), (6), (8), (9b), and (10) RE: §2255.

COMMENT: The committee supports the proposed amendments to the above stated rules.

DISCUSSION: The proposed amendments are designed to conform the language of the rules governing proceedings in Section 2255 matters with language in the Federal Rules of Civil Procedure. They were also designed to avoid conflicts with the Federal Rules of Civil Procedure and conform to current practices in many instances. The changes are not controversial and are only substantive to the extent that they conform with existing statutes or federal rules.



ILLINOIS STATE
BAR ASSOCIATION

RECEIVED
2/16/01

00-CV-012

Dennis A. Rendleman • *General Counsel*
Stephanie K. Hughes, *Assistant Counsel* • Thomas C. Speedie Jr., *Assistant Counsel*

February 13, 2001

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: Proposed Amendments to Federal Rules of Civil Procedure

Dear Mr. McCabe:

Enclosed, please find a letter from William Borah containing comments on proposed Amendments to Federal Rules of Civil Procedure. These comments do not state the official position of the Illinois State Bar Association or its Civil Practice and Procedure Section Council. They are, however, the observations of the ISBA Civil Practice and Procedure Section Council member who volunteered and was entrusted by the council to take the time to review the proposed changes and provide feedback on the subject.

Thank you for soliciting the opinion of the Illinois State Bar Association on this matter.

Sincerely,

Tom Speedie

Tom Speedie

Enclosure

cc: John Mulgrew, Chair, ISBA Civil Practice and Procedure Section Council
Angela Imbierowicz, Vice-Chair, ISBA Civil Practice and Procedure Section Council
William Borah

WILLIAM J. BORAH & ASSOCIATES
ATTORNEYS AT LAW

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February 12, 2001

Mr. Thomas C. Speedie
Assistant Counsel, Legal Department
Illinois State Bar Association
Illinois Bar Center
Springfield, IL 62701

Re: Proposed Amendments to Federal Rules of Civil Procedure

Dear Mr. Speedie:

Rule 7.1(a)(1)(A): Disclosure Statement (in District Court, as in Appellate Court)

This proposal requires non-government corporate parties to disclose more information about its parent corporation and any publicly held corporation that holds 10 per cent or more of that corporation's stock. This is to give more information to judges so they can determine if they should disqualify themselves, at least on financial ground. Attorneys must also supplement the disclosure if there are changes.

Comment: This seems to be a good idea, and it would also give the opposing party information about the corporate structure of the opponent.

Rule 7.1(a)(1)(B) and 7.1(a)(2): Requires all parties to disclose any information "that may be required by the Judicial Conference of the United States."

Comment: How can we give an intelligent comment to this? Why should we express commitment to requirements when we don't even know what the Judicial Conference might recommend?

Rule 54(d): Judgment for attorneys fees does not have to be set forth in a separate judgment.

Comment: No problem, but see Rule 58 below.

Rule 58: This rule addresses the issue of when a "separate document" is needed to begin the time for appeal, and sets forth certain exceptions.

Comment: This proposal seems to make the whole issue even more confusing and complicated. While the commentary acknowledges the confusing state of this matter, I think that more thought should go into this before a proposal is made which adds to the problems. The commentary refers to the possibility that the "separate document" rule should be abandoned altogether, and this would not be a bad idea.

Sincerely yours,



WILLIAM J. BORAH

WJB/bam

V-A

NO MATERIALS

V-B

has granted or denied his request for a certificate, requiring the government to file its answering brief defeats the screening purpose of Section 2253(c)(1). As the Tenth Circuit explained in *United States* v. *Simmonds*, 111 F.3d 737, 741 (1997), "[r]equiring the government to invest time, money, and energy into briefing the merits of an appeal before the circuit court has even ruled on whether it will exercise jurisdiction under 28 U.S.C. § 2253(c), is contrary to the certificate of appealability's intended purpose." *See also Lucas v. Johnson*, 101 F.3d 1045, 1046 (5th Cir. 1996).

In some cases, a district judge might issue a limited or hybrid certificate that permits the prisoner to appeal some, but not all, of his claims. In those cases, the prisoner might request a circuit judge to expand the certificate to include the claims that were not certified by the district judge. Moreover, at least one circuit treats the notice of appeal in such cases as a request for a certificate on the uncertified claims. *See United States v. Sparkman*, 117 F.3d 949, 953 (6th Cir. 1997); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997) (administrative order); *but see Bui v. DiPaolo*, 170 F.3d 232, 238 (1st Cir. 1999), *cert. denied*, 120 S. Ct. 1717 (2000); *United States v. Kimler*, 150 F.3d 429, 430 (5th Cir. 1998). The prisoner might also file a brief raising the uncertified issues along with the certified issues, and at least one circuit treats such briefing as a request for an expansion of the certificate. *See United States v. Allen*, 157 F.3d 661, 665 (9th Cir. 1998); *United States v. Cruz-Mendoza*, 147 F.3d 1069, 1074 (9th Cir. 1998). In other cases, the prisoner might request that a certificate issued by a circuit judge be expanded to include additional claims. In these circumstances, the government should not be required to file its answering brief until the scope of the appeal is finally determined by the court of appeals' resolution of the prisoner's requests for expansion of the certificate. *See Bui v. DiPaolo*, 170 F.3d at 238.

Requiring the government to file its answering brief before the court grants or denies a prisoner's request for a certificate or an expansion of a previously issued certificate in effect transforms the prisoner's request for a certificate into an appeal on the merits. *See Lucas v. Johnson*, 101 F.3d at 1046. The proposed amendment would avoid this result by establishing a uniform national rule that requires resolution of pending requests for a certificate before the government's briefing schedule is set. Proposed new subsection (b)(4) of Rule 22 would prohibit the court of appeals from setting a due date for the government's brief, and suspend the time under Rule 31 for the government to file its brief, until the court resolves the prisoner's request for a certificate of appealability and any timely request for expansion of a certificate previously issued.

In light of variations in local practice in the courts of appeals, the FRAP Committee asked the Department to formulate a proposal to establish uniform procedures for considering requests for certificates of appealability in cases on collateral review, and we considered

several other procedures that could be addressed in amendments to Rule 22. We concluded, however, that local practices should be allowed to percolate longer in the courts of appeals so that the advantages and disadvantages of the various practices can be evaluated before developing a more comprehensive proposal. Consequently, the proposed amendment establishes a uniform national rule only with respect to the timing question.

I understand that at its last meeting the FRAP Committee specifically asked the Department of Justice representative on the Committee, Douglas Letter, to consider whether there should be special rules in this area concerning capital cases or successive habeas petitions. At this time, the Department of Justice is proposing only a uniform rule concerning timing of briefing, and we do not believe this proposed rule should be affected by the type of case or whether it involves a successive petition.

Thus, we suggest the attached amendment to Rule 22, along with the accompanying advisory committee note, and submit this matter to you for consideration by the full FRAP Advisory Committee.

Sincerely,

Barbara D. Underwood

Barbara D. Underwood
Acting Solicitor General

cc: Professor Patrick J. Schiltz
Associate Dean and Professor of Law
University of St. Thomas School of Law
1000 LaSalle Avenue, TMH 440
Minneapolis, Minnesota 55403-2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY J. SCIRICA
CIRCUIT JUDGE

22614 UNITED STATES COURTHOUSE
SIXTH AND MARKET STREETS
PHILADELPHIA, PENNSYLVANIA 19106
(215) 597-2399
FAX (215) 597-7373

November 22, 1999

TO: Honorable W. Eugene Davis
Honorable Will L. Garwood

Dear Gene and Will:

It has come to my attention that appellate and district courts have been writing local procedural rules for certificates of appealability in habeas corpus cases. I know that the Advisory Committee on Criminal Rules has been looking into possible revision of the habeas corpus rules. Should we also be looking into the advisability of uniform national rules for certificates of appealability in habeas corpus?

For your information, I enclose a memorandum prepared by our chief staff attorney in the Third Circuit on the various practices in the Courts of Appeals. I also enclose a local appellate rule recently adopted by the Third Circuit, local district court rules recently adopted in our circuit, and a model rule that was prepared by a Third Circuit Death Penalty Task orce.

Sincerely,

Anthony J. Scirica

AJS:dm

Enclosures

cc: Professor Dan Cocquilette
Professor Patrick J. Schiltz
Professor David A. Schlueter
Peter McCabe
John K. Rabiej

TO: Judge Scirica
FROM: Marcy Waldron
RE: Practices in Other Circuits on Certificate of Appealability
DATE: November 12, 1999

Per your request attached are (1) an updated summary of the practices in capp cases in the courts of appeal; (2) the local rules on habeas cases from the districts in our circuit; (3) the model local rule for death penalty cases drafted by the Death Penalty Task Force. Chief Judge Becker circulated the model local rule to all the chief judges of the district courts in our circuit and all the chief judges of the circuit courts of appeal. I note that at the district court level there are national rules for habeas cases. See Rules Governing Habeas Corpus Cases Under Section 2254 and Rules on Motion Attacking Sentence Under Section 2255, which are placed after the Rules of Civil Procedure in most volumes.

Most circuits decide the capp issue before briefing. If capp is granted, most circuits appoint counsel only if the case is complex. I don't think there should be a national rule on appointment of counsel. There is considerable difference as to how many judges a capp request is submitted to. Of the circuits responding to my e:mail, the 1st, 3rd, 8th and DC circuits submit the request to a 3 judge panel; the 5th and 6th, to one judge. The 7th and 10th responded that it takes one judge to grant and two to deny. Section 2253, both before and after AEDPA, provides that "a" circuit judge may grant a certificate. In In re Burwell, 350 U.S. 521, 522 (1956), the Court approved of local variation as to how many judges are needed to decide the issue:

> It is for the Court of Appeals to determine whether such an application to the court is to be considered by a panel of the Court of Appeals, by one of its judges, or in some other way deemed appropriate by the Court of Appeals within the scope of its powers. It is not for this Court to prescribe how the discretion vested in a Court of Appeals, acting under 28 U.S.C. § 2253, should be exercised. As long as that court keeps within the bounds of judicial discretion, its action is not reviewable.

(citations omitted).

Finally, there is great variation as to what short form to use for "certificate of appealability". The 1st and 3rd circuits use "capp"(3rd) or "cap"(1st). Most others use COA, but the 11th seems to use CA. I used "certificate" in the summary to avoid this problem.

Is the question of a certificate of appealability considered before or after briefing:

1st Circuit - Before briefing in all cases. If the district court granted as to some, but not all, issues, the petitioner may seek expansion of the issues from the court of appeals before briefing

2nd Circuit - In most cases before; rarely after briefing.

3rd Circuit - In most cases before. Both parties are notified by letter that the case will be submitted to a motions panel to decide the question of whether a certificate should be granted. They are given opportunity to submit letter argument in favor of or in opposition to issuance of a certificate, but this is not required. If appellant submits nothing, the notice of appeal is construed as a request for a certificate. The government usually doesn't file anything. Sometimes the court directs the government to file a response, e.g. if the court is considering summary reversal. Rarely after briefing; usually only in difficult cases or if there is a question of whether a capp is necessary.

4th Circuit - In non-death penalty habeas appeals, the cases are automatically screened off the calendar, an informal briefing schedule is established, and the cases are routed to the staff attorneys office. In the routine case, relief is denied along with the denial of a certificate. If the assigned panel desires oral argument, a certificate will issue to advise the attorney (either appointed or retained) as to the issues to be formally briefed. In death penalty appeals, the cases are assigned to a panel. If counsel are present, the panel generally decides the certificate question along with the merits following formal briefing. If the inmate is pro se, a capp decision will be made in advance of the decision on the merits if the panel desires appointment of counsel. Under such circumstances, the certificate defines the issues upon which the panel desires briefing and argument.

5th Circuit - Appellant must file brief in support of certificate request; case is dismissed if appellant fails to file brief. Appellee files brief only if certificate granted

6th Circuit - Always before. The notice of appeal is considered a request under the rule for a certificate. If the appellant filed a motion it is considered, otherwise, everything in the record is reviewed with or without a motion. Can never recall an opposition to a certificate being filed.

7th Circuit - Before briefing. Respondents are not required to do respond, but sometimes they will file motions to dismiss the appeal or motions in opposition to the issuance of a certificate.

8th Circuit - Before briefing. Often the petitioner/movant has simply filed a notice of appeal with the district court which is construed as an application for a certificate, so there is nothing other than the pleadings filed in the district court in support of the sec. 2254 petition or sec. 2255 motion.

9th Circuit - Before briefing. In noncapital cases, based on the record below and the optional motion/response. In capital cases, based on the record below and mandatory motion/response. If district court grants a certificate as to some issues, appellant may apply to court of appeals for expansion of the certificate.

10th Circuit - In noncapital cases, whether a certificate should issue is usually decided after the appellant has filed his/her merits brief, but before the appellee has filed a brief. In rare instances, where the case is complex and the panel believes briefing from the government would assist the panel, the panel may order a merits brief from the appellee before ruling on whether a certificate should issue.

In capital cases, the court considers whether to grant a more expansive certificate than did the district court at two stages. First, at the case management stage, which is before any briefing, and then again after both parties have filed their merits briefs (the appellant's brief usually will discuss why a certificate should be granted on additional issues, but the appellee's brief usually will address only those issues on which a certificate has already been granted).

11th Circuit - Whether a certificate should issue is decided before briefing. If a certificate is denied the appellant (or non-moving party if there is a grant) is allowed to move for reconsideration with arguments in support. All certificate motions are initially decided by a single judge; the motions for reconsideration, by a panel.

DC Circuit - Often after briefing

<u>Appointment of counsel when certificate granted</u>:
1st Circuit - No general rule; probably would be appointed if it was contemplated case would go to oral argument

2nd Circuit -

3rd Circuit - Automatically if certificate granted and petitioner is indigent

4th Circuit - see above

5th Circuit - Only if the court thinks the case will go to oral argument. This is very rare. The staff attorney memo sufficiently frames the issue for the court.

6th Circuit - No general rule; depends on complexity of case.

7th Circuit - No general rule, not routinely done. Depends on complexity of the case and whether the judges think oral argument would be helpful.

8th Circuit - Counsel is routinely appointed after a certificate is granted

9th Circuit - Only if case is complex

10th Circuit - There is no hard and fast rule. In noncapital cases, counsel will be appointed based on the complexity of the issues raised, the adequacy of the pro se brief, the likelihood of oral argument, etc. In capital cases, the appellant is virtually always already represented by counsel.

11th Circuit - In all cases, appointment of counsel depends upon the complexity of the case, whether appellant raises an important novel issue, and the adequacy of the appellant's brief. It is rarely necessary to appoint counsel in these cases.

DC Circuit - Routinely appointed, though still must go to a panel

LOCAL CIVIL AND CRIMINAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
LOCAL CIVIL RULES
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Current with amendments received through 7-15-1999

CIV. RULE 81.2 HABEAS CORPUS AND MOTIONS UNDER 28 U.S.C. S 2255

(a) Unless prepared by counsel, petitions to this Court for a writ of habeas corpus and motions under > 28 U.S.C. S 2255 shall be in writing (legibly handwritten in ink or typewritten), signed by the petitioner or movant on forms supplied by the Clerk. When prepared by counsel, the petition or motion shall follow the content of the forms.

(b) If the petition or motion is presented in forma pauperis it shall include an affidavit (attached to the back of the form) setting forth information which establishes that the petitioner or movant is unable to pay the fees and costs of the proceedings. Whenever a Federal, State, or local prisoner submits a civil rights complaint, petition for a writ of habeas corpus, or motion for relief under > 28 U.S.C. S 2255 and seeks in forma pauperis status, the prisoner shall also submit an affidavit setting forth information which establishes that the prisoner is unable to pay the fees and costs of the proceedings and shall further submit a certification signed by an authorized officer of the institution certifying (1) the amount presently on deposit in the prisoner's prison account and, (2) the greatest amount on deposit in the prisoner's prison account during the six-month period prior to the date of the certification. The affidavit and certification shall be in the forms attached to and made a part of these Rules as Appendix P. The Clerk shall reject any complaint, petition or motion which is not in full compliance with this requirement.

(c) If the prison account of any petitioner or movant exceeds $200, the petitioner or movant shall not be considered eligible to proceed in forma pauperis.

(d) The respondent shall file and serve his or her answer to the petition or motion not later than 45 days from the date on which an order directing such response is filed with the Clerk, unless an extension is granted for good cause shown. The answer shall include the respondent's legal argument in opposition to the petition or motion. The respondent shall also file, by the same date, a certified copy of all briefs, appendices, opinions, process, pleadings, transcripts and orders filed in the underlying criminal proceeding or such of these as may be material to the questions presented by the petition or motion.

(e) Each party in any habeas corpus proceeding or motion under > 28 U.S.C. S 2255 in which the imposition of a death sentence is challenged shall file a "Certificate of Death Penalty Case" with the initial petition, motion or other pleading. This Certificate shall include the following information:

(1) names, addresses and telephone numbers of parties and counsel;

(2) if set, the proposed date of execution of sentence; and

(3) the emergency nature of the proceedings.

Upon docketing of any initial petition, motion or other pleading, the Clerk shall transmit a copy of the Certificate, together with a copy of the petition, motion or other initial pleading to the Clerk of the Third Circuit Court of Appeals.

(f) A Certificate of Death Penalty Case shall be filed with the Clerk by the United States Attorney for the District of New Jersey upon return of a verdict of death in a Federal criminal case.

(g) Upon entry of an appealable order, the Clerk and appellant's counsel will prepare the record for appeal. The record will be transmitted to the Third Circuit Court of Appeals within five days after the filing of a notice of appeal from the entry of an appealable order under > 18 U.S.C. S 3731, > 28 U.S.C. S 1291 or > 28 U.S.C. S 1292(a)(1), unless the appealable order is entered within 14 days of the date of a scheduled execution, in which case the
record shall be transmitted immediately by an expedited means of delivery.

[Effective April 1, 1997.]

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOCAL RULES OF CIVIL PROCEDURE

Copr. C West Group 1999. No claim to orig. U.S. govt. works.

Current with amendments received through 6-1-1999

RULE 9.3 PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTIONS PURSUANT TO 28 U.S.C. S 2255

(a) All petitions for writ of habeas corpus and all motions pursuant to > 28 U.S.C. S 2255 shall be filed on forms provided by the Court and shall contain the information called for by such forms. The required information shall be set forth concisely and legibly. Ordinarily, the Court will consider only those matters which are set forth on the forms provided by the Court. Any attempt to circumvent this requirement by purporting to incorporate by reference other documents which do not comply with this Rule may result in dismissal of the petition.

(b) Any petition filed pursuant to > 28 U.S.C. S 2254, or motion filed pursuant to > 28 U.S.C. S 2255, which does not substantially comply with Rules 2 and 3 of the Rules governing petitions and motions filed pursuant to those sections, may be returned by the Clerk of Court to the petitioner, if a judge of the Court so directs, together with a statement of the reason for its return. A copy of any petition or motion returned for failure to comply shall be retained by the Clerk.

Effective July 1, 1995.

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SECTION I

CHAPTER XVIII. HABEAS CORPUS AND MOTIONS ATTACKING SENTENCE AND APPEALS WHERE PARTY IS INCARCERATED

Copr. C West Group 1999. No claim to orig. U.S. govt. works.

Current with amendments received through 6-1-1999

LR 83.32 PETITIONS FOR WRIT OF HABEAS CORPUS AND MOTIONS PURSUANT TO 28 U.S.C S 2255

LR 83.32.1 Form of Petitions and Motions. Petitions for a writ of habeas corpus by persons detained in custody pursuant to the judgment of a federal or state court, and persons who are in custody and may be subject to future custody pursuant to the judgment of a federal or state court and motions filed pursuant to > 28 U.S.C. S 2255 (attacking a sentence imposed by this court) shall be in writing and the facts and statements therein verified under penalty of perjury by the petitioner's signature. Unless prepared by counsel, such petitions and motions shall be on standard forms supplied, upon request, by the clerk of court. If prepared by counsel, standard forms are not necessary, but the petition must include the same information and material as contained in the standard form.

LR 83.32.2 Reference to Governing Rules. The rules governing cases and proceedings under > 28 U.S.C. § 2254 and > 2255, as approved in P.L. 94426, dated September 28, 1976, as amended, hereby become part of the local rules and procedures of this district. Such rules are set forth in > 28 U.S.C. § 2254 and > 2255.

LR 83.32.3 In Forma Pauperis Proceedings.

(a) Affidavit Required. A petitioner or movant seeking to proceed in forma pauperis must complete the in forma pauperis affidavit or declaration attached at the back of the petition for a writ of habeas corpus and shall set forth information which establishes, pursuant to > 28 U.S.C. S 1915, that he or she is unable to pay the fees and costs, or give security therefor. In the absence of exceptional circumstances, leave to proceed in forma pauperis may be denied if the value of the money and securities in the petitioner's institutional account exceeds fifty dollars ($50.00).

(b) Warden's Certificate. Under Rule 3 of the rules governing S> 2254 cases a certificate of the warden or other appropriate officer of the institution in which the petitioner is confined is required in addition to the affidavit or declaration of poverty.

Such a certificate is provided at the end of the standard form for filing S> 2254 cases, and this certificate must be completed and returned with the forms. The certificate may be considered by the court in acting upon the request to proceed in forma pauperis.

LR 83.32.4 Addresses and Reference of Petitions and Motions. Petitions and motions shall be addressed to the Clerk of the United States District Court for the Middle District of Pennsylvania. Petitioners or movants shall send to the clerk an original and a sufficient number of copies of the completed petition or motion for service on all named respondents. A petition or motion addressed to an individual judge shall be directed to the clerk of the court for processing. Whenever possible, successive petitions and motions by a person in custody shall be directed by the clerk to the judge who handled prior petitions and motions by such person.

Effective April 15, 1997.

WEST'S PENNSYLVANIA RULES OF COURT
LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA
SECTION I
CHAPTER XVIII. HABEAS CORPUS AND MOTIONS ATTACKING SENTENCE AND APPEALS
WHERE PARTY IS INCARCERATED
Copr. C West Group 1999. No claim to orig. U.S. govt. works.
Current with amendments received through 6-1-1999

LR 83.33 TIME FOR APPEAL WHERE PARTY IS INCARCERATED

When it appears that a party who is incarcerated has delivered a notice of appeal within thirty (30) days after the entry of a civil judgment to the authorities in charge of that party's incarceration, the time for filing the notice of appeal is extended for a period not to exceed thirty (30) days in order to allow for the handling and transmission of the notice of appeal by the authorities to the clerk of the court.

Effective April 15, 1997.

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LOCAL CIVIL RULES OF COURT

Copr. C West Group 1999. No claim to orig. U.S. govt. works.

Current with amendments received through 6-1-1999

LR 9.1 STANDARD FORM FOR HABEAS CORPUS PETITIONS AND MOTIONS

Proceedings for habeas corpus under > 28 U.S.C. 2254 and proceedings to vacate sentence under > 28 U.S.C. 2255 shall be in accordance with the rules promulgated with respect to such proceedings by the Supreme Court and modified by the Congress by P.L. 94-426 and P.L. 94-577, effective February 1, 1977.

A. Petitions and motions in such proceedings shall be in substantially the forms prescribed by the court, copies of which forms shall be made available by the clerk upon request.

B. The district attorney or an assistant of the county where the petitioner was sentenced or is being held shall represent and appear for respondent in all cases arising under state law.

Effective June 1, 1997.

WEST'S PENNSYLVANIA RULES OF COURT

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LOCAL CIVIL RULES OF COURT

Copr. C West Group 1999. No claim to orig. U.S. govt. works.

Current with amendments received through 6-1-1999

LR 9.3 TIME FOR FILING APPEAL BY PRISONERS

In habeas corpus and all civil matters, the time for filing a formal notice of appeal by a prisoner shall be automatically extended for a period not to exceed 30 days beyond the time required by > Rule 4 of the Federal Rules of Appellate Procedure, where it appears that the papers filed by a prisoner show that he/she had delivered his/her notice of appeal to the prison authorities within 30 days after the date of the judgment from which the appeal is taken.

Effective June 1, 1997.

MODEL LOCAL RULE
GOVERNING PETITIONS UNDER 28 U.S.C. § 2254 AND MOTIONS TO VACATE SENTENCE UNDER 28 U.S.C. § 2255 IN DEATH PENALTY CASES

1. All petitions for a writ of habeas corpus under 28 U.S.C. § 2254 and motions to vacate sentence under 28 U.S.C. § 2255 must be accompanied by a cover sheet that lists:

a. petitioner's full name and prisoner number; if prosecuted under a different name or alias that name must be indicated

b. name of person having custody of petitioner (warden, superintendent, etc.)

c. petitioner's address

d. name of trial judge

e. court term and bill of information or indictment number

f. charges of which petitioner was convicted

g. sentence for each of the charges

h. plea entered

i. whether trial was by jury or to the bench

j. date of filing, docket numbers, dates of decision and results of direct appeal of the conviction.

k. date of filing, docket numbers, dates of decision and results of any state collateral attack on a state conviction including appeals

l. date of filing, docket numbers, dates of decision of any prior federal habeas corpus or § 2255 proceedings, including appeals

m. name and address of each attorney who represented petitioner, identifying the stage at which the attorney represented the litigant

2. A petition for writ of habeas corpus under 28 U.S.C. § 2254 or motion to vacate sentence under 28 U.S.C. § 2255 in a death penalty case

a. must list every ground on which the petitioner claims to be entitled to relief under 28 U.S.C. § 2254 (or § 2255 for federal prisoners) followed by a concise statement of the material facts supporting the claims;

b. must identify at what stage of the proceedings each claim was exhausted in state court if the petition seeks relief from a state court judgment;

c. must contain a table of contents if the petition is more than 25 pages;

d. may contain citation to legal authority that form the basis of the claim.

