ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, DC
November 15, 2006

Agenda for Fall 2006 Meeting of
Advisory Committee on Appellate Rules
November 15, 2006
Washington, D.C.

I. Introductions

II. Approval of Minutes of April 2006 Meeting

III. Report on June 2006 Meeting of Standing Committee and on Status of Pending Amendments (new FRAP 32.1 and amendments to FRAP 25)

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

V. Discussion Items

A. Item No. 05-05 (FRAP 29(e) — timing of amicus briefs)

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

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

D. Item No. 06-03 (new FRAP 28(g) — pro se filings by represented parties)

E. Items Awaiting Initial Discussion

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

2. Item No. 06-05 (Statement of issues to be raised on appeal)

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

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

VII. Schedule Date and Location of Spring 2007 Meeting

VIII. Adjournment

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Members:

Honorable Jeffrey S. Sutton
United States Circuit Judge
United States Court of Appeals
260 Joseph P. Kinneary
United States Courthouse
85 Morconi Boulevard
Columbus, OH 43215

Honorable Kermit Edward Bye
United States Circuit Judge
United States Court of Appeals
Quentin N. Burdick
United States Courthouse
Suite 330
655 First Avenue North
Fargo, ND 58102

Honorable T.S. Ellis III
United States District Judge
United States District Court
Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314-5799

Honorable Randy J. Holland
Associate Justice of the
Supreme Court of Delaware
44 The Circle
Georgetown, DE 19947

Dean Stephen R. McAllister
University of Kansas School of Law
1535 West 15th Street
Lawrence, KS 66045

Mark I. Levy, Esquire
Kilpatrick Stockton LLP
607 14th Street, N.W., Suite 900
Washington, DC 20005-2018

Maureen E. Mahoney, Esquire
Latham & Watkins LLP
555 11th Street, N.W., Suite 1000
Washington, DC 20004-1304

James F. Bennett, Esquire
Dowd Bennett LLP
7733 Forsyth, Suite 1410
S. Louis, MO 63105

Solicitor General (ex officio)
Honorable Paul D. Clement
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5143
Washington, DC 20530

Douglas Letter, Appellate Litigation Counsel
Civil Division, U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 7513
Washington, DC 20530

October 16, 2006
Projects

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Reporter:

Professor Catherine T. Struve
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Advisors and Consultants:

Charles R. Fulbruge III
Clerk
United States Court of Appeals
207 F. Edward Hebert Federal Building
600 South Maestri Place
New Orleans, LA 70130

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

October 16, 2006
Projects

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Honorable Thomas S. Zilly
United States District Judge
United States District Court
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, WA 98101

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2600

Honorable Susan C. Bucklew
United States District Judge
United States District Court
United States Courthouse
801 North Florida Avenue, Suite 1430
Tampa, FL 33602

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Professor Catherine T. Struve
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Professor Jeffrey W. Morris
University of Dayton School of Law
300 College Park
Dayton, OH 45469-2772

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Professor Sara Sun Beale
Duke University School of Law
Science Drive and Towerview Road
Box 90360
Durham, NC 27708-0360

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Jeffrey N. Barr
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Timothy K. Dole
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988

October 16, 2006
Projects

FEDERAL JUDICIAL CENTER

Staff:

Joe Cecil (Committee on Rules of Practice and Procedure) — Phone 202-502-4084
Senior Research Associate
Research Division — Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <jcecil@fjc.gov>

Marie Leary (Appellate Rules Committee) — Phone 202-502-4069
Research Associate
Research Division — Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <mleary@fjc.gov>

Robert J. Niemic (Bankruptcy Rules Committee) — Phone 202-502-4074
Senior Research Associate
Research Division — Fax 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <bniemic@fjc.gov>

Thomas E. Willging (Civil Rules Committee) — Phone 202-502-4049
Senior Research Associate
Research Division — Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <twillgin@fjc.gov>

Laural L. Hooper (Criminal Rules Committee) — Phone 202-502-4093
Senior Research Associate
Research Division — Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <lhooper@fjc.gov>

Tim Reagan (Evidence Rules Committee) — Phone 202-502-4097
Senior Research Associate
Research Division — Phone 202-502-4199
One Columbus Circle, N.E.
Washington, DC 20002-8003 — <treagan@fjc.gov>

Advisory Committee on Appellate Rules
Table of Agenda Items — October 2006

FRAP Item	Proposal	Source	Current Status
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04 Standing Committee returned to Advisory Committee for further study 06/04; referred to Federal Judicial Center for study Approved with further changes by Advisory Committee 04/05 Approved by Standing Committee 06/05 Approved with changes by Judicial Conference 09/05 Approved by Supreme Court 04/06
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
03-10	Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04 Discussed and retained on agenda 11/04 Draft approved 04/05 for submission to Standing Committee Approved for publication by Standing Committee 06/05 Published for comment 08/05 Restyled draft approved 04/06 for submission to Standing Committee, with request that Style Subcommittee reconsider style changes Approved by Standing Committee 06/06 Approved by Judicial Conference 09/06
04-04	Amend FRAP 25(a) to authorize courts to mandate electronic filing.	Hon. John W. Lungstrum (D. Kan.) on behalf of CACM	Awaiting initial discussion Draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 11/04 Published for comment 11/04 Approved with changes by Advisory Committee 04/05 Approved with changes by Standing Committee 06/05 Approved by Judicial Conference 09/05 Approved by Supreme Court 04/06
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Awaiting initial discussion Discussed and retained on agenda 04/06; awaiting report from Department of Justice
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Awaiting initial discussion Discussed and retained on agenda 04/06
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/06

FRAP Item	Proposal	Source	Current Status
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/06; deadline subcommittee appointed
06-03	Add new FRAP 28(g) to bar pro se filings by represented parties.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/06; awaiting report from Department of Justice
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Awaiting initial discussion
06-05	Adopt a rule modeled on Pennsylvania Rule of Appellate Procedure 1925 concerning statement of issues to be raised on appeal	Hon. Michael M. Baylson (E.D. Pa.)	Awaiting initial discussion
06-06	Extend time for NOA and petitions for rehearing in cases involving state-government litigants	William E. Thro, Virginia State Solicitor General	Awaiting initial discussion

DRAFT

Minutes of Spring 2006 Meeting of
Advisory Committee on Appellate Rules
April 28, 2006
San Francisco, CA

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Friday, April 28, 2006, at 8:30 a.m. at the Park Hyatt San Francisco. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. Sanford Svetcov, Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Neil M. Gorsuch, Principal Deputy Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge J. Garvan Murtha, liaison from the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Judge Patrick J. Schiltz, the outgoing Reporter, participated in presenting the agenda items, and Prof. Catherine T. Struve, the incoming Reporter, took the minutes.

During the course of the meeting, Judge Stewart noted three departures from the Committee: Mr. W. Thomas McGough, Jr., Mr. Svetcov, and Judge Schiltz. Judge Stewart expressed the Committee's great appreciation for their service, and presented commendations to Mr. Svetcov and Judge Schiltz (Mr. McGough was unable to be present).

II. Approval of Minutes of April 2005 Meeting

The minutes of the April 2005 meeting were approved.

III. Report on June 2005 and January 2006 Meetings of Standing Committee

At the June 2005 meeting, the Standing Committee approved Rule 32.1 (concerning the citation of unpublished opinions). Judge Schiltz observed that the Standing Committee greatly shortened the Committee Note. Judge Schiltz reported that the Judicial Conference approved Rule 32.1 but rendered it prospective only (i.e., the Rule as approved by the Judicial Conference applies only to decisions issued on or after January 1, 2007); he noted that some Circuits may choose to apply the new Rule's approach retroactively as well. Also at the June 2005 meeting,

the Standing Committee approved an amendment to Rule 25(a)(2) (authorizing the adoption of local rules that require electronic filing), and approved for publication new Rule 25(a)(5) (discussed below).

The Appellate Rules Committee had no items on the agenda for the Standing Committee's January 2006 meeting. Judge Stewart noted that the January meeting included a very interesting discussion on the legacy of Chief Justice Rehnquist.

IV. Action Item

A. Item No. 03-10 (new FRAP 25(a)(5) – electronic filing / privacy protections)

Judge Stewart invited Judge Schiltz to introduce the following proposed amendment and Committee Note:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) **Privacy Protection.** An appeal in a case that was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. All other proceedings are governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

* * * * *

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

Judge Schiltz summarized the genesis of proposed new Rule 25(a)(5). The E-Government Act of 2002 directs that the rulemakers address privacy concerns relating to electronic filing. In response, the Standing Committee's E-Government Subcommittee, the Judicial Conference's Committee on Court Administration and Case Management ("CACM"), and the chairs and reporters of the advisory committees have developed proposed privacy rules for use at both trial and appellate levels. Judge Schiltz noted the decision to adopt a "dynamic conformity" approach for the Appellate Rules; under this approach, proposed Rule 25(a)(5) adopts by reference the provisions of the relevant trial-court Rules. Proposed Rule 25(a)(5) was published for comment in August 2005; the Committee received seven public comments, of which three addressed Rule 25(a)(5) (the other four addressed only the trial-court proposals).

Judge Schiltz reported that CACM supports the approach taken in Rule 25(a)(5).

Judge Schiltz next discussed the comments received from the Public Citizen Litigation Group ("Public Citizen"). Public Citizen takes issue with the proposed treatment of Social Security and immigration case records, at both the trial and appellate levels. Judge Schiltz noted the Judicial Conference's policy that privacy protection on appeal should track the privacy protection applicable in the proceeding below. Judge Schiltz observed that the Civil Rules Committee would revisit the issues raised by Public Citizen this spring, and suggested that the

Appellate Rules Committee should defer to the judgment reached by CACM and the Civil Rules Committee on these questions.

Third, Judge Schiltz summarized the views of the National Association of Criminal Defense Lawyers ("NACDL"), which asserts that Rule 25(a)(5) requires clarification with respect to habeas and § 2255 proceedings. Judge Schiltz argued that, to the contrary, Rule 25(a)(5) is clear: Under Rule 25(a)(5), appeals in habeas and § 2255 proceedings are governed by Civil Rule 5.2; and Civil Rule 5.2(b)(6) excludes habeas and § 2255 proceedings from the redaction requirements in Civil Rule 5.2(a).

Judge Schiltz then turned to the changes suggested by the Style Subcommittee. Those changes would use language referring to "a case whose privacy protection was governed by" the relevant trial-level privacy rule, rather than language referring to "a case that was governed by" the relevant trial-level privacy rule, thus:

> **Privacy Protection.** An appeal in a case whose privacy protection ~~that~~ was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In a~~A~~ll other proceedings, privacy protection is ~~are~~ governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

The Style Subcommittee's concern was that readers might not otherwise know that the cited trial-level rules deal with privacy protections; one member expressed agreement with this concern. Judge Schiltz argued that the Style Committee's proposed language would be redundant and ambiguous; on the other hand, he noted that the proposed changes are stylistic and that this Committee ordinarily defers to the Style Subcommittee on matters of style. Judge Murtha stated that he would place Judge Schiltz's comments before the Style Subcommittee. Mr. Rabiej noted that under the relevant protocol, the Advisory Committees are to defer to the Style Subcommittee on matters of style, but can also send an alternative style suggestion to the Standing Committee for consideration. Judge Stewart proposed that the Advisory Committee approve Rule 25(a)(5) as restyled by the Style Subcommittee, but that the Advisory Committee ask the Style Subcommittee to reconsider its view. This proposal was moved and seconded, and the motion carried (over three dissents).

V. Discussion Items

A. Item No. 05-01 (FRAP 21 & 27(c) – conform to Justice for All Act)

Mr. Letter described the provisions in the Justice for All Act of 2004 which concern appellate review of district court determinations regarding rights for victims of crime. The

Committee had asked Mr. Letter to report on whether the timing constraints imposed by those provisions necessitate changes in the Appellate Rules. Mr. Letter reported that after polling relevant parts of the Department of Justice and United States Attorneys' Offices, he was aware of only one appellate case addressing such timing issues. In *Kenna v. U.S. District Court*, 435 F.3d 1011 (9th Cir. 2006), when the Ninth Circuit Court of Appeals granted a mandamus petition under the Act, it noted and apologized for its failure to comply with the Act's time limits, and stated that it was adopting procedures for handling such petitions in the future. From the Clerk of the Ninth Circuit Mr. Letter learned that the Circuit has adopted a new rule – Rule 21-5 – concerning petitions under the Act. Rule 21-5, however, simply requires notice to the court when a petition will be filed under the Act, so that a panel may then issue orders to promote speedy handling; Rule 21-5 does not itself set such procedures. To Mr. Letter's knowledge, no other Circuits have adopted rules implementing the Act's appellate review provisions. Though the Criminal Rules Committee has proposed rules amendments relating to the Act, Mr. Letter reported that those amendments do not concern appellate review.

Mr. Letter stated the Department of Justice's belief that no new Appellate Rules provisions are warranted at this time; he recommended that the Committee monitor developments under the Act. Mr. Fulbruge reported that the appellate clerks with whom he has discussed this question tell him that timing questions under the Act have not been a big issue. Mr. McCabe noted that the AO is aware of only four instances nationwide in which a district court denied a right asserted by a victim under the Act. A member noted that it is unclear whether the Appellate Rules are truly in tension with the Act, since the Act's provisions may be read in different ways. A member predicted that appellate-review issues under the Act will be very rare, since district judges will be careful not to impinge on victims' rights under the Act, and U.S. attorneys (and probation officers) will be careful to point such issues out to district judges. Mr. McCabe noted that the AO is setting up a computer system to notify crime victims of all relevant court proceedings. Mr. Letter promised that the Department of Justice would continue to monitor practice under the Act, and that he would keep the Reporter updated. Judge Stewart requested that if new issues arise under the Act, Mr. Letter should notify the Committee without waiting until the next meeting.

B. Items Awaiting Initial Discussion

1. Item No. 05-04 (FRAP 41 – *Bell v. Thompson*)

Judge Schiltz outlined the litigation in *Bell v. Thompson*, 125 S. Ct. 2825 (2005), and explained how that case highlighted ambiguities in Rule 41, which governs issuance of the mandate. In *Bell*, Thompson (a capital habeas petitioner) appealed from a district court judgment dismissing his petition. The Sixth Circuit Court of Appeals affirmed, but stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari. After certiorari was denied, Thompson obtained an order from the Court of Appeals staying issuance of the mandate until the Supreme Court resolved Thompson's petition for rehearing. After the Supreme Court

denied rehearing, the Court of Appeals' mandate still failed to issue – but the parties (not noticing this omission) proceeded to litigate other matters (focusing on whether Thompson was competent to be executed). Meanwhile, without notice to the parties, the Court of Appeals reexamined the merits of Thompson's habeas petition, and five months after the Supreme Court denied rehearing the Court of Appeals issued an amended opinion vacating and remanding for an evidentiary hearing.

On review in the Supreme Court, Thompson contended that the Court of Appeals' failure to issue the mandate (after the Supreme Court's denial of rehearing) in effect constituted a third stay, authorized by Rule 41(b)'s grant of authority to "extend the time" for issuance of the mandate. The state argued that Rule 41(d)(2)(D) required the Court of Appeals to issue its mandate "immediately" after certiorari was denied, and accordingly that both the second and third stays were impermissible. The Supreme Court avoided this broader question, and held for the state on the ground that even if Rule 41 would authorize a stay of the Court of Appeals' mandate following denial of certiorari, and even if the third stay could have taken effect without entry of an order, the issuance of such a stay under the circumstances of *Bell* constituted an abuse of discretion.

Judge Schiltz pointed out that *Bell* uncovered ambiguities in Rule 41, concerning whether the Court of Appeals has authority to stay issuance of its mandate following denial of certiorari, and if so, under what circumstances. The question, then, is whether it would be worthwhile for the Committee to revisit Rule 41 with a view to clarifying these matters. Judge Schiltz observed that *Bell*'s fact pattern was very unusual. A member concurred in this assessment, and noted that any attempt to clarify the questions aired in *Bell* would raise tough issues regarding many different possible fact patterns. Mr. Fulbruge reported that he did not think appellate clerks see a need for changes in Rule 41 at this point. Another member noted that the lawyer whose position was favored by the Court of Appeals' judgment ordinarily would seek to ensure that the Court of Appeals did in fact issue its mandate. Mr. Letter noted that counsel can readily check whether the mandate has issued by using the PACER system. A district judge member noted that while lawyers may not always think to check whether the mandate has issued, he makes it a practice to check whether the Court of Appeals' mandate has issued before he proceeds. Mr. Fulbruge reported that he gets calls from district judges asking whether the mandate has issued, which indicates that the district judges pay attention to this question.

By consensus, the Committee removed this item from the study agenda. Judge Stewart will write to John Kester (the Standing Committee member who brought this issue to this Committee's attention) to explain that the Committee had considered the issue.

2. Item No. 05-05 (FRAP 29(e) – timing of amicus briefs)

Judge Schiltz summarized the questions raised by Public Citizen regarding the time for filing amicus briefs under Rule 29(e). Public Citizen points out that when an amicus files a brief

in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) may leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions.

Mr. Letter agreed that such difficulties could arise, but noted that when they do, the appellant can move for an order granting more time to respond. Mr. Fulbruge agreed that if the issue arose, the Court of Appeals would probably grant such a request. (A member noted that it would be inefficient to have the party file a supplemental brief responding to an amicus' contentions; Mr. Letter observed that the party could request time to file an amended brief that incorporates a response to the amicus.)

Mr. Letter stated that the Department of Justice would oppose a rule change that shortened the time allotted to amici filing briefs in support of the appellee, and that the Department would not support a change that lengthened the time for filing the appellant's reply brief. Mr. Letter noted that it is often not possible for the government to share its draft briefs with amici in advance of filing. Mr. Letter expressed the hope that timing difficulties would arise less often as electronic filing becomes more prevalent.

A member asked why the Appellate Rules' approach differs from that taken by the Supreme Court rules (which require that amici submit their briefs within the time allowed for filing the brief of the party whom they are supporting).[1] Mr. Letter stated that the rationale for the Appellate Rules' approach was to permit amici to review the party's filing, so as to minimize duplication of arguments. The member responded that the Rules have not been effective in serving this goal. Judge Schiltz noted that the Appellate Rules used to take the same approach as the Supreme Court rules; a member voiced support for a return to this approach. Mr. Letter observed that the government needs time to look at a party's brief before deciding whether to file an amicus brief. A member countered that a private party is free to show the government its brief prior to filing, to facilitate the government's decision. Judge Stewart noted that it is helpful for an amicus brief to state clearly what it adds to the arguments made in the party's brief.

A number of participants voiced the view that these timing questions merit further study. A member pointed out that these issues could be addressed as part of changes to be considered concerning time computation more generally. Mr. Letter undertook to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting. Judge Stewart observed that it would be useful to consult Justice Randy Holland, a Committee member who was unable to attend this meeting.

By consensus, the Committee retained this item on its discussion calendar.

3. Item No. 05-06 (FRAP 4(a)(4) – amended NOA after favorable or insignificant change to judgment)

---

[1] *See* Supreme Court Rule 37.3(a).

Judge Schiltz described the decision in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005), in which Judge Leval raised questions concerning the operation of Rule 4(a)(4) in cases where a party files a notice of appeal and the district court subsequently alters or amends the judgment. In *Sorensen*, the district court initially entered a judgment which awarded relief on certain claims and dismissed others. The plaintiff filed a notice of appeal, and the district court subsequently granted a posttrial motion dismissing one of the claims on which it had initially awarded relief. The plaintiff failed to file a timely notice of appeal that encompassed the judgment that ultimately resulted after this grant of posttrial relief. The Court of Appeals held that the plaintiff failed properly to preserve her challenge to the district court's dismissal of the relevant claim. In particular, the court held that under Rule 4(a)(4)(B) the plaintiff's initial notice of appeal did not effect an appeal from the court's later dismissal (on the posttrial motion) of one of the plaintiff's claims. Writing for the court, Judge Leval characterized Rule 4(a)(4) and its Note as ambiguous and contradictory, and raised the possibility that problems could also arise for an appellant who fails to file a new or amended notice of appeal after the district court amends the judgment in the appellant's *favor*.

Judge Schiltz reported that he had done a quick search of the caselaw and had failed to find other opinions reading Rule 4 in the same way as the *Sorensen* court. A member noted that lawyers tend to file a new notice of appeal just in case, and stated that *Sorensen* is the only case he knows of in which this issue has arisen. Mr. Fulbruge, too, stated that he had not come across such cases. Another member questioned how often the timing configuration would be such as to permit the issue to arise at all (given the time limits for filing postjudgment motions and the fact that a postjudgment motion tolls the time for filing a notice of appeal).

A member asked whether the Note could be amended to clarify the issue, without amending the Rule; Judge Schiltz responded that he did not think so. Mr. Rabiej noted that there had been a similar desire to clarify the operation of certain Evidence Rules without amending the Rules themselves, and that the FJC had responded by producing an explanatory pamphlet.

A member expressed disbelief that any court would interpret Rule 4(a)(4) to require an appellant to file an amended notice of appeal just because the district court had amended the judgment *in the appellant's favor*. Another member agreed that such an interpretation would be absurd. Mr. Letter observed, though, that if such a situation arose, his office would file a new notice of appeal to be on the safe side.

By consensus, the Committee decided to leave the matter on the study agenda. The Reporter will inquire into the background of the 1998 amendments (which produced the relevant language in Rule 4(a)(4)).

4. Item Nos. 06-01 (FRAP 26(a) – time-computation template) and 06-02 (adjust deadlines to reflect time-computation changes)

Judge Schiltz described the work of the Standing Committee's Time-Computation Subcommittee, for which he has served as reporter. The Subcommittee's goals are to simplify and reconcile the time-computation provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules. The Subcommittee has circulated to the Advisory Committees a template showing the proposed approach; that template will be presented to the Standing Committee for approval at its June 2006 meeting. Assuming approval of the template, the Advisory Committees will consider conforming amendments to their respective Rules, and will also undertake a revision of relevant deadlines to address issues raised by the change in computation approach. The goal is to publish the proposed Rules amendments for public comment, as a package, in August 2007.

A notable feature of the proposed template is that it takes a "days are days" approach – i.e., all intermediate days are counted when computing a deadline. By contrast, current Appellate Rule 26(a)(2) excludes intermediate weekend days and holidays when computing periods less than eleven days (unless the period is stated in calendar days).

Mr. Fulbruge noted that the appellate clerks favor the proposed approach. An attorney member cautioned that such changes would be acceptable so long as relevant periods were extended to take account of the change in computation method; otherwise, the member warned that the amendments could be seriously problematic. The member noted that some periods may require significant lengthening, and also noted that the "three-day rule" (discussed below) will impact the analysis. Another attorney member expressed agreement.

Mr. Letter queried why Rule 26(a)(4) treats state holidays (of the state in which is found the relevant district court or the circuit court's principal office) as legal holidays for purposes of time computation. Mr. Fulbruge reported that federal courts in Texas, Mississippi and Louisiana do not close on state holidays; he also noted Louisiana's practice of having half-holidays (which vary parish-to-parish). Judge Stewart observed that the federal court in New Orleans is obliged to close on Mardi Gras because its employees cannot get to work. Judge Schiltz agreed that there are some federal courts that do close on some state holidays. Judge Schiltz recalled that the rationale previously given for the state-holiday rule is that its application (which is likely to be rare) will protect litigants in the unusual circumstances where that may be necessary.

On the general topic of revisions to the deadlines, a member emphasized that everyone recognizes that revising the time-computation approach will necessitate changes in the deadlines. The member stressed that right now, all the Committee would be doing is approving the approach in principle.

Another member observed that changes in the time-computation approach could also impact deadlines set by court order or by statute. A district judge member noted that when he sets deadlines by court order he picks a date rather than setting a number of days, and he pointed out that this approach would leave deadlines set by court order unaffected by time-computation

changes. Statutory time periods, however, were noted (such as that set by 28 U.S.C. § 1292(b)[2] and that set by the Class Action Fairness Act[3]). Mr. Letter noted that, under 28 U.S.C. § 2072(b), rules promulgated under the Rules Enabling Act supersede any previously enacted statutory provisions that conflict. Members expressed concern that, unlike rule deadlines, statutory deadlines could not (as a practical matter) be adjusted through the Rules Enabling Act process, and thus those deadlines may become unreasonably short.

Judge Schiltz observed that other Advisory Committees have set up subcommittees to reconsider all relevant deadlines. Judge Stewart thereupon named a subcommittee to reconsider deadlines in the Appellate Rules. The subcommittee includes Judge Sutton (as chair), Ms. Mahoney, and Mr. Letter.[4] By consensus, the Committee decided that: (1) The concerns aired above (with respect to supersession of statutory provisions and with respect to the concerns over revision of deadlines) should be raised with Judge Kravitz (the Chair of the Time-Computation Subcommittee) and/or the Standing Committee; (2) Judge Sutton's Deadlines Subcommittee will study the relevant deadlines; and (3) The Committee will continue to look at these issues during the fall.

Next, the Committee discussed questions relating to the accessibility of the clerk's office. Judge Schiltz noted that the Standing Committee has asked the Advisory Committees for guidance on whether rules such as 26(a)(3) (concerning inaccessibility of the clerk's office) should be changed in the light of the advent of electronic filing. How should the rules treat a situation where the clerk's office is physically inaccessible but electronically accessible? How should the rules treat the converse situation? A member pointed out that so long as paper filings are permitted the courthouse's physical accessibility will remain significant. Mr. Fulbruge stated that the issue requires attention; he reported that after Hurricane Katrina, his court faced challenges relating to electrical power, the electronic docket and email capability for the judges. Mr. Fulbruge noted that the courts are looking into the feasibility of using backup servers to avoid outages in the future, and he observed that a well-functioning system of backup servers could moot some issues concerning court accessibility. By consensus, the Committee determined

---

[2] *See* 28 U.S.C. § 1292(b) (authorizing certain interlocutory appeals based on certification by district court and permission by court of appeals, so long as the application for permission "is made to [the court of appeals] within ten days after the entry" of the district court order containing certification).

[3] *See* 28 U.S.C. § 1453(c)(1) (providing with respect to removals under Section 1453 that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand ... if application is made to the court of appeals not less than 7 days after entry of the order").

[4] Reporter's note: Subsequently, Mr. Levy – who is a member of the Standing Committee's Time Computation Subcommittee – also agreed to serve on the Deadlines Subcommittee.

the following: (1) The Committee agrees that these issues warrant review, and (2) the Committee will offer Mr. Fulbruge to serve on the relevant subcommittee.

Judge Schiltz noted that the Standing Committee has also requested input from the Advisory Committees on whether changes are warranted in the "three-day rule" set by Appellate Rule 26(c) and certain other rules. This rule provides that, when a party is to act within a set period after service of a paper on the party, and the paper is served by means other than personal service, the party gets an additional three days in which to act. Judge Schiltz recounted that electronic service was included in the "three-day rule" in order to induce parties to consent to its use,[5] and he suggested that when electronic service no longer required party consent, such a rationale would no longer apply. A member suggested that a wait-and-see approach may make sense at this time. Mr. McCabe noted that when electronic filing is used, the other parties get an electronic notification from the court, with a link to the electronic copy of the filing. Mr. Letter queried what would happen if electronic filing and service were removed from the three-day rule and a party decided to e-file on a weekend or holiday. A member cautioned that there will always (for the foreseeable future) be small practitioners who lack the ability to file electronically; he suggested that there is no reason to tackle the three-day rule in addition to the calendar-days issue. The member noted that the practicing bar would prefer moderation in the rate of rule-making. Mr. Fulbruge observed that the district courts have followed the lead of the bankruptcy courts in implementing electronic case filing; but Mr. Fulbruge noted that the large volume of pro se filings will continue to be made in hard copy rather than electronically.

By a unanimous vote, the Committee determined to recommend no action on the "three-day rule" in Rule 26(c).

5. Item No. 06-03 (new FRAP 28(g) – pro se filings by represented parties)

Mr. Letter described a proposal approved by the Solicitor General for a new Rule 28(g) which would generally bar the Courts of Appeals from accepting "pro se briefs" filed by represented parties. The proposed rule would contain exceptions for situations where counsel has moved to withdraw under *Anders v. California*, 386 U.S. 738 (1967), or where the party seeks appointment of new counsel. The proposal would require the clerk to forward any such pro se filing to the party's attorney.

Mr. Letter stated that such "pro se" filings by represented parties are a major problem for U.S. Attorneys' offices, because of the burden imposed when the U.S. Attorney feels obliged to respond to multifarious arguments raised in the additional "pro se" filing. He also posited that such filings could burden the courts, and might harm the "pro se" filer by distracting from

---

[5] Judge Schiltz noted that under Rule 25(c)(1)(D), parties can consent to service by electronic means.

stronger arguments selected by the party's counsel.