3. Petitioner must file, not later than 60 days after the date of the filing of the petition under § 2254 or motion to vacate sentence under § 2255, a memorandum of law in support. The memorandum of law must

a. contain a statement of the case;

b. contain a table of contents if it is more than 25 pages;

4. The petition/motion and memorandum together must not exceed 150 pages

5. All documents filed must be succinct and must avoid repetition.

6. Respondent need not file a response until the memorandum of law is filed.

a. The response must not exceed 150 pages

b. The response must contain a table of contents if it is more than 25 pages.

c. The response must be filed within 60 days of the filing of the memorandum of law.

7. Any reply to the response must be filed within 21 days of the filing of the response and may not exceed 30 pages.

8. Upon motion and for good cause shown, the judge may extend the page limits for any document.

9. Upon motion and for good cause shown, the judge may extend the time for filing any document.

10. The petitioner must file with the Clerk of the District Court a copy of the "Certificate of Death Penalty Case" required by Third Circuit L.A.R. Misc. 111.2(a). Upon docketing, the clerk of the district court will transmit a copy of the certificate, together with a copy of the petition to the Clerk of the Court of Appeals as required by Third Circuit L.A.R. Misc. 111.2(a).

11. Upon the entry of a warrant or order setting an execution date in any case within the geographical boundaries of this district, and in aid of this court's potential jurisdiction, the clerk is directed to monitor the status of the execution and any pending litigation and to establish communications with all parties and relevant state and/or federal courts. Without further order of this court, the clerk may, prior to the filing of a petition, direct parties to lodge with this court (1) relevant portions of previous state and/or federal court records, or the entire record, and (2) pleadings, briefs, and transcripts of any ongoing proceedings. To prevent delay, the case may be assigned to a judge, by the same selection process as for other cases, up to 14 days prior to the execution date. The identity of the judge assigned shall not be disclosed until a petition is actually docketed.

12. In accordance with Third Circuit L.A.R. Misc. 111.3(b), at the time a final decision is entered, the court shall state whether a certificate of appealability is granted or denied. If a certificate of appealability is granted, the court must state the issues that merit the granting of a certificate and must also grant a stay pending disposition of the appeal, except as provided in 28 U.S.C. § 2262.

Comment:

The standard forms have proved inadequate for complex death penalty cases. The purpose of the rule is to supplement the Rules Governing § 2254 Cases and Rules Governing § 2255 cases so that the court and the parties can identify the issues at an early stage of the proceedings. The word petitioner refers to the party who files a petition under 28 U.S.C. § 2254 or a motion to vacate sentence under 28 U.S.C. § 2255. The Rule should be applied flexibly. The court should notify petitioners of deficiencies in filings and provide a reasonable opportunity to correct defects before issuing an order of dismissal for failure to comply with the Rule. The requirement that the petition and/or memorandum of law identify how a claim has been exhausted in state court should not be interpreted to preclude a petitioner from arguing in additional filings that the claim has been exhausted in a proceeding different from the one identified in the initial petition.

22.2 Statement of Reasons for Certificate of Appealability

At the time a final order denying a petition under 28 U.S.C. § 2254 or § 2255 is issued, the district judge shall make a determination as to whether a certificate of appealability should issue. If the district judge issues a certificate, the judge shall state the specific issue or issues that satisfy the criteria of 28 U.S.C. § 2253. If an order denying a petition under § 2254 or § 2255 is accompanied by an opinion or a magistrate judge's report, it is sufficient if the order denying the certificate references the opinion or report. If the district judge has not made a determination as to whether to issue a certificate of appealability by the time of the docketing of the appeal, the Clerk shall enter an order remanding the case to the District Court for a prompt determination as to whether a certificate should issue.

Source:	**F.R.A.P. 22**
Cross-references:	**28 U.S.C. §§ 2253, 2254, 2255; F.R.A.P. 22**
Committee Comments:	**Technical changes were made to conform to the Antiterrorism and Effective Death Penalty Act. This rule takes no position on the question of whether a district court can grant or deny a certificate of appealability.**

22.5 Application for Authorization to File a Second or Successive Petition Under 28 U.S.C. § 2254 or § 2255

(a) Forms for filing an application to file a second or successive petition under 28 U.S.C. § 2254 or § 2255 are available from the Clerk. If the form application is not used, the application must contain the information requested in the form. ~~A motion for authorization to file a second or successive petition under 28 U.S.C. § 2254 or § 2255~~ The application must be accompanied by:

~~(1) a memorandum, not exceeding 15 pages, clearly stating how the standards of § 2244(b) and/or § 2255 are satisfied;~~

(21) the proposed new § 2254 or § 2255 petition;

(32) copies of all prior § 2254 or § 2255 petitions;

(43) copies of the docket entries in all prior § 2254 or § 2255 proceedings;

(54) copies of all magistrate judge's reports, district court opinions and orders disposing of the prior petitions; and

(65) any other relevant documents.

(b) The application may be accompanied by a memorandum, not exceeding ~~15~~ 20 pages, clearly stating how the standards of § 2244(b) and/or § 2255 are satisfied

(~~b~~c) The movant shall serve a copy of the application for authorization to file a second or successive petition and all accompanying attachments on the appropriate respondent.

(~~c~~d) Any response to the application must be filed within 7 days of the filing of the application with the Clerk.

(~~d~~e) If the court determines that the motion and accompanying materials are not sufficiently complete to assess the motion, the court may deny the motion with or without prejudice to refiling or may in its discretion treat the motion as lodged, the filing being deemed complete when the deficiency is remedied.

(~~e~~f) The Clerk shall transmit a copy of any order granting authorization to file a second or successive petition to the appropriate district court together with a copy of the petition.

(~~f~~g) No filing fee is required for an application to file a second or successive petition.

If the application is granted, the filing of the petition in the district court will be subject to the requirements of 28 U.S.C. § 1915(a).

(~~g~~h) If the district court issues an order transferring to the court of appeals an application to file a second or successive petition or a § 2254 or § 2255 petition that the district court deems to be a second or successive petition requiring authorization, the Clerk of the district court shall promptly transmit the record to the court of appeals. The record shall include the documents listed in part (a)(2) through (5) of this rule. The Clerk of the district court shall transmit copies of its order of transfer and any necessary documents to the appropriate respondent.

(~~h~~i) If a case transferred by the district court does not contain a statement by the applicant as to how the standards of § 2244(b) and/or § 2255 are satisfied, the Senior Staff Attorney may direct the applicant to file a memorandum clearly stating how the statutory standards are met. Failure to file a memorandum as directed will result in the dismissal of the case by the Clerk without further notice. If the applicant files a memorandum as directed, the time prescribed in § 2244(b)(3)(D) for deciding the application will run from the date the memorandum is filed.

(~~i~~j) If an appeal is taken in a case in which the district court issued an order denying a petition under § 2254 or § 2255 on the grounds that it is a second or successive petition that requires authorization under § 2244, the record on appeal transmitted to this court shall include the documents listed in part (a)(2) through (5) of this rule.

Source: F.R.A.P. 22

Cross-references: 28 U.S.C. §§ 2244, 2253, 2254, 2255; F.R.A.P. 22

Committee Comments: Technical changes were made to conform to the Antiterrorism and Effective Death Penalty Act.

V-C

REED SMITH SHAW & MCCLAY LLP

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August 14, 2000

Honorable Will L. Garwood
United States Circuit Judge
903 San Jacinto Boulevard
Suite 300
Austin, TX 78701

RE: ADVISORY COMMITTEE ON APPELLATE RULES

Dear Judge Garwood:

At the last meeting of our committee, I volunteered to look into the allegation that the term "President's Day" in FRAP 26 and FRAP 45 should more properly be "Washington's Birthday." Toward that end, I enclose a memorandum prepared by Aaron Potter, now a third year law student at Notre Dame and, until recently, a summer associate at Reed Smith.

I encouraged Aaron to have some fun with the assignment and, as I think you will see, he did. Perhaps most interesting, at least to me, was the intensity of some people's feelings about this issue as reflected in some of the additional material Aaron retrieved from the internet -- and which I could supply to committee upon request.

In any event, I would appreciate the inclusion of this memorandum in the next batch of materials distributed to the committee as well as its listing on our next agenda. We can decide at that time whether further action by the committee is in order.

Best Regards,

W. Thomas McGough, Jr.

WTMcG,Jr.:mal
cc: John K. Rabiej, Chief (w/encl.)
Aaron Potter (w/encl.)
Carol Ann Mooney (w/encl.)
Patrick J. Schiltz (w/encl.)

REED SMITH SHAW & MCCLAY LLP
MEMORANDUM

TO: W. Thomas McGough, Jr., Esquire DATE: 8/11//2000

FROM: Aaron Potter

RE: Washington's Birthday vs. Presidents' Day in the Federal Rules of Appellate Procedure

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First in war, first in peace, and first in the hearts of his countrymen.

—Congressman Richard Henry Lee,
shortly after the death of George Washington

There's hope a great man's memory
may outlive his life half a year.

—Shakespeare, *Hamlet*

When the birthday of Washington shall be forgotten,
liberty will have perished from the earth.

— President James Buchanan

December of 1999 marked the 200th year since the death of George Washington. The memory of this great man has survived the second millennium, but we may wonder whether it will endure the third. Though our country has observed Washington's Birthday as a national holiday for well over a century, subtle forces are now undermining this memorial to our Founding Father. Formerly inchoate, these forces have now established a beachhead in the Federal Rules of Appellate Procedure, which — since 1995 — have referred in Rules 26 and 45 to "Presidents' Day."

Recently, the Advisory Committee on the Federal Rules of Appellate Procedure received a letter from Jason Bezis, a law student at Boalt Hall School of Law, who pointed out

that the federal holidays statute[1] still identifies the third Monday in February as Washington's Birthday.[2] In his letter Mr. Bezis alleged that Appellate Rules 26 and 45 incorrectly designate Washington's Birthday as Presidents' Day. While recognizing that Mr. Bezis must have too much leisure time on his hands, the Advisory Committee decided this discrepancy merited further investigation. Why had it decided in 1995 to change the designation of Washington's Birthday to Presidents' Day? Whatever the reason for the change, which designation would be correct?

The answers to these questions require some historical background. President Chester Arthur made Washington's Birthday a national holiday in 1885. It was to be celebrated on February 22, which was probably the day Washington was born.[3] The United States observed Washington's birthday on February 22 until 1968, when Congress passed the Monday Holiday Law.[4] This enactment retained the title Washington's Birthday but moved its observance to the third Monday in February. And so it has remained since.

But popular culture, not content to detach President Washington's special day from February 22 to create a three-day weekend, has further demoted the Founder of Our Country. Since 1968, common usage has referred to the holiday as Presidents' Day —

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[1] *See id.* § 6103(a) ("The following are legal public holidays: . . . Washington's Birthday, the third Monday in February.").

[2] In this letter Mr. Bezis also complained that the same Appellate Rules (26 and 45) mistakenly name the holiday "Birthday of Martin Luther King, Jr." as "Martin Luther King, Jr.'s Birthday" and place an inappropriate apostrophe in "Veterans Day." He was correct (*compare* 5 U.S.C. § 6103(a) (1994) *with* FED. R. APP. P. 26 & 45), but the Appellate Committee deemed these peccadilloes negligible.

[3] Regarding uncertainty surrounding the actual date of Washington's birthday, the legislative history of the 1968 Monday Holiday Law notes the following:

> In recommending that Washington's birthday be observed on the third Monday in February, the committee took note of the fact that the exact date of Washington's birth is subject to conjecture. He was reported to have been born on February 11 according to the calendar in effect at the time of his birth. However, when the United States adopted the Gregorian Calender in 1752 all dates were advanced 11 days. Yet, according to Douglas' "American Book of Days," Washington's birthday was first celebrated on February 12 at the direction of Compte de Rochambeau, commander of the French forces during the American Revolution.

S. REP. NO. 1293 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2335, 2337.

[4] This law is codified at 5 U.S.C. § 6103 (1994).

commemorating Washington's birthday, Lincoln's February 12th birthday, and, in some accounts, Franklin Roosevelt's January 30th birthday. Some states, too, have legally designated the holiday as Presidents' Day.[5]

Congress has been aware of the shift in usage, and has even (accidentally) written Presidents' Day into at least one statute. As originally written this statute — designated the 1999 Nation's Capital Bicentennial Designation Act[6] — "establish[ed] the *Presidents' Day* holiday in the year 2000 as a day of national celebration for the 200th anniversary of Washington, D.C."[7] Congress later realized and corrected its error by striking out the incorrect title and inserting the correct: "the *Washington's Birthday* holiday."[8] Still, not all members of Congress are so friendly to the holiday's age-honored title. Bills have recently been introduced that would change it to Presidents' Day.[9] Congress, however, has stood firm: The name of the holiday is Washington's Birthday.

Some members of Congress are trying to reverse the drift toward Presidents' Day. A bill recently introduced to the Senate deplores "efforts to degrade George Washington's Birthday into an amorphous and ultimately meaningless 'Presidents Day' holiday"[10] and proposes that Congress reaffirm the holiday as Washington's Birthday. Another bill would honor our First President by "requiring all entities and officials of the United States Government, as well as federally funded publications, to refer to [the] day as 'Washington's Birthday.'"[11] Though

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[5] *See* ALASKA STAT. § 44.12.010 (Mitchie 2000); ARIZ. REV. STAT. § 1-301 (2000) ("Lincoln/Washington Presidents' Day"); DEL. CODE ANN. tit. 1, § 501 (2000); HAW. REV. STAT. § 8-1 (2000); 205 ILL. COMP. STAT. 630/17 (West 2000); NEB. REV. STAT. ANN. § 25-2221 (Mitchie 2000); N.M. STAT. ANN. § 12-5-2 (Mitchie 2000); N.D. CENT. CODE § 49-23-01 (2000); OKLA. STAT. tit. 25, § 82.1 (2000); OR. REV. STAT. § 187.010 (1997); 44 PA. CONS. STAT. § 11 (1999); TEX. GOV'T CODE ANN. § 662.003 (2000); UTAH CODE ANN. § 63-13-2 (2000) ("Washington and Lincoln Day"); WASH. REV. CODE ANN. § 1.16.050 (2000). *But see* MASS. ANN. LAWS ch. 6, § 15VV (2000) (establishing May 29 as Presidents' Day, in honor of the four United States presidents who were from Massachusetts).

[6] Pub. L. No. 105-100 § 147, 111 Stat. 2180 (1997).

[7] *Id.* (emphasis added).

[8] Pub. L. No. 105-277 § 163, 112 Stat. 2681-149 (1998).

[9] *See, e.g.*, S. 429, 106th Cong. (1999) (proposing that the holiday be designated Presidents' Day in honor of Washington, Lincoln, and Roosevelt).

[10] S.J. Res. 543, 106th Cong. (1999).

[11] 145 CONG. REC. S4897 (daily ed. May 6, 1999) (statement of Senator Warner, introducing the George Washington Bicentennial Act of 1999, S. 978, 106th Cong. (1999)).

Congress has not adopted these proposals, it has nevertheless chosen to maintain the name, and the meaning, that President Arthur gave the holiday long ago.

One-hundred and ten years after the inception of the holiday, the Advisory Committee (in an October 20, 1995 meeting[12]) considered whether it should follow the drift of public usage and remove Washington's Birthday from the Appellate Rules. At that meeting Mr. Bryan Garner, a consultant to the Standing Committee, proposed changing the holiday's title as part of the original comprehensive stylistic revision of the Appellate Rules. A footnote in Mr. Garner's report said the change was a "necessary update." Judge Easterbrook, the liaison from the Standing Committee, asked where the apostrophe should appear in the holiday's title — whether it should be "President's" or "Presidents'." The Advisory Committee chose the latter, since more than one president was implicated. Someone asked Mr. Garner from what authority the change had come. He explained that he had followed the *Random House Dictionary*'s designation of Washington's Birthday as Presidents' Day.[13] Professor Carol Mooney, the Advisory Committee's reporter, commented that the statute[14] actually said Washington's Birthday; this produced a laugh, but nothing more. The Advisory Committee then approved the change, accepting Mr. Garner's implicit explanation that Presidents' Day was more current and reflected existing practices.

The *Random House Dictionary*, Mr. Garner's authority for the revision, assumes that the text of the Monday Holiday Law changed Washington's Birthday to Presidents' Day. The dictionary defines Washington's Birthday as follows: "(1) February 22, *formerly observed as a legal holiday* in most states of the United States in honor of the birth of George Washington. (2) See Presidents' Day."[15] It defines Presidents' Day as "the third Monday in February, *a legal holiday* in the United States, commemorating the birthdays of George Washington and Abraham

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[12] The written minutes of this meeting only summarize the proceedings. The account presented here is derived from the audio recording of the meeting, as related by John K. Rabiej, Chief of the Rules Committee Support Office of the Administrative Office of the United States Courts.

[13] *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2145 (2d ed. 1987) (hereinafter DICTIONARY) (defining "Washington's Birthday"); *id.* at 1530 (defining "Presidents' Day").

[14] Professor Mooney was apparently referring to 5 U.S.C. § 6103 (1994).

[15] DICTIONARY, *supra* note 13, at 2145 (emphasis added).

Lincoln."[16] But the dictionary is wrong. Presidents' Day is not a federal holiday, and only a handful of states have legally adopted it.[17]

At present, the Federal Rules of Appellate Procedure are the only federal procedural rules to use the term Presidents' Day. Washington's Birthday is used by the Federal Rules of Civil Procedure (Rules 6 and 77), the Federal Rules of Criminal Procedure (Rules 45 and 56), the Federal Rules of Bankruptcy Procedure (Rule 9006), the Rules of the United States Court of Appeals for Veterans Claims (Rule 26), the Rules of Practice and Procedure of the United States Tax Court (Rule 25), the Rules of the United States Court of International Trade (Rules 6 and 82), and the Rules of the United States Court of Federal Claims (Rules 6 and 77).

Thus, to the extent the Advisory Committee aspired in 1995 to initiate a trend, its leadership has apparently gone without federal followers. The 1995 change remains a novelty, a widowed precedent that conflicts with the federal statute. Absent an unlikely change of heart by Congress, the Advisory Committee should consider amending Rules 26 and 45 to restore the designation of the holiday as Washington's Birthday.

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[16] *Id.* at 1530 (emphasis added).
[17] *See supra* footnote 5 (listing states that have formally adopted the title Presidents' Day).

00-03

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(510) 664-0786

RECEIVED 1/28/2000

00-AP-A

January 23, 2000

Mr. Peter G. McCabe
Secretary, Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. McCabe:

I have written to call to your attention three technical errors which appear in the Federal Rules of Appellate Procedure at Rule 26 (Computing and Extending Time) and at Rule 45 (Clerk's Duties), as amended by the Supreme Court Order of April 24, 1998, which took effect on December 1, 1998.

First, the lists of legal holidays in Rule 26(a)(4) and in Rule 45(a)(2) erroneously substitute "Presidents' Day" for "Washington's Birthday". According to Title 5, U.S.C. § 6103(a), "Washington's Birthday" is the official designation for the legal public holiday commemorated on "the third Monday in February".

Second, Rule 26(a)(4) and Rule 45(a)(2) misname the legal holiday commemorated on the third Monday in January as "Martin Luther King, Jr.'s Birthday". Title 5, U.S.C. § 6103(a) designates that holiday as "Birthday of Martin Luther King, Jr." Finally, Rules 26 and 45 erroneously include an apostrophe in "Veterans Day"; the official designation does not have one.

I request that the appropriate entity within the Judicial Conference (possibly the Advisory Committee on Appellate Rules) please investigate my claim and order the necessary technical corrections to Rules 26 and 45 at the next revision.

Please feel free to contact me at (510) 664-0786 or at the above e-mail address for more information.

Sincerely yours,

Jason A. Bezis

Jason A. Bezis
Student, Boalt Hall School of Law,
University of California at Berkeley

Enclosures

vide faster delivery than First-Class Mail; therefore, there should be no objection to the use of commercial carriers as long as they are reliable. In order to make use of the mailbox rule when using a commercial carrier, the amendment requires that the filer employ a carrier who undertakes to deliver the document in no more than three calendar days. The three-calendar-day period coordinates with the three-day extension provided by Rule 26(c).

Subdivision (c). The amendment permits service by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. The amendment also expresses a desire that when reasonable, service on a party be accomplished by a manner as expeditious as the manner used to file the paper with the court. When a brief or motion is filed with the court by hand delivering the paper to the clerk's office, or by overnight courier, the copies should be served on the other parties by an equally expeditious manner—meaning either by personal service, if distance permits, or by overnight courier, if mail delivery to the party is not ordinarily accomplished overnight. The reasonableness standard is included so that if a paper is hand delivered to the clerk's office for filing but the other parties must be served in a different city, state, or region, personal service on them ordinarily will not be expected. If use of an equally expeditious manner of service is not reasonable, use of the next most expeditious manner may be. For example, if the paper is filed by hand delivery to the clerk's office but the other parties reside in distant cities, service on them need not be personal but in most instances should be by overnight courier. Even that may not be required, however, if the number of parties that must be served would make the use of overnight service too costly. A factor that bears upon the reasonableness of serving parties expeditiously is the immediacy of the relief requested.

Subdivision (d). The amendment adds a requirement that when a brief or appendix is filed by mail or commercial carrier, the certificate of service state the date and manner by which the document was mailed or dispatched to the clerk. Including that information in the certificate of service avoids the necessity for a separate certificate concerning the date and manner of filing.

Rule 26. Computing and Extending Time

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

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

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

(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or—if the act to be done is filing a paper in court—a day on which the weather or other conditions make the clerk's office inaccessible.

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

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

The provisions of this rule are based upon FRCP 6(a), (b) and (e) [rule 6(a), (b) and (e), Federal Rules of Civil Procedure]. See also Supreme Court Rule 34 and FRCrP 45 [rule 45, Federal Rules of Criminal Procedure]. Unlike FRCP 6(b), this rule, read with Rule 27, requires that every request for enlargement of time be made by motion, with proof of service on all parties. This is the simplest, most convenient way of keeping all parties advised of developments. By the terms of Rule 27(b) a motion for enlargement of time under Rule 26(b) may be entertained and acted upon immediately, subject to the right of any party to seek reconsideration. Thus the requirement of motion and notice will not delay the granting of relief of a kind which a court is inclined to grant as of course. Specifically, if a court is of the view that an extension of time sought before expiration of the period originally prescribed or as extended by a previous order ought to be granted in effect ex parte, as FRCP 6(b) permits, it may grant motions seeking such relief without delay.

1971 Amendments

The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended Title 5, U.S.C. § 6103(a), changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a). The first three sentences describe a procedure similar to the rule on substitution in civil actions in the district court. See FRCP 25(a) [rule 25(a), Federal Rules of Civil Procedure]. The fourth sentence expressly authorizes an appeal to be taken against one who has died after the entry of judgment. Compare FRCP 73(b) [rule 73(b), Federal Rules of Civil Procedure], which impliedly authorizes such an appeal.

The sixth sentence authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no representative. At present, if a party entitled to appeal dies before the notice of appeal is filed, the appeal can presumably be taken only by his legal representative and must be taken within the time ordinarily prescribed. 13 Cyclopedia of Federal Procedure (3d Ed.) § 63.21. The states commonly make special provision for the even of the death of a party entitled to appeal, usually by extending the time otherwise prescribed. Rules of Civil Procedure for Superior Courts of Arizona, Rule 73(t), 16 A.R.S.; New Jersey Rev.Rules 1:3–3; New York Civil Practice Law and Rules, § 1022; Wisconsin Statutes Ann. 274.01(2). The Provision in the proposed rule is derived from California Code of Civil Procedure, § 941.

Subdivision (c). This subdivision is derived from FRCP 25(d) [rule 25(d), Federal Rules of Civil Procedure] and Supreme Court Rule 48, with appropriate changes.

1986 Amendment

The amendments to Rules 43(a) and (c) are technical. No substantive change is intended.

Rule 44. Case Involving a Constitutional Question When the United States Is Not a Party

If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General. (As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

This rule is now found in the rules of a majority of the circuits. It is in response to the Act of August 24, 1937 (28 U.S.C. § 2403), which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule.

Rule 45. Clerk's Duties

(a) General Provisions.

(1) Qualifications. The circuit clerk must take the oath and post any bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

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

(b) Records.

(1) The Docket. The circuit clerk must maintain a docket and an index of all docketed cases in the manner prescribed by the Director of the Administrative Office of the United States Courts. The clerk must record all papers filed with the clerk and all process, orders, and judgments.