A member recounted his experience as appointed counsel in CJA cases. He recalled that sometimes he refused to raise issues because he considered them frivolous. Often, that was the end of the matter; but sometimes his client would submit a "pro se" brief. In his experience, when that occurred, the court usually accepted the "pro se" filing; the U.S. Attorney usually did not respond; and the arguments in the "pro se" brief would get only a passing mention during the oral argument.

Mr. Letter responded that he would be unwilling to take the approach the member described: As he put it, the U.S. Attorney's Office ignores an issue in the pro se brief at its peril. A member suggested that if a court felt that a point in a pro se brief warranted attention, it could call on the U.S. Attorney for a response. The member questioned whether the proposed Rule 28(g) might encourage requests for appointment of new counsel. The member also suggested that permitting the filing of pro se briefs could head off some claims of ineffective assistance of counsel.

A district judge member observed that "pro se" briefs are frequently filed in the district court, and that the court reviews those filings to make sure that it is not missing anything. A member then asked why the rule on "pro se" filings in the Courts of Appeals should differ from the practice in the district courts. Mr. Letter responded that in appellate practice, there is a greater expectation that the lawyer will play a role in winnowing out weaker arguments. A member noted that under *Martinez* there is no *Faretta* right to self-representation on appeal.[6] Judge Sutton observed that the Sixth Circuit accepts "pro se" briefs. Judge Stewart noted the need to consider practicality; he observed that "pro se" briefs can be difficult to scan electronically, and that such briefs generally employ a "shotgun" approach rather than zeroing in on new or particularly strong issues.

A member suggested that an alternative approach would be to provide that the Court of Appeals will not act upon an argument in a "pro se" brief without giving the government an opportunity to respond to the relevant argument. Mr. Fulbruge noted the Fifth Circuit's rule that a represented party cannot file a "pro se" brief without leave of court.[7] When a represented party attempts to make such a filing, the clerk's office notifies the party of the rule, encourages the party to contact his or her counsel, and notes that the party can make a motion for leave to file. If the Court of Appeals grants the party leave to file the brief, the order can provide the other side with a chance to respond. Mr. Fulbruge argued against the provision in proposed Rule 28(g) that

---

[6] *See* Faretta v. California, 422 U.S. 806, 836 (1975) (holding that criminal defendant has Sixth Amendment right to represent self at trial); Martinez v. Court of Appeal of California, 528 U.S. 152, 154 (2000) (holding that the *Faretta* right does not extend to appeals).

[7] *See* Fifth Circuit Rule 28.7 ("Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel.").

would require the clerk's office to send the party's filing to the party's counsel.

A judge member observed that the filing of a "pro se" brief can occasion awkwardness for the party's counsel; but he also noted that sometimes the "pro se" brief is better than counsel's brief. The member stated that the Fifth Circuit's approach (requiring court permission) might be a good solution. Mr. Letter expressed a tentative view that the government would prefer the Fifth Circuit approach to a more permissive one.

Mr. Letter undertook to investigate further (by ascertaining the Supreme Court's rule, and by canvassing colleagues in the Justice Department for their views on various options), and to email his findings to the Committee in advance of its next meeting. Mr. Fulbruge agreed to contact clerks in the First, Second, Fourth and Sixth Circuits to learn what their experience has been.[8]

VI. Additional Old Business and New Business

There was no additional old business. Under new business, a member raised three issues.

First, the member noted that some of the Appellate Rules treat states in the same way as the U.S.,[9] but that state and federal government litigants receive different treatment with respect to the time limit for filing a notice of appeal[10] and the time limit within which to petition for panel rehearing or rehearing en banc.[11] The member reported that some state solicitor generals would like states to be accorded the same treatment as the U.S. A member expressed support for this idea. Another member observed that if the states were given more time to decide whether to appeal, they might be more likely to forgo appeals in some cases. The item was not placed on the agenda, however, because the committee will wait to see whether a formal recommendation on the matter results from the summer meeting of the National Association of Attorneys General.

Second, the member reported that some judges on the Federal Circuit would favor adoption of a rule that requires amici to disclose whether any other entity contributed monetarily

---

[8] A member suggested that it would be important to canvass the views of practitioners outside the Justice Department, and that it could be helpful to ask the AO and/or the FJC to study courts' experiences with different approaches. Judge Stewart observed that these measures could be taken after the Committee has had an opportunity for further discussion.

[9] *See, e.g.*, Rule 29(a) (permitting federal and state governments to "file an amicus-curiae brief without the consent of the parties or leave of court").

[10] *See* Rule 4(a)(1).

[11] *See* Rules 40(a)(1) (panel rehearing) and 35(c) (rehearing en banc).

to the preparation or submission of the amicus brief and whether counsel for a party worked on the amicus brief. (The Supreme Court has such a rule – Rule 37.6.) A member asked why the Federal Circuit could not impose such a requirement by local rule. Another member, though, pointed out that an Appellate Rule on the topic could provide welcome clarity. This item was put on the study agenda.

Third, the member reported that some Federal Circuit judges would favor a decrease in the permitted length of reply briefs from 7,000 words to 3,500 words. An attorney member expressed skepticism, arguing that such a reduction would not improve the resulting briefs and would cause great opposition from the bar. A judge member noted that the current length did not cause him concern (because he skims portions that seem unhelpful) and that some cases are complex enough that they really require the full 7,000-word length. Another attorney member strongly opposed shortening the limit, noting that it would create an extra hassle for attorneys who would have to move for leave to enlarge the length. By consensus, this item was not placed on the study agenda.

VII. Date and Location of Fall 2006 Meeting

Mr. Rabiej will circulate to the Committee suggestions for a meeting date in November 2006; Friday will be the preferred day of the week for the meeting.

V. Adjournment

The Committee adjourned at 11:40 a.m.

Respectfully submitted,

_____

Catherine T. Struve
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 22-23, 2006
Washington, D.C.
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 22-23, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, Jeffrey N. Barr, and Timothy K. Dole, attorneys in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., consultant to the committee. Professor R. Joseph Kimble, style consultant to the committee, participated by telephone in the meeting on June 23.

Representing the advisory committees were:

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

Deputy Attorney General McNulty attended part of the meeting on June 22. The Department of Justice was also represented at the meeting by Associate Attorney General Robert D. McCallum, Jr.; Alice S. Fisher, Assistant Attorney General for the Criminal Division; Ronald J. Tenpas, Associate Deputy Attorney General; Benton J. Campbell, Counselor to the Assistant Attorney General; and Jonathan J. Wroblewski and Elizabeth U. Shapiro of the Criminal Division.

INTRODUCTORY REMARKS

Judge Levi welcomed Supreme Court Justice Samuel A. Alito, Jr. to the meeting and presented him with a plaque honoring his service as a member and chair of the Advisory Committee on Appellate Rules.

Later in the day, Chief Justice John G. Roberts, Jr. came to the meeting, greeted the members, and spent time with them in informal conversations. Judge Levi presented the Chief Justice with a framed resolution expressing the committee's appreciation, respect, and admiration for his support of the rulemaking process and his service as a member of the Advisory Committee on Appellate Rules. Judge Levi noted that the Chief Justice had been nominated as the next chair of that committee, but his elevation to the Supreme Court had intervened with the succession. The Chief Justice expressed his appreciation for the work of the rules committees and emphasized that he had experienced that work from the inside.

Judge Levi reported that Professor Struve had been appointed by the Chief Justice as the new reporter for the Advisory Committee on Appellate Rules, succeeding Patrick Schiltz, who had just been sworn in as a district judge in Minnesota. Judge Levi pointed out that Professor Struve had written many excellent law review articles and has been described as "shockingly prolific."

Judge Levi noted that Dean Kane would retire as dean of the Hastings College of the Law on June 30, 2006. He also reported that she, Judge Murtha, and Judge Thrash would be leaving the committee because their terms were due to expire on September 30, 2006. He said that their contributions to the committee had been enormous, particularly as the members of the committee's Style Subcommittee. He also reported with sadness that the terms of Judge Fitzwater and Justice Wells were also due to expire on September 30, 2006. They, too, had made major contributions to the work of the committee and would be sorely missed. He noted that all the members whose terms were about to expire would be invited to the next committee meeting in January 2007.

Judge Levi noted that the civil rules style project had largely come to a conclusion. The committee, he said, needed to make note of this major milestone. He said that the style project was extremely important, and it will be of great benefit in the future to law students, professors, lawyers, and judges. The achievement, he emphasized, had been the joint product of a number of dedicated members, consultants, and staff.

In addition to recognizing the Style Subcommittee – Judges Murtha and Thrash and Dean Kane – Judge Levi singled out Judge Rosenthal, chair of the Advisory Committee on Civil Rules, and Judges Paul J. Kelly, Jr. and Thomas B. Russell, who served as the chairs of the advisory committee's two style subcommittees. Together, they

shepherded the style project through the advisory committee. Judge Levi also recognized the tremendous assistance provided by Professors R. Joseph Kimble, Richard L. Marcus, and Thomas D. Rowe, Jr., and by Joseph F. Spaniol, Jr., all of whom labored over countless proposed drafts, wrote and read hundreds of memoranda, and participated in many meetings and teleconferences.

Judge Levi also thanked the staff of the Administrative Office for managing the process and providing timely and professional assistance to the committees – Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, Robert P. Deyling, and Jeffrey N. Barr, and their excellent supporting staff – who keep the records, arrange the meetings, and prepare the agenda books. Finally, he gave special thanks to Professor Cooper who, he emphasized, had been the heart and soul of the style project. Professor Cooper was tireless and relentless in reviewing each and every rule with meticulous care and great insight. He helped shape every decision of the committee.

Judge Levi said that there was little to report about the March 2006 meeting of the Judicial Conference. He noted that the Supreme Court had prescribed the proposed rule amendments approved by the Judicial Conference in September 2005, including the package of civil rules governing discovery of electronically stored information. The amendments, now pending in Congress, are expected to take effect on December 1, 2006.

Judge Levi also thanked Brooke Coleman, his rules law clerk, for her brilliant work over the last several years in assisting him in all his duties as chair of the committee. He noted that she would soon begin teaching at Stanford Law School.

Judge Levi reported that Associate Attorney General McCallum had been nominated by the President to be the U.S. ambassador to Australia. Accordingly, he said, this was likely to be Mr. McCallum's last committee meeting. He emphasized that he had been a wonderful member and had established a new level of cooperation between the rules committees and the Department of Justice. He said that it is very important for the executive branch to be involved in the work of the advisory committees, especially when its interests are affected. He noted that the Department is a large organization, and its internal decision making on the federal rules works well only when its top executives, such as the Associate Attorney General, are personally involved. He emphasized that Mr. McCallum had attended and participated in all the committee meetings, and that he is a brilliant lawyer and a great person.

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, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters affecting the rules system. First, he pointed out that the Rules Enabling Act specifies that, unlike other amendments to the federal rules, any rule that affects an evidentiary privilege must be enacted by positive statute. He noted that the Advisory Committee on Evidence Rules had been working for several years on potential privilege rules, including a rule on waiver of the attorney-client privilege and work product protection. But before the committee could proceed seriously with a privilege waiver rule, it should alert Congress to all the relevant issues and obtain its acceptance in pursuing legislation to enact the rule. Accordingly, he said, Judge Levi and he had met on the matter with the chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, Jr.

Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule. Judge Levi reported that the chairman was very supportive and had urged the committee by letter to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in later proceedings.

Mr. Rabiej reported that the Advisory Committee on Evidence Rules had drafted a proposed rule, FED. R. EVID. 502, addressing the three topics suggested by Chairman Sensenbrenner. He added that Judge Levi would meet on June 23 with the chief counsel to the Senate Judiciary Committee and others to discuss the proposed rule.

Second, Mr. Rabiej reported that the Advisory Committee on Bankruptcy Rules had produced a comprehensive package of amendments and new rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed out that two senators had written recently to the Chief Justice objecting to three provisions in the advisory committee's proposed rules. The Director of the Administrative Office responded to the senators by explaining the basis for the advisory committee's decisions on these provisions and emphasizing that the committee would examine afresh the senators' suggestions, along with other comments submitted by the public, as part of the public comment process.

Third, Mr. Rabiej noted that a provision of the Class Action Fairness Act of 2005 required the Judicial Conference to report on the best practices that courts have used to make sure that proposed class action settlements are fair and that attorney fees are reasonable. He said that the Judicial Conference had filed the report with the judiciary committees of the House and Senate in February 2006. The thrust of the report

emphasized that the extensive 2003 revisions to FED. R. CIV. P. 23 had provided the courts with a host of rule-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The revised rule was intended largely to codify and amplify the best practices that district courts had developed to supervise class action litigation.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending projects of the Federal Judicial Center. He directed the committee's attention to two projects.

First, he noted, the Center was working with the Administrative Office to monitor developments in the courts following the Class Action Fairness Act of 2005. He said that the study was showing that class-action filings had increased since the Act. But not many class action cases are being removed from the state courts. Rather, he said, cases that previously would have been filed in the state courts are now being filed in the federal courts as original actions.

Second, the Center was studying the issue of appellate jurisdiction and how it affects resources in the appellate courts and district courts. He said that the Center would examine the exercise of jurisdiction under 28 U.S.C. § 1292(b), and a report would be forthcoming soon. He added, in response to a question, that concerns had been expressed regarding § 1292(b) motions in patent cases. He said that it had been difficult in the past to get district courts to certify an appeal and for the courts of appeals to accept the appeal. But the reluctance seems to have diminished, and changes are being seen.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Rules for Final Approval

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. 49.1

Judge Fitzwater explained that the four proposed rules have been endorsed by the Technology Subcommittee and the respective advisory committees. They comply with the requirement of the E-Government Act of 2002 that rules be prescribed "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The substance of the proposed rules,

he said, was based on the privacy policy already developed by the Court Administration and Case Management Committee and adopted by the Judicial Conference. In essence, since all federal court documents are now posted on the Internet, the proposed rules impose obligations on people filing papers in the courts to redact certain sensitive information to protect privacy and security interests.

Professor Capra added that the statute specifies that the rules must be uniform "to the extent practicable." He referred to the chart in the agenda book setting forth the proposed civil, criminal, and bankruptcy rules side-by-side and demonstrating how closely they track each other. (The proposed amendment to the appellate rules would adopt the privacy provisions followed in the case below.) He said that the subcommittee and the reporters had spent an enormous amount of time trying to make the rules uniform, even down to the punctuation. He pointed out that individual rules differ from the template developed by the Technology Subcommittee only where there is a special need in a particular set of rules. For example, a special need exists in criminal cases to protect home addresses of witnesses and others from disclosure. Therefore, the criminal rules, unlike the civil and bankruptcy rules, require redaction of all but the city and state of a home address in any paper filed with the court. Professor Coquillette added that the consistent policy of the Standing Committee since 1989 has been that when the same provision applies in different sets of federal rules, the language of the rule should be the same unless there is a specific justification for a deviation.

Judge Levi pointed out that the Court Administration and Case Management Committee had raised two concerns with the proposed privacy rules. First, that committee had suggested that the criminal rules require redaction of the name of a grand jury foreperson from documents filed with the court. But, he said, the signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

Second, the Court Administration and Case Management Committee had raised concerns over arrest and search warrants that have been executed. Initially, he said, the Department of Justice had argued, and the advisory committee was persuaded, that the effort required to redact information from arrest and search warrants would be considerable and that redaction of these documents should not be imposed. Now, though, the Department was suggesting that search warrants can be redacted, but not arrest warrants. Judge Levi said that he had advised the Court Administration and Case Management Committee that these matters needed to be studied further, but he did not want to delay approval of the privacy rules because of the concerns over warrants.

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 25(a)(5)

Judge Stewart reported that the advisory committee had met in April and that the E-Government privacy rule had been the major item on its agenda. He pointed out that the proposed appellate rule on privacy differs from the proposed civil, criminal, and bankruptcy rules in that it adopts a policy of "dynamic conformity." In other words, the appellate rule provides simply that the privacy rule applied to the case below will continue to apply to the case on appeal. He added that the advisory committee had been unanimous in approving this approach. The only objections raised in the committee related to some of the suggested style changes.

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Informational Items

Judge Stewart reported that the other items in the committee's report in the agenda book were informational. First, he said, the advisory committee had begun to consider implementing the time-computation template developed by the Standing Committee's Time-Computation Subcommittee by establishing a subcommittee to work on it. The subcommittee would begin work this summer to consider each time limit in the appellate rules. He added that Professor Struve had initiated the project with an excellent memorandum in which she identified time limits set forth in statutes. There is concern about statutes that impose time limits, he said, because FED. R. APP. P. 26 specifies that the method of counting in the rules is applicable to statutes. One problem is that the time limits for complying with many statutes — often 10 days — may be shortened because the template calls for counting each day, while the current time computation rule excludes weekends and holidays if a time limit is less than 11 days.

Judge Stewart reported that the advisory committee had also been asked to consider the provision in the time-computation template addressing the "inaccessibility" of the clerk's office. He said that the advisory committee would add Fritz Fulbruge, clerk

of the Court of Appeals for the Fifth Circuit in New Orleans, to the subcommittee. He has had relevant, actual experience with inaccessibility as a result of Hurricane Katrina.

Judge Stewart said that the advisory committee had conducted a thorough discussion of the "3-day rule" – FED. R. APP. P. 26(c). The committee voted unanimously not to make any change in the rule at the present time, but the members had a lively debate on the topic. Since electronic filing and service are just being introduced in the courts of appeals nationally, the committee will monitor their impact on the 3-day rule to see whether the rule should be modified.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 24, 2006 (Agenda Item 11).

Judge Zilly reported that the advisory committee had been very busy during the last 12 months, particularly in drafting rules and forms to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In all, the committee had held six meetings. The most recent, held in March 2006 at the University of North Carolina in Chapel Hill, had lasted three full days, and the advisory committee took two additional votes after the meeting.

He noted that a great deal of material was being presented to the Standing Committee. In all, more than 70 changes to the rules were under consideration. He said that the advisory committee was recommending:

(1) final approval of eight rules not related to the recent bankruptcy legislation;
(2) withdrawal of one rule published for public comment;
(3) final approval of an amendment to Interim Bankruptcy Rule 1007 and a related new exhibit to the petition form;
(4) final approval of seven additional changes to the forms, to take effect on October 1, 2006;
(5) publication of a comprehensive package of amendments to the rules to implement the recent bankruptcy legislation, most of which had been approved earlier as interim rules; and
(6) publication of all the revisions in the Official Forms.

Amendments for Final Approval

Judge Zilly reported that the proposed amendments to FED. R. BANKR. P. 1014, 3001, 3007, 4001, 6006, and 7007.1 and new rules 6003, 9005.1, and 9037 had been published for comment in August 2005. A public hearing on them had been scheduled for January 9, 2006. But there were no requests to appear, and the hearing was cancelled. He noted that the proposed Rules 3001, 4001, 6006 and new Rule 6003 had generated a good deal of public comment.

FED. R. BANKR. P. 1014(a)

Judge Zilly said that Rule 1014 (dismissal and transfer of cases) would be amended to state explicitly that a court may order a change of venue in a case on its own motion.

Joint Subcommittee Recommendations on
FED. R. BANKR. P. 3007, 4001, 6003, and 6006

Judge Zilly explained the origin of the proposed changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003. He said that about three years ago, the Bankruptcy Administration Committee of the Judicial Conference, chaired by Judge Rendell, and the Advisory Committee on Bankruptcy Rules had formed a joint subcommittee to examine a number of issues arising in large chapter 11 cases. As a result of the subcommittee's work, changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003 were published. He added that the advisory committee was recommending a number of minor changes to the four rules as a result of the public comments.

FED. R. BANKR. P. 3007

Judge Zilly explained that Rule 3007 (objection to claims) was being amended in several ways. It would preclude a party in interest from including in a claims objection any request for relief that requires an adversary proceeding. The proposed rule would allow omnibus claims objections. Objections of up to 100 claims could be filed in a single objection to claims. It would also limit the nature of objections that may be joined in a single filing, and it would establish minimum standards to protect the due process rights of claimants.

FED. R. BANKR. P. 4001

Judge Zilly noted that Rule 4001 (relief from the automatic stay and certain other matters) would be amended to require that movants seeking approval of agreements related to the automatic stay, approval of certain other agreements, or authority to use

cash collateral or obtain credit submit along with their motion a proposed order for the relief requested and give a more extensive notice of the requested relief to parties in interest. The rule would require the movant to include within the motion a statement not to exceed five pages concisely describing the material provisions of the relief requested. Judge Zilly noted that the advisory committee had made some changes in the rule after publication, including deletion of an unnecessary reference to FED. R. BANKR. P. 9024 (relief from judgment or order).

FED. R. BANKR. P. 6003

Judge Zilly explained that proposed Rule 6003 (interim and final relief immediately following commencement of a case) is new. It would set limits on a court's authority to grant certain relief during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, a court could not grant relief during the first 20 days of a case on: (1) applications for employment of professional persons; (2) motions for the use, sale, or lease of property of the estate, other than a motion under FED. R. BANKR. P. 4001; and (3) motions to assume or assign executory contracts and unexpired leases. He added that subdivision (c) had been amended following publication to delete a reference to the rejection of executory contracts or unexpired leases. The amendment, he said, allows a debtor to reject burdensome contracts or leases.

FED. R. BANKR. P. 6006

Judge Zilly reported that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would authorize omnibus motions to reject executory contracts and unexpired leases. It would also authorize omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The amended rule would establish minimum standards to ensure protection of the due process rights of claimants. Following publication, the advisory committee amended the rule to allow the trustee to assume but not assign multiple executory contracts and unexpired leases in an omnibus motion.

FED. R. BANKR. P. 7007.1

Judge Zilly explained that the proposed new Rule 7007.1 (corporate ownership statement) would require a party to file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed Rule 9005.1 (constitutional challenge to a statute) is new. It would make the new FED. R. CIV. P. 5.1 applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

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

FED. R. BANKR. P. 9037

As noted above on page 7, the committee approved the proposed new Rule 9037 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee. Adopted in compliance with § 205 of the E-Government Act of 2002, the rule would protect the privacy and security concerns arising from the filing of documents with the court, both electronically and in paper form, because filed documents are now posted on the Internet.

Judge Zilly noted that the proposed new bankruptcy rule is similar to the companion civil and criminal rules. It is slightly different in language, though, because it uses the term "entity," a defined term under the Bankruptcy Code, rather than "party" or "person." Entity includes a governmental unit under § 101(15) of the Code, while "person" excludes it in the definition section of the Code § 101(41).

Withdrawal of an Amendment

FED. R. BANKR. P. 3001(c) and (d)

Judge Zilly reported that the advisory committee had decided to withdraw the proposed amendments to Rule 3001 (proof of claim) following publication. The current rule states that when a claim (or an interest in property of the debtor) is based on a writing, the entire writing must be filed with the proof of claim. The proposed amendments, as published, would have provided that if the writing supporting the claim were 25 pages or fewer, the claimant would have to attach the whole writing. But if it exceeded 25 pages, the claimant would have to file relevant excerpts of the writing and a summary, which together could not exceed 25 pages. Similarly, any attachment to the proof of claim to provide evidence of perfection of a security interest could not exceed five pages in length.

Judge Zilly said that the advisory committee had received several comments opposing the amendments. One organization objected to the rule on the grounds that

summaries would be difficult to prepare. In light of the comments, the committee discussed increasing the page limitation on proof of perfection from five to 15 pages. After considering and debating all the comments, though, the committee decided to recommend that no changes be made to Rule 3001. But it agreed to change Form 10 (the proof of claim form) to warn users against filing original documents. The proposed language on the form would advise: "Do not send original documents. Attached documents may be destroyed after scanning."

The committee without objection approved withdrawal of the proposed amendment by voice vote.

Amendments to an Interim Rule and the Official Forms

Judge Zilly explained that to conform to the 2005 bankruptcy legislation, the committee had prepared interim rules that were then approved by the Standing Committee and the Executive Committee of the Judicial Conference for use as local rules in the courts. The interim rules had been drafted as revised versions of the Federal Rules of Bankruptcy Procedure. The courts were encouraged, but not required, to adopt them as local rules. The interim rules included 35 amendments to the existing rules and seven new rules. All the courts adopted the rules before the October 17, 2005, effective date of the bankruptcy law, some with minor variations.

In addition, the advisory committee prepared amendments to 33 of the existing Official Forms and created nine new forms, all of which were approved in August 2005 by the Standing Committee and the Judicial Conference, through its Executive Committee. The forms, under FED. R. BANKR. P. 9009, became new Official Forms and must be used in all cases.

Judge Zilly reported that the advisory committee had received comments from various sources on both the interim rules and the Official Forms. Based on those comments, it was now recommending a change in Interim Rule 1007 to require a debtor to file an official form that includes a statement of the debtor's compliance with the new pre-petition credit counseling obligation under § 109(h) of the Code. The amendment would be sent to the courts with the recommendation that it be adopted as a standing order effective October 1, 2006. Also based on the comments, the advisory committee was recommending changes to OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to OFFICIAL FORM 1. In addition, he said, the advisory committee recommended having the Judicial Conference make the changes in the Official Forms and have them take effect on October 1, 2006.

FED. R. BANKR. P. 1007

Judge Zilly explained that the 2005 Act had amended § 109(h) of the Bankruptcy Code to require that all individual debtors receive credit counseling before commencing a bankruptcy case. In its current form, Interim Rule 1007 (lists, schedules, statements, and other documents) implements § 109(h) by requiring the debtor to file with the petition either: (1) a certificate from the credit counseling agency showing completion of the course within 180 days of filing; (2) a certification attesting that the debtor applied for but was unable to obtain credit counseling within 5 days of filing; or (3) a request for a determination by the court that the debtor is statutorily exempt from the credit counseling requirement.

Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate from the provider of the counseling. As a result, debtors have filed a petition with the court, paid a filing fee, and then had their case dismissed by the court even when they had received the counseling but not filed the certificate. The proposed amendments to Rule 1007(b) and (c) address the problem by permitting debtors in this position to file a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor will have 15 days after filing the petition to file the certificate with the court.

Professor Morris added that the advisory committee was recommending amending both the interim rule and the final Rule 1007.

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

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, 23
and Exhibit D to OFFICIAL FORM 1

Judge Zilly added that the advisory committee was recommending a new Exhibit D to OFFICIAL FORM 1 (voluntary petition) to implement the proposed amendment to Rule 1007(b)(3). Exhibit D is the debtor's statement of compliance with the credit counseling requirement. Among other things, it includes a series of cautions informing debtors of the consequences of filing a bankruptcy petition without first receiving credit counseling. Many pro se debtors, for example, are unaware of the significant adverse consequences of filing a petition before receiving the requisite counseling, including dismissal of the case, limitations on the automatic stay, and the need to pay another filing fee if the case is refiled. The warnings may deter improvident or premature filings, and they should both reduce the harm to those debtors and ease burdens on the clerks, who often are called upon to respond to inquiries from debtors on these matters.

Judge Zilly added that the advisory committee was recommending that the Judicial Conference make changes in the following seven Official Forms, effective October 1, 2006:

1	Voluntary petition
5	Involuntary petition
6	Schedules
9	Notice of commencement of a case, meeting of creditors, and deadlines
22A	Chapter 7 statement of current monthly income and means test calculation
22C	Chapter 13 statement of current monthly income and calculation of commitment period and disposable income
23	Debtor's certification of completion of instructional course concerning personal financial management

Judge Zilly reported that the advisory committee recommended that OFFICIAL FORMS 1, 5, and 6 be amended to implement the statistical reporting requirements of the 2005 bankruptcy legislation that take effect on October 17, 2006. The proposed amendments to OFFICIAL FORMS 9, 22A, 22C, and 23 are stylistic or respond to comments received on the 2005 amendments to the Official Forms.

Judge Zilly pointed out that each of the forms was described in the agenda book. Once approved by the Judicial Conference, he said, they would become official and must be used in all courts. But, he said, the proposed changes in the seven forms will also be published for public comment, even though they will become official on October 1, 2006, because they had been prepared quickly to meet the statutory deadline and had not been published formally.

The committee without objection by voice vote agreed to send the proposed revisions in the forms to the Judicial Conference for final approval.

Amendments to the Rules for Publication

Judge Zilly reported that the advisory committee was seeking authority to publish the interim rules – together with proposed amendments to five additional rules not included in the interim rules – as a comprehensive package of permanent amendments to implement the 2005 bankruptcy legislation and other recent legislation. They would be published in August 2006 and, following the comment period, would be considered afresh by the advisory committee in the spring of 2007 and brought back to the Standing Committee for final approval in June 2007.