(2) Calendar. Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to appeals in criminal cases and to other proceedings and appeals entitled to preference by law.

(3) Other Records. The clerk must keep other books and records required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, or by the court.

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

(d) Custody of Records and Papers. The circuit clerk has custody of the court's records and papers. Unless the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office. Upon disposition of the case, original papers constituting the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve a copy of any brief, appendix, or other paper that has been filed.

(As amended Mar. 1, 1971, eff. July 1, 1971; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

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WESTLAW ELECTRONIC RESEARCH

See WESTLAW guide following the Explanation pages of this volume.

§ 6103. Holidays

(a) The following are legal public holidays:

New Year's Day, January 1.

Birthday of Martin Luther King, Jr., the third Monday in January.

Washington's Birthday, the third Monday in February.

Memorial Day, the last Monday in May.

Independence Day, July 4.

Labor Day, the first Monday in September.

Columbus Day, the second Monday in October.

Veterans Day, November 11.

Thanksgiving Day, the fourth Thursday in November.

Christmas Day, December 25.

(b) For the purpose of statutes relating to pay and leave of employees, with respect to a legal public holiday and any other day declared to be a holiday by Federal statute or Executive order, the following rules apply:

(1) Instead of a holiday that occurs on a Saturday, the Friday immediately before is a legal public holiday for—

(A) employees whose basic workweek is Monday through Friday; and

(B) the purpose of section 6309 of this title.

(2) Instead of a holiday that occurs on a regular weekly nonworkday of an employee whose basic workweek is other than Monday through Friday, except the regular weekly nonworkday administratively scheduled for the employee instead of Sunday, the workday immediately before that regular weekly nonworkday is a legal public holiday for the employee.

This subsection, except subparagraph (B) of paragraph (1), does not apply to an employee whose basic workweek is Monday through Saturday.

(c) January 20 of each fourth year after 1965, Inauguration Day, is a legal public holiday for the purpose of statutes relating to pay and leave of employees as defined by section 2105 of this title and individuals employed by the government of the District of Columbia employed in the District of Columbia, Montgomery and Prince Georges Counties in Maryland, Arlington and Fairfax Counties in Virginia, and the cities of Alexandria and Falls Church in Virginia. When

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00-04

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

March 14, 2000

The Honorable William L. Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendment to FRAP to Establish a New Rule Governing "Indicative Rulings" by District Courts

Dear Judge Garwood:

The Department of Justice proposes creation of a new provision in the Federal Rules of Appellate Procedure (FRAP) to cover the use of a procedure commonly referred to in civil cases by the courts of appeals as seeking an "indicative ruling." An indicative ruling procedure allows a district court that has lost jurisdiction over a matter due to the filing of a notice of appeal to notify the court of appeals how it would rule on a motion if it still had jurisdiction. If the district court would grant the motion, the court of appeals can then remand the matter for entry of a new order. The indicative ruling is commonly used in the context of a motion that would be filed under Federal Rule of Civil Procedure 60(b), but it can also be used in an interlocutory appeal when the district court's ruling is needed on the specific issue appealed.

We are suggesting a new provision in the FRAP to cover this indicative ruling procedure for civil cases because it is widely employed by the Circuits on the basis of case law, but is nowhere mentioned in the federal civil or appellate rules. There is no relevant rule in the FRAP. FRCP 60(a) provides that a district court may grant relief from a "clerical mistake" while an appeal is pending "with leave of the appellate court." But the civil rules mention no other situations and do not explain the procedure to be used.

A federal rule is warranted because our experience in dealing with many counsel in appellate civil cases over the years has revealed that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals. In addition, the Circuits use somewhat differing procedures, although there appears to be no good reason for local variation.

The indicative ruling procedure is discussed in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), and is currently used by nearly every Circuit.[1] Under this procedure, "when an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial." The Circuits that follow this procedure appear to accept that a district court has some form of jurisdiction to allow it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. The Ninth Circuit, however, maintains that the district court has no jurisdiction to entertain a Rule 60(b) motion, and therefore requires a remand from the court of appeals before a district court can even deny such a motion.

By contrast, the Second Circuit has on some occasions used a different procedure. For example, in Haitian Centers Council, Inc. v. Sale, Acting Commissioner, INS, No. 93-6216 (Oct. 26, 1993), the court declined to use the indicative ruling procedure and instead dismissed the appeal without prejudice for 60 days. The Second Circuit then reinstated the case in the court of appeals after the district court had ruled on the relevant motion. We have found this procedure to be commonly used in the Second Circuit.

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[1] See Commonwealth of Puerto Rico v. SS Zoe Colocotroni, 601 F. 2d 39 (1st Cir. 1979); Toliver v. Sullivan, 957 F. 2d 47 (2nd Cir. 1992); United States v. Accounts Nos. 3034504504 & 144-07143, 971 F.2d 974 (3d Cir. 1992); Fobian v. Storage Tech. Corp., 164 F.3d 887 (4th Cir. 1999); Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, (5th Cir. 1994); Detson v. Schweiker, 788 F. 2d 372 (6th Cir. 1986); Brown v. United States, 976 F. 2d 1104 (7th Cir. 1992); Pioneer Insurance v. Gelt, 558 F.2d 1303 (8th Cir. 1977); Aldrich Enterprises, Inc. v. United States, 938 F. 2d 1134 (10th Cir. 1991).

Originally, the Circuits used the indicative ruling procedure solely or principally for parties who wished to move for a new trial based on newly-discovered evidence. In other circumstances, however, this procedure has been deemed applicable -- for example, when new methodologies or procedures change the impact of evidence used below; when the law has changed subsequent to judgment; when settlement negotiations are contingent on the district court's judgment being vacated; or when there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issues on appeal.

Indicative rulings are procedurally superior to other possible methods of handling these situations. The district court, being familiar with the case, is often in the best position to evaluate a motion's merits quickly. If a motion should clearly not be granted, the district court will usually recognize that fact faster than the appellate court. If the motion has possible merit, there is no need for the appellate court to have discovered that first. Most importantly, an early indication of the district court's view can avoid a pointless remand in those cases where the trial court would deny the motion.

In addition, indicative rulings have become critical in modern settlement negotiations, following the Supreme Court's ruling in U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), for cases that are on appeal. In that opinion, the Supreme Court ruled that, in most circumstances, a court of appeals need not vacate the decision of a district court if an appeal becomes moot through a settlement. The Court made clear, however, that the district court remains free to vacate its own judgment pursuant to Fed. R. Civ. P. 60(b). See 513 U.S. at 29. Vacatur of a district court ruling is often a key element in a negotiated settlement. The indicative ruling procedure can be used effectively to determine if a district court would be willing to vacate its judgment as part of an overall settlement of a case. If the district court indicates a willingness to issue such an order, more cases on the docket of the appellate courts can be settled and dismissed without taking up scarce appellate judicial resources.

A formal amendment to the FRAP is warranted for several reasons. While the indicative ruling procedure is commonly used, its inclusion in the federal rules would ensure that all practitioners are aware of it. In addition, while nearly every Circuit currently employs this procedure, courts have used other mechanisms to achieve the same end. By making our recommended change to the FRAP, the courts would have

one standardized procedure to rely on under these circumstances, which would promote efficiency, consistency, and predictability in judicial proceedings.

Therefore, we propose a new rule, and suggest that it be located after current FRAP 4. At this point, it appears appropriate to provide for this procedure only in civil cases; our understanding is that post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters. In addition, Federal Rule of Criminal Procedure 33 already states that, if an appeal is pending, a district court may grant a new trial in a criminal case "based on the ground of newly discovered evidence," "only on remand of the case." Because our proposal does not apply to criminal cases, we also make clear that it does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, FRAP 4 does not apply to appeals from the Tax Court (see FRAP 14), but we make clear in the explanatory note that the courts of appeals are free to use this same procedure in Tax Court cases.

We suggest a new FRAP 4.1, to read as follows:

"**Rule 4.1. Indicative Rulings**. When a party to an appeal in a civil case seeks post-judgment relief in district court that is precluded by the pendency of an appeal, the party may seek an indicative ruling from the district court that heard the case. A party may seek an indicative ruling by filing a motion in district court setting forth the basis for the relief requested, and stating that an indicative ruling appears to be necessary because an appeal is pending and the district court lacks jurisdiction to grant the relief absent a remand. The movant must notify the clerk of the court of appeals that a motion requesting an indicative ruling has been filed in the district court, and must notify the clerk of any disposition of that motion. If the district court indicates in an order that it would grant the relief requested in the event of a remand, the movant may seek a remand to the district court for that purpose. Nothing in this rule governs relief sought under FRAP 8, and it does not apply to matters under 28 U.S.C. §§ 2241, 2254, and 2255."

We also propose the following as an Advisory Committee Note:

"This rule is designed to make known, and to make uniform, a procedure commonly used by the courts of appeals in civil cases for obtaining 'indicative

rulings' by the district courts when an appeal is pending. (The problem arises because a district court loses jurisdiction over a judgment when an appeal is filed.) The D.C. Circuit described this procedure in Smith v. Pollin, 194 F.2d 349 (D.C. Cir. 1952), as follows:

> When an appellant in a civil case wishes to make a motion for a new trial on the ground of newly discovered evidence while his appeal is still pending, the proper procedure is for him to file his motion in the District Court. If that court indicates that it will grant the motion, the appellant should then make a motion in [the proper court of appeals] for a remand of the case in order that the District Court may grant the motion for new trial."

Nearly all of the Circuits have adopted this procedure in their case law; they appear to accept that a district court has some form of jurisdiction that allows it to deny a post-judgment motion, even though an appeal is pending, but not to grant such a motion. Accordingly, a uniform procedure is needed so that a district court may notify the parties and the court of appeals that it would grant or seriously entertain a post-judgment motion, and that a remand from the appellate court is thus warranted for that purpose. This procedure is currently used by the courts of appeals in a variety of situations other than simply seeking a new trial based on recently discovered evidence: new methodologies or other procedures change the impact of evidence used below; there has been a post-judgment change in the law; settlement negotiations are contingent on a decision that the district court's judgment be vacated, see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994); or there is an interlocutory appeal and the district court's ruling is needed on a matter relating to the issue on appeal. Thus, the indicative ruling procedure should be used in appropriate circumstances for filing post-judgment motions in civil cases, such as under FRCP 60(b), and may also be used when an interlocutory appeal is pending. The procedure provided by this Rule 4.1 will not be necessary or appropriate, of course, where the movant seeks relief pending appeal under Rule 8 FRAP (i.e., a stay or injunction pending appeal) or seeks other relief in aid of the appeal, since such relief is available in the district court without a remand even after the notice of appeal is filed. Moreover, nothing in this rule would foreclose a district court from exercising any authority it retains during the pendency of an interlocutory appeal. There does not appear to be a need for this procedure in

criminal cases, and FRCrP 33 already provides that a district court may grant a new trial in a criminal case 'based on the ground of newly discovered evidence,' 'only on remand of the case.' Because this new rule does not apply to criminal cases, it also does not apply to cases under 28 U.S.C. §§ 2241, 2254, and 2255, which are technically civil in nature but are linked to criminal matters. In addition, although Rule 4 does not apply to appeals from the Tax Court, the courts of appeals are free to use this same procedure in Tax Court cases."

Thus, I am submitting this matter to you for consideration by the full FRAP Advisory Committee.

Sincerely,

Seth P. Waxman

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

V-E

00-05

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Telephone (410) 962-3606
Fax (410) 962-2855

DIANA GRIBBON MOTZ
United States Circuit Judge

April 10, 2000

Advisory Committee on Appellate Rules

Dear Colleagues:

Our court has recently been confronted with a question which I have been asked to raise with you. The question is: can a non-lawyer sign a notice of appeal for a corporation.

In Smith v. Barry, 502 U.S. 244, 248-49 (1992), the Supreme Court concluded that, "[i]f a document filed within the time specified by [FRAP] 4 gives the notice required by [FRAP] 3, it is effective as a notice of appeal." The Ninth Circuit recently held that the failure of a corporation to file a notice of appeal signed by licensed counsel was not a nullity "so long as a lawyer promptly thereafter enters a formal appearance on behalf of the corporation and undertakes the representation." Bigelow v. Brady (In re Bigelow), 179 F.3d 1164, 1165 (9th Cir. 1999); see also Lewis v. Lenc-Smith Mfg. Co., 784 F.2d 829, 831 (7th Cir. 1986) (per curiam) (stating, where a nonlawyer signed the appellant's brief, that "[w]hile under similar circumstances other courts have dismissed the appeals of pro se appellants who failed to sign the notice of appeal, we believe that the better procedure is to allow Lewis an

opportunity to remedy the omission and to file a brief in her own right" (internal citations omitted)); K.M.A., Inc. v. General Motors Acceptance Corp. (In re K.M.A., Inc.), 652 F.2d 398, 399 (5th Cir. 1981) (per curiam) (recognizing that it is unclear whether the failure of licensed counsel to sign a corporation's notice of appeal deprives the court of appeals of jurisdiction to hear the corporation's appeal and allowing the petitioner thirty days to retain counsel before dismissal of the appeal).

On the other hand, it is, of course, well established that a corporation may not appear pro se in federal court. See e.g. Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 201-02 (1993). A pro se litigant's signature on a notice of appeal is apparently jurisdictional. See FRAP 3(c)(2). Accordingly, the Fourth Circuit has previously held that "a notice of appeal signed by [a pro se party] alone cannot act to bring other unsuccessful litigants within the jurisdiction of an appellate court even though he may have captioned his case 'Covington, et al' and attempted to note an appeal on behalf of his fellow plaintiffs." Covington v. Allsbrook, 636 F.2d 63, 64 (4th Cir. 1980) (emphasis added); see also Gonzales v. Wyatt, 157 F.3d 1016, 1021-22 & n.2 (5th Cir. 1998) (describing Rule 3(c)(2) as a "narrow exception" to the general rule that "a notice of appeal signed by a nonlawyer on his own behalf and on behalf of another effects an appeal only as to the signer.").

FRAP 3 was amended in 1993 to expressly permit an attorney to designate multiple parties through use of the phrase "et al." See Fed. R. App. P. 3(c) advisory committee notes. The 1993 amendments

do not seem to undermine the analysis in Covington, however, because Covington involved a pro se individual, rather than an attorney, who sought to file a notice of appeal on behalf of himself and others with the "et al" designation. See Covington, 636 F.2d at 63-64. Although the analysis in Covington was based partially upon the lack of specificity in the "et al" designation, see id. at 64, the court also relied in large part upon the conclusion that "a non-lawyer is not qualified to represent his fellow inmates," id..

If the rationale of Covington is applied to a notice of appeal filed by a nonlawyer for a corporation, it would seem to require dismissal of the appeal. Yet such a result appears in tension with the purpose of a notice of appeal, i.e. to provide notice.

Are the rules unclear here or has our court missed something? I hope to receive some advice from you at our Thursday meeting. I look forward to seeing you then.

Sincerely,

Diana Gribbon Motz

DGM\mk

V-F-1

defendant of his right to appeal and must offer an opportunity to have the clerk of court file a notice of appeal on defendant's behalf. Fed. R. Crim. P. 32(c)(5). Hirsch's lawyer has stated that, when asked whether the clerk should file an appeal on his behalf, Hirsch answered yes. But the clerk did nothing, and by the time counsel realized this it was too late.

This is shocking for at least two reasons. One is the clerk's failure to perform a ministerial act whose omission could have serious adverse consequences for a criminal defendant. The other is counsel's failure to ensure that a notice of appeal was filed. Defendants have 10 days to appeal, with an extension to 40 days available for "excusable neglect or good cause". Fed. R. App. P. 4(b)(4). The clerk's failure would have been "good cause" for counsel to file a belated appeal, so all counsel had to do was check the docket any time within 40 days—but Hirsch's lawyer did not take that simple precaution. The absence of a docketing notice from this court would have put a prudent lawyer on guard. Both the Rules of Appellate Procedure and the Circuit Rules impose duties on counsel that begin with the notice of appeal. For example, the appellant's lawyer must file a docketing statement within seven days after the notice of appeal. Circuit Rule 3(c)(1). An appellant must order any relevant transcript within 10 days of the notice of appeal. Fed. R. App. P. 10(b)(1). In this circuit, the appellant's brief is due 40 days after the appeal is docketed, Circuit Rule 31(a), so counsel must ascertain the docketing date. Had Hirsch's lawyer taken any steps to comply with these rules, he would have learned that no notice of appeal had been filed. But for approximately 100 days after Hirsch's sentencing, his lawyer did nothing.

Not until May 20, 1999, did Hirsch's lawyer (Douglas A. Forsyth, of St. Louis, Missouri) bestir himself on behalf of his client. On May 20 he filed in the district court a motion for permission to take an untimely appeal; the next day Forsyth filed a notice of appeal. On June 11 the district

judge entered an order granting Forsyth's motion and stating that "the May 21, 1999, Notice of Appeal is deemed timely." That decision is ineffectual. Appellate Rule 4(b)(4) provides that a district court may "extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Rule 26(b)(1) adds that a district court lacks power to extend the time for a notice of appeal, except to the extent provided in Rule 4. Thus the maximum lawful extension would have been to March 15, 1999, a date long gone when Forsyth asked for extra time. (The outer limit is March 15, rather than March 18, because the extra days added to an original period that ends on a weekend or holiday are not tacked onto the extension period.)

When purporting to grant Forsyth additional time to file a notice of appeal, the district court did not make findings of fact concerning Forsyth's assertion that Hirsch asked the clerk to file a notice of appeal on his behalf. If such a request was made, then the district court needs to change its procedures to ensure compliance with Rule 32(c)(5). Failure to file a notice of appeal, after the defendant so requests in open court, is rare and may be unique; we have been unable to find any other case in which judges have had to ponder how to proceed when the clerk does not carry out that mechanical step. One possibility would be to declare that what *should* have been done will be treated *as* done; then we would proceed as if a notice of appeal had been filed on January 29, 1999. That approach would protect defendants from bureaucratic errors, but it could not be reconciled with the Rules of Appellate Procedure, which require an actual notice of appeal rather than a virtual one, or with the principle that a timely notice of appeal is essential to appellate jurisdiction. *Browder v. Director, Department of Corrections*, 434 U.S. 257, 264 (1978). Treating as done whatever *should* have been done would demolish the Rules' timetables. It would, for example, treat a client's request to his lawyer to file a notice of appeal as getting

the appeal under way, whether the lawyer filed the notice or not. Even limiting the approach to public officials would require many rules and doctrines to be rewritten. Consider, for example, Fed. R. Crim. P. 29(c), which limits to seven days the time a defendant has to file a motion for acquittal (and also limits the period within which the judge may extend that time). *Carlisle v. United States*, 517 U.S. 416 (1996), holds that the court lacks authority to grant a motion filed one day late, even on the assumption that it should have been filed earlier and that the delay did not cause prejudice. A principle that the court will treat a motion (or notice of appeal) as filed when it *should* have been filed would require a different outcome in *Carlisle* and many similar cases. Even the "unique circumstances doctrine," an approach that treats some steps in the appellate process as if they had been done on time, applies only when a court expressly assures counsel or a litigant that a step has been taken correctly, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178-79 (1989), and no express assurance is evident here.

Unsettling as it is to disadvantage Hirsch because of what may have been a clerical error, we have no choice but to dismiss this appeal. But just as in *United States v. Marbley*, 81 F.3d 51 (7th Cir. 1996), dismissal does not bring proceedings to a close; quite the contrary. Strict enforcement of a rule meant to expedite appellate resolution will breed delay, for Hirsch is not out of options. He may now file a motion under 28 U.S.C. §2255, contending that Forsyth's failure to ensure that the clerk followed through deprived Hirsch of the assistance of counsel guaranteed by the sixth amendment. See *Roe v. Flores-Ortega*, 68 U.S.L.W. 4132 (U.S. Feb. 23, 2000); *United States v. Nagib*, 56 F.3d 798 (7th Cir. 1995); *Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994). If the district court finds that Forsyth was asleep on the job, then the court must vacate the judgment and reimpose the sentence to permit an appeal.

Of course, the judge cannot overlook the possibility that Hirsch did *not* make a timely request for an appeal on his behalf. If he did not make a request in open court, or to counsel within 10 days, then relief is not available under §2255. See *United States v. Nagib*, 44 F.3d 619 (7th Cir. 1995); *United States v. Mosley*, 967 F.2d 242 (7th Cir. 1992).

The transcript of the sentencing proceedings, which was prepared at our request, does not jibe with Forsyth's representations to the district court (or to us). The district judge informed Hirsch: "If you so request, a notice of appeal will be docketed by the clerk at this time. Do you understand that?" Hirsch answered "yes" but did not go on to make the request. If the transcript is in error and Hirsch did make a timely request in open court, or if he asked Forsyth within 10 days to file an appeal, then Hirsch has received ineffective assistance of counsel. But if there was no request within 10 days in or out of court, then Hirsch cannot change his mind later and blame his lawyer. See *Flores-Ortega*, 68 U.S.L.W. at 4133-35.

We observed in *Marbley* that this multi-step process poorly serves the interests of both defendants and the judicial system. We are sending this opinion to the Judicial Conference's Standing Committee on Rules of Practice and Procedure so that the bodies charged with proposing changes to the federal rules may consider whether it would be prudent to amend either Criminal Rule 32(c)(5) or Appellate Rule 4(b)(4) to provide for the possibility that the clerk will fail to comply with a request to file a notice of appeal. Perhaps it would be beneficial to amend Appellate Rule 4(b)(4) to provide that an appeal is timely if, within 10 days after being sentenced, a criminal defendant informs either court or counsel of his desire to appeal. Our function today, however, is not to draft new rules but to implement the rules as they exist. Under those rules, Hirsch's appeal must be dismissed for want of jurisdiction.

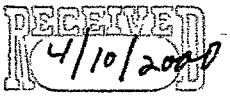
A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—3-23-00

United States District Court
Southern District of Illinois
301 West Main Street
Benton, Illinois 62812



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Chambers of
J. PHIL GILBERT
CHIEF JUDGE

April 6, 2000

Honorable Frank H. Easterbrook
Circuit Judge
United States Court of Appeals
219 South Dearborn Street
Chicago, IL 60604

Dear Frank:

This letter is a comment on the opinion you issued recently in the case of *United States of America v. Steven Hirsch* (App. No. 99-2304), an appeal from this Court's case 97-CR-40094. In eight years serving as a federal judge, I have never felt the need nor desire to respond to any appellate opinion, until now. While I do not take issue with the decision you and the panel reached in this case, I do take issue and want to express my strong disagreement with the content, tone and implications of your opinion.

As you recall, defendant Hirsch pled guilty to drug-related crimes and appealed the sentence imposed by this Court on January 29, 1999, and docketed on February 3, 1999. While your decision dismissed Hirsch's appeal as untimely, the written opinion strongly criticized this Court and implied that the Court erroneously failed to file a notice of appeal on Hirsch's behalf. The opinion also chastised Hirsch's court-appointed counsel, Doug A. Forsyth. This letter, however, addresses only the aspects of your opinion implying that this Court and its Clerk did not fulfill their duties under the rules. Although your opinion forcibly criticized this Court, that criticism was not warranted by, nor based on, the evidence and record that was before the Appellate Court. What truly baffles me is that on the last page of your opinion you even acknowledged that the transcript of the sentencing hearing does not "jibe" with the representation that the defendant requested an appeal.

In plain words, the implication in your opinion that I did not inform the defendant of his right to appeal and give him an opportunity to have the Clerk of Court file a notice of an appeal is dead wrong. I am utterly at a loss to understand how you could have arrived at the conclusion in the first part of the opinion that the Court Clerk failed to file a requested notice of appeal for Hirsch.

I find it very difficult to reconcile the opinion's first four pages with its last three paragraphs. You spent the first four pages of your opinion leaving the distinct impression that we failed in our duty to advise the defendant of his right to appeal and then record a requested notice of appeal at time of sentencing when, on the last page of your opinion, you reached the opposite and correct conclusion, based on the record, that no request for appeal was ever made at time of sentencing.

At the beginning of your opinion, you state that if counsel Forsyth's explanation of events is true, the circumstances surrounding this appeal would be "shocking." You used the word "shocking" not once but twice and left the impression that my Court Clerk failed in her ministerial duties. You also characterize the circumstances as resulting from "what may be a clerical error." The use of such words is not only unfortunate, but misleading, and leaves any reader of the opinion with the impression that the Court failed to record a requested notice for an appeal. Someone reviewing this opinion must read page five before the truth of the transcript and record finally comes out. To illustrate and further amplify the potentially misleading nature of your opinion, the Chicago Daily Law Bulletin article of April 4, 2000, reported that "the clerk apparently did not file a notice of appeal." Since an appeal was not requested, nothing could be further from the truth. Despite that truth, however, this article demonstrates how easily your opinion can lead to an incorrect interpretation of the facts.

After criticizing my Court Clerk, you imply that the transcript in this case was inaccurate. Your opinion states that Forsyth said that "when asked whether the clerk should file an appeal on his (Hirsch's) behalf, Hirsch answered yes." And yet, you acknowledge that the transcript of Hirsch's sentencing hearing "does not jibe with Forsyth's representations" to either the District Court or to the Appellate Court. Rather than accept this Court's written record of these proceedings and make your determination based on that evidence, you inexplicably and without any justification whatsoever, question the accuracy and integrity of the transcript. I strongly object to your suggestion that the transcript provided to you is in error. Court Reporter Jane McCorkle has been a court reporter for 24 years, more than 10 working in the federal court system. The accuracy and veracity of her transcripts have never been questioned, and you provide no basis nor explanation for questioning the integrity of the transcript in this case.

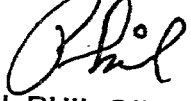
The transcript provided to you clearly and unequivocally shows that neither Hirsch nor his counsel Forsyth requested that a notice of appeal be filed at time of sentencing. I clearly asked Hirsch if he understood that an appeal would be docketed for him at this time if he so requested. He clearly answered "yes" to my question. As you freely acknowledge, Hirsch did not go on to request an appeal, despite being given the opportunity to do so. Under those circumstances, I have never sought nor would never seek to have the Clerk file a notice of appeal. This Court does not and will not file a notice of appeal for criminal defendants who do not specifically make such a request at the sentencing hearing. My Clerk of Court does not enter a notice of appeal at time of sentencing unless I am convinced the defendant made such a request, and I further direct the Clerk to enter a notice of appeal.

I understand the disadvantage appellate courts operate under when attempting to read and interpret transcripts. From that vantage point, the appellate judge cannot assess the tone nor inflections, nor hear nor understand the pauses inherent in any human conversation. Maybe court transcripts should begin to reflect "pauses." Nevertheless, in this case, and with this transcript, the evidence and record clearly show that neither Hirsch nor his counsel Forsyth told or requested the Court to file a notice of appeal.

You indicated that you are sending this opinion to the Judicial Conference's Standing Committee on Rules of Practice and Procedure so that the bodies charged with proposing changes to federal rules may consider whether it would be prudent to amend either Rule 32(c)(5) or Appellate Rule 4(b)(4) to provide for the possibility that the clerk will fail to comply with a request to file a notice of appeal. I am not taking a position on whether the committee needs to change the rules, but I do take the position that this case is not the poster child to use when considering a possible rule change, when the facts and record of this case do not support your implication that the Clerk failed in her duty. I am sending a copy of this letter along with the transcript of the sentencing hearing to the Judicial Conference's Standing Committee on Rules of Practice and Procedure so that they can see, that at least in this case, the defendant made no request to appeal and that this Court and my Clerk did not fail to comply with a request that was never made.

The facts and evidence before you absolutely and indisputably support the conclusion that the Clerk of this Court did not fail to comply with a request to file a notice of appeal. Hirsch did not make that request, and the transcript conclusively shows that he made no such request. Consequently, although I believe your decision was correct, the majority of your opinion was inconsistent with the evidence and record in this case.

Very truly yours,



J. PHIL GILBERT
CHIEF JUDGE

JPG/slw

cc: Judge Ripple
Judge Kanne
District Judges, Illinois So. Dist.
Clerk of Court, Illinois So. Dist.
Doug Forsyth
Standing Committee on Rules of Practice and Procedure

Author: Linda Terhune at ~7dc-ils-eaststlouis
Date: 4/5/2000 8:40 AM
Normal
Receipt Requested
TO: Sherry Wayne at ~7dc-ils-benton, Joanna Wells at ~7dc-ils-benton, Chris Connors at ~7dc-ils-benton
Subject: Chicago Daily Law Bulletin Article
---------- Message Contents

I think your chambers gets the CDLB on paper, but I wasn't sure how long it would take to get to you.

LANGUAGE: ENGLISH

LOAD-DATE: April 5, 2000

2 of 2 DOCUMENTS

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Chicago Daily Law Bulletin

April 4, 2000, Tuesday

SECTION: Appellate Summary; Pg. 1

LENGTH: 511 words

HEADLINE: Criminal law & procedure - untimely appeal

SYLLABUS: Trial court erred in granting defense counsel's motion for permission to take untimely appeal because federal rules provide that court may extend time for appeal by no more than 30 days for good cause or excusable neglect, and defense counsel's motion was more than three months late.

BODY:

The 7th U.S. Circuit Court of Appeals has dismissed an appeal by defendant Steven Hirsch. U.S. District Judge J. Phil Gilbert of the Southern District of Illinois presided in the trial court.

Defendant Steven Hirsch pleaded guilty to several drug-related offenses. He was sentenced to 157 months in prison on Jan. 29, 1999, and the sentence was recorded on the docket on Feb. 3. In order to appeal, he was required to file a notice of appeal by Feb. 16. His notice of appeal, however, was not filed until May 21, 1999, more than three months late.

Defense counsel's explanation for this delay was, if true, shocking," the appeals court said. The court said that after imposing sentence, a federal judge must tell the defendant of his right to appeal and must offer an opportunity to have the clerk of court file a notice of appeal on the defendant's behalf.

In this case, the clerk apparently did not file a notice of appeal, and by the time defense counsel realized this, it was too late. However, the appeals court said, defense counsel should have ensured that a notice of appeal was filed.

In addition, the appeals court said, defendants have 30 additional days to file a notice of appeal for excusable neglect or good cause." The clerk's failure to file would have been good cause" for counsel to file a belated appeal, and all he had to do was check the docket any time within 40 days, the appeals court said. Defense counsel, however, did not check the docket, the court said.

When the attorney decided to bestir" himself on behalf of his client, he filed the belated notice of appeal. The trial judge granted the motion to file a late appeal.

The 7th Circuit said, however, that the trial judge's decision was ineffectual. The court said Rule 4(b)(4) of the Federal Rules of Appellate Procedure provides that a district court may extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule. The district court does not have the power to extend the time for a notice of appeal, the appeals court said.

The maximum lawful extension in this case would have been to March 15, 1999, a date long gone" when defense counsel requested extra time.

The appeals court said that dismissing the defendant's appeal was unsettling" but that it had no choice.

Even so, the appeals court said, the defendant still was entitled to file a motion under 28 U.S.C. sec2255, contending that his attorney's failure to ensure that the clerk followed through deprived the defendant of effective assistance of counsel.

If the District Court finds that defense counsel was asleep on the job, then the court must vacate the judgment and reimpose the sentence to permit an appeal," the appeals court said.

U.S. v. Steven Hirsch, No. 99-2304. Judge Frank H. Easterbrook wrote the court's opinion with Judges Kenneth F. Ripple and Michael S. Kanne concurring. Released March 23, 2000. (6 pages) 0077

LANGUAGE: ENGLISH

LOAD-DATE: April 5, 2000

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 96-40094
	)	
STEVEN HIRSCH,	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS

Sentencing Hearing

BE IT REMEMBERED AND CERTIFIED that heretofore on January 29, 1999, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, Honorable J. Phil Gilbert, Chief Judge, presiding, the following proceedings were had in open court in East St. Louis, Illinois, to-wit:

APPEARANCES

Mr. Christopher Moore
Asst. U.S. Attorney — For the Plaintiff

Mr. Douglas Forsyth
Appointed Counsel — For the Defendant

JANE McCORKLE
Official Court Reporter
U.S. District Court
301 W. Main Street
Benton, Illinois 62812

THE CLERK: United States of America versus Steven Hirsch, case number 96-40094. This matter is set for disposition. Are all the parties ready?

MR. MOORE: The United States appears by Christopher Moore, Assistant United States Attorney.

MR. FORSYTH: The defendant appears in person and by attorney, Douglas Forsyth. Ready to proceed.

THE COURT: Let the record show that the defendant, Steven Hirsch, is present in court with counsel, Mr. Forsyth. Mr. Moore is present on behalf of the government.

Mr. Moore, with all due respect, I've seen you every day this week.

MR. MOORE: Judge, I was kind of hoping when the door opened -- no, never mind.

THE COURT: I hope I can get through tomorrow.

MR. MOORE: Guaranteed.

THE COURT: Okay. This matter comes before this Court for sentencing. Mr. Hirsch, will you please stand. A written Presentence Investigation Report has been prepared by Probation to assist me in sentencing you. Have you received a copy of that report?

THE DEFENDANT: Yes.

THE COURT: Have you had an opportunity to read it?

THE DEFENDANT: Yes.

THE COURT: Your attorney filed some objections to the report, and Probation prepared an addendum to the Presentence Investigation Report dated January 25th, 1999, or at least that's the date I received it.

THE DEFENDANT: I've never seen it.

MR. FORSYTH: He hasn't seen it.

THE COURT: January 20th. You have not seen it.

MR. FORSYTH: He has not seen the addendum.

THE COURT: You have got to show it to him.

MR. FORSYTH: I understand.

(Off the record.)

THE COURT: Okay, Mr. Hirsch, have you received and reviewed a copy of the addendum to the Presentence Investigation Report?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Forsyth, you had seen this before?

MR. FORSYTH: Yes, I had, Your Honor.

THE COURT: Other than the objections filed by your attorney, do you have any other errors, corrections, alterations or additions to the report which you wish to make to it?

THE DEFENDANT: Just the motions that were filed, Your Honor.

THE COURT: Other than the objections you filed, does the defendant have any other objections to the report

which would affect the sentencing guideline range?

MR. FORSYTH: No.

THE COURT: Does the government have any objections to the report which would affect the sentencing guideline range?

MR. MOORE: None, Judge.

THE COURT: Mr. Forsyth, if I understand your three objections, your first objection has to do with addition of the guideline sentencing manual was used on the ratio on the marijuana equivalence and coming up with a base offense level. Your second objection has to do with an objection to paragraph 103 of the Presentence Investigation Report which presents information pertaining to Jeff Blasor's testimony as to the purity. And your third objection, basically, is in the form of a motion for downward departure.

MR. FORSYTH: Yes, sir.

THE COURT: So as far as objections to the Presentence Investigation Report, we are dealing with Objections 1 and 2.

MR. FORSYTH: That's correct.

THE COURT: I can tell you the Court's not going to consider any departure upward based upon purity so I don't know whether --

MR. FORSYTH: I suppose that's moot.

THE COURT: That will now moot your

Objection No. 2.

MR. FORSYTH: Yes, sir.

THE COURT: But the matters contained in the Presentence Investigation Report will stay in the report. The Court is going to adopt the Probation Officer's position in terms of as a grounds for departure, but I can tell you that the Court is not going to depart upward based upon your --

MR. FORSYTH: Yes, sir.

THE COURT: Now, your Objection No. 2 or No. 1 I'm a little puzzled by because we did use the, in talking to Ms. Sylvester, we did use the '95 guidelines. I mean the increase didn't go into effect until '97.

MR. FORSYTH: I understand. This was an objection my client insisted that I make and I'm submitting it as -- he's arguing that we should be using a pre-1995 computation.

THE COURT: From what I understand, it makes no difference.

MR. FORSYTH: That's my understanding.

THE COURT: Do you understand that, Mr. Hirsch? Whether I use pre-95 or post-95 up to '97 when this offense occurred, it makes no difference as to the guideline calculations based on relevant conduct when you use the marijuana equivalence of the cocaine, meth and marijuana that was involved in this conspiracy. Is there anything you wish

to add?

MR. FORSYTH: No.

THE COURT: Mr. Moore, anything you wish to add?

MR. MOORE: Judge, I wholeheartedly concur. It doesn't make any difference whether you use '92, '93, '94 or '95. It's all the same.

THE COURT: Or '96.

MR. MOORE: There was no '96.

THE COURT: There was no '96. That's why we didn't use it. I adopt the Probation Officer's recommendation and overrule the objection of the defendant as to Objection No. 1.

And, therefore, it will be the finding of this Court -- and thereby is going to adopt the Presentence Investigation Report and the findings contained therein of the Probation Officer, the findings of this Court. It will therefore be the determination of this Court that the guideline range applicable to this defendant is as follows: Total Offense Level of 28, Criminal History Category of III, imprisonment range on Counts 1 and 4 of 97 to 121 months, on Count 7, a 60-month consecutive to any sentence imposed on Count 1. Supervised release range on Count 1 of four to five years, on Count 4, three years, on Count 7 of two to three years, and a fine range of $12,500 to $3,000,000. Any objections to those specific guideline range findings?

MR. MOORE: Not from the government.

MR. FORSYTH: None.

THE COURT: Mr. Forsyth, do you wish to address your motion for downward departure?

MR. FORSYTH: Yes, Your Honor. As the Court is aware, my client has undergone a virtual sea of changes in his health status during his period of confinement. When I was first appointed to represent Mr. Hirsch many moons ago, I feared that he was suffering some health problems. The Court was very generous in sustaining our motion to have him physically examined, and indeed, he was transferred to the Medical Center for Federal Prisoners at Springfield, Missouri. They conducted a complete battery of testing analysis and were ready to perform any treatment deemed necessary for Mr. Hirsch, and this was early on in this case when he was still confined, and I believe it was at the Franklin county jail at Benton, Illinois.

Basically, the Springfield Medical Center found that he was as hale as a horse, and they sent him back and said that he really needed very few requirements in the way of any sort of medical management or medication. Thereafter, not by choice of my client, not due to any wrongdoing on his part, but mere just, one would suppose, luck of the draw, he was taken to and confined in the Williamson County jail in Marion, Illinois. And frankly, I do not represent Mr. Hirsch

on any potential or pending or whatever type of civil matter so I -- the causative factors remain somewhat nebulous to me, but he contracted various ailments at the Williamson County jail.

He was not treated adequately at the Williamson County jail. The Court observed my client as we began the trial. Golly, this was almost just a little over a year ago right after the Christmas holidays of 1997, early in 1998. We began the trial and we, meaning myself and my client, Mr. Hirsch, participated in that trial for the first three, three and a half weeks.

As the Court will recall, I recall the Court very kindly noting at the time that my client physically collapsed after trial one day, that he was obviously not faking. He was, obviously, you know, doing his best to maintain and attend to the proceedings and assist me in his defense during the trial. And, certainly, you know, there was not some sort of voluntary opting out of the proceedings. In fact, he was deathly ill.

And he was taken to a variety of medical facilities where he received medical treatment and spent days virtually on death's door, again, through no fault of his own and simply due to the circumstances of his confinement. He has been back and forth to medical facilities, and he is probably going to be taken back immediately after this proceeding as

soon as transportation allows to the Springfield center for prisoners in Springfield, Missouri.

He has suffered above and beyond what any punishment allowed by law could inflict upon him. If the Court in its darkest hour wished to punish Steven Hirsch as harshly as it could, it could not visit upon him what has already taken place in his life.

I would ask the Court to take this into account in sentencing Mr. Hirsch. The circumstances of his confinement, I've been unable to find any case law on this, but I think that the circumstances of his confinement take this out of the heartland of the sentencing process. I think that the fact that he has suffered permanent progressive and irreparable health damage should be given its due in sentencing this man.

Obviously, I don't think the Court can do anything with the 60-month sentence on the firearms charge. That's a 60-month consecutive sentence. That's the statutory minimum and I don't know of any means that the Court can sidestep that. I would urge -- the Court does have some downward departure discretion in terms of the other counts, the narcotics counts, and would ask the Court to depart as deeply as possible in order not to acknowledge that my client is some great human spirit, but to heed because of these health problems has been and gone through so far much more than any

other person who has been charged in this matter that simply any comparison pales. And I would beg for mercy on behalf of my client from the Court.

THE COURT: Thank you. Mr. Moore.

MR. MOORE: Judge, of course, there's no question that Mr. Hirsch's health has been extraordinary in terms of defendants this Court sees, but that is not something that is contemplated within the structure of the Sentencing Guidelines. The Court is familiar, I'm sure, with -- actually, I can only find one reported case.

THE COURT: My case.

MR. MOORE: United States versus Sherman, and the -- in order to provide for a downward departure, as the Court is well aware, there has to be particularized evidence, particular competent medical evidence that he can't receive the care that he needs.

Mr. Hirsch looks better now than he did when he came into the court system when we first saw him. He's been in the custody of BOP. That doesn't contemplate, does not constitute competent medical testimony. But -- and then, of course, in the Sherman case, the Seventh Circuit cites a whole series of cases saying that a heart condition left to be treated with medication is not sufficient. The presence of AIDS is not sufficient, being a wheelchair bound quadriplegic is not sufficient, borderline mental

retardation. Chronic manic-depressive disorder, scoliosis and disabling back pain are not sufficient.

There's no evidence here to support a downward departure. And I'm not sure that the way the request for downward departure is framed, it's even framed within the idea that it ought to be done because of what's going to come in terms of incarceration, but rather he's already paid his price because whoever it is that inflicts this kind of injury on him has already exacted a price. And that may be true, but it doesn't fit within the sentencing guidelines, and that's what we are here today with. So I would respectfully request that the motion for downward departure be denied.

THE COURT: Anything further, Mr. Forsyth?

MR. FORSYTH: I'm not trying to split hairs with the Court, but I think that the ailments referenced in that opinion were preexisting. My client, you know, appeared before the Court having had no real preexisting illness. That's why I referenced that first exam that was done at Springfield at the Court's allowance. My early fears about his health were just plain unfounded. I was just plain wrong. They found him healthy.

So what we're really talking about here is not simply the ailment itself. We're talking about the circumstances of the ailment, as well. And that is, that this was something that he became afflicted with while he was

being detained, while he was still presumably innocent before the government had put on its case before a jury, granted after a probable cause finding had been made, granted after an order of detention.

I would also note that Mr. Hirsch has amassed monstrous medical bills because I think there's -- in retrospect, I think I would have to recall when he was placed on bond, then he racked up all these medical bills. I mean he gets sick under the order of detention. Then he has to manage the medical bills. Clearly, the Court has the power to rectify that by making a downward departure.

THE COURT: Okay. The Court, in reviewing the guidelines, the Court is well aware of the facts of this case, and I don't need to reiterate for the parties here, but in reviewing the guidelines, it is clear to this Court that unless there is some indication that the Bureau of Prisons is not capable of attending to any particular health need that a defendant may have that's going to be incarcerated under the guidelines, that is not a grounds for departure. It makes no difference to this Court nor to the guidelines that any illness or ailment was contracted pretrial or during trial. If it was a grounds for departure that someone, if they got sick while they were being detained, then you'd find a lot of people while they are being detained and trying to get family members to bring in viruses and all kinds of ailments and

illnesses that they'd get sick and go to the hospital, and if they got convicted, they would come before the Court and say, "Judge, I got sick while I was in federal custody. Therefore, that's a grounds for downward departure." That's not the case.

It is very unfortunate what happened to Mr. Hirsch. As Mr. Hirsch and Mr. Forsyth know, this Court did everything possible to accommodate Mr. Hirsch. Efforts were made to airlift him from Marion Memorial Hospital to Springfield, and we just couldn't get it done. And the doctors said, "He's got to be out of this hospital in a matter of hours." And the only place we could find that would treat him for what then people thought was Legionnaire's disease, and I think it was determined he did not have it, was Lourdes Hospital in Paducah.

The only way that we could get that done was to release him on bond and send him down there. I hope that by the actions of this Court, it helped save his life, and that is why he is there today. Because one of the last reports I had from one of the doctors was that he may not make it.

And there's no question Mr. Hirsch has suffered physically. And where he contracted this, I don't know. That is not for this Court to determine. But what I do know, it's not a grounds for downward departure, and so the Court will deny the grounds for downward departure made by the

defendant. Does the government have any evidence by way of aggravation or a recommendation?

MR. MOORE: We have no evidence by way of aggravation. We would request that he be sentenced to the low end of the applicable guideline range.

THE COURT: Mr. Forsyth, any evidence by way of mitigation or a recommendation?

MR. FORSYTH: I think other than the fact I believe my client would like to enter a substance abuse program, if he could be -- there is, I believe, ample information concerning substance abuse in the Presentence Investigation Report, specifically, paragraphs 81 and 82. Would ask that he be allowed to enter into any comprehensive drug and alcohol treatment program the Court is able to recommend.

THE COURT: Mr. Hirsch, will you and your counsel please approach the podium. Do you have anything you wish to say or offer in mitigation before this Court imposes sentence?

THE DEFENDANT: I don't understand how you can deny the downward departure. Are you aware that I lost most of my right lung?

THE COURT: Yes.

THE DEFENDANT: Just doesn't seem like that -- I mean that's something that happened at Williamson County jail. I was there for nine months. I didn't bring it in

with me. And they refused medical -- they refused to get me a doctor. They said I was faking it. I had a temperature of 105 degrees. I was coughing up blood, and there is some permanent damage. I've lost a lot of memory. Right now I have problems just putting words together. I know what I want to say, but I can't get them out. And I have to disagree with you on the downward departure for the medical. It has been quite a bit of punishment.

THE COURT: Well, I'm not saying it hasn't been, Mr. Hirsch. What I'm saying, I don't have any authority under the law to downward depart. As I'm sure you're aware, we don't have a lot of discretion in federal sentencing.

THE DEFENDANT: I understand.

THE COURT: What I'm telling you, even if I wanted to, I couldn't under my interpretation of the law. Now is there anything you wish to say before I pass sentence?

THE DEFENDANT: No, Your Honor.

MR. FORSYTH: If I could say one thing, Your Honor.

THE COURT: Yes.

MR. FORSYTH: My client, because of his health and because of the medical bills, he is utterly unable to pay any sort of a fine.

THE COURT: The Court's aware of that.

THE DEFENDANT: Also one thing from me, Your

Honor. I would like to go back to Springfield as soon as possible.

THE COURT: The Court will have that done, too. Recommend that.

THE DEFENDANT: Okay.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it will be the judgment of this Court that the defendant, Steven Lloyd Hirsch, is hereby sentenced to the custody of the Bureau of Prisons to be imprisoned for a term of 97 months on each of Counts 1 and 4 to be served concurrently. The defendant is hereby sentenced to the custody of the Bureau of Prisons to be sentenced for 60 months on Count 7 to be served consecutively to Counts 1 and 4. The Court is going to find that the defendant has the inability to pay a fine, and the Court will waive a fine in this case.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of four years. This term consists of terms of four years on Count 1 and a term of three years on each of Counts 4 and 7, all such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall

not commit another federal, state or local crime and shall comply with the standard conditions that have been adopted by this Court. The defendant shall not illegally possess a controlled substance. The defendant shall submit to one drug urinalysis within 15 days after being placed on supervision and two periodic drug tests thereafter as determined by the Court. The defendant shall not possess a firearm or destructive device.

In addition, the defendant shall comply with the following special conditions: The defendant shall participate as directed and approved by the Probation Office for treatment of narcotic addiction, drug dependence or alcohol dependence which includes urinalysis or other drug detection measures and which may require residence and/or participation in a residential treatment facility.

It is further ordered that the defendant shall pay the United States a special assessment of $150. This special assessment is payable through the Clerk of the U.S. District Court. And the defendant shall make special assessment payments from any wages he may earn in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. Any portion of the assessment that is not paid in full at the time of your release from imprisonment shall become a condition of supervision.

THE COURT: I need to advise you, Mr. Hirsch, that

you have a right to appeal this sentence. Said appeal must be filed within ten days after entry of judgment. If you cannot afford the services of an attorney to handle your appeal, one will be appointed for you. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you cannot afford it, a transcript of the record will be prepared for appeal at the government's expense. Do you understand that?

THE DEFENDANT: Yes, I will probably need both.

THE COURT: Pardon?

THE DEFENDANT: I probably will need both.

THE COURT: If you so request, a notice of appeal will be docketed by the clerk at this time. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: The Court is going to order the Marshals to transport Mr. Hirsch back to the medical facility in Springfield as soon as practical. While you're in prison, they have a lot of voluntary drug treatment programs which I encourage you to engage in because from reading your Presentence Investigation Report, you do have an addiction that needs to be addressed, or else when you get out, you are not going to be any better off than you are now.

Anything further, Mr. Forsyth?

MR. FORSYTH: I have nothing.

THE COURT: Anything further, Mr. Moore?

MR. MOORE: Nothing, Judge.

THE COURT: That concludes this hearing.

(End of hearing.)

REPORTER'S CERTIFICATE

I, Jane McCorkle, Official Court Reporter for the United States District Court for the Southern District of Illinois, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings of Sentencing Hearing had in this cause as same appears from my stenotype notes made personally during the progress of said proceedings.

DATE: _____

_____

JANE McCORKLE

V-F-2

UNITED STATES of America,
Plaintiff–Appellee,

v.

James TRUESDALE; Ronald Hamilton,
Defendants–Appellants.

No. 99–10096.

United States Court of Appeals,
Fifth Circuit.

May 5, 2000.

Criminal defendants whose convictions were reversed on appeal filed joint application for reimbursement of attorney fees under the Hyde Amendment. The United States District Court for the Northern District of Texas, Sidney A. Fitzwater, J., denied application, and defendants appealed. The Court of Appeals, King, Chief Judge, held that: (1) appeal was subject to appeal period applicable in civil, not criminal, cases; (2) appeal was not fatally premature; (3) denial of application would be reviewed for abuse of discretion; (4) defendants were not entitled to discovery and a hearing as a matter of right; (5) defendants bore the burden of proof; (6) defendants had to prove more than just that government's position was not substantially justified; and (7) defendants were not entitled to fees absent showing that underlying prosecution was vexatious or frivolous.