Thirty-five of the rules that the advisory committee was seeking authority to publish had been approved previously by the Standing Committee. They had to be in place in the bankruptcy courts in advance of the effective date of the Act, October 17, 2005 – FED. R. BANKR. P. 1006, 1007, 1009, 1010, 1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, and 9009. Judge Zilly explained that minor modifications, largely stylistic in nature, had been made in the rules. More significant improvements had been made to nine of the rules and are explained in the agenda book – FED. R. BANKR. P. 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5).

Judge Zilly reported that five changes to the rules in the package were new and had not been seen before by the Standing Committee. Changes to four rules were necessary to comply with the various provisions of the Act, but did not have to be in place by October 17, 2005 – FED. R. BANKR. P. 1005, 2015.3, 3016 and 9009 (the changes to 3016 and 9009 are distinct from previous changes to those rules made by the Interim Rules). In addition, the proposed change to Rule 5001 was necessary to comply with the new 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside their districts in emergency situations.

He noted that the proposed amendment to Rule 1005 (caption of the petition) conforms to the Act's increase in the minimum time allowed between discharges from six to eight years. New Rule 2015.3 would implement § 419 of the Act requiring reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest. The proposed amendment to Rule 3016(d) (filing plan and disclosure statement) would implement § 433 of the Act and allow a reorganization plan to serve as a disclosure statement in a small business case. The amendment to Rule 9009 (forms) would provide that a plan proponent in a small business Chapter 11 case need not use the Official Form of a plan of reorganization and disclosure statement.

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

Amendments to the Official Forms for Publication

Judge Zilly reported that the advisory committee recommended publishing for comment all the amendments made to the 20 forms amended or created in 2005 to implement the changes brought about because of the Act (*i.e.*, OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24). He noted that publishing for comment forms already in effect as Official Forms was an unusual step. But because the new law required so many changes to the forms, the advisory committee wanted to give the bench and bar a full, formal opportunity to comment on them.

Judge Zilly said that the advisory committee had, at the direction of Congress, finished drafting and was recommending publishing for comment, three new forms to be used in small business cases: Form 25A (sample plan of reorganization); Form 25B (sample disclosure statement); and Form 26 (form to be used to report on value, operations, and profitability as required by § 419 of the Act). He noted that new Rule 2015.3 would require the debtor in possession to file Form 26 in all Chapter 11 cases. He also said that the advisory committee's recommended new change to Rule 9009 was on account of the congressional directive that the sample plan and sample disclosure statement (Forms 25A and 25B) be illustrative only. The change excepts Forms 25A and 25B from Rule 9009's general requirement that the use of applicable Official Forms is mandatory.

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

Informational Items

Judge Zilly noted that when Congress enacted the 2005 legislation, it required the debtor's attorney in a Chapter 7 case to certify that the attorney has no knowledge, after inquiry, that the information provided by the debtor in the schedules and statements is incorrect. The legislation also states that it is the sense of Congress that FED. R. BANKR. P. 9011 should be modified to include a provision to that effect. In addition, he said, Senator Grassley and Senator Sessions had sent letters urging the committee to include the provision in the rule and forms.

Judge Zilly said that the advisory committee was not yet recommending any change to Rule 9011 or to any of the forms. As it stands now, he said, Rule 9011 provides that an attorney's signature on any paper filed with the court other than the schedules amounts to a certification by the attorney after a reasonable inquiry that any factual allegations are accurate. Changes made by the Act would generally extend the attorney's certification to bankruptcy schedules, at least in chapter 7. He said that it has been a long-standing, consistent principle of the committee not to amend the rules simply to restate statutory provisions. He stated the advisory committee takes the Senators' concerns seriously and has formed a subcommittee to further consider how Rule 9011 and the forms might be amended, and that the subcommittee would report on its progress at the next advisory committee meeting in September.

Judge Zilly reported that the term of Professor Alan Resnick had come to an end. He had been the advisory committee's reporter, and then a member of the committee, for more than 20 years. Judge Zilly noted that Professor Resnick has an extraordinary institutional memory and unmatched insight and wisdom that will be greatly missed by the committee. Judge Zilly also thanked the committee's current reporter, Professor

Morris, its consultant on the bankruptcy forms, Patricia Ketchum, and the staff attorneys in the Administrative Office who have supported the committee with great talent and dedication – James Wannamaker and Scott Myers.

Judge Levi concluded the discussion by observing the enormity of the work and the work product of the advisory committee in implementing the comprehensive 500-plus page legislation within such a short time period.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of June 2, 2006 (Agenda Item 12).

Amendments for Final Approval

FED. R. CIV. P. 5.2

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

STYLE PACKAGE

Judge Rosenthal explained that the final product of the style project, presented to the Standing Committee for final approval, consisted of four separate parts:

(1) the pure style amendments to the entire body of civil rules – FED. R. CIV. P. 1-86;
(2) the style-plus-substance amendments – FED. R. CIV. P. 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78;
(3) the restyled civil forms; and
(4) the restyled version of rule amendments currently pending in Congress – FED. R. CIV. P. 5.1, 24(c), and 50 – and the electronic discovery rules – FED. R. CIV. P. 16, 26, 33, 34, 37, and 45.

Judge Rosenthal reported that the advisory committee had made a few changes in the rules following publication, two of which are particularly important. First, she said, the committee expanded the note to FED. R. CIV. P. 1 to provide more information about the style project and its intentions. She noted that the committee had decided at the very start of the style project that there needed to be a brief statement somewhere in the rules

or accompanying documents describing the aims and style conventions of the project. The committee concluded ultimately that the statement should be placed in an expanded note to Rule 1 identifying the drafting guidelines used and summarizing what the committee did and why. The committee note, for example, emphasizes that the style changes to the civil rules are intended to make no changes in substantive meaning. It also explains the committee's formatting changes and rule renumbering and its removal of inconsistencies, redundancies, and intensifying adjectives.

Second, the advisory committee responded to a fear expressed in some of the public comments that when the restyled rules take effect on December 1, 2007, they will supersede any potentially conflicting provision in existing statutes. Judge Rosenthal explained that that clearly was not the intent of the committee. Moreover, she said, supersession had not proven to be a problem with the restyled appellate rules and criminal rules.

She pointed out that Professor Cooper had prepared an excellent memorandum emphasizing that the committee intended to make no change in any substantive meaning in any of the rules. It also recommends a new FED. R. CIV. P. 86(b) that would make explicit the relationship between the style amendments and existing statutes, putting to rest any supersession concern. The proposed new rule specifies that if any provision in any rule other than new Rule 5.2 "conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007."

The committee without objection by voice vote agreed to send all the changes recommended by the style project to the Judicial Conference for final approval.

Judge Rosenthal commended Judge Levi and Judge Anthony Scirica – the current and former chairs of the Standing Committee – for their decision to go forward with restyling the civil rules after completion of the appellate and criminal rules restyling projects. She noted that an attempt had been made in the 1990's to begin restyling the civil rules, but the project had been very difficult and time-consuming. After laboring through several rules, the advisory committee decided at that time that the effort was simply too difficult and time-consuming, and it was detracting from more pressing matters on the committee's agenda. Therefore, the civil rules project had been deferred for years. She said that it took a great deal of vision, belief, and understanding of the benefits for Judges Scirica and Levi to bring it back and see it through to its successful conclusion.

Judge Rosenthal thanked the Standing Committee's Style Subcommittee – Judges Thrash and Murtha and Dean Kane – emphasizing that they had been tireless, gracious, and amazing. Also, she said, Professors Marcus and Rowe had been stalwarts of the

project, researching every potential problem that arose. The project, she added, could not have been handled without the support of the Administrative Office – Peter McCabe, John Rabiej, James Ishida, Jeff Hennemuth, Jeff Barr, and Bob Deyling – who coordinated the work and kept track of 750 different documents and versions of the rules. She added that Joe Spaniol had been terrific, offering many great suggestions that the committee adopted.

Judge Rosenthal explained that it was hard to say enough about Professor Kimble's contributions. The results of the style project, she said, are a testament to his love of language. His concept was that the rules of procedure can be as literary and eloquent as any other kind of writing. His stamina and dedication to the project, she said, had been indispensable.

Finally, she thanked Professor Cooper, explaining that he had been the point person at every stage of the project. Noting the extremely heavy volume of e-mail exchanges and memoranda during the course of the project, she emphasized that Professor Cooper had read and commented on every one of them and had been an integral part of every committee decision. His unique combination of acute attention to detail and thorough understanding of civil procedure had kept the project moving in the right direction and made the final product the remarkable contribution to the bench and bar that it will be. She predicted that within five years, lawyers will not remember that the civil rules had been phrased in any other way.

Professor Cooper added that the most important element to the success of the project, by far, had been the decision to accelerate the project and get the work done within the established time frame. The success, he said, was due to Judge Rosenthal. The project had been completed well ahead of time and turned out better than any of the participants could have hoped. Judge Murtha and Professor Kimble echoed these sentiments and expressed their personal satisfaction and pride in the results.

Informational Items

Judge Rosenthal reported that the advisory committee had approved several amendments for publication at its last meeting. The committee, though, was not asking to publish the amendments in August 2006, but would will defer them to August 2007. The bar, she said, deserves a rest. Therefore, the advisory committee was planning to come back to the Standing Committee in January 2007 with proposed amendments to FED. R. CIV. P. 13(f) and 15(a), and 48, and new Rule 62.1. The proposals, she said, were described in the agenda book.

FED. R. CIV. P. 13(f) and 15(a)

Judge Rosenthal explained that the proposed amendments to Rules 13(f) (omitted counterclaim) and 15(a) (amending as a matter of course) deal with amending pleadings. Rule 13(f) is largely redundant of Rule 15 and potentially misleading because it is stated in different terms. Under the committee's proposal, an amendment to add a counterclaim will be governed by Rule 15. The Style Subcommittee, she said, had recommended deleting Rule 13(f) as redundant, but the advisory committee decided to place the matter on the substance track, rather than include it with the style package.

Judge Rosenthal reported that the advisory committee's proposal to eliminate Rule 13(f) would be included as part of a package of other changes to Rule 15. It would also amend Rule 15(a) to make three changes in the time allowed a party to make one amendment to its pleading as a matter of course.

Professor Cooper added that the advisory committee had decided not to make suggested amendments to Rule 15(c), dealing with the relation back of amendments. The committee had not found any significant problems with the current rule. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.

One member suggested that the proposed change to Rule 15 could take away a tactical advantage from defendants by eliminating their right to cut off the plaintiff's right to amend. The matter, he said, could be controversial. Judge Rosenthal responded that the advisory committee had thought that amendment of the pleadings by motion is routinely given. Moreover, it is often reversible error for the court not to allow an amendment. She said that the publication period will be very helpful to the committee on this issue.

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

Judge Rosenthal reported that the advisory committee would propose an amendment to Rule 48 (number of jurors; verdict) to add a new subdivision (c) to govern polling of the jury. The proposal, she said, had been referred to the advisory committee by the Standing Committee. She explained that it was a simple proposal to address jury polling in the civil rules in the same way that it is treated in the criminal rules. But, she added, there is one difference between the language of the civil and criminal rules because parties in civil cases may stipulate to less than a unanimous verdict.

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the advisory committee would propose a new Rule 62.1 (indicative rulings). It had been on the committee agenda for several years and would provide explicit authority in the rules for a district judge to rule on a matter that is the subject of a pending appeal. Essentially, it adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) to vacate a judgment that is pending on appeal. Almost all the circuits now allow district judges to deny post-trial motions and also to "indicate" that they would grant the motion if the matter were remanded by the court of appeals for that purpose. The proposed new rule would make the indicative-ruling authority explicit and the procedure clear and consistent.

Professor Cooper added that the advisory committee was considering publishing two versions of the indicative-ruling proposal. One alternative would provide that if the court of appeals remands, the district judge "would" grant the motion. The other would allow the district judge to indicate that he or she "might" grant the motion if the matter were remanded. The court of appeals, though, has to determine whether to remand or not.

One member inquired as to why the advisory committee had decided to number the new rule as Rule 62.1 and entitle it "Indicative Rulings." Professor Cooper explained that the advisory committee at first had considered drafting an amendment to Rule 60(b) because indicative rulings arise most often with post-judgment motions to vacate a judgment pending on appeal. The committee, however, ultimately decided on a rule that would apply more broadly. Therefore, it placed the proposed new rule after Rule 62, keeping it in the chapter of the rules dealing with judgments. Judge Stewart added that the Advisory Committee on Appellate Rules would like to monitor the progress of the proposed rule and might consider including a cross-reference in the appellate rules. Judge Rosenthal welcomed any suggestions and said that the committee was open to a different number and title for the rule.

FED. R. CIV. P. 30(b)(6)

Judge Rosenthal reported that the advisory committee had heard from the bar that many practical problems have arisen with regard to Rule 30(b)(6) depositions of persons designated to testify for an organization. The committee was in the process of exploring whether the problems cited could be resolved by amendments to the rules. She noted that the committee had completed a brief summary and was looking further at particular aspects in which amendments might be helpful. For example, should the rules protect against efforts to extract an organization's legal positions during a deposition? Some treatises state that if a witness testifies, the testimony binds the organization. But that is not the way the rule was intended to operate. Therefore, the advisory committee would consider whether the rule should be changed to make it clear that this is not the case.

That, she said, is just one of the problems that has been cited regarding depositions of organizational witnesses.

FED. R. CIV. P. 26(a)

Judge Rosenthal said that the advisory committee was also considering whether changes were needed to the provision in Rule 26(a) (disclosures) that requires some employees to provide an expert's written report. She noted that the rule and the case law appear to differ as to the type of employee who must give an expert's report. The rule says that no report is needed unless the employee's duties include regularly giving testimony, but the case law is broader. She also noted that the ABA Litigation Section has asked the House of Delegates to approve recommendations with respect to discovery of a trial expert witness's draft reports and discovery of communications of privilege matter between an attorney and a trial expert witness. These questions also will be considered.

One of the members suggested that the advisory committee's inquiry of Rule 26(a) should be broadened to also include the problems that have arisen with regard to the testimony of treating physicians.

FED. R. CIV. P. 56

Judge Rosenthal said that the final area being considered by the advisory committee involves the related subjects of summary judgment and notice pleading. She added that the committee planned to address issues in a leisurely way. She noted that the committee's work on restyling FED. R. CIV. P. 56 (summary judgment) was the most difficult aspect of the style project. It was a frustrating task because the rule is badly written and bears little relationship to the case law and local court rules. Since the national rule is so inadequate, she said, local court rules abound. She said that the advisory committee had decided to limit its focus to the procedures set forth in the summary judgment rule. Some of the time periods currently specified in the rule, such as leave to serve supporting affidavits the day before the hearing, are impracticable. But, she said, there was no enthusiasm in the advisory committee for addressing the substantive standard for summary judgment. That would continue be left to case law.

Related to summary judgment, she noted, is the issue of pleading standards. Much interest had been expressed over the years in reexamining the current notice pleading standard system. To that end, she said, the advisory committee had examined how it might structure an appropriate inquiry into both summary judgment and notice pleading. Certainly, she recognized, it would be difficult, and very controversial, to attempt to replace notice pleading with fact pleading. But, she said, the advisory committee had not closed the door on the subject.

As part of the inquiry, the advisory committee has considered recasting Rule 12(e) (motion for a more definite statement) and giving it greater applicability. Today, a pleading has to be virtually unintelligible before a motion for a more definite statement will be granted. The committee will consider liberalizing the standard as a way to help focus discovery.

FED. R. CIV. P. 54(d)(2), 58(c)(2)

Professor Cooper reported that the Advisory Committee on Appellate Rules had suggested that the Civil Rules Committee consider the interplay between the rules that integrate motions for attorney fees and the rules that govern time for appeal – FED. R. CIV. P. 54(d)(2) (claims for attorney's fees) and 58(c)(2) (entry of judgment, cost or fee award) and Fed. R. App. P. 4 (time to appeal). He explained that there is a narrow gap in the current rules. But, he said, the Civil Rules Committee was of the view that the matter was extremely complex, and that it was better to live with the current complexity than to amend the rules and run the risk of unintended consequences or even greater complexity.

Judge Rosenthal reported that the Advisory Committee on Civil Rules has begun to work on the time-computation project and would consider it further at its September 2006 meeting. She predicted that the committee could likely come to the conclusion that the problem of time limits set forth in statutes will not turn out to be as great in practice as in theory. The committee planned to go forward in accord with the initial schedule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 20, 2006 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 11(b)

Judge Bucklew reported that the proposed amendment to Rule 11 (pleas) was part of a package of amendments needed to bring the rule into conformity with the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), which effectively made the federal sentencing guidelines advisory rather than mandatory.

She noted that Rule 11(b) specifies the matters that a judge must explain to the defendant before accepting a plea. Under the current rule, the judge must advise the defendant of the court's obligation to apply the sentencing guidelines. But, since *Booker*

has made the guidelines advisory, that advice is no longer appropriate. Accordingly, the amended rule specifies that the judge must inform the defendant of the court's obligation to "calculate" the applicable range under the guidelines, as well as to consider that range, possible departures under the guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a).

Judge Bucklew said that the advisory committee had received comments both from the federal defenders and the U.S. Sentencing Commission. The defenders, she said, had argued that the proposed amendment would give too much prominence to the guidelines, and they suggested that the committee recast the language to require a judge to consider all the factors in 18 U.S.C. § 3553(a). The Sentencing Commission asked the committee to change the word "calculate" to "determine and calculate." The advisory committee, she said, had considered both suggestions in detail, but it decided not to make the proposed changes and agreed to send the proposed amendment forward as published.

Professor Beale added that the advisory committee had added a paragraph to the committee note pointing out that there have been court decisions stating that under certain circumstances, the court does not have to calculate the guidelines *(e.g., United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005)). She pointed out that the added language was limited and had been worked out with the Department of Justice to make sure that it is not too broad.

One member suggested, though, that the added paragraph was inconsistent with the developing case law in his circuit, which requires district judges to calculate the guidelines in every case. Other members suggested, though, that it is a waste of time for a judge to calculate the guidelines in, say, a case with a mandatory minimum sentence. Some participants suggested possible improvements to the language of the last paragraph of the note. Judge Bucklew and Professor Beale agreed to work on the language during the lunch break, and subsequently reported their conclusion that the language should be withdrawn.

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

FED. R. CRIM. P. 32(d) and (h)

Judge Bucklew reported that the advisory committee had proposed several changes to Rule 32 (sentence and judgment). First, it inserted the word "advisory" into the heading of Rule 32(d)(1) (presentence report) to emphasize that the sentencing guidelines are advisory rather than mandatory.

She noted that the committee had received several comments on the proposed revision of subdivision (h) (notice of intent to consider other sentencing factors) to require notice to the parties of a judge's intent to consider other sentencing factors. The current rule, she said, specifies that if the court is going to depart under the guidelines for a reason of which the parties have not been notified, the court must provide "reasonable notice" and a chance to argue. She explained that the advisory committee would expand the rule to require reasonable notice whenever the court is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence for a reason not identified either in the presentence report or a party's pre-hearing submission. She said that the advisory committee had added more specific language to the rule following the comment period, stating that the notice must specify "any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence."

Professor Beale added that there had been litigation on this matter, but the committee was of the view that non-guideline sentences should be treated the same as departures. She noted that the committee had also adopted some refinements in language suggested by the Sentencing Commission.

Judge Bucklew reported that the advisory committee had added language to Rule 32(d)(2)(F) to require the probation office to include in the presentence report any other information that the court requires, including information relevant to the sentencing factors specified in 18 U.S.C. § 3553(a). Professor Beale said that the central question is how much information the probation office must include in the presentence investigation report. As revised, the rule specifies that the report must include any other information that the court requires, including information relevant to the factors listed in § 3553(a). She noted that the probation offices in many districts already include this information in the reports. But, she added, there is quite a variance in practice, and the revised language will provide helpful guidance.

A member expressed concern about the provision requiring special notice of a non-guidelines sentence, questioning whether it would undercut the right of allocution and interfere with judicial discretion. He suggested that matters arise at an allocution that the judge should take into account and may affect the sentence. He asked whether the sentencing judge would be required to adjourn the hearing and instruct the parties to return later. He also saw a difference between the obligation to notify parties in advance that the judge is considering a departure under the guidelines and a sentence outside the guidelines.

Other members shared the same concerns and expressed the view that the language of the proposed rule might restrict the authority of a judge to impose an appropriate sentence under *Booker* and 18 U.S.C. § 3553(a). One asked what the remedy

would be for a failure by the court to comply with the requirement. He added that there is also the question of whether the defendant can forfeit rights on appeal under the rule by not raising objections in the district court.

Judge Bucklew said that the case law in the area was very fluid. She noted that the advisory committee had no intention of restricting the court or requiring that any formal notice be given. Rather, she said, the focus of the committee's effort had been simply to avoid surprise to the parties. One participant emphasized that the rule uses the term "reasonable notice," which has not changed since *Booker* and has a long history of interpretation. Another participant noted that lawyers will have to look at the law of their own circuit.

One member added that the problem of surprise arises because parties normally have an expectation that the judge will impose a sentence within the guideline range. But, he added, in at least one circuit, the guidelines are now only one factor in sentencing, and the parties do not have the expectation of a guideline sentence.

Judge Hartz moved to send the proposed amendments to subdivision (h) back to the advisory committee to consider the matter anew in light of the concerns expressed and the developing case law. One member noted that the appellate court decisions on these precise points appear to be going in different directions. Another added that the matter is very fluid, and the committee should avoid writing into the rules a standard that will change over time.

The committee with one objection approved Judge Hartz's motion to send the proposed revisions to Rule 32(h) back to the advisory committee.

The committee without objection by voice vote agreed to send the proposed amendments to Rule 32(d) to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(k)

Judge Bucklew reported, by way of information, that the advisory committee had decided to withdraw the published amendment to Rule 32(k) (judgment). It would have required judges to use a standard judgment and statement of reasons form prescribed by the Judicial Conference. But, she said, a recent amendment to the USA PATRIOT Act requires judges to use the standard form. Thus, there was no longer a need for an amendment.

FED. R. CRIM. P. 35(b)

Judge Bucklew reported that the only purpose of the proposed amendment to Rule 35 (correcting or reducing a sentence) was to remove language from the current rule that seems inconsistent with *Booker*. She added that the National Association of Criminal Defense Lawyers had suggested during the comment period that any party should be allowed to bring a Rule 35 motion, not just the attorney for the government. She said that the advisory committee did not adopt the change and recommended that the rule be approved as published.

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

FED. R. CRIM. P. 45(c)

Judge Bucklew explained that the proposed revision of Rule 45 (computing and extending time) would bring the criminal rule into conformance with the counterpart civil rule, FED. R. CIV. P. 6(e) (additional time after certain kinds of service). It specifies how to calculate the additional three days given a party to respond when service is made on it by mail and certain other specified means.

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

FED. R. CRIM. P. 49.1

As noted above on page 7, the committee approved the proposed new Rule 49.1 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Amendments for Publication

FED. R. CRIM. P. 29

Judge Bucklew reported that the proposed revision to Rule 29 (motion for judgment of acquittal) had a long and interesting history. She pointed out that the proposal had been initiated by the Department of Justice in 2003. The principal concern of the Department, she said, was that a district judge's acquittal of a defendant in the middle of a trial prevents the government from appealing the action because of the Double Jeopardy Clause of the Constitution. She explained that the Department's

proposed rule would have precluded a judge in all cases from granting an acquittal before the jury returns a verdict.

Judge Bucklew noted that the advisory committee had considered the rule at two meetings, in 2003 and 2004. At the first, she said, the committee had been inclined to approve a rule in principle, and it asked the Department of Justice to provide additional information. At the second meeting, however, the committee decided that no amendment to Rule 29 was necessary.

At the January 2005 Standing Committee meeting, the Department made a presentation in favor of amending Rule 29. In doing so, it pointed to a number of cases in which district judges had granted acquittals in questionable cases. As a result, she said, the Standing Committee returned the rule to the advisory committee and asked it to: (1) draft a proposed amendment to Rule 29, and (2) recommend whether that amendment should be published.

Judge Bucklew reported that the advisory committee had considered the rule again, and it took several meetings to refine the text. The committee was in agreement on the language of the rule. But, she said, it was divided on wisdom of proceeding with the rule as a matter of policy. It recommended publication by a narrow vote of 6-5. She noted that one committee member had been absent, and his vote would have made the vote 7-5 for publication.

She emphasized that the reservations of certain members were not as to the language of the rule, but as to the policy. The objectors, she explained, were concerned that the rule would restrict the authority of trial judges to do justice in individual cases and to further case management. She added that there also was real doubt among the advisory committee members as to the need for any amendment. They accepted the fact that there had been a few cases of abuse under the current rule, but the number of problems had been minimal.

Judge Bucklew stated that the revised Rule 29 would specify that if a court is going to grant a motion for acquittal before the jury returns a verdict, it must first inform the defendant personally and in open court of its intent. The defendant then must waive his or her double jeopardy rights and agree that the court may retry the case if the judge is reversed on appeal.

One of the participants observed that a sentence in the proposed committee note declared that the rule would apply equally to motions for judgment of acquittal made in a bench trial. Professor Beale replied that the rule did not apply to bench trials, and the sentence would be removed.

Deputy Attorney General McNulty thanked the advisory committee and the Standing Committee for considering the recommendations of the Department of Justice. He said that Department attorneys felt very strongly about the subject and wanted the committee to go forward with publication. He added that the vast majority of judges exercise their Rule 29 authority wisely and in a way that allows the government to seek judicial review. But, he said, there had been some bad exceptions that have had a large impact and had undercut the jury's ability to decide the case and the government's right to have its charging decision given appropriate deference. He said that Rule 29 presented a unique situation that needed to be addressed, and he added that it had been the policy of Congress to provide greater opportunity to the government for appellate review.

Finally, he said, the waiver approach adopted by the advisory committee with the revised rule achieves a fine balance. It gives the judge the opportunity to do justice and further case management objectives, while preserving the right of the government to appeal. He concluded by strongly urging the committee to approve publication.

One of the members objected on the grounds that the rule represents a major shift in the architecture of trials that would upset the balance in criminal trials and diminish the rights of defendants. First, he said, such a large change in criminal trials should be made by Congress through legislation, and not through rulemaking by the committee. Second, he expressed concern over the closeness of the vote in the advisory committee. The 6-5 vote, he said, was essentially a statistical tie, and the fact that the matter had been debated and deferred at so many meetings demonstrates that there are serious problems with the proposal. Third, he expressed concern that the defendant must waive his or her constitutional rights. This, he said, was unsettling. Fourth, he emphasized that he was aware of many instances in which the government overcharges, particularly by including extraneous counts and peripheral defendants. The courts, he argued, should have the power to winnow out the extra charges and defendants, and the hands of judges should not be bound by the rule. Fifth, he said that it is unfair for defendants to have a "sword of Damocles" hanging over their heads for two or three years, while the government appeals the trial judge's decision to acquit. Finally, he summarized, the rule was sure to lead to unintended consequences, and the changes the government wants should not be made through the rules process.

Several members of the committee expressed sympathy for these views, but they nevertheless announced that they favored publication of the rule.

Judge Levi added some background on the history of the rules. He noted that it had been on the agenda for some time, and it had been approved originally by the advisory committee with considerable support, perhaps by an 8-4 vote. Then, however, at the next meeting the committee changed its mind.

Initially, he explained, the proposal of the Department of Justice had been to prevent a judge from entering a pre-verdict of acquittal in any circumstances. But the district judges on the advisory committee asked how they would be able to deal with problems arising from excess defendants, excess counts, and hung juries.

The waiver proposal, he said, had been developed to address these competing concerns. It would preserve the discretion of the district judges and help them manage their cases. Yet it would give the government the right to appeal a district judge's pre-verdict acquittal. Nevertheless, he pointed out, the advisory committee rejected the waiver proposal and decided that no change was needed in the rule.

At the January 2005 Standing Committee meeting, Associate Deputy Attorney General Christopher Wray made strong arguments in support of the proposed rule amendment that included the waiver procedure. Judge Levi said that the Department had been very persuasive, and the Standing Committee took a strong position and directed the advisory committee to draft a proposed amendment. Then, he said, the Department went back to the advisory committee and made the argument for the proposed amendment, which the committee approved on a 6-5 vote.

Judge Levi said that he would prefer to handle the proposal through the rulemaking process, rather than have the Department go to Congress for legislation.

One member expressed concerns over the proposal, but said that he had been convinced to support publication because the rule was supported by Robert Fiske, a distinguished member of the advisory committee who had served as both a prosecutor and defense lawyer. He added that while the number of abuses is very small, the cases in which abuse has occurred under Rule 29 have tended to be prominent.

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all

other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word "even" from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a magistrate judge having authority in the district where the investigation is taking place, or by a magistrate judge in the District of Columbia. The advisory committee, she added, had voted 10-1 to publish the rule.

Judge Bucklew advised the committee of developments that had occurred since the vote. She noted that at Judge Levi's suggestion, Mr. Rabiej had sent the proposal to Judge Clifford Wallace, who chairs the Ninth Circuit's Pacific Islands Committee. In turn, Judge Wallace contacted the Chief Justice of American Samoa, who objected to the proposed amendment. Judge Wallace suggested that the proposal be remanded back to the advisory committee in order to give American Samoa a chance to respond. She added that she was not sure exactly what American Samoa's concerns were, but it appeared that

the Chief Justice did not want judges in other parts of the country issuing warrants for execution in American Samoa.

Judge Bucklew reported that after speaking with Judge Wallace, the Administrative Office had polled the advisory committee as to whether it should wait until the Chief Justice of American Samoa and the Pacific Islands Committee of the Ninth Circuit respond. Accordingly, it voted 9-2 to allow time for a response. She noted that the Department of Justice representative objected, along with one other advisory committee member. She added that later discussions have suggested that the proposal could still be published, with American Samoa and the Pacific Islands Committee commenting during the public comment period.

She pointed out that after the advisory committee meeting, the House of Representatives passed a bill containing a provision similar to the proposal to amend Rule 41(b). Basically, it would allow investigation of possible fraud and corruption by officers and employees of the United States in possible illegal sales of passports, visas, and other documents. It would authorize the district court in the District of Columbia to issue search warrants for property located within the territorial and maritime jurisdiction of the United States. She added that she was not sure what the Department's position would be on the bill, and she noted that the legislation probably did not cover everything in the proposed rule amendment.

Professor Beale said that the Department of Justice's largest concern was with visa fraud. This, in turn, was connected with larger issues of illegal immigration and terrorism. In addition, the question arose whether the committee would have to republish the current proposal if its reference to a territory of the United States were deleted following the public comment period. She concluded that republication would probably not be required. She explained that subdivision (a) of the rule, which refers to territories, was not connected to subdivisions (b) and (c), which authorize search warrants for property in diplomatic or consular missions and residences of diplomatic personnel. She said that the committee could place brackets around subdivision (a) and invite comment from American Samoa and others as to whether subdivision (a) should be included.

Judge Bucklew also pointed out, as mentioned in the advisory committee's report, that a similar, but broader proposal had been approved by the Judicial Conference but rejected by the Supreme Court in 1990.

Judge Levi suggested bracketing the language regarding American Samoa. He noted from speaking with Judge Wallace that there is a great deal of sensitivity in American Samoa about any intrusion into its judicial process. He noted that the situation is very different from the other Pacific Islands territories, such as Guam and the Northern Marianas, both of which have Article I federal district courts. The history of how the

United States acquired American Samoa is different from that of other territories, and the relevant treaty explicitly requires the United States to respect the judicial culture of American Samoa. He noted, too, that there had been a proposal to establish an Article I federal court in American Samoa, but it has been very controversial.

Judge Levi also pointed out that Judge Wallace warned that if the proposal to amend Rule 41 is published without bracketing American Samoa, there could be a good deal of needless controversy generated. The primary concern of the Department of Justice, he said, is with oversees searches, and not with American Samoa. He asked whether the advisory committee would be amenable to bracketing the language dealing with American Samoa.

Judge Bucklew responded that the advisory committee would certainly approve placing brackets around the provision to flag it for readers. She said that the proposed amendments to Rule 41 were very beneficial, and it would be a shame not to have them proceed because of a controversy over a matter of relatively minor concern to the government.

The committee unanimously approved the proposed amendment, with the pertinent language of subsection (A) bracketed, for publication by voice vote.

MODEL FORM 9 ACCOMPANYING THE SECTION 2254 RULES

Mr. Rabiej stated that the committee needed to abrogate Form 9 accompanying the § 2254 rules. He noted that the form is illustrative and implements Rule 9 of the § 2254 rules (second or successive petitions). The form, however, was badly out of date, even before the habeas rules were restyled, effective December 1, 2004. For example, it contains references to subdivisions in Rule 9 that no longer exist and includes provisions that have been superseded by the Antiterrorism and Effective Death Penalty Act of 1996.

He added that when the restyled habeas corpus rules had been published for comment in August 2002, the advisory committee received comments from district judges recommending that the form not be continued because the courts relied instead on local forms. The courts wanted to retain flexibility to adapt their forms to local conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the

regular rulemaking process. *i.e.,* approval by the committee and forwarding to the Supreme Court and Congress.

The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.

Informational Items

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2006 (Agenda Item 8).

New Rule for Publication

FED. R. EVID. 502

Judge Smith reported that the advisory committee had only one action item to present — proposed new FED. R. EVID. 502 to govern waiver of attorney-client privilege and work product protection. He referred back to the report of the Administrative Office and Mr. Rabiej's description of the exchange between Judge Levi and the chairman of the House Judiciary Committee. He noted that the committee had received a specific request from Chairman Sensenbrenner to draft a rule that would:

1. protect against inadvertent waiver of privilege and protection,

2. permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and

3. allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings.

He explained that rules that affect privilege must be addressed by Congress and enacted by legislation. Thus, the rules committees could produce a rule through the Rules Enabling Act process that would then be enacted into law by Congress.

Judge Smith noted that the advisory committee had conducted a very profitable conference at Fordham Law School in New York at which 12 invited witnesses commented on a proposed draft of the rule. He said that the committee had refined the rule substantially as a result of the conference, and the improved product was ready for approval by the Standing Committee to publish. He explained that the rule incorporated the following basic principles agreed upon unanimously by the advisory committee:

1. A subject-matter waiver should be found only when privileged material or work product has already been disclosed and a further disclosure "ought in fairness" to be required.

2. There should be no waiver if there is an inadvertent disclosure and the holder of the protection takes reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.

3. Selective waiver should be allowed.

4. Parties should be able to get an order from a court to protect against waiver vis a vis non-parties in both federal and state courts.

5. Parties should be able to contract around the common-law waiver rules. But without a court order, their agreement should not bind non-parties.

Judge Smith pointed out that the rule included some controversial matters, but it was needed badly to control excessive discovery costs. He said that the burdens and cost of preserving the privileged status of attorney-client information and trial preparation materials had gotten out of hand without deriving any countervailing benefits.

Judge Smith pointed out that selective waiver was the most controversial provision in the rule. It would protect a party making a disclosure to a government law enforcement or regulatory agency from having that disclosure operate as a waiver of the privilege or protection vis a vis non-governmental persons or entities. He explained that the advisory committee would place the provision in brackets when the rule is published and state that the committee had not made a final decision to include it in the rule.

Professor Capra agreed that the most controversial aspect of the rule was the selective waiver provision. He pointed out that the proposed rule takes a position inconsistent with most current case law. He emphasized that the advisory committee had not decided to promulgate that part of the rule, so the provision is set forth in brackets. In addition, the accompanying letter to the public states that the committee had not made a decision to proceed and wanted comments directed to the advisability of including a selective waiver provision. Judge Levi added that Chairman Sensenbrenner had specifically asked the committee to include a selective waiver provision in the rule.

Professor Capra explained that the original version of the rule had a greater effect on state court activity and sought to control state law and state rules on waiver. But the Federal-State Jurisdiction Committee of the Judicial Conference – and the advisory committee itself after its hearing in New York – concluded that the draft was too broad. Accordingly, it was amended and now covers only activity occurring in a federal court.

Judge Levi noted that the representative of an American Bar Association's Task Force on the Attorney-Client Privilege opposed the rule at the New York conference because he said that it would foster the "coercive culture of waiver." The task force, he explained, is concerned that waivers are being extorted by government agencies from businesses as part of the regulatory and law enforcement processes.

Judge Levi added that he had spoken to the chair of the task force and emphasized that the committee was not trying to encourage the use of waivers. Nor was it taking a position on Department of Justice memoranda to U.S. attorneys encouraging them to weigh a corporations's willingness to waive the attorney-client privilege in assessing its level of cooperation for sentencing purposes. Rather, he emphasized, the rules committee was just trying to promote the public interest by facilitating the conduct of government investigations into public wrongs. Judge Levi added that, in response to the concerns of the ABA task force, the committee should include a statement in the publication to the effect that the committee was not taking a position regarding the government's requests for waivers. The addition, he said, could avoid misdirected criticism of the rule.

Associate Attorney General McCallum agreed that the explanation would be helpful to the organized corporate bar. He said that the Department had been surprised by the feedback at the Fordham conference, where some participants had voiced strong

opposition to the proposal on the ground that it would foster a culture of waiver. He said that the Department supported the pending new Rule 502 and would continue to work with the organized bar over their concerns.

One member questioned the effect of the proposal on state court proceedings. He asked whether the advisory committee had examined the power of Congress under the Commerce Clause of the Constitution to effect changes in the rules of evidence in the state courts. Professor Capra responded that the committee had indeed examined the issue and had invited an expert to testify on it at the mini-conference. In addition, he said, Professor Kenneth Broun, a consultant to the committee and a former member of the committee, had also completed a good deal of research on the issue. He said that the proposed rule dealt only with the effect on state court proceedings of disclosures made in the federal courts. It did not address the more questionable proposition of whether the rule could control disclosures made in state court proceedings. The literature, he said, suggests that Congress has the power to regulate even those disclosures. But, he said, the advisory committee narrowed the rule to cover only disclosure at the federal level.

One member asked whether the Department of Justice favored selective waiver in order to promote law enforcement and regulatory enforcement efforts. He noted that he had sat on a case in which the panel of the court of appeals had asked the Department to file an amicus curiae brief on the issue, but had received none. He said that the panel had been frustrated by the uncertainty regarding the Department's views on the issue. Associate Attorney General McCallum pointed out that the Department acts as both plaintiff and defendant and that some components of the Department strongly favor selective waiver. He noted, by way of example, that the prosecutions in the Enron case would have been more difficult and time-consuming if waivers had not been given. The waivers, he emphasized, had been voluntarily given with the advice of counsel. He explained that the Department favors selective waiver, but had not yet taken an official position on the matter.

Judge Levi explained that the purpose of selective waiver is to encourage companies to cooperate in regulatory enforcement proceedings. He said that the Securities and Exchange Commission favored the proposed Rule 502, and it would be very helpful to obtain the views of other law enforcement and regulatory authorities in order to develop the record for the advisory committee. Professor Capra added that the strong weight of authority among the circuits, as expressed in the case law, was against selective waiver. Therefore, he said, there needed to be a strong showing in favor of it during the public comment period. Judge Levi concurred and added that a strong case also needs to be made by the state attorneys general and other regulatory authorities.

The committee unanimously approved the new rule for publication by voice vote.

Informational Items

Professor Capra reported that the advisory committee had been monitoring the developing case law on testimonial hearsay following *Crawford v. Washington,* 541 U.S. 36 (2004). He noted that the Supreme Court had just issued some opinions dealing with *Crawford,* but the issues in the cases were relatively narrow and do not provide sufficient guidance on how to treat hearsay exceptions in the federal rules. The advisory committee, he said, would continue to monitor developments, and it wanted to avoid drafting rules that later could become constitutionally questionable.

Professor Capra also reported that the advisory committee was considering restyling the Federal Rules of Evidence, mainly to conform the rules to the electronic age and to account for information in electronic form. He noted that the committee had had discussions on how to address the matter, and it had considered the possibility of restyling the entire body of evidence rules. He added that he planned to work with Professor Kimble to restyle a few rules for the committee to consider at its next meeting. Finally, he noted, the view of the Standing Committee on whether to restyle the evidence rules will be very important.

Professor Capra reported that draft legislation was being considered in Congress that would establish a privilege for journalists. The legislative activity, he said, stemmed in part from the controversies surrounding the celebrated cases involving the imprisonment of New York Times reporter Judith Miller and the leak of the identity of C.I.A. employee Valerie Plame. He explained that the Administrative Office had reviewed the proposed legislation and offered some suggestions on how its language could be clarified. Mr. Rabiej added that many of the suggestions had been adopted by the Congressional drafters.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of January 20, 2006 (Agenda Item 9).

Judge Kravitz reported that the advisory committees at their Spring 2006 meetings had embraced the time-computation template developed by the subcommittee, including its key feature of counting all days and not excluding weekends and holidays.

He pointed out that the Standing Committee at its January 2006 meeting had asked the subcommittee and the advisory committees specifically to address two issues: (1) the inaccessibility of a clerk's office to receive filings; and (2) whether to retain the provision that gives a responding party an additional three days to act when service is

made on it by mail or by certain other means, including electronic means. He noted that the advisory committees had decided that the issue of inaccessibility needed additional study, and the subcommittee was willing to take on the task. Professor Capra added that the Technology Subcommittee had already considered these issues as part of its participation in the project to develop model local rules to implement electronic filing.

As for the "three-day rule," Judge Kravitz reported that the sense of the advisory committees was to leave the rule in place without change at this time. He said that it seemed odd to give parties an extra three days when they have been served by electronic means, but many filings are now made electronically over weekends and the committees were concerned about potential gamesmanship by attorneys. So, the general inclination has been not to amend the rule at this point.

Judge Kravitz said that the Advisory Committee on Civil Rules had suggested some helpful improvements to the template. First, he noted, the language of the template speaks in terms of filing a "paper." But in the electronic age, he said, it makes sense to eliminate the word "paper."

Second, he pointed out that the template speaks in terms of a day in which "weather or other conditions" make the clerk's office inaccessible. He said that the advisory committee was concerned about the specific reference to "weather" because it implies that only physical conditions may be considered. Instead, the language might be improved by simply referring to a day on which the clerk's office "is inaccessible." The committee note could explain, though, that elimination of the word "weather" is not intended to remove weather as a condition of inaccessibility.

Third, the advisory committee suggested deleting state holidays as days to exclude in computing deadlines. Most federal courts, he said, are in fact open on state holidays. He noted that the subcommittee had not decided to make this change, but would be amenable to doing so if the Standing Committee expressed support for the change.

Fourth, he said that the advisory committee had noted that "virtual holidays" were not included in the template, *e.g.*, the Friday after Thanksgiving and the Monday before a national holiday that falls on a Tuesday. Some federal courts, he said, are effectively closed on those days, although their servers are available to accept electronic filings.

Fifth, he said that the advisory committee had suggested including a definition of the term "last day" in the text of the rule. He reported that Professor Cooper had drafted a potential definition, drawing on the text of local court rules implementing electronic filings. It states that, for purposes of electronic filing, the "last day" is midnight in the time zone where the court is located. For other types of filings, it is the normal business hours of the clerk's office, or such other time as the court orders or permits.

Judge Kravitz explained that the civil, bankruptcy, and appellate rules – unlike the criminal rules – apply in calculating statutory deadlines as well as rules deadlines. He pointed out that Professor Struve had completed an excellent memorandum on the subject in which she identified many important statutory deadlines. Her initial study had found more than 100 statutory deadlines of 10 days or fewer. Many of them, he added, are found in bankruptcy. Moreover, some apply not to lawyers, but to judges. Under the current rules, he said, a deadline of 10 days usually means 14 days or more because weekends and holidays are not counted. But under the approach adopted in the template, 10 days will mean exactly 10 days.

Judge Kravitz reported that the Advisory Committee on Civil Rules had suggested that the advisory committees should consider expressing all, or most, time periods in multiples of seven days. The concept, he noted, seems generally acceptable but may not work well across-the-board for all deadlines. It may be, he said, that deadlines below 30 days would normally be expressed in multiples of seven, but the longer periods now specified in the rules, such as 30, 60, or 90 days might be retained.

Finally, Judge Kravitz thanked Judge Patrick Schiltz, former reporter for the appellate rules committee and special reporter for the time-computation project, for his superb research and memoranda and for drafting the template and supporting materials that got the project moving. He also thanked Professor Struve for picking up the work from Judge Schiltz and for her excellent memorandum on statutory deadlines. He also praised the advisory committees for their dedication to the project and their invaluable help to the subcommittee.

Professor Struve highlighted the backward-counting provision in the template rule and wondered about its practical effect. Judge Kravitz explained that the advisory committee had wanted a simple rule. He acknowledged that there are scenarios under the template in which litigants may lose a day or two in filing a document, and judges would gain a day or two. But, he said, even though the subcommittee consisted mostly of practicing attorneys, all endorsed the basic principle – in the interest of simplicity – that once one starts counting backward, the count should continue in the same direction.

Professor Cooper added that the bar for years had urged the Advisory Committee on Civil Rules to make the rules as clear as possible, and one attorney recently had asked the committee to draft a clear rule telling users how to count backwards, *e.g.,* to calculate a deadline when a party has to act a certain number of days *before* an event, such as a hearing. To that end, he said, it might be advisable to put back into the template the words "continuing in the same direction," which had been dropped from an earlier draft in the interest of simplicity. Including those words would make it clear that backward counting follows the same pattern as forward counting. A member of the committee strongly urged including the clarifying language in the rule.

Judge Kravitz said that the most difficult issue appeared to be the applicability of the rule to statutory deadlines. A few statutes, he said, speak specifically in terms of calendar days. But when statutes do not specify calendar days, it can be assumed that only business days are counted under the current rule when a deadline is 10 days or fewer. He pointed out that the practical impact of the template rule would be to shorten statutory deadlines of 10 days or fewer. That result, he said, might undercut the bar's acceptance of the time-computation project.

Professor Morris added that the template rule would have a substantial impact on bankruptcy practice because a great many state statutes are in play in bankruptcy cases. Under the current bankruptcy rule, he said, the statutes are calculated by counting only business days.

Professor Morris also noted that the proposed template rule speaks of inaccessibility in such a way that it could be interpreted to include inaccessibility on a lawyers' end, as well as the inaccessibility of the clerk's office to accept filings. He suggested that the rule might be broad enough to cover the situation where a law firm's server is not working.

Judge Rosenthal explained that the civil advisory committee had considered that situation and had decided tentatively that it was not possible to write a rule to cover all situations. She suggested that it should be left up to the lawyers to decide whether they need to ask a court for an extension of time in appropriate situations. She cautioned, however, that there are a handful of time limits in the rules that a court has no authority to extend.

One participant urged that the time had come to move forward with the time-computation project, despite the complications posed by statutory deadlines. He suggested, moreover, that Congress might well be amenable to making appropriate statutory adjustments in this area to accommodate the time-computation project, especially if the bar associations agree with the committee's proposal.

Judge Levi asked whether the subcommittee was contemplating further changes or additions to the template. Judge Kravitz responded that at least three changes should be made. First, he said the subcommittee would eliminate the word "paper." Second, he said that he had been persuaded to eliminate the word "weather," so the rule would state simply that the last day is not counted if the clerk's office is "inaccessible." Third, he agreed to add to the rule a definition of "last day" along the lines of Professor Cooper's proposal. That definition, he noted, is workable and already exists in most of the local court rules dealing with electronic filing.

In addition to those three changes, Judge Kravitz said that he had no objection to eliminating state holidays from the rule if there were support for the change. As for closure of the federal court on a "virtual holiday," he said that the problem would be taken care of by revising the rule to specify that the last day is not counted if the clerk's office is inaccessible. Several members of the committee suggested that both state holidays and virtual holidays be eliminated from the rule. Thus, the only exclusions in the rule would be for federal holidays and days when the clerk's office is "inaccessible." Another member added that it should be made clear in the rule that "inaccessibility" applies only to problems arising at the courthouse, and not in a lawyer's office.

Judge Kravitz noted that the instructions from the Standing Committee were for the advisory committees to review individually each of the individual time limits in their respective rules and to recommend appropriate adjustments to them in light of the template's mandate to count all days, including weekends and holidays.

One participant suggested that the only significant issue relating to statutes was the problem that the proposed rule would shorten statutory deadlines of 10 days or fewer. Another participant pointed out, though, that the supersession provision of the Rules Enabling Act might also be implicated.

One advisory committee chair suggested that it would be very helpful for the advisory committees to have a list of all the various statutory deadlines and an indication of how often they actually arise in daily situations. Some of the statutes, she said, might make a big difference in federal practice, such as the 10 days given a party by statute to object to a magistrate judge's report.

One member said that the problem of shortening statutory deadlines had the potentiality of undermining the whole time-computation project and wasting a great deal of time and work by the advisory committees.

Another added that it was questionable whether judges have authority to extend statutory deadlines. He suggested that it might be appropriate to speak with members of Congress about the issue. Another participant said that Congress might give its blessing to fine tuning the calculation of statutory deadlines, as long as the particular deadlines affected are not politically charged.

Professor Struve added that she had just scratched the surface with her initial research into statutory deadlines. She said that it would be a truly major project to gather all the statutes, and the committee was bound to make a mistake or two. Professor Cooper pointed out that, unless the new rule also sweeps up all future statutes, some time periods could end up being counted one way and others another way – the worst possible outcome.

One member asked whether lawyers in fact even look to the federal rules to calculate a deadline in a statute. Or do they merely look to the statute itself? In other words, if a statutory deadline is 10 days, do lawyers assume that it means 10 days, as set forth in the plain language of statute itself, or 14 days, as calculated under the federal rules?

Judge Kravitz suggested that the choice for the advisory committees was either: (1) to continue their examination of each time limit in their respective rules, or (2) to try to solve the statutory deadline problems first, present a solution to those problems at the January 2007 Standing Committee meeting, and then resume work on the specific time limits. One advisory committee chair said that it was important to have a firm road map in place before the advisory committees commit themselves to a great deal of work.

One participant concluded that the committees may not be able to resolve all the open questions regarding statutory interpretation and the interplay between statutes and rules. Professor Cooper pointed out that supersession questions already make it unclear in several instances whether a statute or a related rule should control the computation of a given time limit. Many of those questions have never been faced and answered. In the interest of simplicity, though, he suggested that it may make sense simply to abolish the 11-day rule explicitly for both rules and statutes, even if that results in certain statutory time limits being shortened.

Two members suggested that another possible resolution of the statutory problems would be to eliminate all reference in the rule to calculating time limits set forth in statutes. Therefore, the rules, as revised, would apply only in calculating time limits set forth in rules and court orders. Another member pointed out that this solution would bring the civil and bankruptcy rules into line with the current criminal rules, which do not extend to calculation of statutory time limits.

One advisory committee chair suggested that there was great value in continuing the momentum that the Technology Subcommittee had created. She said that the civil advisory committee had made a good deal of progress, and it would be best to continue its work over the summer, despite the uncertainties over statutes.

Another advisory committee chair pointed out that there is a difference between counting hours and counting days. Under the rules, he explained, days are considered as units, not 24-hour periods. Therefore, a party has until the end of the last day in which to act. On the other hand, in counting hours, an hour counts as exactly 60 minutes, not as a unit. Therefore, a party has exactly 60 minutes in which to act. The time period is not rounded up to the end of the last hour. He suggested that the committee consider specifying in the template that 60 minutes is 60 minutes precisely.

One participant recommended that the committee consider whether Congress contemplates that its statutes will be interpreted according to the time-computation provisions in the federal rules. He suggested that the committee, by changing the method of calculating shorter statutory deadlines, might be contradicting the intentions of Congress in enacting the statutes.

Judge Kravitz added that the rule should provide clear advice to judges and lawyers on how to count time limits set forth in statutes. The proposed revision of the federal rules would effectively shorten the time for people to act. Therefore, he said, the committee should study such matters as how judges and lawyers actually count time in statutes, how many statutory deadlines there are, how often they arise in the courts, and whether they have caused practical problems. Once the committees understand these issues better, they should be able to propose the appropriate solution to the problem of counting time as set forth in statutes.

One member emphasized that the bar wants a clear, revised rule, and the time has come to promulgate it. Among other things, he said, lawyers are deeply concerned about achieving clarity because missing a deadline is a serious mistake that can lead to a malpractice claim. He suggested, among other things, that the committee expressly solicit the views of the bar regarding statutory deadlines or hold a conference with members of the bar on the subject.

Judge Levi suggested that each advisory committee decide how it should proceed on the matter in light of the discussion. Judge Stewart added that the template, with the various adjustments suggested at the meeting, provides the appropriate vehicle for the advisory committees.

LONG RANGE PLANNING

Mr. Ishida reported that the Judicial Conference's Long Range Planning Group, comprised of the chairs of the Conference's committees, had met in March 2006, and its report was included in the agenda book (Agenda Item 10). The group, he said, was preparing the agenda for its next meeting and had asked the chairs of each committee to submit suggested topics.

The planning group first asked the Standing Committee to identify key strategic issues affecting the rulemaking process and to report on what initiatives or actions it was taking to address those issues. Second, the planning group asked the committee to identify trends in the courts that merit further study and could lead to new rules. Mr. Ishida asked the members to consider these requests and send him any ideas that could be included in the committee's report to the planning group.

Mr. McCabe suggested that it would be very helpful for the committee to take advantage of the new statistical system being built by the Administrative Office. He said that the committee should consider the kinds of data that might be extracted from court docket events to develop a sound empirical basis for future rules amendments. Judge Levi endorsed the Administrative Office's efforts to improve and expand collection of statistical information from the courts.

One member suggested that the committee might also consider pro se cases as an area that needed to be addressed in future rulemaking.

Judge Levi agreed to work with Mr. Ishida on a response from the committee to the long range planning group.

NEXT COMMITTEE MEETING

The next committee meeting of the committee will be held in Phoenix in January 2007. The exact date of the meeting was deferred to give the chair and members an opportunity to check their calendars and for the staff to explore the availability of accommodations.

Respectfully submitted,

Peter G. McCabe,
Secretary

EXCERPT MINUTES FROM THE

CIVIL RULES COMMITTEE MEETING

MAY 22-23, 2006

DISCUSSION ON CIVIL RULES 58 AND 62.1

2007, other proposals may be lost in the shadows of time. This effect would be enhanced if work on summary judgment or pleading proceed on a pace for publication in 2007. The Committee concluded that the time for publication should be decided by the Standing Committee after consultation with Judge Levi and Reporter Coquillette.

Rules 54(d), 58(c)(2), Appellate 4

Professor Gensler reported his conclusions on the Appellate Rules Committee's recommendation that the Civil Rules be amended to impose a deadline for exercising the Rule 58(c)(2) (Style Rule 58(e)) authority to suspend appeal time when a timely motion for attorney fees is made.

The origin of Rule 58(c)(2) lies in the Supreme Court ruling that a timely motion for attorney fees does not affect the finality of a judgment on the merits. The fee demand is not a "claim" for purposes of Rule 54(b), so disposition of all "claims" in the case establishes a final judgment. Nor is the fee motion one to alter or amend the judgment, so it does not count as a Rule 59(e) motion that suspends appeal time under Appellate Rule 4. If it were not for Rule 58(c)(2), the result would be that a party wishing to appeal judgment on the merits must file a notice of appeal within the allotted time or lose the right to appeal. That result is sound when it is better to have the appeal on the merits decided before the attorney-fee questions are decided by the district court. But it can be a source of difficulty when it would be better to present both merits and the fee issues in a single appeal.

The response of Rule 58(c)(2) is to establish the district court's authority to decide whether a fee motion should suspend appeal time. It is not easy for a tyro to unravel the rule. As stated in Style Rule 58(e):

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

The Sixth Circuit had to wrestle with this provision in *Wikol ex rel. Wikol v. Birmingham Public Schools*, 6th Cir. 2004, 360 F.3d 604, lamenting the difficulty of working through four rules to find an answer. Its opinion also reflects the absence of any explicit provision in Rule 58 that cuts off the time for seeking an order when there is no notice of appeal. It would be possible to read the rule literally to support an argument that so long as there is a timely fee motion the court can suspend the time to appeal on the merits long after the time to appeal has run. Judgment is entered in Day 1. A timely fee motion is made on Day 12. Days march by and the time to appeal on the merits expires. On Day 150 the court rules on the fee motion. On Day 160 a party moves for an order that the timely fee motion has the effect of suspending time to appeal on the merits. Because no notice of appeal has yet been filed, Rule 58 might seem to allow the order. Few courts are likely to grant such an order. The more plausible reading, moreover, is that the court must act while it is still possible to file an appeal notice that will become effective.

The complexity of these rules is not welcome. But the experience of Appellate Rule 4 is instructive. Provisions that ought to be clear on careful reading have been continually amended to meet the challenge of careless reading. Lawyers continue to lose the opportunity to appeal nonetheless. Surrender to careless practice, however, would carry a high price. There are good reasons for complexity. Post-judgment motions should be timely made. Rule 6(b), indeed, specifically prohibits extensions of time. Appeal time is taken very seriously — only recently has there been any room even to question the "mandatory and jurisdictional" characterization.