Affirmed.

1. Criminal Law ⇐1081(4.1)

A timely notice of appeal is necessary to the exercise of appellate jurisdiction.

2. Criminal Law ⇐1069(1)

Prevailing criminal defendant's motion for reimbursement of attorney fees pursuant to Hyde Amendment is subject to 60-day appeal period for appeals in civil cases in which government is a party, rather than 10-day period for appeals in criminal cases. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note; F.R.A.P.Rule 4(a), 28 U.S.C.A.

3. Criminal Law ⇐1024(1)

The government generally cannot, without statutory authority, appeal from a decision in a criminal case.

4. Criminal Law ⇐1068.5

Fact that denial of prevailing criminal defendants' motion for reimbursement of attorney fees under the Hyde Amendment was recorded on the criminal docket, rather than the civil docket, did not preclude appellate jurisdiction over defendants' appeal from that denial, on ground that appeal was not perfected under governing civil rules, where judgment of district court was obviously final, and government was neither misled nor prejudiced by recording of judgment on criminal docket. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note; F.R.A.P.Rule 4(a)(1)(B), (a)(2), (a)(7), 28 U.S.C.A.; Fed. Rules Civ.Proc.Rule 79(a), 28 U.S.C.A.

5. Criminal Law ⇐1023(2)

For a ruling to be final, for appeal purposes, it must end the litigation on the merits and the judge must clearly declare his intention in this respect.

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6. Criminal Law ⇐1148

Court of Appeals would review for abuse of discretion district court's denial of prevailing criminal defendants' motion for reimbursement of attorney fees under the Hyde Amendment. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note.

7. Criminal Law ⇐1139

Court of Appeals would review de novo legal determinations underlying district court's denial of prevailing criminal defendants' motion for reimbursement of attorney fees under the Hyde Amendment. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note.

8. Costs ⇐314

Prevailing criminal defendants were not entitled to discovery and a hearing as a matter of right on their application for reimbursement of attorney fees under the Hyde Amendment, where neither discovery nor hearing was requested. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note.

9. Costs ⇐314

In order to recover attorney fees as a prevailing party under the Hyde Amendment, prevailing criminal defendants bore burden of proof to show by a preponderance of the evidence that the government's position was vexatious, frivolous, or in bad faith. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note.

10. United States ⇐147(10)

Under Equal Access to Justice Act (EAJA), authorizing award of costs and attorney fees against the government in civil cases, the government must prove by a preponderance of the evidence that its position was substantially justified. 28 U.S.C.A. § 2412.

11. Costs ⇐308

Prevailing criminal defendant who seeks reimbursement of attorney fees under the Hyde Amendment, which requires showing that government's position was vexatious, frivolous, or in bad faith, must prove more than just that government's position was not substantially justified. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note.

12. Costs ⇐308

Prevailing criminal defendants were not entitled to reimbursement of attorney fees under the Hyde Amendment, absent showing that prosecution against them for illegal gambling was vexatious or frivolous. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, § 617, 18 U.S.C.A. § 3006A note.

13. Criminal Law ⇐1030(1)

If a party raises an issue for the first time on appeal, it can prevail only if it shows that the district court committed a plain error that affects the party's substantial rights, and if the trial court committed a plain error that affects a party's substantial rights, Court of Appeals may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Appeal from the United States District Court for the Northern District of Texas.

Before KING, Chief Judge, and DUHÉ and DeMOSS, Circuit Judges.

KING, Chief Judge:

Defendants–Appellants James Truesdale and Ronald Hamilton appeal from the district court's denial of their joint application for reimbursement of attorney's fees. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case revisits the story of an offshore sports wagering enterprise that is well-chronicled in one of our previous opinions. *See United States v. Truesdale*, 152 F.3d 443 (5th Cir.1998). Defendants–Appellants James Truesdale and Ronald Hamilton ("Appellants"), along with two others, were indicted and tried on multiple charges, including conspiracy, money laundering, and conducting an illegal gambling operation. There was evidence at trial that bets were placed over toll-free numbers that terminated in offices offshore, where such activity is legal; however, toll-free numbers also terminated at Appellants' homes, but these lines were used for information purposes only. There was also evidence that Appellants received money in Texas to establish betting accounts, that they deposited the money received in Texas bank accounts, and that they paid winners out of accounts held in Texas. Appellants and their co-defendants were convicted of several of the charges, including conducting an illegal gambling operation. On direct appeal, we reversed their convictions on all counts. *See id.* at 450.

18 U.S.C. § 1955 was the basis for the illegal gambling operation charge. It prohibits "conduct[ing], financ[ing], manag[ing], supervis[ing], direct[ing], or own[ing] all or part of an illegal gambling business." 18 U.S.C. § 1955(a) (1994). An illegal gambling business is defined, in part, as one that "is in violation of the law of the State or political subdivision in which it is conducted." 18 U.S.C. § 1955(b)(1)(i) (1994). As we explained in the direct appeal of Appellants and their co-defendant's conviction:

> In order to meet the first prong (violation of state law), the indictment alleged that appellants' gambling operation was being conducted in violation of Chapter 47, *Gambling*, of the Texas Penal Code. The indictment did not cite a specific provision within this chapter, but it alleged *only* "*bookmaking*." Additionally, the government's case focused entirely on and the jury charge instructed *only* on the "bookmaking" provisions of Chapter 47. Chapter 47 defines "bookmaking" as follows:
>
> (A) to receive and record or to forward more than five bets or offers to bet in a period of 24 hours;
>
> (B) to receive and record or to forward bets or offers to bet totaling more than $1,000 in a period of 24 hours; or
>
> (C) a scheme by three or more persons to receive, record, or forward a bet or an offer to bet.
>
> Tex. Penal Code § 47.01(2)(A)-(C).
>
> Under Texas law "bookmaking" is illegal, and if a person intentionally or knowingly commits "bookmaking," he commits the offense of gambling promotion. Tex. Penal Code § 47.03(a)(2). Bookmaking, however, is not the only activity that constitutes gambling promotion. Section 47.03(a) lists five separate categories of activity (including "bookmaking") each of

which can constitute gambling promotion. Section 47.03(a) makes it a separate offense for an individual, for gain, to "... become[ ] a custodian of anything of value bet or offered to be bet[.]" Tex. Penal Code § 47.03(a)(3). In this case, neither the indictment nor the jury charge nor the government's argument alluded to this section. The indictment only mentioned bookmaking and the jury charge only tracked the language of sections 47.01(2) and 47.03(a)(2).

Truesdale, 152 F.3d at 446–47. The evidence in the case indicated "that the bookmaking activities occurred outside the United States" and not in the state of Texas, as § 1955 requires. *Id.* at 447. There was evidence that Appellants had the capability to accept bets in Texas and that callers attempted to place bets in Texas, and a notebook seized at Hamilton's residence could have indicated that bets were being taken in Texas. However, the opinion notes that Appellants went to great lengths to ensure that their business was conducted legally. *See id.* at 448. In sum, "the circumstantial evidence ... [did] not furnish an adequate basis from which a reasonable juror could conclude beyond a reasonable doubt that the appellants were engaged in bookmaking." *Id.* at 448–49. We indicated that there may have been some evidence that Appellants became custodians of gambling money in violation of section 47.03(a)(3), but the government did not indict them on that section, try them on that section, or instruct the jury on that section.

Following our decision, Appellants' co-defendants moved the district court for reimbursement of attorneys' fees under the so-called Hyde Amendment,[1] and Appellants soon followed suit. The district court denied their co-defendants' motion, which denial was never appealed, and it further denied Appellants' motion in an order entered on December 22, 1998. Appellants filed a notice of appeal ("NOA") on January 20, 1999, twenty-nine days after the district court's order was entered. Before reaching the merits of Truesdale and Hamilton's appeal, we must decide whether their NOA was timely filed.

II. APPELLATE JURISDICTION: RULE 4(a) OR 4(b)?

[1, 2] Federal Rule of Appellate Procedure 4 governs the time period during which

1. The Hyde Amendment was passed in order to provide the reimbursement of attorney's fees to defendants in certain criminal cases. It provides:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code. To determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera (which shall include the submission of classified evidence or evidence that reveals or might reveal the identity of an informant or undercover agent or matters occurring before a grand jury) and evidence or testimony so received shall be kept under seal. Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. app. § 3006A (Supp. III 1997).

an NOA may be filed. "A timely notice of appeal is necessary to the exercise of appellate jurisdiction." *United States v. Cooper*, 135 F.3d 960, 961 (5th Cir.1998) (citing *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960)). Simply put, if a notice of appeal is untimely, we cannot entertain the merits of a case. In order to establish the timeliness of the NOA filed in the instant appeal, we must begin by determining whether it is governed by Rule 4(a)[2] or Rule 4(b).[3] Only one other court of appeals has addressed this issue. In *United States v. Robbins*, the Court of Appeals for the Tenth Circuit held that an appeal from a district court's denial of a motion filed under the Hyde Amendment is governed by Rule 4(b). *See* 179 F.3d 1268, 1270 (10th Cir. 1999).

At the outset, what is most important here is to establish a clear rule governing NOAs in cases like this one. Unfortunately, however, the text of the Hyde Amendment does not clearly establish whether Rule 4(a) or 4(b) should apply. A compelling case can be made that Rule 4(b) should apply to this case and others like it. The Hyde Amendment clearly states that "the court, in any criminal case ... may award to a prevailing party ... a reasonable attorney's fee...." Pub.L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1997), *reprinted in* 18 U.S.C. app. § 3006A (Supp. III 1997) [hereinafter "Hyde Amendment"]. This language can be read as signaling that a Hyde Amendment motion arises in a criminal case. *See Robbins*, 179 F.3d at 1270. On the other hand, the language can be read as simply signaling that the provision is intended to provide relief when, "in any criminal case ... the court finds that the position of the United States was vexatious, frivolous, or in bad faith." *Id.* The latter reading does not necessitate the conclusion that the motion itself is a part of the underlying criminal case. For the reasons that follow, we conclude that the latter reading is appropriate. We are consequently unable to join the Tenth Circuit's conclusion and decide that Rule 4(a) governs an appeal from a district court's ruling on a motion filed under the Hyde Amendment.

Citing *United States v. Young*, 966 F.2d 164, 165 (5th Cir.1992), and *United States v. De Los Reyes*, 842 F.2d 755, 757 (5th Cir. 1988),[4] the government argues that, like a motion to correct sentence under Federal Rule of Criminal Procedure 35, "a motion for reimbursement of attorney's fees and costs, pursuant to the Hyde Amendment, should be

2. Rule 4(a) provides, in pertinent part, that, "[i]n a civil case, ... the notice of appeal ... must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." FED. R.APP. P. 4(a)(1)(A). This time period is extended to 60 days when the United States is a party. *See* FED. R.APP. P. 4(a)(1)(B).

3. Rule 4(b) provides, in pertinent part, that, "[i]n a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after ... the entry of either the judgment or the order being appealed...." FED. R.APP. P. 4(b)(1)(A).

4. In each of those cases, the defendant appealed from the district court's disposition of a motion to correct sentence under Rule 35 of the Federal Rules of Criminal Procedure, and in both cases, the notice of appeal was filed outside of the window allowed by Rule 4(b) but inside the window allowed by Rule 4(a). We recognized that "[a]n appeal from a ruling on a Rule 35 motion is considered part of the original criminal proceeding and must be taken within the ten days provided by [Rule 4(b)]." *De Los Reyes*, 842 F.2d at 757. We also recognized in each case that the same motion could have been raised in a proceeding under 28 U.S.C. § 2255, in which case the sixty-day window in Rule 4(a)(1)(B) would have applied. Citing "the liberality accorded to *pro se* filings," *id.*, we decided to treat the ill-styled motions as § 2255 motions and found jurisdiction to entertain the appeals.

considered part and parcel of the criminal matter rather than a separate civil proceeding." Government's Brief at 19. The government provides no support for this argument, and after comparing a motion under the Hyde Amendment to a Rule 35 motion, we cannot agree. A Rule 35 motion deals directly with the movant's liberty interest, precisely the sort of consideration that has been cited to support the shorter filing period under Rule 4(b). *See United States v. Craig*, 907 F.2d 653, 656 (7th Cir.1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration."). A motion under the Hyde Amendment, on the other hand, does not implicate the movant's liberty interest. Indeed, as we discuss shortly, the interests it implicates are identical to those implicated by a motion for attorney's fees under 28 U.S.C. § 2412, the Equal Access to Justice Act (the "EAJA"), the procedures and limitations of which, with a few exceptions, are made applicable to proceedings under the Hyde Amendment. The longer time period provided in Rule 4(a) applies to proceedings under the EAJA. We find the comparison of a motion filed pursuant to the Hyde Amendment to one filed under the EAJA a closer analogy than the Rule 35 comparison provided by the government on brief.

We have in the past used this sort of analogy to decide which Rule 4 time period to apply. For example, *United States v. Cooper*, 876 F.2d 1192 (5th Cir.1989), dealt with a petition for a writ of error coram nobis. We determined that such a petition was equivalent to a motion under 28 U.S.C. § 2255, the difference being that a § 2255 motion is made by a person in federal custody and a petition for a writ of error coram nobis is filed by a person who has been released. We explained that the rules governing § 2255 cases state specifically that Rule 4(a) applies to such motions, *see* Rule 11 Governing § 2255 Proceedings for the United States District Courts, 28 U.S.C. app. § 2255 (1994), and concluded that Rule 4(a) should apply to an appeal from the denial of the petition, just as the Rules Governing § 2255 Proceedings specifically apply Rule 4(a) to an appeal from a denial of a § 2255 motion. Two cases cited by Appellants from the Court of Appeals for the Seventh Circuit similarly apply Rule 4(a) after comparing the proceeding at issue to a § 2255 proceeding. *See Betts v. United States*, 10 F.3d 1278 (7th Cir.1993) (petition for a certificate of innocence); *United States v. Craig*, 907 F.2d 653 (7th Cir.1990) (petition for a writ of error coram nobis).

Here, a motion under the Hyde Amendment is equivalent to a motion under the EAJA. In each case, the movant is seeking an award of attorney's fees based upon a litigating strategy employed by the government that, the movant claims, conflicts with certain statutorily defined notions of fair play. It makes little sense that the time period during which the movant may file an NOA from the denial of such a motion should differ depending upon whether the government's potentially offensive litigation strategy was employed in a civil case or a criminal case. Our comparison of Hyde Amendment motions to EAJA motions is bolstered by Congress' direction that the procedures and

limitations of the EAJA are, with limited exceptions, incorporated into the Hyde Amendment.[5]

[3] Finally, it could prove problematic for the government were we to hold that a motion filed pursuant to the Hyde Amendment is part and parcel of the underlying criminal case and therefore subject to the Rule 4(b) filing period. As a general rule, the government cannot, without statutory authority, appeal from a decision in a criminal case. *See United States v. Sanges*, 144 U.S. 310, 312, 12 S.Ct. 609, 36 L.Ed. 445 (1892). While the question is not before us, we are aware of no statute that authorizes the government to appeal from a ruling on a motion for an award of fees in a criminal case.[6] We anticipate that holding as the government argues would create a situation in this circuit where a movant would be entitled to appeal from an adverse ruling on a motion filed pursuant to the Hyde Amendment, but the government would not be afforded the same privilege. We cannot imagine that the Congress intended such a result and are unwilling, absent clearer statutory direction, to establish precedent in this circuit lending support to such an outcome. If Congress had indeed desired these sorts of proceedings to be treated as part and parcel of the underlying criminal case, we would have expected a path to have been established for the government to appeal. We conclude that Rule 4(a) applies to an appeal from a ruling on a motion pursuant to the Hyde Amendment.

[4] Having so decided, we are left with one last jurisdictional question: Is the NOA in this case fatally premature? Rule 4(a)(1)(B) provides that when the United States is a party to a civil case, the NOA "may be filed ... within 60 days after the judgment or order appealed from is entered." Rule 4(a)(2) provides that an NOA "filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." Under Rule 4(a), entry occurs "when [the judgment or order] is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." FED. R.APP. P. 4(a)(7).

Federal Rule of Civil Procedure 79(a) requires that the decision of the district court be recorded on the civil docket. Here, the ruling below was recorded on the criminal docket. It has therefore never been entered in strict compliance with Rule 4(a)(7), and an argument can be made that an appeal is not perfected under Rule 4(a)(2) until so entered. Neither party has argued, however, that our appellate jurisdiction is defeated by the failure of the clerk of the district court to record the ruling in this case on the civil docket, and we can see no reason why our jurisdiction

5. We agree that application of the Rule 4(a) appeals period is not a procedure contained directly within the text of the EAJA. But, as we see it, Congress' direction that the procedures of the EAJA should apply to proceedings under the Hyde Amendments evinces its intent that, absent statutory direction to treat the proceedings differently, the case giving rise to the motion for an award of fees does not control, and Hyde Amendment proceedings and EAJA proceedings should be conducted in a like manner.

6. We suspect that because of the Tenth Circuit's construction of 28 U.S.C. § 3731, which authorizes the government to appeal in certain criminal cases, this concern was not apparent to the panel that decided *Robbins*. *Compare United States v. Prescon Corp.*, 695 F.2d 1236, 1240 (10th Cir.1982) (section 3731 authorizes any government appeal from a final order that does not implicate the Double Jeopardy Clause) *with United States v. Denson*, 588 F.2d 1112, 1125, *adopted en banc*, 603 F.2d 1143, 1145 (5th Cir.1979) (section 3731 only authorizes appeals from order similar to those in it).

should be so defeated. Were we to dismiss this action for lack of jurisdiction, "the district court would simply [enter its judgment on the civil docket], from which a timely appeal would then be taken. Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978). We find it unnecessary to dismiss this action for two reasons.

[5] First, what is important is that the judgment of the district court be final,[7] which it obviously was in this case, and the appellee, the government here, not be misled or prejudiced by the fact that the judgment was recorded on the criminal docket. *See Mallis*, 435 U.S. at 387, 98 S.Ct. 1117; *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 276, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991). The government was neither misled nor prejudiced in this case.

Second, in the past we have not found our jurisdiction defeated by a judgment being entered on the wrong docket. In *Smith v. Smith*, 145 F.3d 335 (5th Cir.1998), we were confronted with an appeal from a criminal contempt ruling that was entered on the civil docket. We determined that we did not need to decide whether Rule 4(a) or 4(b) applied, because the notice of appeal was timely in either case. *See id.* at 339. Implicit in that decision was a determination that the entry of judgment on the civil docket did not defeat jurisdiction if the case was criminal and Rule 4(b) applied. It follows that the converse should hold true in this case, and we determine that we have jurisdiction to entertain the appeal.

III. STANDARD OF REVIEW

[6] In *Pierce v. Underwood*, the Supreme Court determined that a district court's decision regarding an award of attorney's fees under the EAJA was subject to appellate review under the abuse of discretion standard. *See* 487 U.S. 552, 563, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). Appellants argue that the factors articulated in *Pierce* militate against an abuse of discretion standard and support de novo review in this case. We disagree and conclude that the close ties between the EAJA and the Hyde Amendment coupled with an application of the factors relied upon by the Court in *Pierce* support a application of the abuse of discretion standard.[8]

Awards made pursuant to the Hyde Amendment "shall be granted pursuant to the procedures and limitation (but not the burden of proof) provided for an award under [the EAJA]." Hyde Amendment, *supra*. The proper standard of appellate review is not one of the procedures and limitations of the EAJA, but the language of the Hyde Amendment indicates Congress' intent to have proceedings under the Hyde Amendment treated similarly to those under the EAJA. While the language quoted above does not conclusively determine the proper standard of review, the tie-in between the two provisions lends support to finding that the same standard applies in both situations.

7. "For a ruling to be final, it must end the litigation on the merits and the judge must clearly declare his intention in this respect." *FirsTier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 273–74, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991) (citations and internal quotation marks omitted).

8. In *United States v. Gilbert*, the Court of Appeals for the Eleventh Circuit, the only other circuit court to consider the proper standard of review for Hyde Amendment cases, likewise determined that an abuse of discretion standard was appropriate. *See* 198 F.3d 1293, 1298 (11th Cir.1999).

In *Pierce*, the Supreme Court considered several factors in determining the correct standard of review for EAJA proceedings. First, the Court looked to the language of the statute itself. The EAJA

> provides that attorney's fees shall be awarded "unless *the court finds* that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A) (emphasis added). This formulation, as opposed to simply "unless the position of the United States was substantially justified," emphasizes that the determination is for the district court to make, and thus suggests some deference to the district court on appeal.

Pierce, 487 U.S. at 559, 108 S.Ct. 2541. The Hyde Amendment similarly provides that "the court ... *may* award ... a reasonable attorney's fee ... where *the court finds* that the position of the United States was vexations, frivolous, or in bad faith...." Hyde Amendment, *supra* (emphasis added). The similar language in the Hyde Amendment supports deference to the district court's decision as well.

The Court in *Pierce* also considered whether " 'one judicial actor is better positioned than another to decide the issue in question.' " 487 U.S. at 560, 108 S.Ct. 2541 (quoting *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985)). The Court noted that some aspects of the government's litigating strategy may be known only to the district court. Also, the circuit court may have to spend inordinate time becoming more familiar with the record than is usually required for appeals in order to evaluate not only the merits of the case, but also the government's litigating strategy. While the Hyde Amendment deals with criminal cases rather than civil cases, we find these considerations weigh equally in favor of applying a deferential level of review in Hyde Amendment appeals. The district court is much more familiar with the ins-and-outs of the case, and its judgment will often reflect its unique perspective. Applying a less deferential standard of review would show disrespect for that unique perspective.

Finally, the Supreme Court recognized that flexibility was needed in the area in order for the "substantially justified" standard to develop. "[T]he question ... is ... little susceptible, for the time being at least, of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Id.* at 562, 108 S.Ct. 2541. The "vexatious, frivolous, or in bad faith" standard of the Hyde Amendment, along with the "for good cause shown" standard that governs whether the court may receive evidence in camera and ex parte, will similarly benefit from the experience envisioned by the Supreme Court in *Pierce*. We conclude that an abuse of discretion standard should apply to appeals from judgments in Hyde Amendment proceedings.

[7] Legal determinations underlying the district court's decision are, however, reviewed de novo. *See Spawn v. Western Bank–Westheimer*, 989 F.2d 830, 839 (5th Cir.1993). "As Judge Friendly has stated, '[i]t is not inconsistent with the discretion standard for an appellate court to decline to honor a purported exercise of discretion which was infected by an error of law.' " *Id.* (quoting *Abrams v. Interco, Inc.*, 719 F.2d 23, 28 (2d Cir.1983)).

IV. APPELLANTS' RIGHT TO DISCOVERY AND A HEARING

[8] We begin by disposing of Appellants' argument that the Hyde Amendment entitles them to discovery and a hearing as a matter

of right. For this proposition, Appellants cite *United States v. Gardner*, 23 F.Supp.2d 1283 (N.D.Okla.1998). There, however, the court explained that the movant had requested discovery and the government opposed that request. *See id.* at 1295–96. That is not the case here. Appellants do not allege that they moved for discovery or a hearing in the district court, and our independent review of the record likewise reveals no such motion. The scope of discovery allowable or required upon request of a movant for attorney's fees pursuant to the Hyde Amendment is therefore not an issue we need address in this case. We must decide only whether the district court abused its discretion by ruling on Appellants' motion without granting discovery or a hearing, despite the fact that neither was requested.

The Hyde Amendment provides that, "[t]o determine whether or not to award fees and costs under this section, the court, for good cause shown, may receive evidence ex parte and in camera ... and evidence or testimony so received shall be kept under seal." Hyde Amendment, *supra*. The Amendment, as originally introduced on by Representative Hyde, included no such provision. *See* 143 Cong. Rec. H7786–04, H7791 (daily ed. Sept. 24, 1997). The provision was added in response to concerns voiced by some members of the House regarding

> the after-the-fact exercise required under [the Hyde Amendment] to determine justification for prosecution.... There may be evidence that was relied upon in good faith by the prosecution in coming to its decision to prosecute, but was later suppressed at trial; there may be disclosure or required disclosure and compromise of confidential sources or law enforcement techniques....

Id. at H7793 (remarks of Representative Rivers). *See also Gilbert*, 198 F.3d at 1300–01.

Appellants assert that Representative Rivers's remarks were made at a time when the government was expected to bear the burden of proof under the Amendment. They argue that the burden was changed to the defendant, yet the Amendment still provides for the confidential submission of evidence. They conclude that it "stand[s] to reason that Congress intended for the claimant to have access to evidence except such evidence which is confidential, and such evidence is to be presented to the court in camera." Appellants' Brief at 21–22. We disagree. It appears the provision for in camera review of evidence was included to enable the government to defend itself against Hyde Amendment motions and at the same time protect confidential information. We do not read the Amendment as providing for discovery and a hearing as a matter of right.

The EAJA, the procedures and limitations of which are incorporated into the Hyde Amendment, provides that:

> Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(d)(1)(B) (1994). The government argues that this provision is a procedure contained in the EAJA, and that it is therefore incorporated into the Hyde Amendment, except to the extent that the latter provides otherwise. The government contends that the language of the Hyde Amendment "suggests that a district court has latitude to permit an expansion of the record, for good cause, beyond that available under the EAJA, while at the same time providing necessary safeguards." Government's Brief at 31. The government's reading of the

Amendment seems reasonable, but we need not today determine the situations under which discovery or a hearing is allowed or required, assuming either is allowed at all. It is clear that the Amendment, especially when read in conjunction with the EAJA, does not provide for discovery or a hearing as a matter of right. The district court, therefore, did not abuse its discretion in ruling on Appellants' motion without first affording them an opportunity for discovery or a hearing, because no motion for either was ever filed with the court.

V. THE BURDEN AND LEVEL OF PROOF

[9] Both parties argue that in order to recover attorney's fees as a prevailing party, the Appellants bear the burden of proof under the Hyde Amendment to show by a preponderance of the evidence that the government's position was vexatious, frivolous, or in bad faith. We agree. The Hyde Amendment provides that awards under it "shall be granted pursuant to the procedures and limitation (but not the burden of proof) provided for an award under [the EAJA]." Hyde Amendment, *supra*. It is clearly established that, under the EAJA, the government bears the burden of proof with regard to its litigating position. *See United States v. 5,507.38 Acres of Land*, 832 F.2d 882, 883 (5th Cir.1987). The language of the Hyde Amendment expresses a desire to shift that burden to the movant. The only other court of appeals that has addressed this issue agrees that the movant bears the burden of proof. *See Gilbert*, 198 F.3d at 1304.

[10] Under the EAJA, the government must prove by a preponderance of the evidence that its position was substantially justified. *See United States v. One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992). The Hyde Amendment changes only the party with whom burden of proof lies, not the level of proof by which the claim must be established. We conclude that a party moving for an award of attorney's fees under the Hyde Amendment must establish by a preponderance of the evidence that the government's position was vexatious, frivolous, or in bad faith.

VI. THE VEXATIOUS, FRIVOLOUS, OR IN BAD FAITH STANDARD

[11] The EAJA directs courts to award "to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action ... unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (1994) (emphasis added). The Supreme Court has interpreted the phrase substantially justified to mean "justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565, 108 S.Ct. 2541. The Court equated a substantially justified position with one having a "reasonable basis in law and fact." *Id.* at 566 n. 2, 108 S.Ct. 2541. The Hyde Amendment, on the other hand, allows a district court in a criminal case to "award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigating expenses, where the court finds that the position of the United States was *vexatious, frivolous, or in bad faith*, unless the court finds that special circumstances make such an award unjust." Hyde Amendment, *supra* (emphasis added). Appellants suggest that, other than the switched burden of proof, the standards in the EAJA and the Hyde Amendment are the same; a movant may succeed under the Hyde Amendment if he establishes that the prosecution was not sub-

stantially justified. The language of the two provisions and the legislative history prove otherwise.

The Hyde Amendment, as originally introduced on the floor of the House, made attorney's fees available absent special circumstances making such an award unjust, "unless the court finds that the position of the United States was substantially justified." 143 Cong. Rec. H7786–04, H7791 (daily ed. Sept. 24, 1997). In discussing the proposed Amendment, Representative Hyde drew parallels between it and the EAJA. As far as the standard applicable in such proceedings, he stated that the Amendment "ought to protect anybody who is abused by a suit that is not substantially justified.... What is the remedy, if not this, for somebody who has been unjustly, maliciously, improperly, abusively tried by the Government...." *Id.* at H7792. Representative David Skaggs responded to these comments, stating, "I think the gentleman proves too much. Were the words 'malicious' and 'abusive' in his amendment, and maybe those are criteria that also ought to be introduced, it would be a different matter." *Id.* The standard was eventually changed to "vexatious, frivolous, or in bad faith" in the Conference Committee. *See Gilbert*, 198 F.3d at 1301–02. This change signifies Congress' desire to limit the scope of the Amendment. A movant under the Hyde Amendment must prove more than just that the government's position was not substantially justified. *See id.* at 1302, 1304; *cf. Pierce*, 487 U.S. at 566, 108 S.Ct. 2541 ("To be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness....").

VII. APPELLANTS' CASE

[12] The district court seems to have agreed with Appellants' position. It held that a motion filed pursuant to the Hyde Amendment can succeed only if the movant can "establish that the government did not possess sufficient evidence that could satisfy a reasonable person to believe that the prosecution ... had a reasonable basis in law and fact." Memorandum Opinion and Order denying a motion by Richard Jones and Sandra Miller, filed December 7, 1998, at 4, incorporated by reference in Order filed Dec. 22, 1998. This conclusion was based on the district court's ruling that, "because the procedures and limitations of the EAJA apply to the Hyde Amendment, a prevailing party is not entitled to an award if the government's position in the litigation was 'substantially justified.'" *Id.*

We disagree with the district court that a movant need only prove that the government's position was not substantially justified, i.e. that "a reasonable person considering the government's evidence could [not] find that the prosecution of defendants had a rational basis in both law and fact." *Id.* at 5. As previously explained, the "vexatious, frivolous, or in bad faith" standard is more demanding on a movant than the "not substantially justified" standard. The district court was correct, however, that if a movant is unable even to establish that the prosecution was not substantially justified, he certainly cannot establish that it was vexatious, frivolous, or brought in bad faith. The district court here concluded that Appellants failed to establish that the government's prosecution of them was not substantially justified. If the district was correct in this conclusion, then it did not abuse its discretion in denying Appellants' Hyde Amendment motion, which calls for an even more demanding standard.

Appellants first argue that the government knew, or should have known, that they were not engaged in bookmaking in Texas, and

that, therefore, the government's prosecution of them was vexatious and frivolous. According to Appellants, the government's star witness testified that no bets were taken in Texas. Appellants argue that this case "was clearly a situation where [a Dallas police officer involved in the case] was saying that the F.B.I. contended that the operation was illegal, and the F.B.I. was saying that they were relying on [the Dallas police officer's] training and experience in illegal gambling operations." Appellant's Brief at 33. Appellant's own description sounds more of confusion and sloppiness than vexatiousness or frivolousness. This conclusion is supported by the government's argument that there was some evidence that Appellants had broken state gambling laws by becoming custodians of gambling proceeds, but the government neglected to proceed on this theory, arguing instead only that Appellants broke state law by engaging in bookmaking.

In reaching its conclusion that Appellants had failed to establish that the government's position was not substantially justified, the district relied on evidence that toll-free numbers terminated at Appellants' homes, Appellants paid out winnings from Texas bank accounts, the notebook found in Hamilton's house contained betting information, several callers attempted to place bets with federal agents on the toll-free lines terminating at Appellants' homes, and certain documents seized from Truesdale's home contained possible betting information. The district court had previously tied the "not substantially justified" standard to the "vexatious, frivolous, or in bad faith" standard, and it ruled that "[a]lthough this evidence was insufficient for a reasonable jury to find beyond a reasonable doubt that [Appellants] had engaged in bookmaking operations in Texas, it was sufficient evidence to indicate that the government's prosecution of Truesdale and Hamilton was neither vexatious, frivolous, nor in bad faith." Order filed Dec. 22, 1998, at 2. While we disagree with the standard the district court applied, we agree that Appellants failed to establish even that the government's position was not substantially justified. "To be substantial, evidence must be relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion; it must be more than a speck or scintilla but it need not be a preponderance." *Taylor v. Bowen*, 782 F.2d 1294, 1298 (5th Cir. 1986). Because Appellants failed even to establish that the government's prosecution of them was not substantially justified, they cannot establish that the prosecution was vexatious, frivolous, or in bad faith. The district court, therefore, did not abuse its discretion in denying Appellants' motion.

[13] Finally, Appellants argue that the money laundering charges against them were brought in bad faith. Our independent review of the record reveals that Appellants failed to raise this issue before the district court. If a party raises an issue for the first time on appeal, it can prevail only if it shows that the district court committed a plain error that affects the party's substantial rights. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1423 (5th Cir.1996) (en banc). If the trial court committed a plain error that affects a party's substantial rights, we may correct the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Appellants have not made the requisite showings in this case.[9]

9. We therefore need not address the issue of whether the Hyde Amendment provides relief if just a portion of the government's prosecu-

VIII. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

tion is vexatious, frivolous, or brought in bad faith.

Adm. Office, U.S. Courts—West Group, Saint Paul, Minn.

V-F-3

Send to Rules Committee 00-08

J.C. BASS; Charlene B. Bass,
Plaintiffs–Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE, et al.,
Defendants,

United States Department of Agriculture; Daniel Glickman, Secretary of the U.S. Department of Agriculture; National Appeals Division, formerly known as National Appeals Staff of the U.S. Department of Agriculture; Farm Service Agency, formerly known as Farmers Home Administration of the U.S. Department of Agriculture; Keith Kelly, Administrator of the Farm Service Agency of the U.S. Department of Agriculture; Norman G. Cooper, Director of the National Appeals Division of the U.S. Department of Agriculture, Defendants–Appellees.

No. 99-60366.

United States Court of Appeals,
Fifth Circuit.

May 23, 2000.

Farmers who participated in Farm Service Agency's (FSA's) leaseback/buyback program brought action against Department of Agriculture and federal officials, challenging manner in which FSA established repurchase price for land that they had conveyed to FSA to repay FSA-financed loans. The United States District Court for the Southern District of Mississippi, William H. Barbour, J., granted summary judgment for defendants, and plaintiffs appealed. The Court of Appeals held that: (1) period in which party must move to reopen time to file appeal began to run when party received written notice of entry of judgment, and (2) Director of National Appeals Division properly applied preponderance of evidence standard in rejecting plaintiff's appeal from FSA's evaluation.

Affirmed.

1. Federal Civil Procedure ⇐2659

Federal Courts ⇐669

Motion for reconsideration filed within ten days of district court's judgment is construed as motion to alter or amend judgment that suspends time for filing notice of appeal. F.R.A.P.Rule 4(a)(4), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

2. Federal Courts ⇐655

Under rule which permits district court to reopen time to file appeal if party who did not receive timely notice of entry of judgment files motion to reopen within seven days after it "receives notice of the entry," seven day period in which party must move to reopen time to file appeal begins to run when party receives written notice of entry of judgment; separate rule requires clerk to serve notice of entry of judgment by mail and written notice is more susceptible to proof than oral communications. F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 77(d), 28 U.S.C.A.

3. Administrative Law and Procedure ⇐669.1

In considering petition for review from final agency order, court will generally not consider questions of law which were neither presented to nor passed on by agency.

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The Synopsis, Syllabi and Key Number Classification constitute no part of the opinion of the court.

4. Agriculture ⇐3.5(1)

Farmer challenging Farm Service Agency's (FSA's) determination regarding value of his farm by asserting that FSA applied improper regulation when it determined farm's value failed to preserve issue for judicial review; although farmer alluded to argument in letter to FSA, farmer did not challenge FSA's conclusion regarding applicable regulation during administrative proceedings.

5. Agriculture ⇐3.5(1)

Farm program regulation providing that borrowers "appealing the current market appraisal may obtain an appraisal by an independent appraiser selected from a list of at least three names provided by the servicing official" does not require farmer to produce independent appraisal in order to challenge appraisal of farm by Farm Service Agency (FSA). 7 C.F.R. § 1951.909(i)(3)(i).

6. Agriculture ⇐3.5(1)

Director of National Appeals Division of Department of Agriculture properly applied preponderance of evidence standard in rejecting borrower's appeal from Farm Service Agency's (FSA's) valuation of borrower's farm; although FSA accorded borrower's appraisal little weight, it adequately articulated relationship between facts found and its decision to accept FSA's appraisal over opinion submitted by borrower's appraiser. Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, § 277(c)(4), 7 U.S.C.A. § 6997(c)(4).

Appeals from the United States District Court for the Southern District of Mississippi.

Before WIENER, BENAVIDES and PARKER, Circuit Judges.

PER CURIAM:

Appellants, J.C. and Charlene Bass (collectively "Bass"), appeal a summary judgment for the defendants in this Administrative Procedures Act suit challenging the Farm Service Agency's ("FSA") appraisal of farm property. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case involves a dispute over the way in which the FSA established the repurchase price for farm land that Bass conveyed to the FSA when he became unable to repay FSA-financed loans.[1] The property at issue consists of 531 acres located in Amite County, Mississippi. Bass farmed the land beginning in 1966. In 1977, Bass financed the land through the FSA. Because of financial reverses in 1990, Bass entered into an agreement to deed the farm to FSA in exchange for forgiveness of the debt. The parties agreed that FSA would lease the farm back to Bass with an option to repurchase, pursuant to the FSA's "leaseback/buyback" program, authorized by the Consolidated Farm and Rural Development Act ("CONACT"), 7 U.S.C. § 1921–2009 (1994).

In 1996, Bass notified FSA that he intended to exercise the repurchase option. A dispute arose concerning the value of the farm. After extensive administrative proceedings, Bass sought judicial review of the valuation ruling by the Director of the

1. The FSA was formerly known as the Farmers Home Administration (FmHA), an agency of the U.S. Department of Agriculture (USDA). For simplicity, the agency is referred to as FSA throughout this opinion.

USDA's National Appeals Division ("Director"). The district court entered summary judgment for defendants and this appeal followed.

II. TIMELINESS OF MOTION TO REOPEN APPEAL PERIOD

The district court entered judgment on November 10, 1998. On November 19, Bass retained new counsel who moved for reconsideration. On November 20, Bass's new counsel filed a notice of appearance, giving as his address "300 West Claiborne, Avenue, Greenwood, Mississippi." Defendants opposed the motion for reconsideration and on December 28, 1998, Bass's counsel moved for an enlargement of time to file a rebuttal to defendants' opposition. The district court granted this motion, but the clerk mailed a copy of the order to Bass's counsel at "P.O. Box 1350, Greenwood, Mississippi." The order was returned to the clerk's office "not deliverable as addressed."

On January 20, 1999, the district court entered an order denying Bass's motion for reconsideration. The docket sheet indicates that copies of the order were mailed, and there is no "undeliverable" notation in the docket with respect to service of the order on Bass's counsel. On May 27, 1999, Bass's counsel filed a notice of appeal. Counsel also filed an affidavit averring that on the morning of May 26, 1999, he received a telephone call from Mr. Bass advising him that the court had entered an order denying the motion for reconsideration. Counsel contacted the district court clerk's office on May 26, and was advised by the docketing clerk that the order had been entered on January 20, 1999, and a copy mailed to him at "P.O. Box 1350." Counsel averred that he had not received the order, had not used that address since 1997, and that he had provided the clerk with his correct address.

On June 3, 1999, counsel for Bass filed a motion to reopen the time for appeal, pursuant to FED. R.APP. P. 4(a)(6). The motion was accompanied by counsel's affidavit, in which he stated that he received a copy of the order denying reconsideration in the mail on May 28, 1999. On June 22, 1999, counsel for Bass filed a second notice of appeal.

Federal Rule of Appellate Procedure 4(a)(1)(B) requires that the notice of appeal in a civil action in which the United States is a party be filed within 60 days of entry of the judgment or order from which appeal is taken. A timely motion to alter or amend a judgment under FED.R.CIV.P. 59(e) suspends the time for filing a notice of appeal until entry of an order disposing of the motion. FED. R.APP. R. 4(a)(4).

[1] There is no motion for "reconsideration" in the Federal Rules of Civil Procedure. *See Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n. 10 (5th Cir.1998). However, a motion for reconsideration filed within ten days of the district court's judgment is construed as a Rule 59(e) motion that suspends the time for filing a notice of appeal. *See id.* Because Bass's motion was filed on November 19, within ten days of the November 10 judgment, we construe it as a Rule 59(e) motion, which suspended the time for filing an appeal from the underlying judgment. *See id; see also Harcon Barge Co., Inc. v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir.1986). Bass's notice of appeal was therefore due sixty days from the date the court entered its order denying the motion for reconsideration, or sixty days from January 20, 1999. Bass's notice of appeal, filed May 27, 1999, was therefore untimely.

We must next determine whether the district court abused its discretion in granting

Bass's motion to extend the period for filing his notice of appeal. *See United States v. Clark*, 51 F.3d 42, 43 (5th Cir.1995). Under Rule(4)(a)(6), a district court may reopen the time to file an appeal for 14 days after the order to reopen is entered, if "the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier," the moving party did not receive notice of the entry of judgment sought to be appealed within 21 days after entry, and no party would be prejudiced. Bass's motion was filed within 180 days after entry of the January 20, 1999 order. However, because the time to reopen runs from the earlier of the two dates, the issue becomes whether Bass's motion to reopen the appeal period was filed within 7 days after Bass's counsel "received notice" of entry of the order denying his motion for reconsideration.

In order to determine whether the motion was timely it is necessary to determine whether counsel received notice on May 26, when he learned of the order over the telephone and orally confirmed entry with the district court clerk, or whether he is deemed to have received notice on May 28, when he received a written copy of the order in the mail. The appellate computation-of-time rules provide that "in computing any period of time specified in these rules ... [e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days...." FED. R.APP. P. 26(a). If the seven-day filing period was triggered on May 26, then in accordance with Rules 4(a)(6) and 26(a) the motion was due to be filed June 2, and the motion filed on June 3 was untimely. If the seven-day period was triggered on May 28 when Bass's counsel received a written copy of the order, the motion was timely.

This circuit has not expressly held whether "receives notice" under Rule 4(a)(6) means acquiring knowledge of facts through oral communication which would lead a prudent person to make inquiry or the receipt of written notice. Some circuits have expressly held that the seven-day period is triggered only by receipt of written notice. *See, e.g., Scott–Harris v. City of Fall River*, 134 F.3d 427, 433 (1st Cir.1997), *rev'd on other grounds, Bogan v. Scott–Harris*, 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed.2d 79 (1998); *Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1215 (D.C.Cir.1996); *Avolio v. County of Suffolk*, 29 F.3d 50, 53 (2d Cir.1994). On the other hand, the Eighth and Ninth Circuits speak in terms of "actual notice," without expressly taking a position on whether oral notice is enough. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 794 (9th Cir.1995)(actual notice consisted of attorney reviewing a docket sheet in the clerk's office); *see also Zimmer St. Louis, Inc. v. Zimmer Co.*, 32 F.3d 357 (8th Cir.1994).

[2] We are convinced that "the better perception is that the rule requires written notice." 16A WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3D § 3950.6 (West 1999). Both the rule itself and policy concerns support this conclusion.

First, Appellate Rule 4(a)(6) and Civil Rule 77(d)[2] must be read *in pari materia*. *See Scott–Harris*, 134 F.3d at 433. Rule 77(d)

2. Federal Rule of Civil Procedure 77(d) provides:

> Notice of Orders or Judgements.
> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the

requires the clerk to serve the notice of entry of an order or judgment "by mail." Because a mailed notice is necessarily a written notice, it is logical to conclude that when reference is made later in Rule 77(d) to "lack of notice of the entry," not relieving a party "from failure to appeal within the time allowed *except as permitted in Rule 4(a),*" FED.R.CIV.P. 77(d)(emphasis added), that reference contemplates lack of written notice. *See Scott–Harris*, 134 F.3d at 433. Second, the Advisory Committee's Notes tell us that Rule 4(a)(6)

> provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to [Rule 77(d)], is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal.

FED. R.APP. P. 4(a)(6) Advisory Committee's Notes. The statement "required to be mailed" refers to "notice of entry of a judgment or order," again suggesting that the notice must be in writing. *See Scott–Harris*, 134 F.3d at 434. When a procedural rule uses the precise phrase employed by the Advisory Committee, it can reasonably be inferred that the phrase means the same thing in both contexts. *See id.* Finally, policy concerns support reading Rule 4(a)(6) as requiring written notice. Written notice is more readily susceptible to proof than are oral communications, taking an element of guesswork out of the equation. *See id.* Also, because Rule 77(d) provides that parties who do not wish to rely upon the clerk to transmit the requisite written notice may do so themselves, the scheme "confers certitude without leaving a victorious litigant at the mercy of a slipshod clerk." *Id.*

> entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

Bass's motion to extend the time for filing a notice of appeal, filed within seven days of the date he received written notice of the court's order, was timely. There appearing on this record no other impediment to the district court's exercise of discretion, we hold that the district court did not err in granting the motion.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

[3, 4] Bass argues that 7 C.F.R. § 1955.107(e), rather than 7 C.F.R. § 1922.201, governs how the purchase price for his farm should be determined. "As a general rule, in considering a petition for review from a final agency order, the courts will not consider questions of law which were neither presented to nor passed on by the agency." *Myron v. Martin*, 670 F.2d 49, 51 (5th Cir.1982). Although Bass argues that he "inartfully" alluded to this argument in a letter to the agency, he did not subsequently challenge the agency's conclusion that the Part 1922 regulations applied in determining the farm's value. In fact, the argument raised by Bass before the district court and in his appeal is at odds with the position that Bass took during the administrative proceedings. We therefore conclude that the district court did not err in determining that Bass failed to preserve this issue for judicial review because it was not presented to the agency. *See id.* at 51.

IV. APPLICATION OF 7 C.F.R. § 1951.909(i)(3)

The district court held that the Director's citation to 7 C.F.R. § 1951.909(i)(3) govern-

ing the method for determining the repurchase price of the farm was erroneous, but because the error went only to the weight the Director accorded Bass's evidence, it did not render the decision arbitrary, capricious, or an abuse of discretion.

[5, 6] The regulation at issue provides that "[b]orrowers appealing the current market appraisal may obtain an appraisal by an independent appraiser selected from a list of at least three names provided by the servicing official." 7 C.F.R. § 1951.909(i)(3)(i). This language does not mandate that Bass produce an independent appraisal in order to challenge the FSA appraisal. *See id.* Bass was required to show only that the FSA's determination of value was erroneous "by a preponderance of the evidence." 7 U.S.C. § 6997(c)(4). FSA properly applied this standard in rejecting Bass's appeal. The record does not support Bass's allegation that the Director totally disregarded Bass's appraisal. Although the Director accorded Bass's appraisal little weight, the Director's determination adequately articulates a relationship between the facts found and its decision to accept the FSA's appraisal over the opinion submitted by Bass's appraiser. We therefore conclude that the district court's summary judgment for defendants must be affirmed.

V. CONCLUSION

Based on the foregoing, we hold that we have jurisdiction to consider the merits of this appeal and that the district court's summary judgment for defendants is affirmed.

AFFIRMED.

V-F-4

00-09

Author: stuart_buck@ck6.uscourts.gov at ~Internet
Date: 9/13/00 11:58 AM
Normal
TO: Rules Comments at AO-OJPPO
Subject: Proposed change to Rule 22 of the FRAP
---------- Message Contents

RECEIVED 9/14/00

00-AP-C

Stuart Buck
Clerk to Judge David Nelson, 6th Circuit Court of Appeals
225 Ridgewood Pl.
Fort Thomas, KY 41075
859-442-5005

To the Committee:

I have briefly examined the proposed changes to the Fed. Rules of Appellate Procedure. I did not notice any changes to Rule 22 -- which is why I write.

As you know, the AEDPA changed the requirement for appealing a district court's habeas corpus ruling -- formerly, the petitioner had to get a certificate of probable cause under Section 2253(c), whereas now the petitioner has to get a certificate of appealability under that same section. The new certificate of appealability is granted according to the same substantive standard ("substantial showing of the denial of a constitutional right"), but has a new requirement that the certificate name the SPECIFIC issues to be appealed.

There is currently a circuit split on what to do procedurally when a district court has granted a certificate of probable cause but a certificate of appealability is actually required. Such situations will probably arise even more often now that the Supreme Court has held in Slack v. McDaniel, 120 S.Ct. 1595 (2000), that all appeals undertaken after April 24, 1996, must be done pursuant to a certificate of appealability even if pre-AEDPA substantive law applies because the habeas petition was filed prior to April 24, 1996.

The Fifth Circuit has held that it must remand such cases to the district court for a certificate of appealability. Muniz v. Johnson, 114 F.3d 43 (5th Cir. 1997); Hill v. Johnson, 114 F.3d 78 (5th Cir. 1997). Similarly, the Sixth Circuit has said that it lacks authority under Rule 22 to consider whether to grant a certificate of appealability unless the district court has actually denied one. Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1076 n.18 (6th Cir. 1997).

By contrast, the DC, Second, Third, and Eleventh Circuits (and possibly more) have held that they can treat the certificate of probable cause as a certificate of appealability. See Byrd v. Henderson, 119 F.3d 34, 36 (D.C. Cir. 1997); Smith v. Ross, No. 96-2441, 1997 U.S. App. LEXIS 12329, at *2 --*3 (2d Cir. 1997); Banks v. Horn, 126 F.3d 206, 210 (3d Cir. 1997); Franklin v. Hightower, 215 F.3d 1196 (11th Cir. 2000). The Eleventh Circuit, interestingly, found the power to do this in Rule 27 of the Rules of Appellate Procedure, which allows a court to "review the action of a single judge." More strikingly, the Third Circuit actually decided to "treat the certificate of probable cause as BOTH a certificate of probable cause and a certificate of appealability." Banks, 126 F.3d at 210 (emphasis added).