Integrating these provisions is complicated by the concern that one party should not be able to defeat another's opportunity to make a timely post-judgment motion by immediately filing a preemptive notice of appeal. The desire to protect appellants who file premature notices of appeal, or who file a timely notice that then is suspended by a post-judgment motion, leads to further complexity. Great care must be taken in considering still further complications.

The potential gap in Rule 58 could be addressed by adding one word — the court must act before a "timely" notice of appeal has been filed and has become effective. This amendment, however, would not reduce the complexity of the rules' interplay. Other attempts to fix the rule by requiring that a motion to suspend appeal be made — that the district court act — within the original appeal time encounter the difficulty that a case order or statute may set the time to move for attorney fees beyond the appeal period.

Confronting these perplexities last October, the Committee asked the Federal Judicial Center to study actual use of Rule 58 in practice. The first phase of the study initially examined a sample of more than 8,500 cases terminated over the last eleven years in eight districts. Then it went on to examine at least 200,000 docket sheets that combine references to attorney fees, appeal, and extend. This phase found almost no evidence that Rule 58 is used to suspend appeal time. The second phase responded to the observation that reported opinions do reflect simultaneous consideration on appeal of the merits and attorney-fee awards. Nineteen of these cases were identified. The circumstances that led to combined consideration varied, but almost invariably seemed "legitimate" in the sense that the district court had not deliberately delayed entry of judgment on the merits for the purpose of resolving attorney-fee issues.

Docket-sheet research of this sort may overlook some cases. But it provides a reliable indication that courts are not encountering widespread difficulty with the tightly drawn maze established by the combination of Civil Rules 54 and 58 with Appellate Rule 4.

The Federal Judicial Center was thanked for its work and help.

The Committee concluded that there is not sufficient need to justify the risks of further rulemaking in this area. This conclusion will be reported to the Appellate Rules Committee so that further work can be undertaken if it reaches a different conclusion.

Rule "62.1" — Indicative Rulings

The "indicative rulings" question has remained on the agenda for a few years. It began with a recommendation by the Solicitor General to the Appellate Rules Committee. The Appellate Rules Committee concluded that any rule change should be made in the Civil Rules because the question arises most frequently in civil practice and also because the case-law answers are better developed in civil actions.

The clear starting point is provided by cases that deal with a Civil Rule 60(b) motion to vacate a judgment that is pending on appeal. Almost all circuits agree on a common approach. They begin with the theory that a pending appeal transfers jurisdiction of a case to the court of appeals. The district court lacks jurisdiction to affect the judgment. At the same time, there are important reasons to allow the district court to consider the motion. The appeal does not suspend the time limits of Rule 60(b) — the motion still must be made within a reasonable time, and there is a one-year outer limit if the motion relies on the grounds expressed in paragraphs (1), (2), and (3). The district court, moreover, is commonly in a better position to determine whether the motion should be granted. These competing concerns are reconciled by holding that the district court can entertain the motion and can either deny the motion or indicate that it would grant the motion if the court of

appeals remands for that purpose. Some courts introduce modest variations, but the core remains — the district court can, if it wishes, consider the motion pending appeal, but cannot grant it absent a remand for that purpose.

Although the practice is well settled under Rule 60(b), several reasons are advanced for expressing it in a rule. A national rule would eliminate the minor disuniformities among the circuits. It would give clear notice of a practice that remains unfamiliar to many lawyers and to at least a few judges. It could establish useful procedural incidents, such as a requirement that the movant inform the court of appeals both when the motion is filed and again when the district court acts on the motion. It might — although this is a sensitive issue — prove useful when the parties wish to settle pending appeal but are able to reach agreement only if there is a firm assurance that the district court is willing to vacate its judgment upon settlement.

A more general purpose would be served by adopting a new rule that is not confined to Rule 60(b) motions. A new rule — tentatively numbered Rule 62.1 — could address all situations in which a pending appeal ousts district court authority to act.

Discussion began with the impact on settlement pending appeal. The Supreme Court has suggested that a court of appeals should vacate a judgment to reflect a settlement on appeal only in "exceptional circumstances." But it suggested at the same time that without considering whether there are exceptional circumstances, the court of appeals may remand to the district court to consider the parties's request to vacate, "which it may do pursuant to Federal Rule of Procedure 60(b)." *U.S. Bancorp Mort. Co. v. Bonner Mall Partnership*, 1994, 513 U.S. 18. District-court consideration is an accepted practice. Recognizing the practice in the rule "does not put any weight on the scales; it does not make it more likely that a request to vacate will be granted." Further support was offered with the observation that "in the settlement context you want assurance the settlement will go through and the judgment will be vacated." Each of the alternative drafts supports remand for this purpose.

The Department of Justice prefers adoption of a broader rule that reaches beyond Rule 60(b). The established Rule 60(b) procedure has proved useful. It introduces a structured dialogue between the trial court and the appellate court that can be useful in other settings as well. An express rule will not create a new procedure. It will only make an established procedure more accessible. Adopting a rule confined to Rule 60(b) motions, on the other hand, might be read to imply that the same useful procedure should not be followed in other circumstances. The Rule 62.1 draft does not attempt to define district court authority. Rather, it is framed in terms that apply only when independent doctrine establishes that a pending appeal defeats the district court's authority to act on a motion. A party can file a motion in the alternative, arguing that the district court has authority and should grant the motion, and arguing alternatively that the district court should indicate that it would grant the motion if it concludes that it needs a remand to establish its authority. One complex illustration is provided by a case in which a qui tam relator appealed from dismissal for want of jurisdiction of a False Claims Act action. While the appeal was pending the Department of Justice concluded that it should intervene in the action. It would be useful to be able to win a district-court ruling that intervention would be granted if the court of appeals were to remand.

Support for the Rule 62.1 alternative was offered with a different example. One party to a class action might take an appeal. Then settlement becomes possible. It can be important to win a remand so the trial court can proceed to settlement.

It was noted that neither the Rule 60 version nor the Rule 62.1 version would affect the time limits for making motions.

A narrower question is presented by a drafting alternative. The rule can call for an indication that the district court "would" grant the motion on remand, or instead it can call for an indication that the district court "might" grant the motion. There are competing concerns. The court of appeals may be reluctant to remand without an assurance that delay of the appeal will lead to accelerated disposition of the new issues put to the district court. But the district court may be reluctant to invest heavily in full proceedings and decision when the court of appeals may proceed to resolve the appeal — and on grounds that may moot the district court's indicative grant of relief.

The question whether the district court should be able to seek remand by stating only that it "would" grant relief was approached by asking whether "would likely" is a useful compromise. This proposal was attractive, but "might" was further supported. The court of appeals, after all, is left in control. It can decide whether "might grant" provides a sufficient reason to remand in light of the progress of the appeal and the weight of the reasons for investing further district-court effort only if a remand provides assurance that an appellate decision will not defeat the effort. A district judge will have to invest more effort to determine that it "would" grant the motion than to determine that it "might" grant the motion. But perhaps that is a good thing — the court has to think harder. On the other hand, the district court has the alternative option — which must be written into the rule — to defer any consideration at all. The ability to consider the motion to the point of determining that a real investment of effort will be required to reach a final conclusion may be important. A remand in this circumstance will allow the court to go either way, to grant the motion or to deny it.

It was pointed out that if the rule published for comment is the broader version, Rule 62.1, the indicative ruling practice will be extended into territory where it is not firmly established. For this reason, it seems better to publish it with bracketed alternatives — the district court can indicate that it "[might][would]" grant relief if the case is remanded.

A motion was made to adopt the broader Rule 62.1 version. Discussion began with the observation that the most common application of this version will involve interlocutory injunction appeals under § 1292(a)(1). Civil Rule 62(c) and Appellate Rule 8(a)(1)(C) seem to establish a firm rule not only that the district court can act on a motion to "suspend, modify, restore, or grant an injunction," but also that it is the preferred forum. Several courts of appeals, however, defeat these rules by relying on the theory that an appeal ousts district-court jurisdiction of the order being appealed. One approach to this problem might be to rewrite these rules to establish that they mean what they rightly say — it is better that the first consideration be in the court of appeals. This invitation was not taken up.

It was agreed that the broad Rule 62.1 approach should not attempt to define the situations in which a pending appeal ousts district-court jurisdiction. Instead it should be drafted in terms that assume that independent sources of authority establish that the district-court lacks authority.

The motion to adopt the general Rule 62.1 approach was approved, 9 yes and none opposed.

The draft rule in the agenda materials was refined to read:

Rule 62.1 Indicative Rulings

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer consideration of the motion,

(2) deny the motion, or

(3) indicate that it [might][would] grant the motion if the appellate court should remand for that purpose.

(b) Notice to Appellate Court. The movant must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.

(c) Indicative Statement. If the [district] court indicates that it [might][would] grant the motion, the appellate court may remand the action to the district court.

Subcommittee Report: Rule 30(b)(6)

Judge Campbell introduced the report on Rule 30(b)(6) by observing that the Subcommittee also is addressing at least two questions about Rule 26(a)(2)(B) disclosure of trial expert-witness reports.

Rule 30(b)(6) came to the agenda with a memorandum from the New York State Bar Association Committee on Federal Procedure. The Subcommittee sought further information by sending a letter to bar groups that had commented on the e-discovery amendments. Fourteen letters were received in response. Professor Marcus also researched the origins of Rule 30(b)(6) and the case law. Working with these responses, the Subcommittee identified six issues to consider. Professor Marcus drafted illustrative rule language to focus the discussion.

Some of the issues that arise in practice are case-specific and are not suitable for treatment in a national rule. For example, there is no way to say that 30(b)(6) depositions should be used at the beginning or at the end of discovery. Use early in discovery is often important to identify the sources of information to support further discovery, or to develop information needed for efficient discovery of electronically stored information. But use later in the discovery period also may be important.

Another set of issues not likely to yield to rule amendments concern the scope of the deposition. How broad or particular is the notice of the matters on which examination is requested? How clear is the deponent's designation of the matters on which a named person will testify? How closely must examination of the witness adhere to the notice of matters for examination? Responses indicate that lawyers who represent plaintiffs complain that named witnesses often are unprepared. Lawyers who represent defendants complain that notices are unclear and that questioning regularly extends beyond matters identified in the notice. "That's how adversaries are." We cannot hope to accomplish much by rules changes.

Other questions may be susceptible to rules provisions, but remain difficult. Illustrations are provided by disputes about the "binding" effect of a witness's answers and by the related questions whether supplementation after the deposition should be seen as a duty or as an opportunity.

Professor Marcus began his presentation by noting that rule 30(b)(6) is a valuable and important device. Although there are legitimate concerns about its implementation, the concerns do not of themselves mean that ameliorative reform is possible. The topics that became the focus of Subcommittee deliberation seem the best way to introduce the topic.

April 12, 2006

Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ John G. Roberts, Jr.

April 12, 2006

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein an amendment to Appellate Rule 25 and a new Rule 32.1.

[See infra., pp. ___ ___ ___.]

2. That the foregoing amendment and new rule shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a

written paper for the purpose of applying these rules.

* * * * *

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007.

(b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that

opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 02-16 & 02-17

As you know, the Advisory Committee considered criticisms concerning the disparate briefing requirements in the various circuits. The FJC produced a survey of those requirements in Fall 2004. The Advisory Committee concluded that no FRAP amendments were warranted, but that the Chair should write to the Chief Judge of each circuit to encourage them to reduce or eliminate any circuit-specific briefing requirements. Specifically, it was decided that the letter should cite the FJC study, urge national uniformity, and point out those specific local rules that appear to be inconsistent with the FRAP. A draft of the letter was agreed upon. The Advisory Committee's goal was to send out the letters after the controversy over new Rule 32.1 died down. Accordingly, Judge Stewart sent the letters out last month.

I attach, as a sample, the text of the letter that Judge Stewart sent to Chief Judge Boudin. I also attach a document showing the bullet points that Judge Stewart included in his letters to each of the other Chief Judges. During the November 15, 2006 committee meeting Judge Stewart will give a brief oral summary of the responses he has received from the Chief Judges.

Encls.

Dear Chief Judge Boudin:

I write in my capacity as Chair of the Advisory Committee on the Federal Rules of Appellate Procedure ("FRAP").

Over the past few years, appellate practitioners and bar organizations — including the Department of Justice and the Council of Appellate Lawyers of the American Bar Association — have expressed concern about the proliferation of local rules. These concerns have focused on local rules regarding the content of briefs. Practitioners contend that these local rules are numerous, vague, and confusing; that these local rules are often in tension, if not in conflict, with FRAP; and that it is difficult for practitioners to find, much less to follow, all local rules on briefing. Practitioners say that they must devote significant time — time that is often charged to clients — researching local briefing requirements and resubmitting briefs that have been "bounced" by clerks for failure to comply with a local briefing requirement. Practitioners have urged the Advisory Committee to take action to reduce or eliminate local rules on briefing.

In order to assist its deliberations, the Advisory Committee asked the Federal Judicial Center ("FJC") to assess the scope of this problem. The exhaustive report prepared by the FJC, entitled *Analysis of Briefing Requirements in the United States Courts of Appeals*, is available at http://www.fjc.gov/library/fjc_catalog.nsf (if you would prefer to have a hard copy, please let me know and I will make sure that you receive one). The FJC reported that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in FRAP. According to the FJC, over half of the courts of appeals impose seven or more such requirements, and some impose as many as ten.

The FJC has also described for us the difficulty it encountered in trying to identify all local requirements regarding briefing. Depending on the circuit, those requirements may be found in local rules, internal operating procedures, standing orders, practitioner guides, or briefing checklists. In some cases, it was impossible for the researchers employed by the FJC to be confident that they had located all local directives regarding briefing without calling the clerk's office.

The Advisory Committee has discussed the FJC's findings at great length. The Advisory Committee has determined that the best way to address the local-rules problem is to seek the assistance of the circuits. The Advisory Committee has two requests:

First, the Advisory Committee urges every circuit to collect all requirements regarding briefing in one clearly identified place on its website. The E-Government Act of 2002 requires every court to post all local rules, standing orders, general orders, and judges' individual rules on the court's website. Placing all briefing requirements, including those found in the court's internal operating procedures, in one centralized location — or even including a prominent notice that identifies and links to all briefing requirements — would be consistent with the Act's purpose. It would also help the bar, improve the administration of justice, and likely reduce the

number of complaints about local rules. I am glad that your circuit has summarized those requirements under the "Filing Tips and FAQ" link on the circuit website.

Second, the Advisory Committee requests that you review the enclosed report and consider whether the additional requirements on briefing imposed by your circuit might be reduced or eliminated. As of October 2004, the FJC identified the additional requirements on briefing imposed by your circuit as including the following:

- Addendum must include judgment appealed from and any supporting documentation. *See* First Circuit Local Rule 28(a)(1).

- Addendum must include portions of any jury instructions that are the subject of an appeal. *See* First Circuit Local Rule 28(a)(2).

- Addendum must include pertinent portions of any document in the record that is the subject of an issue on appeal. *See* First Circuit Local Rule 28(a)(3).

- Addendum must include other items or short excerpts from the record, if any, considered necessary for understanding specific issues on appeal. *See* First Circuit Local Rule 28(a)(4).

The Advisory Committee understands that the circuits differ and thus that some local variation might be appropriate. The Advisory Committee also understands that, especially in this era of rapidly changing technology, allowing circuits to experiment in their local rules can be beneficial to all. At the same time, the purpose of some of the local variations imposed by the circuits is not clear, and it seems likely that many of them could be eliminated.

Thank you for your attention to these requests. Should you need any additional information or if you have any comments or concerns about the requests, please feel free to contact me.

Sincerely,

Carl E. Stewart
Chair, Advisory Committee on Appellate Rules

cc: First Circuit Clerk
First Circuit Executive
First Circuit Advisory Committee

Bullet points included in letters to chief judges of other circuits:

Second Circuit:

- Brief must include preliminary statement indicating the name of the judge or agency member rendering the decision appealed from, and the citation of the decision if it is reported. *See* Second Circuit Local Rule 28.

- Parties must provide Special Appendix (as an addendum to the brief or as a separately bound volume) if the application or interpretation of any rule of law, including any constitutional provision, treaty, statute, ordinance, etc., is significant to the resolution of any issue on appeal. *See* Second Circuit Local Rule 32(d).

- Docket number must be printed in type at least one inch high on cover of briefs and appendix. *See* Second Circuit Local Rule 32(c).

Third Circuit:

- Brief must include, in the statement of the issues presented for review, a designation by reference to specific pages of the appendix or place in the proceedings at which each issue on appeal was raised, objected to, and ruled upon. *See* Third Circuit Local Appellate Rule 28.1(a)(1).

- Brief must include a statement of related cases and proceedings. *See* Third Circuit Local Appellate Rule 28.1(a)(2).

- The statement of the standard or scope of review for each issue on appeal should appear under a separate heading placed before the discussion of the issue in the argument section. *See* Third Circuit Local Appellate Rule 28.1(b).

- Citations must follow the forms specified in Third Circuit Local Appellate Rule 28.3(a).

- Party's initial brief must certify that at least one of the attorneys on the brief is a member of the bar of the court, or has filed an application for admission. *See* Third Circuit Local Appellate Rule 28.3(d).

- Volume one of the appendix must consist only of (1) a copy of the notice of appeal, (2) the order or judgment from which the appeal is taken, and any other order or orders of the trial court which pertain to the issues raised on appeal, (3) the relevant opinions of the district court or bankruptcy court, or the opinion or report and recommendation of the magistrate judge, or the decision of the administrative agency, if any, (4) any order granting a certificate of appealability, and (5) no more than 25 additional pages. *See* Third Circuit Local Appellate Rule

32.2(c).

Fourth Circuit:

- Brief or addendum must include text of pertinent constitutional provision, treaty, statute, ordinance, rule or regulation cited in brief. Supplementation of brief with material not enumerated in Local Rule 28(b) requires a motion for leave. *See* Local Rule 28(b).

Fifth Circuit:

- First page of each brief must contain a certificate of interested persons (which is broader in scope than the corporate disclosure statement contemplated in Fed. R. App. P. 26.1). *See* Fifth Circuit Rule 28.2.1.
- Summary of the argument limited to five pages (and preferably limited to two pages). *See* Fifth Circuit Rule 28.2.2.
- All assertions concerning matter in the record must cite page number of the original record. *See* Fifth Circuit Rule 28.2.3.
- Jurisdictional statement should cite authority when needed for clarity. *See* Fifth Circuit Rule 28.2.5.
- The court "requests" that standard of review be stated under a separate heading before discussion of relevant issue, rather than in the discussion of the issue. Fifth Circuit Rule 28.2.6.
- Fifth Circuit Rule 28.3 supplements FRAP 28(a)'s direction concerning the order of the contents of the brief.

Sixth Circuit:

- In all social security appeals, Title VII appeals, habeas corpus § 2254 appeals and motion to vacate § 2255 appeals, a one-page fact sheet must be placed between the table of contents and the statement of issues for review. *See* Sixth Circuit Rule 28(c).
- Sixth Circuit Rule 30(f) specifies contents of appendix (including items under seal). Sixth Circuit Rules 30(b) and 28(d) require that the parties' designations (of parts of the record to be included in the appendix) be included as addenda in each principal brief.

Seventh Circuit:

- Seventh Circuit Rule 28(a) requires inclusion of detailed information in the jurisdictional statement.

Eighth Circuit:

- Opening brief must include addendum (subject to page limit) containing district court or agency opinion or order; any magistrate's report and recommendation; short excerpts from the record; and other relevant rulings. *See* Eighth Circuit Rule 28A(b).

- Certificate of compliance regarding type-volume limitation must identify name and version of the word processing software used. *See* Eighth Circuit Rule 28A(c).

- First item in appellant's brief must be a statement giving, inter alia, a summary of the case. Appellee can include a responsive statement in its brief. *See* Eighth Circuit Rule 28A(f)(1).

- Statement of issues presented for review must list, as to each issue, the most relevant cases, constitutional and statutory provisions. *See* Eighth Circuit Rule 28A(f)(2).

Ninth Circuit:

- Parties must not append or incorporate by reference briefs submitted to court below, to agency, or on prior appeal. *See* Ninth Circuit Rule 28-1(b).

- Ninth Circuit Rule 28-2.2 requires a few details, in the jurisdictional statement, that are not specified in FRAP 28(a)(4).

- Ninth Circuit Rule 28-2.4 requires statements concerning bail and custody status (in criminal appeals) and custody status (in Board of Immigration Appeals matters).

- Ninth Circuit Rule 28-2.6 requires a statement concerning related cases.

- Pertinent portions of relevant statutes, rules, regulations, etc. must be provided in an addendum (rather than in the brief or in pamphlet form, which are alternatives permitted under FRAP 28(f)). *See* Ninth Circuit Rule 28-2.7.

- In appeals arising out of bankruptcy court, Ninth Circuit Rule 28-2.9 requires appellant to provide name, address and court of bankruptcy judge who initially ruled on the matter.

Tenth Circuit:

- Tenth Circuit Rule 28.1(B) and the Practitioner's Guide at VI.A.1.e. specify how to cite to the record.

- Appellant's brief must include copies of pertinent lower court findings, conclusions, opinions or orders; transcript pages for any oral judicial pronouncement; certain administrative dispositions in social security cases; and written rulings plus transcript of oral ruling in immigration cases. *See* Tenth Circuit Rule 28.2(A). Appellee's brief must include any such items omitted by appellant's brief. *See* Tenth Circuit Rule 28.2(B).

- Tenth Circuit Rule 28.2(C)(1) requires each party's first brief to include a statement of related cases (at the end of the table of cases).

- Principal briefs must cite precise part of record where each issue raised on appeal was raised and ruled upon below. *See* Tenth Circuit Rule 28.2(C)(2). If appeal is based on an action to which the party must object in order to preserve right to appeal, briefs much cite precise part of record where requisite objection was made and rule upon. *See* Tenth Circuit Rule 28.2(C)(3).

- Each principal brief's front cover must show the name of court and judge whose judgment is being appealed. *See* Tenth Circuit Rule 28.2(C)(5).

- Parties cannot meet FRAP 28(a) and (b) requirements by incorporating by reference briefs or pleadings below, and such incorporation by reference "is disapproved." Tenth Circuit Rule 28.4.

- Statement of applicable standard of review must precede discussion of the relevant issue (rather than appearing in the discussion of the issue, which is an alternative permitted by FRAP 28(a)(9)(B)). *See* Practitioner's Guide at VI.A.1.g.

- Practitioner's Guide IV.A.3. specifies how to present exhibits that were returned to the parties after trial.

Eleventh Circuit:

- Eleventh Circuit Rule 28-1 adds some details (not specified in FRAP 28(a) & (b)) concerning the order of items in the principal briefs.

- Eleventh Circuit Rules 26.1-1 and 28-1(b) require more detailed disclosures (concerning interested parties) than do FRAP 26.1's specifications concerning the corporate disclosure statement.

- Page references in table of contents must include all required sections, plus each heading or subheading for each issue. *See* Eleventh Circuit Rule 28-1(d).

- Asterisks in the margin of the table of citations must identify the authorities on which the party primarily relies. *See* Eleventh Circuit Rule 28-1(e).

- Party adopting another brief by reference must specify in detail which parts of which briefs are adopted. *See* Eleventh Circuit Rule 28-1(f).

- Eleventh Circuit Rule 28-1(i) requires that all assertions regarding matter in the record be supported by cites to original record.

- Eleventh Circuit Rule 28-1(i) adds to FRAP 28(a)(6)'s requirements concerning the statement of the case. Under Rule 28-1(i), the statement of the case must state whether a criminal defendant is incarcerated; must include the statement of the facts; and must include the standard of review for each contention.

- Eleventh Circuit Rule 28-1(k) sets requirements for format of citations to authority.

D.C. Circuit:

- Appellant's Certificate as to Parties, Rulings and Related Cases must include a list of all parties, intervenors and amici appearing below or on appeal. Other parties' briefs can incorporate appellant's list by reference. D.C. Circuit Rule 28(a)(1)(A).

- Certificate as to Parties, Rulings and Related Cases must also include references to rulings under review, in the form specified in D.C. Circuit Rule 28(a)(1)(B).

- Certificate as to Parties, Rulings and Related Cases must also identify related cases, providing the information specified in D.C. Circuit Rule 28(a)(1)(C).

- Asterisks in the margin of the table of citations must identify the authorities on which the party primarily relies. *See* D.C. Circuit Rule 28(a)(2).

- Brief must contain glossary defining abbreviations that are not part of common usage. *See* D.C. Circuit Rule 28(a)(3).

- D.C. Circuit Rule 28(a)(5) sets forth details (not specified in FRAP 28(f)) concerning the presentation of pertinent statutes, rules, or regulations.

- If case is scheduled for argument, first page of brief must state the scheduled date; if case is to be submitted without argument or has already been argued, first page must so state. *See* D.C. Circuit Rule 28(a)(8).

- D.C. Circuit Handbook of Practice and Internal Procedures ("Handbook") IX.A.8. adds details (not specified in FRAP 28(a) & (b)) concerning the order of the contents of the briefs.

- Handbook IX.A.8.e. specifies additional details (not required by FRAP 28(a)(4)) concerning whether subject matter jurisdiction is in dispute.

Federal Circuit:

- An attorney for each party or amicus (other than the United States) must file a certificate of interest providing the information required by Federal Circuit Rule 47.4(a). *See also* Federal Circuit Rule 28(a)(1) concerning placement of certificate within brief.

- Principal briefs must contain statement of related cases providing information required by Federal Circuit Rule 47.5. *See also* Federal Circuit Rule 28(a)(4) concerning placement of statement within brief.

- Statement of case must include citation of any published decision of tribunal below. *See* Federal Circuit Rule 28(a)(7).

- Judgment in question and any opinion, memorandum, or findings and conclusions supporting it should be contained in an addendum. See Federal Circuit Rule 28(a)(12).

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 05-05

At the Advisory Committee's April meeting, the Committee discussed questions raised by Public Citizen regarding the time for filing amicus briefs under Rule 29(e). (A copy of Brian Wolfman's May 25, 2005 letter on behalf of Public Citizen is attached.) Public Citizen points out that when an amicus files a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) may leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions. The Committee decided to leave this item on its discussion calendar, and Doug Letter undertook to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting.

This memo briefly reviews the changes, over time, in the relevant provisions, and notes the interplay between this issue and the Time-Computation Project.

I. The pre-1998 framework

As adopted in 1968, FRAP 29 provided in relevant part that "[s]ave as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer."

II. The 1998 amendments

FRAP 29 was amended in 1998 and now provides in relevant part: "(e) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer." The 1998 Committee Note explains:

> The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

In response to the 1998 amendments, Public Citizen raised concerns about the new timing system. As described in the minutes of the Advisory Committee's October 1999 meeting, "Public Citizen Litigation Group has raised two concerns about this change: First, an appellant might have to file a reply brief before being able to read the brief of an amicus supporting the appellee. Second, an amicus supporting an appellee might not be able to see the appellee's brief until just before the amicus's brief is due, and thus the amicus might not be able to take account of the arguments made by the appellee in its brief." The minutes describe the discussion that ensued:

> Mr. Letter said that he wrote to several organizations that frequently file amicus briefs in the courts of appeals to solicit their suggestions about how FRAP 29 might be amended to fix these problems. He received virtually no response to his letter. He also talked to several appellate attorneys in the Department of Justice. None of them had experienced the problems feared by Public Citizen Litigation Group.
>
> Mr. Letter urged that Item No. 98-03 be removed from the Committee's study agenda. If these problems materialize in the future, the Committee can address them at that time. For the present, though, no action was necessary.
>
> A member moved that Item No. 98-03 be removed from the Committee's study agenda. The motion was seconded. The motion carried.

III. The 2002 amendments

In 2002, FRAP 26(a)'s time-computation provision was amended in a way that affected the computation of FRAP 29(e)'s seven-day periods. Prior to the 2002 amendments, FRAP 26(a) provided that intermediate weekends and holidays were to be omitted when computing periods of less than seven days. The 2002 amendments changed the trigger to "less than 11 days" – which effectively extended FRAP 29(e)'s seven-day periods: Seven days will always mean at least nine days (because one weekend will always intervene); could mean as many as eleven days (if two weekends intervene); and occasionally will mean thirteen days (if two weekends and the Christmas and New Year's holidays intervene). But the 2002 shift in FRAP 26(a) from "less than 7 days" to "less than 11 days" did not affect the calculation of the due dates for the *parties'*

briefs.[1]

Hence Public Citizen's renewed interest in FRAP 29(e)'s timing rules. Public Citizen suggests, among other things, that the seven-day period be restated as "7 calendar days."

IV. The relevance of the Time-Computation Project

If the Time-Computation Project's proposals are adopted and if the text of FRAP 29(e) is left unchanged, the result will be to adopt Public Citizen's suggestion: FRAP 29(e)'s seven-day periods will once again be computed using a days-are-days approach. This effect is discussed at greater length in the memos concerning Items 06-01 and 06-02.

As noted in its memo, the Advisory Committee's Deadlines Subcommittee has considered the effect of the Time-Computation Project on various appellate deadlines, including those set in FRAP 29(e). The Subcommittee notes that the Advisory Committee (in its consideration of Item 05-05) might decide to return to the pre-1998 approach of requiring amici to file at the same time as the party they support. If the Advisory Committee decides to retain the staggered-timing approach, the Deadlines Subcommittee recommends that the periods remain seven days (i.e., that they return, in effect, to seven calendar days).

Encl.

---

[1] The 40-, 30-, and 14-day periods set by FRAP 31(a)(1) were too long to be affected and the 3-day period in FRAP 31(a)(1) was too short to be affected.

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009

(202) 588-1000
(202) 588-7795 (FAX)

BRIAN WOLFMAN
DIRECT DIAL: (202) 588-7730
E-MAIL: BRIAN@CITIZEN.ORG

May 25, 2005

Honorable Samuel A. Alito, Jr.
Chair
Advisory Committee on Appellate Rules
United States Post Office and Courthouse
Federal Square and Walnut Street, Room 357
P.O. Box 999
Newark, New Jersey 07101-0999

Re: Timing of amicus briefs under FRAP

Dear Judge Alito:

I am writing regarding the time for filing amicus briefs under FRAP 29(e). The issue arose in a case that we are currently litigating on behalf of an appellant. Rule 29(e) provides that an amicus brief is due no later than 7 days after the filing of the principal brief of the party supported by the amicus. When an amicus brief is filed in support of an appellant, that leaves plenty of time – usually about 20 days – for the appellee to reply both to the appellant's brief and, if necessary, to the amicus brief. However, the time is much tighter for an appellant, which has only 14 days to file its reply brief. If, as in most cases, the appellee's amicus files on the due date, the appellant has only half of the allotted time, or, nominally, only 7 days, to consider and respond to the amicus brief.

I say "nominally" because the period is effectively shorter than 7 days. Under FRAP 26(a)(2), weekends and holidays are excluded in counting the 7-day period. Therefore, an amicus will *always* have at least 9 days to file its brief. In the case of an amicus brief filed in support of an appellee, then, the effect of Rule 26(a)(2) is to shorten the already quite short nominal 7-day period for considering and responding to the amicus brief.

An example illustrates our point. Say that the appellee files its brief at the clerk's office on Thursday June 9, 2005, and serves the brief by hand (as occurs in about half of our appellate cases). The appellant's reply is due on Thursday, June 23, 2005. The appellee's amicus need not, and as a matter of practice generally will not, be filed until the deadline – in this example, late in the day on Monday, June 20, 2005. That leaves only 3 calendar days for the appellant to

consider the amicus brief and incorporate a response into its reply brief. The problem would be considerably exacerbated if the amicus chose to file and serve the brief by regular U.S. mail, as it has a right to do. If that occurred, the brief probably would not be received by appellant's counsel until Wednesday or Thursday, the due date for appellant's reply. To make matters worse, if, in the above example, either Monday, June 13 or Monday, June 20, were a federal holiday, the amicus brief would not be due until late in the day on Tuesday, June 21, 2005, just two days before appellant's reply would be due. Finally, the time crunch would be magnified if, as is sometimes the case, more than one amicus files a brief in support of the appellee.

The above example – involving the filing of an appellee's brief on a Thursday – maximizes the time crunch imposed by the interaction of Rules 26(a)(2) and 29(e). However, even a scenario that *minimizes* the filing period for the amicus is highly problematic. Let's say that the appellee physically files its brief on Wednesday June 8, 2005, and serves the brief by hand. The appellant's reply is due on Wednesday, June 22, 2005. The appellee's amicus need not file until late in the day on Friday, June 17, 2005. That leaves only 5 calendar days, including two weekend days, for the appellant to consider the amicus brief and incorporate a response into its reply brief. As above, the problem would be exacerbated if the amicus chose to file and serve the brief by regular U.S. mail, because the appellant likely would not receive the amicus brief until Monday or even Tuesday.

It is possible that the effect on Rule 29(e) was not contemplated by the Advisory Committee when Rule 26(a)(2) was amended in 2002 to increase from less than 7 days to less than 11 days the time periods for which interim weekends and holidays are excluded. In any event, amici do not need the extension provided by Rule 26(a)(2) as do other litigants facing filing deadlines of less than 11 days. Amici generally know about the case and have an idea of what they are going to say before they receive the brief of the party that they are supporting. Indeed, they are often provided drafts of the principal brief as the process unfolds. Perhaps that is why, until 1998, FRAP required amici briefs to be filed at the same time as the principal brief that they were supporting. Although we think the 7-day window for amici is sensible for a number of reasons, we do not think it is necessary to extend that window under Rule 26(a)(2), given the difficulty such an extension imposes on appellants. Therefore, we recommend that the Committee propose that Rule 29(e) be amended to require that an amicus file its brief no later than 7 *calendar* days after the principal brief of the party that it is supporting. Moreover, we suggest that a Committee note strongly encourage amici to serve their briefs electronically, given the short time period for response (particularly for appellants).

The time for responding to an amicus brief is sometimes shorter than the nominal period for another reason as well. The time for a party to answer a principal brief runs from the service of that brief, not from its physical filing in the clerk's office. But the time for the filing of the amicus brief runs from the time when the brief that the amicus supports is actually received and filed stamped at the clerk's office. Thus, in cases where the appellee mails its brief to the

courthouse, the time for the appellant to consider the appellee's amicus brief is effectively shortened. Indeed, even without Rule 26(a)(2), depending on the speed of the mail, the amicus may not be required to file its brief until 10 days (or more) into the 14 day-period in which the appellant has to reply. The Advisory Committee was aware of this issue when it established the 7-day amicus filing window. *See* 1998 Adv. Comm. Note to Rule 29(e). We recognize that the time crunch created by this problem will not generally be as severe as the Rule 26(a)(2) problem discussed above because, in general, when a party mails its brief to the court, it also mails the brief to opposing counsel, which would extend the 14-day period for filing the reply by three days. *See* FRAP 26(c). That is not always the case, however. In some of our cases, for instance, counsel for both parties are in Washington, D.C., and the briefs are hand served, while the court is in another city (say, New York), and the brief is "filed" by mail. Therefore, we also ask the Committee to consider amending Rule 29 to require amici to file their briefs no later than 7 calendar days from the date on which the principal brief that they are supporting is *served*. This change will not impose a burden on amici because an amicus can be expected to be in communication with the party it is supporting and obtain prompt service from that party, regardless of when that party's brief is actually filed with the court.

Thank you for considering this request.

Sincerely,

Brian Wolfman

Brian Wolfman

cc: Professor Patrick J. Schiltz, Reporter
Peter G. McCabe, Secretary

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 05-06

In Sorensen v. City of New York, 413 F.3d 292 (2d Cir. 2005), the court raised questions concerning the operation of Rule 4(a)(4) in cases where a party files a notice of appeal and the district court subsequently alters or amends the judgment.[1] In particular, the court held that under Rule 4(a)(4)(B) the plaintiff's initial notice of appeal did not effect an appeal from the court's later dismissal (on the posttrial motion) of one of the plaintiff's claims. Writing for the court, Judge Leval characterized Rule 4(a)(4) and its Note as ambiguous and contradictory, and raised the possibility that problems could also arise for an appellant who fails to file a new or amended notice of appeal after the district court amends the judgment in the appellant's favor. *See id.* at 296 & n.2.

At the April 2006 meeting, the Committee decided to leave this matter on the study agenda, and requested that I look into the amendment that produced the current language in Rule 4(a)(4). As the Committee is aware, the current language dates from the 1998 restyling. However, to understand the questions raised by the *Sorensen* court, I thought it helpful to go back to the 1993 amendments. The attached chart shows the evolution of the Rule from the pre-1993 version to the current version.

I. The 1993 amendments to Rule 4

In 1993, Rule 4(a)(4) was amended to eliminate a trap for the untutored litigant. The then-current version of the Rule provided in relevant part: "A notice of appeal filed before the disposition of any of the above [timely post-trial] motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." Under this provision, a notice of appeal filed while a timely

---

[1] In *Sorensen*, the district court initially entered a judgment which awarded relief on certain claims and dismissed others. *See* 413 F.3d at 294. The plaintiff filed a notice of appeal, and the district court subsequently granted a posttrial motion dismissing one of the claims on which it had initially awarded relief. *See id.* The plaintiff failed to file a timely notice of appeal that encompassed the judgment that ultimately resulted after this grant of posttrial relief. *See id.* at 294-95. The Court of Appeals held that the plaintiff failed properly to preserve her challenge to the district court's dismissal of the relevant claim. *See id.* at 296.

post-trial motion was pending was ineffective. To take an appeal, the appellant had to file a notice of appeal after the disposition of the motion.

As the 1993 Advisory Committee Note explains, "[m]any litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule." Accordingly, the 1993 amendments altered Rule 4(a)(4) to read in relevant part:

> A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.

The text of this version of the Rule accomplished a number of things. First, it eliminated the requirement for a second notice of appeal, so long as the appellant wished only to challenge the initial judgment or other orders specified in the initial notice of appeal. This was clearly true of a judgment left unchanged, or substantially unchanged, by the disposition of the posttrial motions. It was also true of a judgment that was altered by the disposition of a posttrial motion, so long as the aspects challenged by the appellant on appeal existed in the initial judgment. As the 1993 Advisory Committee Note explained:

> Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

Second, the version adopted in 1993 made clear that if a party wished to challenge the disposition of a posttrial motion, or otherwise wished to challenge any alteration or amendment of the initial judgment, the party had to file a new or amended notice of appeal. This was clear from the text of the Rule, and it was underscored by the Committee Note, which explained: "If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to

appeal from the disposition of the motion, the party must amend the notice to so indicate."

Thus, Rule 4(a)(4) as it existed prior to the 1998 restyling[2] provided straightforward answers to each of the questions posed by the *Sorensen* court in footnote 2 of its opinion:

- "[W]hether the requirement of a new or amended notice to appeal the ruling on the post-trial motion arises only when the ruling on the post-judgment motion alters the judgment, as opposed to when the ruling declines to alter the judgment":
    - Clearly, the answer under the pre-1998 version of the Rule was that no new or amended notice of appeal was necessary when the post-judgment motion was denied.[3] The clear intention of the 1993 amendment – apparent from the face of the pre-1993 and post-1993 Rule text – is to provide that a notice of appeal filed while a timely post-trial motion is pending takes effect after the disposition of that motion. If a new or amended notice of appeal were required even when the post-trial motion was denied, then the clear intent of the amendment would have failed, because the cases to which it could apply would be a null set.
- "[W]hether a new or amended notice is required when the ruling on the post-trial motion alters the judgment in a manner favorable to the appellant, or alters it only in an insignificant manner, or supersedes the original judgment without alteration, so that the merits of the appeal do not depend on differences between the earlier judgment and the later one":

---

[2] Rule 4(a)(4) was amended slightly in 1995 to read in relevant part:

> Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file ~~an amended notice~~ a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.

The 1995 Committee Note explains that this amendment was designed "to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment." There is no reason to think that this change in the Rule's text would alter the answers to the questions posed by the *Sorensen* court. Thus, if those questions are currently problematic, it must be because of the language adopted in the 1998 restyling.

[3] Of course, an appellant who wishes also to challenge the denial of the post-trial motion must amend the notice of appeal to encompass that issue.

- The text of the pre-1998 Rule required a new or amended notice of appeal if the litigant wished to challenge an order disposing of a post-trial motion or to challenge an alteration or amendment of the judgment. Neither situation is present when the ruling on the post-trial motion alters the judgment in a manner favorable to the appellant, so no new notice of appeal would have been required.[4]

- Likewise, if the post-trial motion resulted in an "insignificant" alteration of the judgment, presumably the appellant would not be seeking to challenge that particular alteration on appeal, but rather would continue to seek appellate review of some aspect that existed in the original judgment. No new or amended notice of appeal would be necessary.

- If a ruling on the post-trial motion resulted in the entry of a new judgment, which was precisely the same as the prior judgment, the appellant would not be seeking to challenge an alteration or amendment of the judgment.

II. The 1998 restyling of Rule 4

The Advisory Committee appears to have begun the restyling process circa 1994. It considered the first chunk of proposed restyled rules at its October 1994 meeting. The proposed restyling was published for comment in 1996. The package of restyled rules ultimately took effect December 1, 1998. I have reviewed the Advisory Committee minutes available on the AO website for meetings from 1994 through 1998, but those minutes do not discuss the restyling of the language with which this memo is particularly concerned.

Restyled Rule 4(a)(4)(B), as published for comment, read as follows:

> (i) If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.
>
> (ii) To challenge an order disposing of the motion, or a judgment altered or amended upon such a motion, a party must file a notice of appeal, or an amended notice of appeal – in compliance with Rule 3(c) – within the time prescribed by

[4] Admittedly, if the appellant still wishes to take the appeal, it is likely that this is because some aspect of the appellant's post-trial motion has been denied – so that the appellant could be viewed as challenging the disposition – i.e., denial – of that part of the post-trial motion. But that clearly can't be what is meant by the disposition of a post-trial motion, because if it were, then that would be true any time that the ruling declines to alter a challenged aspect of the judgment.

this Rule measured from the entry of the order disposing of the last such remaining motion.

The wording of the Rule was altered in some respects after the comment period, but the language that concerns us was already part of the proposed restyled Rule as published: Unlike the pre-1998 version – which referred to *challenges to "an alteration or amendment* of the judgment" – the proposed restyled version referred to *challenges to "a judgment* altered or amended" upon a post-trial motion. The implications of this shift are reviewed in more detail in Part III below.

The Advisory Committee's May 1997 report to the Standing Committee attaches a summary of the comments submitted on the restyling package. Evidently, at least two commentators questioned the proposed language in restyled Rule 4(a)(4)(B). As described in the summary, Francis Fox stated that

> he . . . does not understand new Rule 4(a)(4)(B). He also notes that he does not know what the phrase "in whole or in part" does in (B)(i). He says that the prematurely filed notice of appeal will be effective to save the appeal, in whole or in part, once a pending motion has been decided; but then (B)(ii) requires another notice of appeal where the particular motion has amended something. He says that one would think that the amended something would be part of the judgment or order that has already been appealed "in whole or in part" by (B)(i).

May 1997 Report to Standing Committee at 21. Cathy Catterson, the Ninth Circuit Clerk, forwarded comments from members of the Ninth Circuit Advisory Committee; the summary stated that those comments included the following:

> Rule 4(a)(4)(B) may inject an ambiguity into whether an amended notice must be filed. The ambiguity arises because (B)(i) now provides that an early notice "becomes effective" when the order disposing of the last remaining motion is entered, and then (B)(ii) states that once the order disposing of the motion is entered the challenging party must file a notice or amended notice. One might read the rule to suggest that because you filed an earlier notice that is now "effective" that notice qualifies as the notice required by (B)(ii). The commentator suggests rephrasing the rule to clarify that the earlier filed notice is ineffective, but upon the district court's action on the pending motion, the party can either file a new notice or simply amend the earlier one.

Id. at 25.

Though both these comments critiqued the proposed language of 4(a)(4)(B), neither focused on the use of the language concerning challenges to "a judgment altered or amended upon" a post-trial motion – i.e., neither focused on the change giving rise to the difficulties

discussed in this memo. Thus, when the language of Rule 4(a)(4)(B) was changed after the comment period, the change did not address that difficulty. "To challenge an order disposing of the motion, or a judgment altered or amended upon such a motion, a party must file a notice of appeal . . . ." became "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal . . . ." Report at 27. But though the Gap Report asserts that this change was adopted "to help clarify the meaning," *id.*, the change did nothing to address the difficulty that would be caused by the use of the "judgment altered or amended" language.

III. Current Rule 4(a)(4)(B): Interpretation and assessment

As a result of the restyling, Rule 4(a)(4)(B) currently provides, in relevant part:

> (B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.
>
> (ii) A party **intending to challenge an order** disposing of any motion listed in Rule 4(a)(4)(A), **or a judgment altered or amended upon such a motion**, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

The restyled Rule's reference to challenges to "a judgment altered or amended upon" a post-trial motion is the source of the confusion noted by the *Sorensen* court. If one were to read Rule 4(a)(4)(B)(ii) in isolation, one might conclude that any time a court's disposition of a post-trial motion alters or amends a judgment, the Rule requires any and all appellants to file a new or amended notice of appeal after that disposition of the post-trial motion. Nor would recourse to Rule 4(a)(4)(B)(i) necessarily dispel this impression: The suggested reading of Rule 4(a)(4)(B)(ii) would not render (4)(a)(4)(B)(i) surplusage, because that subdivision would still cover situations where all the post-trial motions are denied.

If such a reading of the current Rule were correct, then the 1998 restyling would have produced a substantive change: The Rule would now require an appellant to file a new or amended notice of appeal even if the intervening disposition of the post-trial motion altered the judgment only insignificantly, or in a way that was favorable to the appellant. But such a reading should be rejected. The 1998 Advisory Committee Note stresses that (with exceptions not relevant here) the 1998 amendments to Rule 4 were "intended to be stylistic only."

A court that is willing to give weight to Advisory Committee Notes when interpreting the

Rules[5] should continue to answer the questions posed by footnote 2 of the *Sorensen* opinion in the same way that they would have been answered under the pre-restyling version of the Rule.[6] Indeed, even a court that is normally unwilling to give weight to the Notes should be willing to consult them (and thus employ them to reach the appropriate interpretation of Rule 4(a)(4)(B)(ii)) when confronted with a circumstance in which the text's application would result in absurdity[7] – as it would if Rule 4(a)(4)(B)(ii) were read to require an amended notice of appeal when a judgment has been altered in a way that *benefits* the appellant.

However, the existence of a persuasive argument that the restyling did not alter Rule 4(a)(4)(B)(ii)'s effects does not mean that the language is unproblematic. One might argue that readers of Rule 4(a)(4)(B)(ii) should not have to research the pre-restyling version of the Rule in order to discern the meaning of the current version. It is thus worth considering whether there is a simple way to clear up the confusion. One possibility would be to amend Rule 4(a)(4)(B)(ii) to read as follows:

> A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or ~~a judgment altered or amended~~ an alteration or amendment of a

---

[5] *See* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1159 (2002) (arguing that "the main textualist objections to the use of legislative history lack bite when applied to the Advisory Committee Notes").

[6] At least one treatise appears to interpret the current version of the Rule in this way. Discussing the current Rule, that treatise observes that "the premature notice of appeal will not be effective to challenge the district court's rulings on the post-trial motions. To review those decisions, or any part of the judgment amended as a result of such a decision, one must amend the notice of appeal already filed, or file a new notice of appeal." Michael E. Tigar & Jane B. Tigar, Federal Appeals Jurisdiction and Practice § 6.03, at 336-37 (3d ed. 1999). (The quoted language is, I realize, ambiguous – but read in context, I think this text suggests the view that challenges to an unchanged portion of the judgment do not require amendment of the notice of appeal.) Though it does not refer specifically to the language of the current Rule, Moore's takes a similar view: "[W]hen a post-decisional motion is made in a civil case, and a notice of appeal is filed before it is decided, if a party wants to have the disposition of that motion, or any change in the judgment made as a result of that motion, reviewed on appeal, that party must file an amended notice of appeal." 20 Moore's Federal Practice - Civil § 304.13[1]. The Federal Practice & Procedure treatise is less informative on the question at hand, because it focuses on the pre-1998 language. *See* 16A Wright, Miller, Cooper & Schiltz, Federal Practice & Procedure § 3950.4.

[7] See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (conceding that legislative history may be consulted "to verify that what seems to us an unthinkable disposition . . . was indeed unthought of").

judgment upon such a motion, must file a notice of appeal, or an amended notice of appeal–in compliance with Rule 3(c)–within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

IV. Conclusion

The *Sorensen* court has identified difficulties in the interpretation of current Rule 4(a)(4)(B)(ii). Those difficulties stem largely from the adoption – during the 1998 restyling project – of language concerning "a judgment altered or amended upon" a post-trial motion. A return to the pre-1998 phrase "an alteration or amendment of" the judgment could alleviate the confusion.

Pre-1993 amendment	Pre-1995 amendment	Pre-1998 restyling	Current Rule 4(a)(4)
(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. **A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.** No additional fees shall be required for such filing.	(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: (A) for judgment under Rule 50(b); (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment; (C) to alter or amend the judgment under Rule 59; (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal; (E) for a new trial under Rule 59; or (F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment. A **notice of appeal** filed after announcement or entry of the judgment but before disposition of any of the above motions **is ineffective** to appeal from the judgment or order, or part thereof, specified in the notice of appeal, **until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.** No additional fees will be required for filing an amended notice.	(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure: (A) for judgment under Rule 50(b); (B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment; (C) to alter or amend the judgment under Rule 59; (D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal; (E) for a new trial under Rule 59; or (F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. **A notice of appeal** filed after announcement or entry of the judgment but before disposition of any of the above motions **is ineffective** to appeal from the judgment or order, or part thereof, specified in the notice of appeal, **until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.** No additional fees will be required for filing an amended notice.	(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: (i) for judgment under Rule 50(b); (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment; (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58; (iv) to alter or amend the judgment under Rule 59; (v) for a new trial under Rule 59; or (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered. (B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--**the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.** (ii) **A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal**--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion. (iii) No additional fee is required to file an amended notice.

96

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 06-01 and 06-02

As discussed at the Advisory Committee's April meeting, the Standing Committee has created a Time-Computation Subcommittee and tasked it with examining the time-computation provisions found in the national rules. The Subcommittee's goals are to adopt a consistent and simpler approach to time-computation in the Appellate, Bankruptcy, Civil, and Criminal Rules. At the April meeting, the Advisory Committee reviewed the Subcommittee's draft template (which uses Civil Rule 6(a) for purposes of illustration).

A key feature of the template is the "days-are-days" approach, under which the computation of short time periods will no longer exclude intermediate weekends and holidays. (Under current FRAP 26(a), intermediate weekends and holidays are excluded when counting periods of less than eleven days.) At the April meeting, members stressed the need to lengthen short periods to offset this change; and members pointed out that FRAP 26(a) governs computation of periods set by statute as well as periods set by rule. Judge Stewart appointed a Deadlines Subcommittee to study these issues; the Subcommittee is chaired by Judge Sutton and its members are Doug Letter, Mark Levy and Maureen Mahoney. The Deadlines Subcommittee's memo is attached; that memo provides the Subcommittee's thoughts on the Time-Computation Project and proposes changes to relevant deadlines in the light of the proposed change in time-computation approach.

At the Standing Committee's June 2006 meeting, the template draft was extensively discussed, as was the issue of statutory deadlines. Over the summer, in my capacity as reporter to the Time-Computation Subcommittee, I began the task of compiling a list of statutory deadlines that could be affected by the change in time-computation approach.[1] Meanwhile, the Time-Computation Subcommittee considered further changes to the draft template. I attach the most recent draft of the template, in both clean and redlined versions; the redlined version shows the changes made since the template was circulated to the Advisory Committee for the April meeting. I also attach a memo concerning the definition of the "last day" of a period; the current

[1] Statutory periods affecting appellate practice are discussed in the Deadlines Subcommittee's memo. I also attach a spreadsheet showing the results to date of the search for statutory deadlines; this spreadsheet is still a work in progress but it illustrates the large number of statutory provisions we have found (most of which do not affect appellate practice).

template draft attempts to address the question of after-hours filings in the light of 28 U.S.C. § 452, which provides that federal courts "shall be deemed always open."

The current template draft's definition of "last day," however, is concededly unsatisfactory, because it might encourage lawyers (or pro se litigants) to seek court officials out at their homes. The Civil Rules Committee discussed this issue at their September meeting, and my understanding is that the Committee will suggest that we remove from the template's definition of the end of the day any specific reference to filing with an appropriate court official. The Civil Rules Committee will likely propose alternative language that I expect will be along the following lines (though this may not be precise, because I am basing it on a rough draft of the minutes):

> (4) "Last Day" Defined. Unless a different concluding time is set by local rule or by order in the case, the last day concludes:
>
> (A) for electronic filing, at midnight in the court's time zone, and
>
> (B) for filing by other means, at the closing of the clerk's office.

In addition to the existing template language, the Time-Computation Subcommittee expects to continue considering a number of issues on which it would be useful to get your thoughts. One such issue, of course, is how best to deal with the question of statutory deadlines. Another concerns the possibility of drafting language to cover both physical and electronic inaccessibility of the clerk's office.

Encls.

Rule 6. Computing and Extending Time

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

(1) ***Period Stated in Days or Longer Unit.*** When the period is stated in days or a longer unit of time,

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a day on which the clerk's office is inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

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

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a time when the clerk's office is inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office

is inaccessible.

(3) ***"Next Day" Defined.*** The "next day" for purposes of (a)(1)(C) and (a)(2)(C) is determined by continuing to count forward when the period is measured after an event and backward when the period is measured before an event.

(4) ***"Last Day" Defined.*** The last day concludes:

(A) (i) for electronic filing, at midnight in the court's time zone; and (ii) for filing by other means, at the closing of the clerk's office or the time designated by local rule, unless

(B) (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.

(5) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period must

be computed. They do not apply when a fixed time to act is set. If, for example, a filing is required to be made "no later than November 1, 2007," then the filing is due on November 1, 2007. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).

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

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(3). Where present subdivision (a) refers to the "act, event, or default" that triggers the deadline, new subdivisions (a)(1), (a)(2) and (a)(3) refer simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

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

When the act to be done is a filing in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office, and the deletion from the text is not meant to suggest otherwise.

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

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. When the act to be done is a filing in court, and inaccessibility of the clerk's office occurs on the day the deadline ends and prior to the time the deadline ends, that day is treated like a Saturday, Sunday, or legal holiday.

Subdivision (a)(3). New subdivision (a)(3) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Courts have held that these provisions permit after-hours filing so long as the filing is made by locating an appropriate official and handing the papers to that official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (after-hours filer "may seek out the clerk or deputy clerk, or perhaps the judge"). Subdivision (a)(4)(B)(ii) carries forward that view. Some courts have also held after-hours filing to be effective when, for example, the filing is time-stamped and placed in an depository maintained by the clerk's office. *See, e.g.*, *Greenwood v. State of N.Y., Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Under subdivision (a)(4)(A)(ii), methods such as time-stamped placement in a depository will be effective if a local rule so provides. Such local rules should take into account the difficulties that can arise if a drop box lacks a device to record the date and time when a filing is deposited. *See, e.g.*, In re Bryan, 261 B.R. 240, 242 (9th Cir. BAP 2001).

Subdivision (a)(5). New subdivision (a)(5) defines "legal holiday" for purposes of the

Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

Rule 6. Computing and Extending Time

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

(1) ***Period Stated in Days or Longer Unit.*** When the period is stated in days or a longer unit of time,

(A) exclude the day of the [~~act, ~~]event[~~, or default~~] that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is a filing[~~ a paper~~] in court — a day on which [~~weather or...ions make ~~]the clerk's office is inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

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

(A) begin counting immediately on the occurrence of the [~~act, ~~]event[~~, or default~~] that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end [~~at a time ~~]on a Saturday, Sunday, legal holiday, or — if the act to be done is a filing[~~ a paper~~] in court — a [~~day on whi...tions make~~]time when the clerk's office is inaccessible, then continue the period

until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.~~]~~

(3) ***"Next Day" Defined.*** The "next day" for purposes of (a)(1)(C) and (a)(2)(C) is determined by continuing to count forward when the period is measured after an event and backward when the period is measured before an event.

(4) ***"Last Day" Defined.*** The last day concludes:

(A) (i) for electronic filing, at midnight in the court's time zone; and (ii) for filing by other means, at the closing of the clerk's office or the time designated by local rule, unless

(B) (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.