Thus, I would suggest an amendment to Rule 22 which would clarify what circuit courts can do in this situation. Here are some possible sentences that might be added at the end of 22(b)(1):

A) "If a district judge has granted a certificate of probable cause where a certificate of appealability would be required, the circuit judge or judges may treat the certificate of probable cause as if it were a certificate of appealability naming all the issues for appeal."

B) "If a district judge has granted a certificate of probable cause where a certificate of appealability would be required, the circuit judge or judges may consider whether or not to grant a certificate of appealability."

I hope that this letter is of some assistance in addressing this confusing issue.

Sincerely,

Stuart Buck

00-10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
600 W. CAPITOL, ROOM 423
LITTLE ROCK, ARKANSAS 72201-3325
(501) 604-5140
Facsimile (501) 324-6869

ILL WILSON
JUDGE

September 26, 2000

The Honorable Will L. Garwood
Chair, Advisory Committee on Appellate Rules
U. S. Circuit Judge
903 San Jacinto Boulevard, Suite 300
Austin, TX 78701

RE: Neutral Assignment of Judges at the Court of Appeals
J. Robert Brown, Jr. and Allixon Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037 (2000)

Dear Judge Garwood:

I heartily commend the referenced article to you and the members of your committee. It seems to me it would be a mighty good thing if we had a national rule requiring "neutral" assignment of judges at the appellate level -- only with narrow, well-defined exceptions perhaps (such as a "related case" rule).

We have random selection here in the Eastern District of Arkansas. If a case is transferred because it is related to another case the parties are notified in advance, and are given an opportunity to object. I think our procedure resolves most worries about how cases get assigned to a particular judge.

We tell juries that not only are they to do justice, but they are to have the appearance of doing justice. I think it is equally important that we judges do both.

Cordially,

Wm. R. Wilson, Jr.

cc: The Honorable Anthony Scirica, Chair
Committee on Rules of Practice and Procedure

V-F-6

00-10

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 2, 2000

MEMORANDUM TO JUDGE GARWOOD AND PROFESSOR SCHILTZ

SUBJECT: *Appellate Rule 35(a)*

Judge Edward Carnes, a member of the Advisory Committee on Criminal Rules, asked me to send to you a copy of the Eleventh Circuit's per curiam opinion in *Gulf Power v. Federal Communications Commission* 2000 WL 1335040 (Sept. 12, 2000) for the committee's consideration. Judge Carnes wrote a separate opinion concerning the majority-voting requirements governing a denial of rehearing en banc, and he suggested changes to Rule 35(a). He recognizes that "the operative language in Rule 35(a) is drawn from 28 U.S.C. § 46(c), which would need to be amended by Congress or superceded by an amendment of the rules, see 28 U.S.C. § 2072(b)."

John K. Rabiej

Attachment

cc: Honorable Edward Carnes (without attach.)

Only the Westlaw citation is currently available.

United States Court of Appeals,
Eleventh Circuit.

GULF POWER COMPANY, Alabama Power Company, et al., Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and United States of America, Respondents.
Tampa Electric Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Florida Power & Light Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Commonwealth Edison Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Potomac Electric Power Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Texas Utilities Electric Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Union Electric Company, d.b.a. Amerenue, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
American Electric Power Services Corporation, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Duke Energy Corporation, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Virginia Electric and Power Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Carolina Power & Light Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Duquesne Light Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Duquesne Light Company, Petitioner,
v.
Federal Communications Commission and United States of America, Respondents.
Nos. 98-6222, 98-2589, 98-4675, 98-6414, 98-6430, 98-6431, 98-6442, 98-6458, 98-6476 to 98-6478, 98-6485 and 98-6486.
Sept. 12, 2000.

David W. Carpenter, Sidley & Austin, Washington, DC, for AT&T Corp.
James T. Hannon, U.S. West, Inc., Denver, CO, for U.S. West, Inc.
Walter Steimel, Jr., Greenberg Traurig, Washington, DC, for Gulf Power Co., Alabama Power Co., Georgia Power Co., Southern Co. Services, Inc., Tampa Elec. Co., Potomac Elec. Power Co., Virginia Elec. and Power Co., Carolina Power & Light Co., Duquesne Light Co., and Delmarva Power & Light Co.
Matthew J. Calvert, Hunton & Williams, Atlanta, GA, for Petitioners in 98- 6222, Tampa Elec. Co. and Florida Power & Light Co.
John Francis Raposa, GTE Serv. Corp., Irvin, TX, for Intervenor GTE Serv. Corp.
Robert B. McKenna, U.S. West, Inc., Washington, DC, for Intervenor, U.S. West, Inc.
William Single, Washington, DC, Paul Glist, Geoffrey Charles Cook, Cole, Raywid & Braverman, John D. Thomas, Washington, DC, Marjorie K. Conner, Hunton & Williams, Washington, DC, for Intervenors in 98-6222.
Jean Howard, Miami, FL, for Gulf Power and Florida Power & Light Co.
Michael S. Schooler, Nat. Cable Television Ass'n, Washington, DC, for Intervenor, Nat. Cable Television Ass'n.
Gregory M. Christophewr, FCC, Robert B. Nicholson, Robert J. Wiggers, U.S. Dept. of Justice/Antitrust Div., Richard

Bruce Beckner, Fleischman & Walsh, LLP, Janet Reno, U.S. Atty. Gen., Dept. of Justice, Washington, DC, Steven D. Strickland, SBC Communications, Inc., San Antonio, TX, Marjorie K. Conner, Hunton, & Williams, Washington, DC, for FCC and U.S.
Jean G. Howard, Florida Power & Light Co., Miami, FL, for Florida Power & Light Co.
Thomas Peter Steindler, Christine M. Gill, Shirley Sachie Fujimoto, McDermott, Will & Emery, Washington, DC, for Houston Lighting and Power Co., Public Serv. Elec. & Gas, Amerite, Commonwealth Edison Co., Union Elec. Co., American Elec. Power Serv. Corp. and Duke Energy Corp.
Wayne Kenneth Ferree, Jonathan L. Wiener, Goldberg, Godles, Wiener & Wright, Washington, DC, for Texas Utilities Elec. Co.

Petitions for Review of an Order of the Federal Communications Commission (Nos. 97-151-CS, 98-20-FCC).
ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion April 11, 2000, 11th Cir., 2000, 208 F.3d 1263)

Before TJOFLAT, EDMONDSON, BLACK, CARNES, BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:
*1 The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.
All other active judges of the Court were recused.

CARNES, Circuit Judge, concerning the denial of rehearing en banc:
My opinion concurring in part and dissenting in part from the panel decision, see Gulf Power Co. v. FCC, 208 F.3d 1263, 1279 (11th Cir.2000), explains why I think the panel majority erred in holding the Pole Attachment Act's regulated rate provisions do not extend to attachments used for wireless communications and Internet services. There is no point in reiterating here what I said there. Instead, I write separately upon the denial of rehearing en banc, because this case is a good example of why the absolute majority provision of Federal Rule of Appellate Procedure 35(a) needs to be changed by Congress or by the Supreme Court through the Rules Enabling Act, see 28 U.S.C. § 2072. [FN1]
Rule 35(a) provides that: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." This Court, along with some of the other federal courts of appeals, has interpreted "circuit judges who are in regular active service" to include all active circuit judges serving on the court at the time of the poll including those judges who are disqualified from participating. In other words, we interpret the rule to mean that the votes of absolute majority, or seven of the twelve judges in active service on our court now, are necessary to take a case en banc. I do not quarrel with our interpretation of the rule, although we are on the short side of a circuit split regarding it, see Judith A. McKenna et al., Federal Judicial Center, Case Management Procedure in the Federal Courts of Appeals 23 (2000) (table indicating that eight circuits do not count disqualified judges when calculating a majority for en banc rehearing purposes, while five circuits do). [FN2] But I do think that Rule 35(a) should be amended so that it is clear that disqualified judges are not counted, in effect, as a vote against rehearing en banc.
*2 As the order denying rehearing en banc in this case indicates, five of the twelve judges in active service on this Court are disqualified from participating in this important case. [FN3] That leaves only seven judges. Two of those seven judges split on the legal issue in question--one of them authored the panel majority opinion and the other one dissented from an important holding in it. Yet the dissenting judge and the five remaining, non- disqualified judges in active service are unable to vote the case en banc under Rule 35(a), no matter how wrong they may think the panel majority's holding is, unless the judge who authored the panel majority opinion votes with them to do it. It sometimes happens that a judge who authors a panel opinion votes to take the case en banc, see Songer v. Wainwright, 756 F.2d 799 (11th Cir.1985)(Roney, J., specially concurring in the order granting rehearing en banc), but not very often. [FN4]
Assume with me, for present purposes, that this is not one of those rare cases in which the judge who authored the majority opinion for the panel wants to have it reviewed by the court sitting en banc--assume that judge has voted against en banc rehearing. If this is one of the usual cases where the author of the panel opinion votes against rehearing en banc, then this case could not be taken en banc no matter how strongly the remaining six non-disqualified judges thought it should be. En banc rehearing is not possible in such a situation because six is not seven, and Rule 35(a) insists on seven votes, and it is not satisfied by any fewer number, not even by six out of seven. The result is that the law of this circuit is decided not on the basis of the votes of a majority of the seven non-disqualified judges of this Court in active service, but instead by the vote of the senior judge from another circuit who was on the panel and broke the tie created by the conflicting votes of the two judges of this court in active service who were on the panel. [FN5] That is how Rule 35(a)'s absolute majority requirement operates.
As bad as the operation of Rule 35(a) is in this case, it can be worse. If one more judge in active service on this

Court had been disqualified, it would have been impossible for the remaining six non-disqualified judges to vote the case en banc, even if the judge who authored the majority opinion was willing to take the extraordinary step of voting for en banc rehearing.

*3 The rule as written can even operate to impose on the circuit and its judges law with which every non-disqualified judge in active service disagrees. It is not unusual for our court to sit in panels consisting of one active judge plus two senior judges, or an active judge plus one senior judge and one visiting judge. [FN6] With such panels, if six or more judges in active service are disqualified from participating in a case, Rule 35(a) makes it possible for the law of the circuit to be set by one senior judge and one visiting judge, even though every one of the non-disqualified judges in active service (up to six in number) adamantly disagree with them about what that law should be.

It can be worse still. If the chief judge of the circuit declares an emergency, which is defined to include the illness of a judge, the requirement that a majority of each panel of a court of appeals be members (active or senior) of that court of appeals is lifted. See 28 U.S.C. § 46(b). [FN7] Although not frequently invoked, this emergency provision has recently resulted in a panel of our Court being composed of one judge in active service and two visiting judges. See Parris v. The Miami Herald Publ'g Co., 216 F.3d 1298, 1299 (11th Cir.2000) (panel consisting of one judge of this Court, a senior judge of another circuit, and a senior district court judge). In that circumstance, if six or more judges in active service on this Court were disqualified, Rule 35(a) could operate to have the law of the circuit made by two visiting judges, and there would be nothing that the six active judges of this Court who were not disqualified could do about it.

What possible justification can there be for the absolute majority rule--why make it possible to have the law of the circuit determined by one active judge against the views of six others, or by a senior and a visiting judge or two visiting judges against the views of six judges in active service? Why not let the decision whether to rehear a case en banc be made by a majority of the judges in active service who are not disqualified? More than a quarter of a century ago, Judge Mansfield, joined by two other Second Circuit judges, put forward two justifications for the absolute majority requirement of Rule 35(a), and 28 U.S.C. § 46(a) from which Rule 35(a) is drawn. See Zahn v. Int'l Paper Co., 469 F.2d 1033, 1041 (2d Cir.1972)(Mansfield, J., concurring in the denial of rehearing en banc). First, Judge Mansfield suggested, the absolute majority rule seeks "to achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel." Id. If protecting majority rule is the goal of Rule 35(a), then it is counterproductive. Under our prior panel precedent rule, a panel decision is the law of the circuit unless and until it is overruled by the Supreme Court or the en banc court. See United States v. Steele, 147 F.3d 1316, 1318 (11th Cir.1998)("The law of this circuit is emphatic that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision.") (internal marks and citation omitted). Every other circuit, or virtually every one, follows the same principle: The law of the circuit is established not just by en banc decisions, but by panel decisions as well. See United States v. Washington, 127 F.3d 510, 517 (6th Cir.1997)("In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision."); Phillip M. Kannan, The Precedential Force of Panel Law, 76 Marq. L.Rev. 755, 755-56 (1993) ("[A]ll thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit."). The absolute majority requirement does nothing to prevent panel decisions from establishing the law of the circuit; instead, the requirement makes it more difficult, or impossible, to have the law made in some panel decisions reviewed en banc.

By insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of the judges in active service. After all, which is a better bet to reflect the views of seven of twelve active judges--the views of six of those judges, or the views of one? And where a question of exceptional importance is involved, shouldn't the law of the circuit be decided by six out of twelve active judges instead of by one active judge coupled with a visiting judge? With en banc worthy issues is it not better to have the law of the circuit decided by six of twelve judges in active service than by one of them, or by none of them--which is what can happen under Rule 35(a) when a panel includes two senior judges or a senior and a visiting judge.

*4 Judge Mansfield also suggested that the absolute majority requirement "serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit of requiring such hearings in every case where a minority of the court may desire a decision by the full court." Zahn, 469 F.2d at 1041. Two things about that. First, the question is not whether to limit en banc review to questions of exceptional importance, but who is better to decide whether a case meets that standard and warrants en banc review--a majority of the judges in active service who are not disqualified, or a minority of those non-disqualified judges, perhaps only one of them? Second, whatever may have been the case a quarter of a century ago, viewed from the perspective of federal appellate courts struggling under the heavy and increasing caseloads of the present day, the notion that courts might "drift" into the "unfortunate habit" of having too many en banc rehearings is quaint. En banc rehearings take a lot of judicial resources and no court of appeals is going to drift into the habit of having too many of them regardless of whether Rule 35(a) is amended.

Judge Adams of the Third Circuit also had a go at justifying the absolute majority requirement. The case was Lewis v. Univ. of Pittsburgh, 725 F.2d 910 (3d Cir.1983), and the vote was five for rehearing en banc, three against, and two disqualified, id. at 928--29 (opinion of Adams, J., on the petition for rehearing). Fearing that the result--denial of

rehearing en banc when the vote was five to three in favor of it--"must appear quite unfair" to the losing litigant, Judge Adams attempted to explain the reason for the absolute majority requirement. Id. at 929. The "main reason" for the requirement, he said, "is that it insures that major developments in the law of the Circuit reflect the participation of all members of the Court." Id. But, of course, because of the prior panel precedent rule the absolute majority requirement does not do that at all. The decision of the panel majority, even if it was composed of only one active judge (or none), is the law of the circuit unless and until overruled en banc or by the Supreme Court. Coupled with the prior panel precedent rule, the absolute majority requirement actually operates to make it more likely that the law of the circuit will not represent the views of a majority of the judges in active service. It does that by preventing the non- disqualified active judges from voting a case en banc in some circumstances even where they (because of their greater number) are more likely to reflect the views of the majority of judges in active service than those, if any, voting against en banc rehearing.

Judge Adams also suggested that lowering the absolute majority bar would lead to the law becoming more unsettled. See id. He gave as a hypothetical for his court, which had ten active members, the situation in which there were five recusals and a vote of three to two in favor of en banc rehearing. See id. Two things about that. First, Judge Adams did not explain why letting the law be decided by three active judges instead of by two would unsettle it. Perhaps the assumption is that en banc rehearings are unsettling, and therefore the fewer of them the better. But leaving a panel opinion in place, particularly if en banc review is sought because the panel opinion conflicts with one or more prior panel decisions, or with a Supreme Court decision, can also unsettle the law. Second, the argument that the absolute majority requirement promotes stability in the law by reducing the number of en banc rehearings knows no end. If cutting down on the number of en banc rehearings is the goal, why limit the effort to recusal situations? Why not raise the bar in all cases by requiring the vote of some super majority, such as three-fifths or three-fourths, of all active judges?

*5 Rule 35(a) should be clarified through amendment, because the circuits are split eight to five on the issue, see McKenna, supra, and there is no good reason why a uniform rule should not be followed in all the circuits. For example, both the Tenth Circuit and this circuit have twelve authorized judgeships. If five active judges are disqualified and six of the remaining seven are convinced the panel decision should be corrected en banc, in the Tenth Circuit it will be. In this circuit, it will not be. A litigant who loses before a panel in this circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit. The definition of "majority of the circuit judges who are in regular active service" should not vary with geography.

It is particularly unfortunate that the geographic lottery relating to Rule 35(a) has worked against en banc rehearing in this case, because this is an important case that may affect every person who uses wireless communication or Internet service in this country. The case comes to us on consolidated petitions for review filed by power companies from around the country and involves the competing interests of those companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers. A more national case could hardly be imagined. And, as the Department of Justice points out, "because this case arose on Hobbs Act review of FCC rules, it may present the last opportunity for any court to address the core, industry-shaping issues presented here." FCC's Petition for Panel Rehearing and Suggestion for Rehearing En Banc at 2. Yet the law on those industry-shaping issues of exceptional importance is decided not by a majority of the judges in active service on this Court but instead solely by one active judge of this Court joined by a senior judge from another court.

In his defense of the absolute majority requirement, Judge Mansfield said that it is not unfair, because "[i]n cases of exceptional importance, or where there is a conflict between circuits, it may be expected that the Supreme Court will grant certiorari and settle the questions in issue." Zahn, 469 F.2d at 1041. We will see.

FN1. The operative language in Rule 35(a) is drawn from 28 U.S.C. § 46(c), which would need to be amended by Congress or superceded by an amendment to the rule, see 28 U.S.C. § 2072(b).

FN2. A good recounting of the history of the interpretative issue and a summary of the arguments on both sides of it are contained in James J. Wheaton, Note, Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals, 70 Va. L.Rev. 1505 (1984). See also Michael Ashley Stein, Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review, 54 U. Pitt. L.Rev. 805, 807--17, 825--27, 851--54 (1993).

FN3. Some may say that all the order indicates is that five judges did not participate and that they obviously recused themselves, but not necessarily that they were disqualified from participating. See generally 28 U.S.C. § 46(b)("unless such judges cannot sit because recused or disqualified"). Whether

there is any real distinction between recusal and disqualification is a collateral issue not material to the present discussion. What is material is that five judges of this Court in active service felt compelled not to participate in the en banc poll. I will follow what appears to be the practice of most commentators and decisions by using disqualification as a synonym for recusal.

FN4. Sometimes a judge will author or join a panel decision dictated by a prior panel precedent that the judge feels should be changed by the en banc court. In that circumstance, which does not occur with much frequency, it is not unusual for a judge who wrote or joined the panel decision to vote to take the case en banc, in effect using it as a vehicle for overruling the prior panel precedent.

FN5. In the usual case there will be a visiting judge or a senior judge of this Court sitting on a panel with two active judges. That was the way more than 70 percent of our panels were composed this court year.

FN6. By "visiting judge" I mean one who was not appointed to sit on this Court. A visiting judge can be a district judge from this or another circuit, or a senior circuit judge from another circuit.

FN7. "In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness." 28 U.S.C. § 46(b).

C.A.11,2000.
Gulf Power Co. v. **Federal Communications Com'n**
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U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

October 13, 2000

The Honorable William L. Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendments to FRAP regarding briefs in cases involving a cross-appeal

Dear Judge Garwood:

I propose amendment of Rules 28, 31, and 32 of the Federal Rules of Appellate Procedure (FRAP) to clarify the length, timing, and cover color of briefs in cases involving a cross-appeal. I suggest these amendments because of ambiguity in the FRAP regarding the treatment of briefs in such cases and the undesirable variation this ambiguity has spawned in the courts of appeals. In particular, for the third brief filed in a case involving a cross-appeal, the different Circuits have applied widely varying word limits, a practice that contrasts sharply with the uniform practice otherwise imposed by the FRAP on brief lengths. One court of appeals has even differed from the others in the number of briefs to be filed in cross-appeals. In short, the FRAP have already largely standardized the number, format, and timing of appellate briefs; the proposed amendments would complete the task by filling unwarranted gaps left by the existing rules and setting uniform rules for briefs in cross-appeals.

1. The FRAP's current treatment of briefs in cases involving a cross-appeal begins with Rule 28(h). This rule provides that the first party to file a notice of appeal normally will be designated as the "appellant" for the purposes of Rules 28, 30, 31, and 34. Rules 28 and 31 then utilize this designation to define a four-stage briefing process for cases involving cross-appeals.

Rule 31(a)(1) provides that the "appellant" begins the briefing with an "appellant's brief" governed by Rule 28(a). The appellee is then required to file a Rule 28(b) "appellee's brief" that addresses both the "appellee's cross-appeal and [its] response to appellant's brief" (Rule 28(h)). See also Rule 31(a)(1). Following this second brief, the appellant is permitted to file another brief, that is, "a brief in reply to the appellee's brief." See Rules 28(c) and 31(a)(1). While Rule 28(c)'s use of the term

"brief in reply" engenders some confusion in the context of a cross-appeal, the rule's description of the next brief in the briefing process makes clear that appellant's "reply brief" is at least partially a "response to the issues presented by the cross-appeal." See Rule 28(c). In other words, the third brief serves as both a reply and a cross-responding brief. Finally, Rule 28(c) authorizes the appellee to file a "reply brief" limited to the issues presented in its cross-appeal. No further briefs may be filed without permission of the court. Ibid.

Rule 28's consolidation of the briefing of appeals and cross-appeals into a four-brief process does not interact well with other provisions of the FRAP. For example, Rule 31(a)(1) specifies the time to file only three of these four briefs, even though Rule 28(h)'s specific reference to Rule 31 indicates that Rule 31 was intended to apply to cases involving cross-appeals. The rule simply fails to address the time to file the appellee's cross-reply brief.

Similarly, Rule 32(a)'s provisions regarding the format of briefs are ambiguous with respect to the third and fourth briefs in the briefing process. An argument can be made that Rule 28(c) designates both of these briefs as "reply" briefs – an appellant's reply brief and an appellee's reply brief. It follows from this view that, as "reply briefs," both briefs are limited to 7,000 words, i.e., one-half the length of "principal" briefs. See Rule 32(a)(7). Under the same logic, both briefs must have gray covers. See Rule 32(a)(2). On the other hand, the far better view is that, while the language of Rule 28(c) refers to "reply briefs," the rule itself makes clear that the function of the third brief is not limited to that of a traditional reply brief. It serves instead as a "response to the issues presented by the cross-appeal," see Rule 28(c), and therefore is at least partially a cross-appellee's brief that should constitute a "principal" brief under Rule 32(a)(7). As a brief of the cross-appellee, this brief also should bear the red cover of an appellee's brief. Cf. Rule 32(a)(2).

2. The ambiguity in Rule 32 has engendered a striking lack of uniformity in the courts of appeals regarding brief lengths. The Second, Seventh, and Federal Circuits treat the third brief in cases involving a cross-appeal simply as a reply brief, limiting its length to 7,000 words.[1] The Eighth Circuit relaxes this limitation somewhat to 10,000 words.[2] The nine remaining Circuits, in contrast, adopt a functional view of the brief

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[1]See 7th Cir. R. 28(d)(1)(a); Fed. Cir. R. 32 practice note (Feb. 4, 2000); see also Seventh Circuit Practitioner's Handbook pt. XI.A (1999 ed.). The Second Circuit has not promulgated a local rule on this issue, but the clerk's office verifies that it treats appellant's reply/cross-responding brief as a reply brief.

[2]See 8th Cir. R. 28A(e)(2).

and consider it as a principal brief with a 14,000-word limit.[3] With respect to the fourth brief (appellee's cross-reply), twelve of thirteen circuits agree that the brief is a "reply brief" subject to the length restrictions in Rule 32(a)(7)(A) and (B)(ii).[4] Inexplicably, however, the Seventh Circuit ends briefing after the third brief, requiring that the appellee/cross-appellant obtain leave of court in order to file a cross-reply.[5] The table below summarizes the word count limitations placed on such briefs.

	Majority Rule	8th Circuit	2d, Fed. Circuits	7th Circuit
1. Brief of Appellant	14,000	14,000	14,000	14,000
2. Brief of Appellee/Cross-Appellant	14,000	14,000	14,000	14,000
3. Reply Brief & Brief of Cross-Appellee	14,000	10,000	7,000	7,000
4. Cross-Reply Brief	7,000	7,000	7,000	None
TOTAL WORDS	49,000	45,000	42,000	35,000

Similar variation is found in the colors used by courts for the covers of the third and fourth briefs. Six courts designate the appellant's reply/cross-responding brief as a

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[3]See, e.g., 3d Cir. R. 28.5; 5th Cir. R. 32.2; 6th Cir. R. 102(a); see also D.C. Circuit Handbook of Practice and Internal Procedures pt. IX.A.2. The First, Fourth, Ninth, Tenth, and Eleventh Circuits have not promulgated local rules on this issue, but their clerks' offices verify that they treat appellant's reply/cross-responding brief as a principal brief for the length limitations of Rule 32(a)(7). See also Tenth Circuit Practitioner's Guide pt. VI.A.3 (5th rev. 1998).