(~~[3]~~5) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period [needs to]must be computed. They do not apply when a fixed time to act is set[to act]. If, for example, a [rule or or...explicitly]filing is require[s that a paper]d to be [filed]made "no later than November 1, 2007," then the [paper]filing is due on November 1, 2007. But if a [rule or order]filing is require[s that a paper]d to be [filed]made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. [(They]It also [apply]applies to[the rare] time periods that are stated in weeks, months, or years. See, e.g., [Fed. R. Evid. 901]Rule 60(b)[(8)].[)]

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 1[0]1 days[or less]. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the [act,]event[, or default] that triggers the deadline is not counted. [Every]All other days — including intermediate Saturdays, Sundays, and legal holidays — [is]are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline [is extended to]falls on the next day that is not a Saturday, Sunday, or legal holiday. [(When the ...er an act]An illustration is provided below, in the discussion of subdivision (a)(3). Where present subdivision (a) refers to the "act, event, or [default. ..., March 14]default" that triggers the deadline, new subdivisions (a)(1), (a)(2) and (a)(3) refer simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 1[0]1 days [or less]will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

When the act to be done is a filing in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office, and the deletion from the text is not meant to suggest otherwise.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods

that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, ~~[see, e.g.,...71(d)(3),]~~as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the ~~[act,]~~event~~[, or default]~~ that triggers the deadline. The deadline generally ends when the time expires. If, however, the deadline ends at a specific time (say, 2:~~[00]~~17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:~~[00]~~17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. ~~[(Again, when]~~Periods stated in hours are not to be "rounded up" to the next whole hour. When the act to be done is a filing~~[a paper]~~ in court, a~~[day on which]~~nd inaccessibility of the clerk's office ~~[is not acc...her reason]~~occurs on the day the deadline ends and prior to the time the deadline ends, that day is treated like a Saturday, Sunday, or legal holiday.~~[)]~~

Subdivision (a)(3). New subdivision (a)(3) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Courts have held that these provisions permit after-hours filing so long as the filing is made by locating an appropriate official and handing the papers to that official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (after-hours filer "may seek out the clerk or deputy clerk, or perhaps the judge"). Subdivision (a)(4)(B)(ii) carries forward that view. Some courts have also held after-hours filing to be effective when, for example, the filing is time-stamped and placed in an depository maintained by the clerk's office. *See, e.g., Greenwood v. State of N.Y., Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Under subdivision (a)(4)(A)(ii), methods such as time-stamped placement in a depository will be effective if a local rule so provides. Such local

rules should take into account the difficulties that can arise if a drop box lacks a device to record the date and time when a filing is deposited. *See, e.g.*, In re Bryan, 261 B.R. 240, 242 (9th Cir. BAP 2001).

Subdivision (a)([~~3~~]5). New subdivision (a)([~~3~~]5) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

MEMORANDUM

DATE: August 9, 2006

TO: Judge Mark R. Kravitz

FROM: Catherine T. Struve

RE: 28 U.S.C. § 452, cognate rules, and the definition of "last day"

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." Corresponding provisions exist in the Bankruptcy,[2] Civil[3], Criminal[4] and Appellate[5] Rules. During the time-computation subcommittee's July 31 conference call, the question was raised whether the "courts always open" provisions bear upon the time-computation definition of the end of the "last day."

A quick survey of treatises and caselaw discloses divided authority concerning the effect of such provisions on whether a litigant can timely file after the closing of the clerk's office, and if so, how. Cases that focus on this issue generally separate into two camps: those that require the after-hours filer to find a court official to whom to hand the papers, and those that permit the after-hours filer to place the papers in the court's night depository or even in another location within the court's custody. The majority of treatises (including Federal Practice and Procedure) take the former view, though Moore's argues that putting the papers in a designated depository should work. It is notable that none of these discussions grounds its conclusions in an argument concerning the intent behind Section 452; this is unsurprising, since there is no indication that the statute or its predecessors was designed to address the issue. This brief survey of authorities

---

[2] Bankruptcy Rule 5001(a) provides: "The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules."

[3] Civil Rule 77(a) provides: "District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules."

[4] Criminal Rule 56(a) provides: "In General. A district court is considered always open for any filing, and for issuing and returning process, making a motion, or entering an order."

[5] Appellate Rule 45(a)(2) provides in relevant part: "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."

indicates that a time-computation provision defining the end of the "last day" could bring clarity to this murky area and would not contravene a discernable statutory purpose.

The statutory and rules provisions. The predecessors of Section 452 date back to 1842.[6] In 19th-century treatises, predecessor provisions are mentioned sometimes in the course of discussions concerning the terms of court,[7] and sometimes during discussions of jurisdiction.[8] Both contexts suggest that the purpose of courts-always-open provisions was to address the power of the courts to act.[9] This was the view taken in the House Report concerning the 1948 legislation that codified the present Section 452: "The phrase 'always open' means 'never closed' and signifies the time when a court can exercise its functions. With respect to matters enumerated by statute or rule as to which the court is 'always open,' there is no time when the

---

[6] Section 5 of the Act of August 23, 1842, 5 Stat. 517, 518, provided in part:

> That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits.

This provision (a predecessor to Revised Statutes §§ 638 and 574) was mirrored in Equity Rule 1 of the Rules of Practice for the Courts of Equity of the United States, January Term 1842.

[7] See, e.g., Horace Andrews, Manual of the Laws and Courts of the United States, and of the several States and Territories 9 (1873) (in a section discussing the "terms of the courts of the United States," noting that "[t]he circuit courts, as courts of equity, are always open for the purpose of filing pleadings, issuing and returning process and commissions, and for interlocutory proceedings").

[8] See, e.g., Robert Desty, A Manual of Practice in the Courts of the United States 51 (5th issue 1881) (section on "Courts always open for certain purposes" listed under the topic heading "Circuit Courts – Jurisdiction"); George W. Field, A Treatise on the Constitution and Jurisdiction of the Courts of the United States 146 (1883) (discussing fact that "circuit courts . . . are always open" in chapter on jurisdiction).

[9] See John M. Gould and George F. Tucker, Notes on the Revised Statutes of the United States 89 (1889) (observing with respect to Rev. St. § 574 that "while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open, the chancellor's authority being personal . . . and capable of exercise equally in term time and in vacation"); cf. Horn v. Pere Marquette R. Co., 151 F. 626, 635 (C.C. E.D. Mich. 1907) ("The power of a United States judge to do chamber business is in large part ascribable to the statutory provisions of section 638, Rev. St. . . . , whereby Circuit Courts are declared to be always open for the transaction of certain business . . . .").

court is without power to act."[10]

The advisory committee notes to the relevant Rules generally do not indicate the purpose of the courts-always-open provisions, other than to say that the provisions correspond in substance to Section 452.[11]

The divided caselaw. Some caselaw indicates that "courts always open" provisions allow a litigant to file after the closing of the clerk's office[12] so long as the litigant can find an appropriate court official[13] to receive the papers after hours.[14] Thus, for example, the First

---

[10] H. Rep. No. 308, 80th Cong., 1st Sess., A52 (1947). The legislative history of the 1963 amendments to Section 452 corroborates the view that the provision was designed to address the question of when courts have the power to act. See S. Rep. No. 88-547, 1963 U.S.C.C.A.N. 996, 997 (1963) ("[T]he requirement [of] holding formal periodic terms by the district courts no longer serves a useful purpose and . . . those statutory requirements should be eliminated.").

[11] See Civil Rule 77, 1937 advisory committee note (rule states substance of Section 452); see also Bankruptcy Rule 5001, [1983] advisory committee note (rule is drawn from Civil Rule 77); Criminal Rule 56, 1944 advisory committee note (stating that relevant part of rule is drawn from Civil Rule 77, and noting "policy of avoiding the hardships consequent upon a closing of the court during vacations").

[12] One district court, though, suggested that reliance on such an interpretation would be risky. Holding that Civil Rule 6(a) applied to the statute of limitations for a Jones Act claim (so that the last day of the period, falling on a Sunday, should be extended to the following Monday), the court rejected the argument that Civil Rule 77(a)'s "courts always open" provision would satisfactorily address such a situation: "Theoretically, the putative litigant might hunt up a Judge of this Court or the Clerk at his residence or elsewhere and file with one of them. But I think it unfair that substantial rights should depend upon the doubtful contingencies which may arise in the attempt to do so." Rutledge v. Sinclair Refining Co., 13 F.R.D. 477, 479 (S.D.N.Y. 1953).

[13] An early case indicated that the judge is not such an appropriate official: In In re Gubelman, 10 F.2d 926, 929 (2d Cir. 1925), *modified on other grounds*, Latzko v. Equitable Trust Co. of New York, 275 U.S. 254, 257 (1927), the Second Circuit interpreted "filing" (for purposes of a statutory provision concerning bankruptcy) to require presentation to the court clerk: "A paper is not filed by presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk of the court, for the purpose of making it a part of the records of the case." But see, e.g., Civil Rule 5(e) ("The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. . . .").

[14] At least one early case applied this principle to determine whether a diversity action was filed within the relevant state statute of limitations. See Hagy v. Allen, 153 F.Supp. 302,

Circuit cited Civil Rule 77(a) for the principle that "A person wishing to file a notice of appeal after closing hours on the last day may seek out the clerk or deputy clerk, or perhaps the judge . . . , and deliver the notice to him out of hours. The notice of appeal would then be filed within the statutory period." Casalduc v. Diaz, 117 F.2d 915, 917 (1st Cir. 1941); see also McIntosh v. Antonino, 71 F.3d 29, 35 n.5 (1st Cir. 1995) (citing *Casalduc* for proposition that "[a]fter hours, papers can validly be filed by in-hand delivery to the clerk or other proper official"; noting that "some clerks' offices reportedly have established so-called 'night depositories' to accommodate after-hours filings"; and declining to decide whether an item is filed at the time it is placed in such a depository after hours).[15]

Other cases are yet more liberal, and provide that the "courts always open" provisions mean that filing has been effected when litigants to leave the papers at the clerk's office (or another place designated by the clerk's office, such as a post office box) even if no one from the clerk's office is there to receive it at that time.[16]

---

305 (E.D. Ky. 1957) (citing Civil Rule 5(e) and rejecting defendants' argument "that since the complaints we[re] filed [with the clerk at her home] and not at the office that they were not properly filed on December 31"). *Hagy*, of course, predates the Supreme Court's holding that Civil Rule 3 (providing that an action is commenced by filing complaint) is not "intended to toll a state statute of limitations." Walker v. Armco Steel Corp., 446 U.S. 740, 750 (1980).

[15] Likewise, a district court considering a case in which the statute of limitations ran out on a Sunday and the litigant's representative "arrived at the office of the clerk of this court, as he says, at 12:15 P.M. [on Saturday] only to find it closed," observed that the suit "could have been filed on [that] Saturday . . . , with any judge of the court." Rose v. United States, 73 F. Supp. 759, 760 & n.1 (E.D.N.Y. 1947). See also In re Asher Development III, Inc., 143 B.R. 788, 788-89 (D. Colo. 1992) ("Although there is no explicit local bankruptcy rule on point, custom allows an attorney to make prior arrangements to file tardy pleadings with the clerk of a court at a convenient location outside of normal business hours."); In re Peacock, 129 B.R. 290, 291 (Bankr. M.D. Fla. 1991) (in rejecting argument that filing could not have been accomplished on a Sunday, citing Bankruptcy Rule 5001 for proposition that "that the clerk and the court are always available to accept filings, even at their homes"); Greeson v. Sherman, 265 F. Supp. 340, 342 (W.D. Va. 1967) (interpreting Civil Rules 3 and 5(e) and holding that filing was effective at the time that "plaintiff's complaint was delivered to the home of the Deputy Clerk on the night of December 30, 1966 by plaintiff's counsel"); Muse v. Freeman, 197 F. Supp. 67, 69-70 (E.D. Va. 1961) ("Irrespective of the validity of the order closing the Clerk's Office to the public on Saturdays, the evidence is clear that deputy clerks, whenever called upon to do so, will accept legal documents for filing on Saturdays. Moreover, the Judge is generally available in his office on Saturdays due to the congested docket prevailing in this area. That the present action could have been filed on Saturday, April 23, 1960, cannot be denied.").

[16] See, e.g., Greenwood v. State of N.Y., Office of Mental Health (OMH), 842 F.2d 636, 639 (2d Cir. 1988) (holding that time-stamped deposit of Section 1983 complaint in court's night depository box constituted filing for purpose of statute of limitations); Freeman v. Giacomo

The treatises. Almost all the treatises that I surveyed take the view that if the clerk's office is closed the litigant must find an appropriate court official and deliver the papers to that person. See, e.g., Wright, Miller & Marcus, 12 Fed. Prac. & Proc. Civ.2d § 3081 (as updated 2006) (courts-always-open provision "does not mean that the office of the clerk of the court must be physically open at all hours or that the filing of papers can be effected by leaving them in a closed or vacant office. Under Rule 5(e) papers may be filed out of business hours by delivering them to the clerk or deputy clerk or, in case of exceptional necessity, the judge").[17] Moore's Federal Practice notes that "[h]anding over papers to the clerk may take place at the clerk's office or home," and warns that "[l]eaving papers under the door of the clerk's office after the office is closed has, in the past, been held to be insufficient to constitute filing." Mary P. Squiers, 1-5 Moore's Federal Practice - Civil § 5.30. The treatise argues, however, that in light of Civil Rule 77(a), "the placement of papers in a night depository box maintained exclusively by the clerk" ought to be held "sufficient to constitute filing as of that date for statute of limitations purposes."

Costa Fu Andrea, 282 F. Supp. 525, 527 (E.D. Pa. 1968) (reasoning "that if plaintiff's messenger had deposited the complaint in the clerk's mail-slot or slipped it under the door of the clerk's office, as soon as he arrived at the courthouse, the action would have been 'commenced' during decedent's lifetime"); see also Johansson v. Towson, 177 F. Supp. 729, 731 (M.D. Ga. 1959) (holding that "the receipt by the Deputy Clerk of these complaints in his Post Office Box in the early morning hours of Saturday, August 23, constituted a sufficient filing of these suits prior to midnight of the following day, notwithstanding the fact that the Clerk did not open the box until 8:30 a.m. on Monday, August 25"); Johnson v. Esso Standard Oil Co., 181 F. Supp. 431, 433-34 (W.D. Pa. 1960) (finding that complaint "was . . . placed in the Clerk's post office box on November 24, 1958, after 2:30 p.m. and before 5:00 p.m., and . . . picked up by the Clerk's office the following day," and holding that "the delivery of this complaint to the Clerk in his post office box on Monday, November 24, 1958, constituted a filing of the complaint and commencement of plaintiffs' action on that day"). Another case relied on a "courts always open" provision to hold a 5:55 p.m. filing timely; since the court did not specify that the litigant sought out a court official at that hour, this may have been a case in which the litigant simply dropped off the papers at the clerk's office. See In re Warren, 20 B.R. 900, 902 (Bankr. D. Me. 1982).

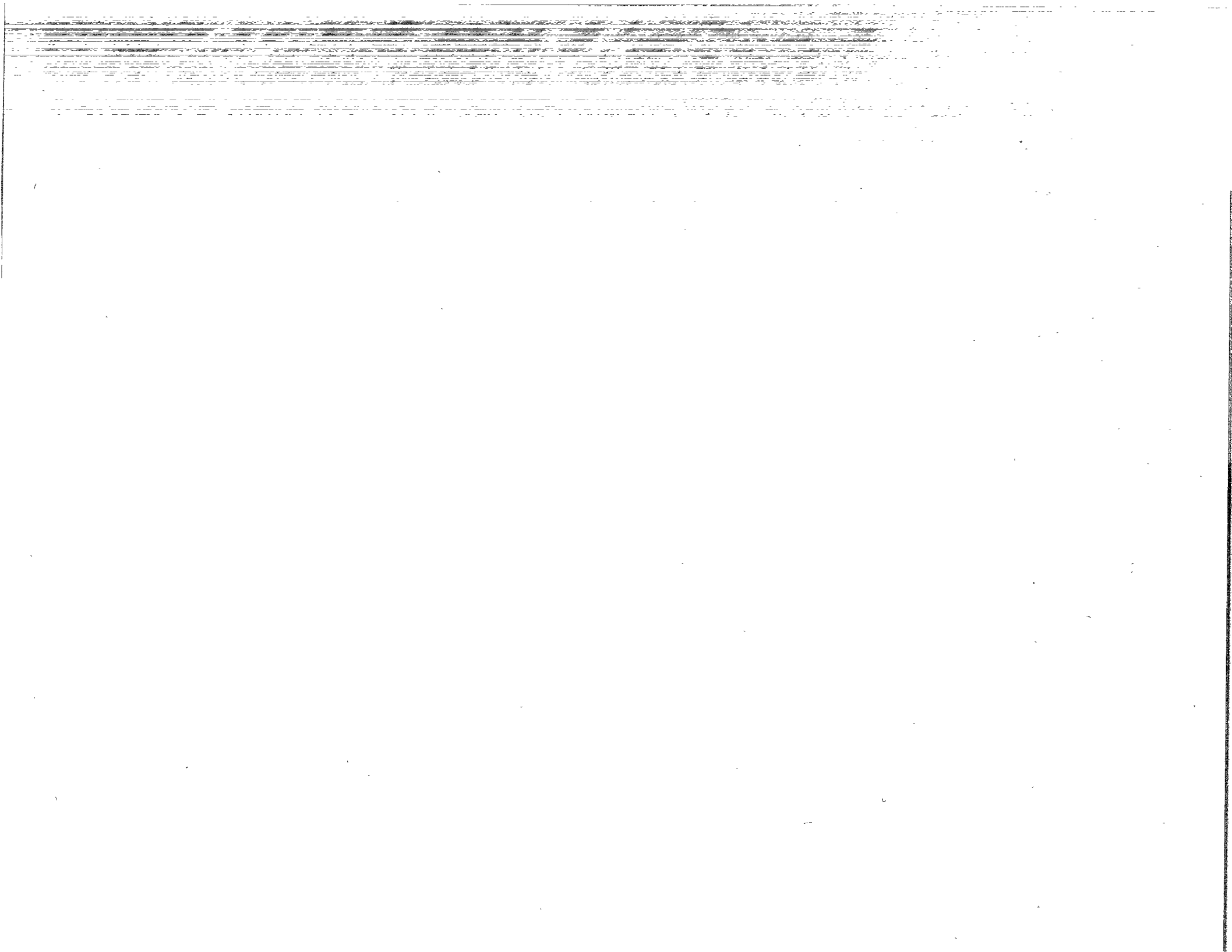
[17] See also David G. Knibb, Federal Court of Appeals Manual § 7.3 (4th ed., updated through 2006) ("The desperate appellant can still meet the deadline after the clerk's office has closed on the last day by personally delivering the notice to the clerk, together with the prescribed filing fee."); 8 Federal Procedure, Lawyers' Edition § 20:330 (database updated through June 2006) ("There is some authority that, if a deadline is approaching and the clerk's office is closed, a party wishing to file a paper must seek out the clerk and place the paper in his actual custody.") (citing *Casalduc*); Lawrence R. Ahern, III & Nancy Fraas MacLean, Bankruptcy Procedure Manual § 5001:01 (2006 ed.) (citing Bankruptcy Rules 5001 and 5005(a) and stating that "[f]iling is accomplished during non-business hours by personal delivery to either the clerk or the judge of the court where the case under the Code is pending"); Suzanne L. Bailey et al., 36 C.J.S. Federal Courts § 488 (database updated May 2006) ("A notice of appeal may be filed on the last day after the closing hours of the clerk's office by seeking out the clerk or deputy clerk and delivering the notice of appeal to him or her . . . .").

Id.[18]

[18] One treatise seems to go further than Moore's, suggesting that when an official cannot be found to receive the papers in person, the "courts always open" provision permits the litigant to deliver the papers to the closed office:

> The fact that the clerk's office is physically closed should not deter a party from taking steps to file papers either by slipping or sliding the papers under the door of the clerk's office, by leaving the papers in the clerk's mail slot or post office box, by delivering the papers to the clerk at his or her home, or by delivering the papers to the judge. And, if the clerk's office is open but there is no one present to receive the papers, the papers may be left in his or her office. . . . When papers are "filed" but are not physically handed over to the proper official, counsel should, at the earliest opportunity, call the clerk of court to inform him or her about such "filing" to insure that the papers are not lost or misplaced; otherwise the papers might not be considered "filed," at least in those jurisdictions where "filing" requires delivery of the paper into the actual custody of the proper official.

8A Federal Procedure, Lawyers' Edition § 22:24 (database updated June 2006).



MEMORANDUM

DATE: October 12, 2006

TO: Judge Carl E. Stewart

FROM: Appellate Rules Deadlines Subcommittee

RE: Time-Computation Project

We write to report on the progress of the Appellate Rules Committee's deadlines subcommittee. The subcommittee held two conference calls in August during which we discussed the time computation project and the question of adjustments to deadlines. Part I of this memo sets forth the subcommittee's drafts of suggested changes to the Appellate Rules' deadlines in the light of the proposed change in time computation approach. Part II discusses questions relating to statutory periods that will be affected by the change in computation approach.

I. Proposed amendments to the Appellate Rules in the light of the change in time computation approach

The subcommittee has reached consensus regarding whether and how to change most of the Appellate Rules deadlines that would be affected by the change in time-computation approach. What follow are rough drafts of proposed amendments, as well as a summary of affected provisions that the subcommittee will likely not propose to alter.

A. Conforming amendments – removing "calendar" from "calendar days"

Some rules currently specify that a time period is counted in "calendar days." Under the proposed "days are days" approach, "calendar" will be redundant. Accordingly, we propose the following amendments:

Rule 25. Filing and Service

(a) Filing.

* * * * *

(2) Filing: Method and Timeliness

* * * * *

(B) A brief or appendix. A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 ~~calendar~~ days.

* * * * *

(c) Manner of Service.

(1) Service may be any of the following:

* * * * *

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

* * * * *

Committee Note

Under current Rule 26(a), short periods that span weekends or holidays are computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the current Rules use the term "calendar days." By contrast, revised Rule 26(a) takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "3 calendar days" in current subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply "3 days."

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). To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the current Rules use the term "calendar days." Because revised subdivision (a) takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period, "3 calendar days" in current subdivision (c) is amended to read simply "3 days."

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

Under current Rule 26(a), short periods that span weekends or holidays are computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the current Rules use the term "calendar days." By contrast, revised Rule 26(a) takes a "days-are-days" approach under which

all intermediate days are counted, no matter how short the period. Accordingly, "7 calendar days" in current subdivision (b) is amended to read simply "7 days."

B. Adjusting time periods in the light of the change in computation approach

We considered the deadlines that would be affected by the change in time computation, and concluded that the following deadlines should be lengthened:

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:

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

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than ~~10~~ 30 days after the judgment is entered.

* * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Subdivision 4(a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. The time limit under current subdivision (a)(4)(A)(vi) is 10 days, reflecting the current 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Revised subdivision (a)(4)(A)(vi) now contains a 30-day limit to match the revisions to the time limits in the Civil Rules.

Rule 5. Appeal by Permission

* * * * *

(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

* * * * *

(2) A party may file an answer in opposition or a cross-petition within ~~7~~ 10 days after the petition is served.

* * * * *

Committee Note

Subdivision (b)(2). Subdivision (b)(2) is amended in the light of the change in Appellate Rule 26(a)'s time computation rules. Subdivision (b)(2) currently requires that an answer in opposition to a petition for permission to appeal, or a cross-petition for permission to appeal, be filed "within 7 days after the petition is served." Under current Rule 26(a), "7 days" will always mean at least nine days (because one weekend will always intervene); could mean as many as eleven days (if two weekends intervene); and occasionally will mean thirteen days (if two weekends and the Christmas and New Year's holidays intervene). Under the new time computation method, intermediate weekends and holidays will be counted. Changing "7 days" to "10 days" lengthens the period accordingly.

Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency must within 14 days file with the clerk and serve on each other party a

proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within ~~7~~ 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Committee Note

Rule 19 currently requires a party who disagrees with the agency's proposed judgment to file a proposed judgment "within 7 days." Under current Rule 26(a), "7 days" will always mean at least nine days (because one weekend will always intervene); could mean as many as eleven days (if two weekends intervene); and occasionally will mean thirteen days (if two weekends and the Christmas and New Year's holidays intervene). Under the new time computation method, intermediate weekends and holidays will be counted. Changing "7 days" to "10 days" lengthens the period accordingly.

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 ~~8~~ 10 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 ~~8-day~~ 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

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

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) currently requires that a response to a motion be filed "within 8 days after service of the motion unless the court shortens or extends the time." Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that does not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; under the current time-computation rule, such days are excluded if the period is less than 11 days.) Under the new time-computation method, intermediate weekends and holidays will be counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

Subdivision (a)(4). Subdivision (a)(4) currently requires that a reply to a response be filed "within 5 days after service of the response." Prior to the 2002 amendments, this period was set at 7 days; it was shortened in the light of the 2002 change in time-computation approach (discussed above). In the light of the new time-computation method, revised subdivision (a)(4) once again sets the period at 7 days.

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least ~~3~~ 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4). Subdivision (f)(4) is amended in the light of the change in Appellate Rule 26(a)'s time computation rules. Subdivision (f)(4) currently requires that the appellee's reply brief be served "at least 3 days before argument unless the court, for good cause, allows a later filing." Under current Rule 26(a), "3 days" could mean as many as five days (e.g., if argument is set for a Monday) or even six days (e.g., if argument is set for the Tuesday after a long weekend). Under the new time computation method, intermediate weekends and holidays will be counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) 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~~ 7 days before argument, unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (a)(1). Subdivision (a)(1) is amended in the light of the change in Appellate Rule 26(a)'s time computation rules. Subdivision (a)(1) currently requires that the appellant's reply brief be served "at least 3 days before argument, unless the court, for good cause, allows a later filing." Under current Rule 26(a), "3 days" could mean as many as five days (e.g., if argument is set for a Monday) or even six days (e.g., if argument is set for the Tuesday after a long weekend). Under the new time computation method, intermediate weekends and holidays will be counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (a)(1) will minimize such occurrences.

C. Time periods that the subcommittee may wish to adjust in consultation with other Advisory Committees

Certain provisions in the Appellate Rules relate closely to practice in the courts below. The subcommittee is in the process of consulting the reporters for the appropriate advisory committees to ensure that our proposals mesh with theirs.

One such provision is Rule 4(a)(4)(A)(vi); the proposed amendment to that Rule, detailed above, arises from our expectation that the Civil Rules Committee will set the deadlines for motions under Civil Rules 50(b), 52(b) and 59 at 30 days.

As discussed in Part D below, a number of time periods existed in the same form prior to 2002, when periods of seven days or more received days-are-days treatment. For most of those time periods, the subcommittee is not inclined to recommend revision. But for a few such periods, the subcommittee is in the process of consulting with the appropriate advisory committee reporter due to the close links between our rules and the rules concerning trial-court practice. Those provisions are:

- Rule 4(a)(6), which provides: "The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied: (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry; (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and (C) the court finds that no party would be prejudiced."

  - The subcommittee has consulted preliminarily with Professor Cooper, who expressed no strong view about the question. Professor Cooper suggested that it would be preferable to choose either 7 or 14 days, so as to employ multiples of seven (thus avoiding periods that end on weekends). He also pointed out that lengthening the time period to 14 days would not unduly threaten any principle of repose. This is particularly true, he pointed out, because "a party anxious to be confident about the expiration of appeal time can protect itself by giving notice of the judgment to other parties."

  - On the other hand, the current 7-day period existed under a days-are-days approach prior to 2002. Moreover, Rule 4(a)(6) is mirrored in 28 U.S.C. § 2107(c), which was amended in 1991 in order to conform the statute to the FRAP. Thus, if the 7-day period in Rule 4(a)(6) becomes 14 days, it would be necessary to seek a corresponding amendment of the statute (or to risk some confusion on the part of practitioners).

- Rule 4(b)(3)(A): "If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such

remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion: (i) for judgment of acquittal under Rule 29; (ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or (iii) for arrest of judgment under Rule 34."

- The deadlines subcommittee is in the process of consulting with Professor Beale to check what the Criminal Rules Committee proposes to do with the deadlines for motions under Criminal Rules 29, 33 and 34. The Criminal Rules Committee's treatment of those deadlines will help to inform the subcommittee's decision whether to suggest alteration of Appellate Rule 4(b)(3)(A)'s time limit concerning new trial motions under Criminal Rule 33 on grounds of newly-discovered evidence.

- Rule 6(b)(2)(B) [regarding appeals in bankruptcy cases]: "The record on appeal. (i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006--and serve on the appellee--a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk. (ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included."

  - The deadlines subcommittee is in the process of consulting with Professor Morris to check whether the Bankruptcy Rules Committee believes these 10-day deadlines should change. Otherwise, the deadlines subcommittee recommends that the deadline remain 10 days.

D. Time periods that the subcommittee does not propose to adjust in the light of the change in computation approach

Some time periods do not appear to require adjustment in the light of the change in time-computation approach. Those periods are nominally the same, at present, as they were under the pre-2002 time-computation approach, when periods of 7 days or more were computed under a days-are-days method. Moreover, those periods concern actions that are relatively straightforward and that should be feasible within the existing time periods under a days-are-days approach. The deadlines subcommittee believes that if litigators practiced under such deadlines under a days-are-days approach prior to 2002, they could do so under the new days-are-days approach as well. Those provisions are:

- Rule 4(a)(5)(C): "(C) No extension [of time to file a notice of appeal] under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later."