[4]See local rules cited in notes 1-3, supra.

[5]See Seventh Circuit Practitioner's Handbook pt. XI.A; cf. 7th Cir. R. 28(d)(1)(a) (discussing three-brief process in cases involving a cross-appeal). This local rule directly contradicts FRAP 28(c)'s statement that "[a]n appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal." It thus should not be permitted to remain in effect.

red brief,[6] six designate it as gray,[7] and one mandates that it be yellow.[8] While most courts that accept a fourth brief as a matter of course designate its cover as gray,[9] one court adopts a white cover.[10]

3. These gaps in Rules 28, 31, and 32, and the variation among the courts of appeals cause confusion, and sometimes unfairness, and they conflict with the overriding spirit of the FRAP. There should instead be a uniform, national rule, as there is for briefs in standard appeals. This is particularly true regarding the length restrictions placed on briefs. In addition, the function of consolidated briefs in cases involving cross-appeals is tangibly different from that of briefs in cases with only one appeal. The second and third briefs in a case with a cross-appeal each consolidate the function of two separate briefs into one. An appellee files a single brief that is both a response to appellant's brief and an opening brief in its cross-appeal. Likewise, the appellant must file a single brief to respond in the cross-appeal and reply to the appellee's response to its own appeal. Because these dual-function briefs often require at least as much text as their single-function counterparts (if not more), the rules governing the length of briefs should reflect this purpose. However, as indicated above, several courts limit the appellant's reply/cross-responding brief to the length of a reply brief (7,000 words). We believe that cross-appeals frequently involve substantive issues that require a second brief longer than 14,000 words, and a third brief considerably longer than 7,000 words. As such, the current length imposes a severe limitation on the appellee's ability to cover its own issues as well as those raised by the appellant, and the appellant's ability to respond in the cross-appeal and reply in the main appeal.

We propose that a uniform rule be set, establishing the length of the second brief

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[6]See, e.g., 5th Cir. R. 32.7; 11th Cir. R. 32-4 I.O.P. 1. The DC, Third, Fourth, and Ninth Circuits clerks' offices verify that the third brief should be red.

[7]See 8th Cir. IOP III.I.1; Fed. Cir. R. 32 practice note. Because the Seventh Circuit allows only three briefs to be filed in cross-appeals, the third (and final) brief is a standard gray reply brief. Cf. Rule 32(a)(2). The clerks' offices of the First, Second, Seventh, and Tenth Circuits verify that the third brief should be gray.

[8]See 6th Cir. R. 102(a)(3).

[9]See, e.g., 5th Cir. R. 32.7; 6th Cir. R. 102(a)(4); 11th Cir. R. 32-4 I.O.P. 1; Fed. Cir. R. 32 practice note. The clerks' offices of the remaining courts verify that the fourth brief should be gray.

[10]See 8th Cir. I.O.P. III.I.1.

in a cross-appeal at 16,500 words, and of the third brief at 14,000 words. We believe that this proposal will provide an adequate number of words for a second brief, which we have found often needs to deal with the issues raised by the appellant as well as quite separate issues involved in a cross-appeal. We have experienced a problem in various criminal cases and in tax cases where we have had to make motions for additional words for the second brief in a cross-appeal because the issues being appealed by the Government often overlap little with those being raised by the appellant in its opening brief.

Our proposal of 14,000 words for the third brief in a cross-appeal accords with the current practice in ten of the Circuits. We have found that the Circuits imposing a 7,000, or even 10,000, word limit on this third brief are unrealistic in expecting that an appellant can provide a useful reply and a response to a cross-appeal in such few words. If the appeals by both parties are serious ones, 7,000 words are plainly too few to address what is necessary in order to provide the courts with a helpful brief.

In addition, our proposal makes the total word counts for the two parties more equal; under the current rules in most Circuits, the appellant/cross-appellee is entitled to a total of 28,000 words for its two briefs, while the appellee/cross-appellant receives only a total of 21,000 words. This disparity seems odd given that both parties are appealing. Under our proposal, the appellant has a total of 28,000 words, while the cross-appellant has a total of 23,500. There is still a disparity here, but we assume that the party not filing the first brief normally will not need the same number of words because various matters will already be set out in the appellant's opening brief.

4. In preparing this proposal, we considered other, more complicated possibilities for the length of briefs in a cross-appeal. For example, we considered the option of giving each party in a cross-appeal a total number of words that could be divided among that party's two briefs as it chose. Thus, for example, an appellant in a particular case could decide to use only 10,000 words in its opening brief, leaving an additional 4,000 words that could be added to its reply/cross-appellee brief, if it so wished. We rejected this idea because it would add considerable complexity for the clerks' offices in policing word limits.

5. In addition to a change in the rules governing brief length, we recommend an amendment to Rule 28(h), to make clear that a party may move to have the parties in a cross-appeal realigned in order to better reflect the true nature of a particular appeal. In many cross-appeal situations, one party is largely satisfied with the ruling below, while the other party is the one most aggrieved by the district court's ruling. The current Rule 28(h) provides generally that the first party to file a notice of appeal is henceforth deemed the appellant in a cross-appeal situation because the party most aggrieved will

often file its appeal first. However, the Seventh Circuit provides (7th Cir. I.O.P. 8) that the clerk will designate as appellant the party principally aggrieved. We think the Seventh Circuit procedure makes sense because it more accurately portrays the nature of the appeal, and provides the more aggrieved party with the larger number of words within the four briefs allowed. However, we are concerned that the Seventh Circuit procedure would place too great a burden and responsibility on the various Circuit clerk's offices. Accordingly, we recommend instead that the new Rule 28(h) notify parties that they can move for a realignment in the relatively rare instances when it is appropriate.

Further, we propose making clear in amended Rule 31(a)(1)(B) and in the comment to amended Rule 28(c) that a cross-appellant has the right to file a final reply brief, addressing the cross-appellee's points. Thus, notwithstanding the Seventh Circuit's Rule 28(d)(1)(a), a cross-appeal should always result in four permissible briefs.

Finally, we propose an amendment to Rule 32(a)(2) to standardize the color of the covers in cross-appeal briefs. We suggest retaining the colors blue and red for the first two briefs respectively. We propose yellow for the color of the third brief (the reply/cross-appellee brief), and gray for the final reply brief by the cross-appellant. Other colors (such as orange, which the Supreme Court requires for briefs in opposition to certiorari petitions) might work as well.

Instead of proposing amendments to several rules, we had considered recommending a separate new rule to deal with cross-appeals alone. That approach would have the advantage of consolidating in one place the special considerations applying to cross-appeals, and thus would likely be more beneficial to practitioners. Indeed, the Committee previously considered such a proposal in April 1988, based on a Sixth Circuit local rule (now 6th Cir. R. 102) and a proposal by William Baughman (see William H. Baughman, Jr., Federal Cross-Appeals – A Guide and a Proposal, 42 Ohio St. L.J. 505, 517-518 (1981)). However, that proposal was not adopted. While there would be a significant advantage to having a special rule for cross-appeals, we ultimately decided to propose instead amendments to the several existing rules that need change.

Thus, we suggest the attached amendments to FRAP 28, 31, and 32, along with the accompanying advisory committee notes, and submit this matter to you for consideration by the full FRAP Advisory Committee.

Sincerely,

Seth P. Waxman

cc: Professor Patrick J. Schiltz

Rule 28. Briefs

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

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

Advisory Committee Note for Rule 28:

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

Subdivision (h). The designation of "appellant" under this subdivision determines which party will file the first and third briefs in the consolidated briefing applicable to cases involving cross-appeals. Because Rule 32(a)(7) provides this party with the opportunity to file briefs longer than those of the "appellee," the Committee

believes that the party principally aggrieved by the judgment below normally should be designated as the appellant. Cf. 7th Cir. IOP 8. Subdivision (h) often will obtain this result since the party principally aggrieved often will file a notice of appeal first. However, the amendment makes explicit that a party who is initially designated as the appellee may move to be redesignated as the appellant on the ground it is the party principally aggrieved by the judgment below, or for other good cause.

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

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief

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

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

Advisory Committee Note for Rule 31:

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

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

(a) Form of a Brief.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; the appellant's responding/reply brief in

a case involving a cross-appeal, yellow; an intervenor's or amicus curiae's, green; and any reply brief, gray. The front cover of a brief must contain:

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

(B) the name of the court;

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

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

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

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

(7) Length.

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

(B) Type-volume limitation.

(i) A principal brief is acceptable if:

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

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

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

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

~~(iii)~~ (iv) Headings, footnotes, and quotations count toward the word and line

limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

Advisory Committee Note for Rule 32:

Subdivision (a). Form of a Brief.

Paragraph (a)(7). Length.

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

V-F-8

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United States Court of Appeals
For The First Circuit

CHAMBERS OF
MICHAEL BOUDIN
U.S. CIRCUIT JUDGE

UNITED STATES COURTHOUSE
SUITE 7710
1 COURTHOUSE WAY
BOSTON, MA 02210
617-748-4431

November 6, 2000

Honorable Anthony J. Scirica
U.S. Court of Appeals
Third Circuit
22614 U.S. Courthouse
Independence Mall West
Philadelphia, Pennsylvania 19106

Dear Tony:

My court has asked me to request that the Standing Committee consider an amendment to Fed. R. App. P. 29 to make clear that a court of appeals is entitled at its discretion to preclude the filing of a particular private amicus brief, even if all parties have consented to the filing. The requested amendment or clarification would not curtail the existing right of government entities to file amicus briefs without consent of the court. The principal concern is with private amicus briefs that would result in the obligatory recusal of a member of the panel.

There is nothing in the existing Rule 29 that squarely precludes a court, by local rule or by order, from prohibiting private amicus briefs that would have this effect. My own view, subject to more research, is that such a local rule or order would be valid because the critical language in the present rule--the last sentence of Rule 29(a)--was not intended to address the issue of court-initiated prohibitions but simply was intended to spare the court the need (where none of the parties objected) to consider whether an amicus brief was appropriate.

Nevertheless, some have read the literal language of the sentence as implying an unqualified right to file a private amicus brief, so long as it is timely and so long as consent is obtained. And, while there are fairly broad statements here and there about the authority of courts to regulate the filing of amicus briefs (see Dick Posner's N.O.W. v. Scheidler, a copy of which is enclosed), a brief search does not reveal any authority squarely in point that applies this generality to a private amicus brief for which consent is obtained from all parties. The D.C. Circuit does have a local rule that precludes amicus briefs at the rehearing

stage without permission (Local Rule 35(f)) but it is possible to distinguish this situation.

The policy issue seems to me a fairly easy one. Amicus briefs are sometimes useful but almost never necessary and there is a risk that they can be used strategically to cause the recusal of individual judges. Even when they are not so intended, the benefit of maintaining the original panel or, more important, a full en banc court may be far greater than the benefit of an amicus brief. Under present circumstances, all parties usually do not consent to amicus briefs and so the court can take recusal into account in deciding whether to grant leave; it is only in the case of consent that there is some doubt about the court's ability to protect itself. Barring the amicus brief does not always avoid a recusal problem but often it may do so.

If further study identifies clear authority for the view that a court can now adopt a rule requiring the leave of court for all amicus briefs, this would satisfy our concern. There may be some other mechanism for clarifying the court's authority that would also serve. But if neither of these courses is available, the active judges of my court are unanimously of the view that this small, almost certainly accidental, loophole should be closed--not in terms that would require courts to do anything but leaving it entirely to them to decide whether and what to do: e.g. (as a proviso to FRAP 29(a)), "provided that the court may by rule or order require leave of court for the filing of amicus briefs other than those filed by governmental entities or officers."

Sincerely,



In the
United States Court of Appeals
For the Seventh Circuit

Nos. 99-3076, 99-3336, 99-3891 & 99-3892

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and others, *et al.*,

Plaintiffs-Appellees,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 7888—**David H. Coar**, *Judge.*

SUBMITTED MARCH 13, 2000—DECIDED MARCH 14, 2000
OPINION JULY 31, 2000

Before POSNER, *Chief Judge*, and KANNE and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* On February 26 of this year, the motions judge for the week denied the requests of Priests for Life, Life Legal Defense Foundation, and the Southern Christian Leadership Conference for permission to file amicus curiae briefs in support of the appellants. Reconsideration of the judge's order was twice sought by one of the appellants, the second time urging that a three-judge panel consider the requests even though the court has, pursuant to Fed. R. App. P. 27(c), delegated the

decision of such requests to a single judge, the motions judge for the week in which the request is filed. 7th Cir. Operating Proc. 1(a)(1). The requests were, however, referred to the entire motions panel, and by it denied, and we have decided to issue an opinion explaining our denial in the hope of clarifying the court's standards for amicus curiae briefs.

Whether to permit a nonparty to submit a brief, as amicus curiae, is, with immaterial exceptions, a matter of judicial grace. Fed. R. App. P. 29(a); *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991); *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970); cf. *Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982). The reasons are threefold (see *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997) (chambers opinion); *Community Ass'n for Restoration of the Environment v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999); *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999); *United Stationers, Inc. v. United States*, 982 F. Supp. 1279, 1288 n. 7 (N.D. Ill. 1997)):

1. We court of appeals judges have heavy caseloads requiring us to read thousands of pages of briefs annually, and we wish to minimize extraneous reading. It would not be responsible for us to permit the filing of a brief and then not read it (or at least glance at it, or require our law clerks to read it), at least when permission is granted before the brief is written, and so reliance on our reading it invited. Therefore amicus curiae briefs can be a real burden on the court system. In addition, the filing of an amicus brief imposes a burden of study and the preparation of a possible response on the parties.

2. Amicus curiae briefs, which we believe though without having proof are more often than not sponsored or encouraged by one or more of the parties in the cases in which they are sought to be filed, may be intended to circumvent the page limitations on the parties' briefs, to

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the prejudice of any party who does not have an amicus ally. The lawyer for one of the would-be amici curiae in this case admits that he was paid by one of the appellants for his preparation of the amicus curiae brief. And that appellant comes close to admitting that its support of the requests to file amicus briefs is a response to our having denied the appellant's motion to file an oversized brief.

3. Amicus curiae briefs are often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal.

The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief; never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties (for a particularly egregious example of such an amicus brief, see *United States v. Gotti*, 755 F. Supp. 1157 (E.D.N.Y. 1991)); to grant permission to file an amicus brief only when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do. *Ryan v. CFTC, supra*, and cases cited there; see also *United States v. Boeing Co.*, 73 F. Supp. 2d 897, 900 (S.D. Ohio 1999). The first ground is not available to these requesters; the appellant's argument that no one can adequately represent it within the page limits permitted by this court is, of course, a reason against granting the request—it is an end run around our order denying permission to file an oversized brief. The second ground is illustrated by the two amicus curiae briefs that the motions judge did allow to be filed on behalf of the appellants, for both of those amici curiae are organizations faced with the same

kind of civil RICO claims that formed the basis of the judgment against the appellants. Finally, none of the rejected briefs presents considerations of fact, law, or policy overlooked by the appellants, who have filed briefs totaling 104 pages. So ground (3) is unavailable as well.

These requests for leave to file amicus curiae briefs were therefore properly denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

January 16, 2001

The Honorable Will Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Proposed Amendment to the Federal Rules of Appellate Procedure Concerning the Citation of Unpublished Decisions

Dear Judge Garwood:

I am writing to propose the adoption of a new provision in the Federal Rules of Appellate Procedure that would establish uniform national standards governing the citation of unpublished court of appeals decisions. As you know, the various circuits have divergent rules in this area, and the need for uniformity has been discussed at previous meetings. Although this is a sensitive topic, I believe that the attached proposal is narrowly framed and focused solely on citation rules that, by their nature, are an appropriate topic for national rule-making.

BACKGROUND

All the federal courts of appeals issue unpublished decisions and all of the circuits, except the Second and Third Circuits, have promulgated local rules governing the circumstances and manner in which unpublished decisions may be cited. All circuits agree that unpublished decisions are not binding precedent, and this proposed amendment would not alter that practice.[1] Beyond that basic

[1] A panel of the Eighth Circuit recently struck down that court's rule authorizing the issuance of non-precedential

similarity, however, the rules governing citation of unpublished decisions diverge:

The D.C., First, Seventh, and Ninth Circuits generally prohibit the citation of unpublished decisions, with only limited exception. Those exceptions variously permit citation in "related cases" (1st Cir. R. 36.2) or to establish "law of the case," "res judicata," "collateral estoppel" (7th Cir. R. 53(b)(2)(iv); 9th Cir. R. 36-3), or an earlier case's "binding or preclusive effect" (D.C. Cir. R. 28(c)).[2] Similarly, the Federal Circuit provides that a panel may designate a decision "as not citable as precedent" on the ground that it does "not add[] significantly to the body of law." Fed. Cir. R. 47.6(b). Although not explicitly linked to publication, the rule does forbid citation of specifically designated decisions, except to establish "claim preclusion, issue preclusion, judicial estoppel, law of the case or the like." Ibid.

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decisions as unconstitutional under Article III of the Constitution. That decision subsequently was vacated as moot. See Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), vacated, 2000 WL 1863092 (8th Cir. Dec. 18, 2000) (en banc). While the United States disagrees with the Anastasoff panel's constitutional analysis, the rule I am proposing does not address or depend upon the resolution of that constitutional question.

[2] The Ninth Circuit recently adopted, on a temporary and "experimental" basis, a rule allowing citation of that court's own unpublished dispositions "in a request to publish [an unpublished decision] or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." 9th Cir. R. 36-3(b)(iii). The experimental rule also allows citation of unpublished dispositions "for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case." 9th Cir. R. 36-3(b)(ii). The new rule became effective July 1, 2000. Unless adopted on a permanent basis, the rule will expire on December 31, 2002, and the Ninth Circuit will revert to a strict prohibition on the citation of its unpublished dispositions.

Six other circuits -- the Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits -- allow more liberal citation of unpublished decisions. Most of those courts discourage practitioners from relying on unpublished decisions, noting that they have only limited precedential value. Citation of unpublished cases is "disfavored" (4th Cir. R. 36(c); 6th Cir. R. 28(g); 10th Cir. R. 36.3(B)), and "parties generally should not cite" such decisions (8th Cir. R. 28A(i)). However, several courts recognize that an unpublished decision may have "persuasive" value (5th Cir. R. 47.5.4; 8th Cir. R. 28(A)(i); 10th Cir. R. 36.3(B)(1); 11th Cir. R. 36-2). Some courts limit citation to circumstances where "no published opinion * * * would serve as well" (4th Cir. R. 36(c); 6th Cir. R. 28(g); 8th Cir. R. 28A(i)), or where an unpublished decision concerns "a material issue that has not been addressed in a published opinion" (10th Cir. R. 36.3(B)(1)).

Two courts of appeals (the D.C. and Seventh Circuits) restrict citation of other courts' unpublished decisions (as well as their own) if the issuing court has a rule similarly restricting citation. D.C. Cir. R. 28(c); 7th Cir. R. 53(b)(2)(iv). The Fourth Circuit permits citation of "an unpublished disposition of [another] court" if "there is no published opinion that would serve as well." 4th Cir. R. 36(c). The other circuits' local rules do not address the citation of unpublished decisions issued by other courts.

DISCUSSION

In light of the divergent local rules governing citation of unpublished opinions, a uniform rule on this topic is both necessary and appropriate. In addition to the typical problems posed by fractured local rules, the current state of the law leaves litigators substantially uncertain concerning how to treat an unpublished decision issued by a court that recognizes the persuasive value of such decisions (such as the Fifth Circuit), when litigating in a court (such as the Ninth Circuit) that prohibits citation of its own unpublished decisions but does not specifically address the citation of decisions issued by other courts.[3]

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[3] Ethical considerations add another dimension to the problem. The American Bar Association has concluded that "[i]t

A proposed amendment, adding a new Federal Rule of Appellate Procedure 32.1, is attached.[4] Consistent with current practice, the rule would expressly discourage citation of such decisions, but would specifically allow citation for two purposes: first, for any binding effect the decision may have on the parties to that case (such as res judicata or law of the case); second, for the decision's persuasive authority on a proposition not adequately addressed in a published opinion. Finally, the rule would provide that a copy of any unpublished decision must be attached to any document in which it is cited.

This rule would be beneficial to both courts and practitioners. As the rules of many circuits recognize, some judges might, for purposes of consistency, want to know how identical matters have been resolved in the past. In addition, an unpublished decision may contain reasoning that is persuasive to judges considering a later case. Judges, however, would retain their present authority to disregard or depart from an unpublished opinion's disposition on the ground that it is not binding precedent.

Six circuits have rules in place allowing citation of unpublished decisions where there is some good reason for doing so, such as when the analysis in the unpublished decision is particularly persuasive or when there is a lack of relevant published authority. We are aware of nothing in the experience

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is ethically improper for a lawyer to cite to a court an unpublished opinion of [any court if the] forum court has a specific rule prohibiting reference in briefs to [unpublished opinions]." ABA Formal Op. 94-386R (1995).

[4] Most circuits include their local rules on this subject under Federal Rule of Appellate Procedure 28 (briefs) or Rule 36 (judgments). Neither location is ideal for a national rule, which should provide general guidance for the citation in any document (including motions and other papers, as well as briefs) of unpublished decisions issued by any court (not just the rule-making court). Rule 32 governs the form of briefs, appendices, and other papers. The new citation rule is more substantive than formal, but it would apply to all papers filed in the courts of appeals, so inserting the amendment in the vicinity of Rule 32 seems to be the most appropriate course of action.

of those six courts to indicate that the practice has been detrimental to the efficiency of litigants or judges. See, e.g., Hon. Boyce F. Martin, Jr., In Defense of Unpublished Opinions, 60 Ohio St. L. J. 177, 195 (1999) (Sixth Circuit's 1988 change to allow citation to unpublished decisions "has not opened the floodgates[;] * * * perhaps ten to twenty percent of the briefs we see include citation of unpublished opinions"). The experience under those rules suggests that the proposed revision would prove eminently workable as a nationwide rule.

Finally, this proposal is deliberately narrow. The rule would implicitly acknowledge that the courts of appeals designate some of their decisions as unpublished or non-precedential, but it would take no position on the ongoing debate concerning the propriety of that practice, nor would it purport to dictate to courts or judges what weight should be given to unpublished decisions. See, e.g., Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (striking down 8th Cir. R. 28A(i) as unconstitutional), vacated, 2000 WL 1863092 (8th Cir. Dec. 18, 2000) (en banc). Further, the rule takes no position regarding what decisions should be published, in what media they should be available, or any of the other difficult questions that have arisen concerning the courts' practice of deciding cases by unpublished dispositions.

Sincerely yours,

Seth P. Waxman

cc: Professor Patrick J. Schiltz

Rule 32.1. Citation of Unpublished or Non-Precedential Decisions DRAFT

(a) Citation Disfavored. Citation of an opinion or other decision designated by the issuing court as unpublished or non-precedential is disfavored. However, an unpublished or non-precedential decision of any court may be cited in a brief, motion, or other paper filed with a court of appeals in the following circumstances:

(1) Related Cases. Any decision may be cited to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or similar doctrines.

(2) Persuasive Value. An unpublished or non-precedential decision may be cited if a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue.

(b) Procedure. A copy of any unpublished or non-precedential decision must be provided to counsel and the court if the decision is cited in a brief, motion, or other paper. The copy of the decision should be included in an attachment or addendum that accompanies the filing.

Committee Note

Rule 32.1 is designed to provide a uniform national rule governing the citation of unpublished decisions, a topic that has divided the circuits. Rule 32.1 follows the lead of the majority of the courts whose rules address the issue -- including the Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits. Each court is entitled to dictate the precedential value of its own decisions, and nearly every circuit has a local rule designating some decisions as unpublished or non-precedential. This rule does not affect those provisions; it addresses only the citation of such decisions. Subdivision (a) identifies the background rule that an unpublished or non-precedential decision normally should not be cited as precedent, and identifies the two exceptions permitting citation. The first exception allows citation in a related case, when the earlier unpublished decision has some direct or binding effect on the parties. Nearly all courts recognize that an unpublished decision is binding on the parties and can be invoked to establish res judicata, collateral estoppel, and law of the case, or to claim such principles as double jeopardy or a party's notice of a previously litigated matter. The second exception allows citation of an unpublished decision to address a material issue on appeal, where the published case law does not sufficiently support a party's argument. This limitation is drawn from the practices of the Fourth, Sixth, Eighth, and Tenth Circuits, and is designed to emphasize that parties should look to unpublished decisions only as a last resort, when published decisions would not serve as well. Permitting citation of unpublished decisions, even in this limited context, is a departure from the stricter practices of some circuits (including the D.C., First, Seventh, Ninth, and Federal Circuits), but it does not dispense with the basic rule that unpublished decisions normally should not be cited. Nor does the rule require a court to give any particular weight to unpublished decisions when cited. Finally, subdivision (b) requires that any party citing an unpublished decision must include a copy of that decision as an attachment or addendum to the brief, motion, or other paper in which it is cited. This procedure has been required by the D.C., Fourth, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits, and ensures that the opposing party and the court have ready access to the full decision.