- Rule 4(b)(1)(A): "In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal."

- Rule 5(d)(1) [regarding appeals by permission]: "Within 10 days after the entry of the order granting permission to appeal, the appellant must: (A) pay the district clerk all required fees; and (B) file a cost bond if required under Rule 7."

- Rule 10(b)(1): "Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals and with the following qualifications: (i) the order must be in writing; (ii) if the cost of the transcript is to be paid by the United States under the Criminal Justice Act, the order must so state; and (iii) the appellant must, within the same period, file a copy of the order with the district clerk; or (B) file a certificate stating that no transcript will be ordered."

- Rule 10(b)(3): "Unless the entire transcript is ordered: (A) the appellant must--within the 10 days provided in Rule 10(b)(1)--file a statement of the issues that the appellant intends to present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement; (B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within 10 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and (C) unless within 10 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so."

- Rule 10(c): "If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. . . ."

- Rule 12(b): "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."

- Rule 29(e), which requires an amicus to file its brief no later than seven days after the filing of the principal brief of the party whom the amicus supports.

    - As you know, the Advisory Committee's agenda includes (as item number 05-05) the question of whether this requirement should be changed. The question was initially raised by Public Citizen, which argues that when an amicus files a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) may leave the appellant with little or no time to incorporate into its reply brief a response to the

amicus's contentions. At our April meeting the Committee noted that prior to 1998, amici were required to file at the same time as the party whom they supported (absent consent of all parties). The Committee retained this question on its study agenda.

- The deadlines subcommittee recognizes that the Committee may decide to return to the pre-1998 approach of requiring amici to file at the same time as the party they support. If the Committee decides to retain the staggered-timing approach, the deadlines subcommittee recommends that the period remain 7 days so as not to throw the rest of the briefing schedule off.

- Rule 30(b)(1): "The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within 10 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within 10 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the court's attention. . . . "

- Rule 39(d): "(1) A party who wants costs taxed must--within 14 days after entry of judgment--file with the circuit clerk, with proof of service, an itemized and verified bill of costs. (2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time."

II. Statutory time periods concerning appellate practice

Most of the statutory periods that would be affected by a change in Appellate Rule 26(a)'s time-computation approach are periods that existed prior to 2002 and that would have been calculated, prior to 2002, using a days-are-days approach.[1] We are currently aware of eight deadlines that either (1) did not exist prior to the 2002 rules amendments or (2) would not have qualified for a days-are-days approach under Appellate Rule 26(a) prior to 2002. Based on our preliminary review, we believe that at least one, and perhaps as many as four, deadlines should be altered in the light of the switch to a days-are-days approach. Here are the eight provisions:

---

[1] Some of those periods set 10-day deadlines for taking an appeal to a U.S. Court of Appeals from an agency determination, see 12 U.S.C. §§ 1817(j)(5) & 4623(a). Others set 10-day periods for taking an appeal to a U.S. Court of Appeals from a lower court determination, see 26 U.S.C. § 7482(a)(2)(A); 28 U.S.C. §§ 1292(b), 1292(d)(1), 1292(d)(2); 38 U.S.C. § 7292(b)(1); 45 U.S.C. § 159; and CIPA § 7(b), 18 U.S.C.A. App. 3. Another sets a presumptive time limit within which a Court of Appeals is to act, see 29 U.S.C. § 2937(a)(2). Another sets the time when the consequences of a challenged agency action take effect after judicial review, see 7 U.S.C. § 18(f). See also 28 U.S.C. § 2107(c) (provision mirroring Appellate Rule 4(a)(6), regarding reopening of time for appeal).

- 18 U.S.C. § 3771(d)(3) (providing, with respect to the review of a district court's denial of certain rights of crime victims, that "[t]he court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed"); *see also id.* (with respect to appellate review of district court's denial of rights asserted by crime victim in criminal prosecution, providing that "[i]n no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter"); *id.* § 3771(d)(5) (with respect to crime victims' rights, providing that "[a] victim may make a motion to re-open a plea or sentence only if-- (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied; (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged").

    - The 72-hour deadline imposed by Section 3771(d)(3) has already been the subject of discussion in the Advisory Committee. At the April 2006 meeting, the Advisory Committee concluded that the 72-hour deadline did not require any changes to the FRAP at the current time, though developments under Section 3771 would continue to be monitored. It would be useful for Congress to extend the 72-hour deadline; that will be particularly true under the new time-computation approach.

    - Section 3771(d)(3)'s five-day limit on stays and continuances presumably concerns stays and continuances of trial-level proceedings. Thus, it would be useful to seek the views of the Criminal Rules Committee concerning whether an extension of that period is necessary in the light of the switch to a days-are-days approach. Unless the Criminal Rules Committee disagrees, we do not believe that an extension of this period is necessary.

    - Finally, we do not propose an extension of the 10-day period set by Section 3771(d)(5).

- Classified Information Procedures Act, § 7(b), 18 U.S.C.A. App. 3 (if interlocutory appeal under CIPA is taken during trial, "the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, [and] (3) shall render its decision within four days of argument on appeal").

    - An extension of these four-day periods would be advisable in the light of the switch to a days-are-days approach.

- 28 U.S.C. § 1453(c)(1) (providing with respect to removals under Section 1453 that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand . . . if application is made to the court of appeals not less than

7 days after entry of the order")[2]; *see also id.* § 1453(c)(3) (providing that absent consent of all parties, 60-day deadline for the court of appeals to "complete all action on" a covered appeal can be extended by at most 10 days).

- Section 1453(c)(1) is evidently flawed (it presumably ought to read "not more than 7 days"). We believe that the provision should be amended to correct the error, and also to set a period longer than 7 days.

- We do not feel as strongly about Section 1453(c)(3)'s 10-day limit on extensions of the 60-day time limit for the court of appeals to complete its action on the appeal.

- 28 U.S.C. § 2349(b) (when petitioner, seeking review of order by certain agencies, requests interlocutory relief from court of appeals, "at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General").

  - We do not believe that this period needs to be lengthened.

- 47 U.S.C. § 402(d) (regarding appeals to D.C. Circuit from orders of Federal Communications Commission, providing that "the appellant shall, not later than five days after the filing of [the notice of appeal], notify each person shown by the records of the Commission to be interested in said appeal").

  - We do not believe that this period needs to be lengthened.

* * *

As you know, at the April 2006 advisory committee meeting, members of this subcommittee raised the question of statutory deadlines and pointed out that the question is a thorny one. Important statutory deadlines that will effectively be shortened by a change in time-computation approach cannot readily be adjusted. In theory, supersession through the rulemaking process would offer one avenue for change;[3] but subcommittee members point out that the superseded statutory provision would remain on the books, potentially causing confusion, even if reporting services such as West note the fact of supersession. Subcommittee members point out that even a practitioner who knows to look to the Rules for the relevant time computation provision might not know to look to the Rules for the relevant deadline – especially

---

[2] Though "not less than 7 days" is not a limit if read literally, courts have read it as setting a deadline of "not more than 7 days." *See, e.g., Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005).

[3] See 28 U.S.C. § 2072(b) (providing with respect to rules promulgated under the Rules Enabling Act that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect").

if the practitioner believes that the deadline is already governed by statute. Amendment by Congress offers another possible avenue; but subcommittee members are skeptical about this option, particularly in the light of the possibility that the list of provisions submitted to Congress might (despite the rulemakers' best efforts) be incomplete.

Admittedly, it does not appear that the change in time-computation approach will affect a great number of statutory provisions concerning *appellate* practice.[4] Some of the affected time periods – most notably, the seven-day deadline set in 28 U.S.C. § 1453 – should be lengthened. But overall, it appears to this subcommittee that the statutory-deadlines question looms larger for other advisory committees, such as the Civil Rules Committee. A failure to find a satisfactory way to address the statutory-deadlines issue likely would not impede the successful adoption of the new time-computation approach within the Appellate Rules – but such a failure would seem to pose a much more significant problem for other sets of Rules. Thus, if a satisfactory fix for the statutory-deadlines problem ultimately cannot be found, members of the subcommittee have doubts about the overall advisability of the time-computation project. To subcommittee members, doubts concerning the statutory-periods conundrum reinforce other concerns about the project. Members point out that, in their experience, practitioners are not confused by the current system of time computation. Members also stress that the current system in fact performs an important function: By omitting intermediate weekends and holidays from the computation of short periods, the current approach permits the system to set short time periods (which keep litigation moving along) while also maintaining grace periods for those instances when short periods span weekends and/or holidays. Members are also concerned about the pace of rulemaking; as outlined above, the proposed change in time computation would lead the subcommittee to recommend amendments to Rules 4, 19, 25, 26, 27, 28.1, 31 and 41, and perhaps also to Rule 6. And members note that a wait-and-see approach would be preferable, especially since further changes in the timing of litigation may evolve in the wake of the adoption of electronic case management and filing. Subcommittee members believe that these concerns should be seriously considered if no satisfactory fix for the statutory-deadlines question materializes.

[4] That is, the number of such provisions is small if one does not count provisions that were calculated using a days-are-days approach prior to the 2002 amendments to the Appellate Rules.

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
2	8	(b)(4)(B)(i)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the announcement of such vacancy.	Time to seek judicial review			Y			Day	2	yellow flag on Westlaw	
2	8	(b)(4)(B)(iii)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member of the House of Representatives whose seat has been announced to be vacant shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the announcement of such vacancy.	Time for court to act			Y			Day	3	yellow flag on Westlaw	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
2	386	(c)	(c) Order and time of taking testimony The order in which the parties may take testimony shall be as follows. (1) Contestant may take testimony within thirty days after service of the answer, or, if no answer is served within the time provided in section 383 of this title, within thirty days after the time for answer has expired. (2) Contestee may take testimony within thirty days after contestant's time for taking testimony has expired. (3) If contestee has taken any testimony or has filed testimonial affidavits or stipulations under section 387(c) of this title, contestant may take rebuttal testimony within ten days after contestee's time for taking testimony has expired.	Time for litigant to act			Y			Day	10		even though this concerns election challenges in House of Representatives under Federal Contested Elections Act, this 10-day period concerns the time for obtaining a subpoena from a federal district court. See 2 USC 388(a). Currently, a time computation method is explicitly provided by 2 USC 394.
2	388	(b)	(a) IssuanceUpon application of any party, a subpena for attendance at a deposition shall be issued by (1) a judge or clerk of the United States district court for the district in which the place of examination is located;...(b) Time, method, and proof of serviceService of the subpena shall be made upon the witness no later than three days before the day on which his attendance is directed. A subpena may be served by any person who is not a party to the contested election case and is not less than eighteen years of age. Service of a subpena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fee for one day's attendance and the mileage allowed by section 389 of this title. Written proof of service shall be made under oath by the person making same and shall be filed with the Clerk.	Notice to litigants or other entities			Y			Day	3		Currently, a time computation method is explicitly provided by 2 USC 394. I've omitted 2 USC 387, since that appears to concern procedure when no subpoena is used, and thus when no court is involved.
2	922	(e)	(b) Appeal to Supreme Court Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered, and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) of this section shall be issued by a single Justice of the Supreme Court. * * * (e) Timing of relief No order of any court granting declaratory or injunctive relief from the order of the President issued under section 904 of this title, including but not limited to relief permitting or requiring the expenditure of funds sequestered by such order, shall take effect during the pendency of the action before such court, during the time appeal may be taken, or, if appeal is taken, during the period before the court to which such appeal is taken has entered its final order disposing of such action.	Timing of relief			Y			Day	10	Section 922(e) refers to Section 904, which is a part of the Gramm-Rudman-Hollings Act that may have been repealed -- need to check this.	922(b), re time limit for filing NOA, is presumably not governed directly by the Civil Rules?

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
7	18	(f)	(e) Review Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located * * * (f) Automatic bar from trading and suspension for noncompliance; effect of appeal Unless the party against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that either an appeal as herein authorized has been taken or payment of the full amount of the order (or any agreed settlement thereof) has been made, such party shall be prohibited automatically from trading on all registered entities and, if the party is registered with the Commission, such registration shall be suspended automatically at the expiration of such fifteen-day period until such party shows to the satisfaction of the Commission that payment of such amount with interest thereon to date of payment has been made: Provided, That if on appeal the appellee prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction, the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.	Effective date of consequences after judicial review of agency action	Y		Y			Day	10		
7	2023	(a)(17)	(13) If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination. * * * (17) During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless on application to the court on not less than ten days' notice, and after hearing thereon and a consideration by the court of the applicant's likelihood of prevailing on the merits and of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.	Notice to litigants or other entities			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
7	136h	(d)(3)	(d) Limitations* * *(3) If the Administrator proposes to disclose information described in clause (A), (B), or (C) of paragraph (1) or in paragraph (2) of this subsection, the Administrator shall notify by certified mail the submitter of such information of the intent to release such information. The Administrator may not release such information, without the submitter's consent, until thirty days after the submitter has been furnished such notice. Where the Administrator finds that disclosure of information described in clause (A), (B), or (C) of paragraph (1) of this subsection is necessary to avoid or lessen an imminent and substantial risk of injury to the public health, the Administrator may set such shorter period of notice (but not less than ten days) and such method of notice as the Administrator finds appropriate. During such period the data submitter may institute an action in an appropriate district court to enjoin or limit the proposed disclosure. The court may enjoin disclosure, or limit the disclosure or the parties to whom disclosure shall be made, to the extent that--(A) in the case of information described in clause (A), (B), or (C) of paragraph (1) of this subsection, the proposed disclosure is not required to protect against an unreasonable risk of injury to health or the environment; or(B) in the case of information described in paragraph (2) of this subsection, the public interest in availability of the information in the public proceeding does not outweigh the interests in preserving the confidentiality of the information.	Time to seek review of agency action			Y			Day	10		
7	499g	(d)	(c) Appeal from reparation order; proceedings Either party adversely affected by the entry of a reparation order by the Secretary may, within thirty days from and after the date of such order, appeal therefrom to the district court of the United States for the district in which said hearing was held: Provided, That in cases handled without a hearing in accordance with subsections (c) and (d) of section 499f of this title or in which a hearing has been waived by agreement of the parties, appeal shall be to the district court of the United States for the district in which the party complained against is located. * * * (d) Suspension of license for failure to obey reparation order or appeal Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment Provided, That if on appeal the appellee prevails or if the appeal is dismissed the automatic suspension of license shall become effective at the expiration of thirty days from the date of the judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.	Effective date of consequences after judicial review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
7	499j		Any order of the Secretary under this chapter other than an order for the payment of money shall take effect within such reasonable time, not less than ten days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, accordingly as it is prescribed in the order, unless such order is suspended, modified, or set aside by the Secretary or is suspended, modified, or set aside by a court of competent jurisdiction. Any such order of the Secretary, if regularly made, shall be final, unless before the date prescribed for its taking effect application is made to a court of competent jurisdiction by the commission merchant, dealer, or broker against whom such order is directed to have such order set aside or its enforcement, operation, or execution suspended or restrained.	Time to seek review of agency action			Y			Day	10		
8	1226a	(a)(5)	(a) Detention of terrorist aliens (1) Custody The Attorney General shall take into custody any alien who is certified under paragraph (3). * * * (3) Certification The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien-- (A) is described in section 1182(a)(3)(A)(i), 1182(a)(3)(A)(iii), 1182(a)(3)(B), 1227(a)(4)(A)(i), 1227(a)(4)(A)(iii), or 1227(a)(4)(B) of this title; or (B) is engaged in any other activity that endangers the national security of the United States. * * * (5) Commencement of proceedings The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.	Time for government to act				Y		Day	7		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
9	4		A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.	Notice to litigants or other entities			Y			Day	5		
10	7666	(a)	(a) If a sale of prize property is ordered by the court, the marshal shall-- (1) prepare and circulate full catalogues and schedules of the property to be sold and return a copy of each to the court, (2) advertise the sale fully and conspicuously by posters and in newspapers ordered by the court, (3) give notice to the naval prize commissioner at least five days before the sale; and (4) keep the goods open for inspection for at least three days before the sale.	Notice to litigants or other entities			Y			Day	3	yellow flag on Westlaw -- apparently due to proposed legislation	see also 5-day notice provision

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
10	7726	(c)	(a) A claimant or party who considers himself adversely affected by a stay under this chapter may serve a written notice on the Secretary of the Navy at Washington, D.C., requesting him to reconsider the stay previously issued and to issue a new certificate. The notice shall identify the stay by means of an attached copy of the certificate of the Secretary or a sufficient description of the stay. The notice may not contain any recital of the facts or circumstances involved. (b) Within ten days after receiving notice under this section, the Secretary or his designee shall hold a secret meeting at which the claimant or party, or his representative, may present any facts and arguments he thinks material. (c) Within ten days after a hearing under this section, the Secretary shall file with the court that ordered the stay a new certificate stating whether the stay is then to be terminated or for what period the stay is to continue in effect. If the Secretary fails to file a new certificate, the court, upon application by the claimant or party, shall issue an order directing the Secretary to file a new certificate within a specified time.	Time for government to act			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	10 USC 7722(a) provides: "Whenever in time of war the Secretary of the Navy certifies to a court, or to a judge of a court, in which a suit described in section 7721 of this title is pending, that the prosecution of the suit would tend to endanger the security of naval operations in the war, or would tend to interfere with those operations, all further proceedings in the suit shall be stayed."
11	109	(h)(3)	(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency * * * an individual or group briefing * * * that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis. * * * (3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that-- (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1); (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and (iii) is satisfactory to the court. * * *	Time for bankruptcy participant to act		Y					Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
11	322	(a)	(a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.	Time for bankruptcy participant to act		Y				Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
11	332	(a)	(a) If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint, not later than 5 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman in the case and shall require that notice of such hearing be timely given to such ombudsman.	Time for bankruptcy participant to act		Y				Day	5		
11	342	(e)(2)	(e)(1) In a case under chapter 7 or 13 of this title of a debtor who is an individual, a creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor.(2) Any notice in such case required to be provided to such creditor by the debtor or the court later than 5 days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.	Time for bankruptcy participant to act		Y				Day	5		
11	521	(e)(2)(A)	(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor. (2)(A) The debtor shall provide-- (i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed, and (ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.	Time for bankruptcy participant to act		Y				Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	521	(e)(3)	(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan-- (A) at a reasonable cost, and (B) not later than 5 days after such request is filed.	Time for court to act		Y				Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
11	521	(i)(2)	(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition. (2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request. (3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing. (4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.	Presumptive time for court to act		Y				Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
11	704	(b)(1)	(b)(1) With respect to a debtor who is an individual in a case under this chapter-- (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b), and (B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.	Time for court to act		Y				Day	5		
11	749	(b)	(b) Notwithstanding sections 544, 545, 547, 548, and 549 of this title, the trustee may not avoid a transfer made before five days after the order for relief if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is-- (1) a transfer of a securities contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, security, or other property margining or securing such securities contract; or (2) the liquidation of a securities contract entered into or carried by or through the debtor on behalf of a customer.	Time for bankruptcy participant to act		Y				Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
11	764	(b)	(b) Notwithstanding sections 544, 545, 547, 548, 549, and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is--(1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract, or(2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.	Time for bankruptcy participant to act		Y				Day	5		
11	1113	(d)(1)	(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.	Presumptive time for court to act		Y				Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	1114	(k)(1)	(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the authorized representative agree.	Presumptive time for court to act		Y				Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	1116		In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall-- (1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief-- (A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return, or (B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;	Time for bankruptcy participant to act		Y				Day	7		
11	1308	(a)	(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.	Time for bankruptcy participant to act		Y				Day	1	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	1708	(c)(6)	(6) Cease-and-desist orders (A) Whenever the Secretary, upon request of the Mortgagee Review Board, determines that there is reasonable cause to believe that a mortgagee is violating, has violated, or is about to violate, a law, rule or regulation or any condition imposed in writing by the Secretary or the Board, and that such violation could result in significant cost to the Federal Government or the public, the Secretary may issue a temporary order requiring the mortgagee to cease and desist from any such violation * * * (B) Within 10 days after the mortgagee has been served with a temporary cease-and-desist order, the mortgagee may apply to the United States district court for the judicial district in which the home office of the mortgagee is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting of suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the mortgagee, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1786	(f)(2)	(f) Temporary cease and desist order; injunctive procedure(1) Whenever the Board shall determine that the violation or threatened violation or the unsafe or unsound practice or practices * * * is likely to cause insolvency or significant dissipation of assets or earnings of the credit union, or is likely to weaken the condition of the credit union or otherwise prejudice the interests of its insured members prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (e) of this section, the Board may issue a temporary order requiring the credit union or such party to cease and desist * * * (2) Within ten days after the credit union concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the credit union or such party may apply to the United States district court for the judicial district in which the home office of the credit union is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the credit union or such party under paragraph (1) of subsection (e) of this section, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	1786	(g)(6)	(6) Within ten days after any director, officer, committee member, or other person has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured credit union under paragraph (3) of this subsection, such director, officer, committee member, or other person may apply to the United States district court for the judicial district in which the principal office of the credit union is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, committee member, or other person under paragraph (1) or (2) of this subsection, and such court shall have jurisdiction to stay such suspension and/or prohibition.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1786	(h)(3)	(3) Not later than ten days after the date on which the Board takes possession and control of the business and assets of an insured credit union pursuant to paragraph (1), such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be enjoined from continuing such possession and control. Except as provided in this paragraph, no court may take any action, except at the request of the Board by regulation or order, to restrain or affect the exercise of powers or functions of the Board as conservator.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1787	(a)(1)(B)	(B) Not later than 10 days after the date on which the Board closes a credit union for liquidation pursuant to paragraph (1), or accepts appointment as liquidating agent pursuant to subsection (b) of this section, such insured credit union may apply to the United States district court for the judicial district in which the principal office of such insured credit union is located or the United States District Court for the District of Columbia, for an order requiring the Board to show cause why it should not be prohibited from continuing such liquidation. Except as otherwise provided in this subparagraph, no court may take any action for or toward the removal of any liquidating agent or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a liquidating agent.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	1817	(j)(5)	(5) Any person whose proposed acquisition is disapproved after agency hearings under this subsection may obtain review by the United States court of appeals for the circuit in which the home office of the bank [FN2] to be acquired is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within ten days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the appropriate Federal banking agency. The appropriate Federal banking agency shall promptly certify and file in such court the record upon which the disapproval was based. The findings of the appropriate Federal banking agency shall be set aside if found to be arbitrary or capricious or if found to violate procedures established by this subsection.	Time to seek review of agency action	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1818	(a)(8)(D)	(8) Temporary suspension of insurance(A) In generalIf the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B) applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may issue a temporary order suspending deposit insurance on all deposits received by the institution.* * *(C) Effective period of temporary orderAny order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and enforceable until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).(D) Judicial reviewBefore the close of the 10-day period beginning on the date any temporary order has been served upon an insured depository institution under subparagraph (A), such institution may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the home office of the institution is located, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	1818	(c)(2)	(2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	1818	(f)	(f) Stay of suspension and/or prohibition of institution-affiliated party Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section, such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	2262	(b)	(b) Within ten days after the institution concerned or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such institution has been served with a temporary cease and desist order, the institution or such director, officer, employee, agent, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the institution or such director, officer, employee, agent, or other person under section 2261 of this title, and such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	2264	(e)	(e) Stay of suspension or prohibition Within ten days after any director, officer, or other person has been suspended from office or prohibited from participation in the conduct of the affairs of a System institution under subsection (c) of this section, such director, officer, or other person may apply to the United States district court for the judicial district in which the home office of the institution is located, or the United States district court for the District of Columbia, for a stay of either such suspension or prohibition, or both, pending the completion of the administrative proceedings pursuant to the notice served upon such director, officer, or other person under subsection (a) or (b) of this section, and such court shall have jurisdiction to stay either such suspension or prohibition, or both.	Time to seek review of agency action			Y			Day	10		
12	3405	(2) & (3)	A Government authority may obtain financial records under section 3402(2) of this title pursuant to an administrative subpena or summons otherwise authorized by law only if--(1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry;(2) a copy of the subpena or summons has been served upon the customer or mailed to his last known address on or before the date on which the subpena or summons was served on the financial institution together with the following notice * * *."Records or information concerning your transactions held by the financial institution named in the attached subpena or summons are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must:"1. Fill out the accompanying motion paper and sworn statement or write one of your own * * *."2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States district courts:"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to ."4. Be prepared to come to court and present your position in further detail."5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.", and(3) ten days have expired from the date of service of the notice or fourteen days have expired from the date of mailing the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	3407	(2) & (3)	A Government authority may obtain financial records under section 3402(4) of this title pursuant to judicial subpena only if-- (1) such subpena is authorized by law and there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; (2) a copy of the subpena has been served upon the customer or mailed to his last known address on or before the date on which the subpena was served on the financial institution together with the following notice ***: "Records or information concerning your transactions which are held by the financial institution named in the attached subpena are being sought by this (agency or department or authority) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: If you desire that such records or information not be made available, you must: "1. Fill out the accompanying motion paper and sworn statement or write one of your own ***. "2. File the motion and statement by mailing or delivering them to the clerk of the Court. "3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to . "4 Be prepared to come to court and present your position in further detail. "5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein will be made available. These records may be transferred to other government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and (3) ten days have expired from the date of service or fourteen days from the date of mailing of the notice to the customer and within such time period the customer has not filed a sworn statement and motion to quash in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	3408	(4)(A) & (B)	A Government authority may request financial records under section 3402(5) of this title pursuant to a formal written request only if-- (1) no administrative summons or subpena authority reasonably appears to be available to that Government authority to obtain financial records for the purpose for which such records are sought; (2) the request is authorized by regulations promulgated by the head of the agency or department; (3) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and (4)(A) a copy of the request has been served upon the customer or mailed to his last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry: "Records or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 [12 U.S.C.A. § 3401 et seq.] for the following purpose: "If you desire that such records or information not be made available, you must "1. Fill out the accompanying motion paper and sworn statement or write one of your own * * *. "2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts: "3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to . "4. Be prepared to come to court and present your position in further detail. "5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights. If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer;" and (B) ten days have expired from the date of service or fourteen days from the date of mailing of the notice by the customer and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions of section 3410 of this title have been complied with.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	3410	(a)	(a) Filing of motion to quash or application to enjoin; proper court; contentsWithin ten days of service or within fourteen days of mailing of a subpena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpena shall be filed in the court which issued the subpena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States district court. * * *Service shall be made under this section upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received pursuant to this chapter. For the purposes of this section, "delivery" has the meaning stated in rule 5(b) of the Federal Rules of Civil Procedure.(b) Filing of response; additional proceedingsIf the court finds that the customer has complied with subsection (a) of this section, it shall order the Government authority to file a sworn response, which may be filed in camera if the Government includes in its response the reasons which make in camera review appropriate. If the court is unable to determine the motion or application on the basis of the parties' initial allegations and response, the court may conduct such additional proceedings as it deems appropriate. All such proceedings shall be completed and the motion or application decided within seven calendar days of the filing of the Government's response.	Time to make a motion or other filing			Y			Day	10	also note "seven calendar days" in (b)	
12	3414	(b)(3)	(b)(1) Nothing in this chapter shall prohibit a Government authority from obtaining financial records from a financial institution if the Government authority determines that delay in obtaining access to such records would create imminent danger of-- (A) physical injury to any person, (B) serious property damage; or (C) flight to avoid prosecution. (2) In the instances specified in paragraph (1), the Government shall submit to the financial institution the certificate required in section 3403(b) of this title signed by a supervisory official of a rank designated by the head of the Government authority. (3) Within five days of obtaining access to financial records under this subsection, the Government authority shall file with the appropriate court a signed, sworn statement of a supervisory official of a rank designated by the head of the Government authority setting forth the grounds for the emergency access. The Government authority shall thereafter comply with the notice provisions of section 3409(c) of this title.	Time for government to act				Y		Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	4623	(a)	(a) Jurisdiction (1) Filing of petition An enterprise that is not classified as critically undercapitalized and is the subject of a classification under section 4614 of this title or a discretionary supervisory action taken under this subchapter by the Director (other than action to appoint a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) may obtain review of the classification or action by filing, within 10 days after receiving written notice of the Director's action, a written petition requesting that the classification or action of the Director be modified, terminated, or set aside. (2) Place for filing A petition filed pursuant to this subsection shall be filed in the United States Court of Appeals for the District of Columbia Circuit.	Time to seek review of agency action	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
12	4632	(d)	(d) Judicial review An enterprise, executive officer, or director that has been served with a temporary order pursuant to this section may apply to the United States District Court for the District of Columbia within 10 days after such service for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of the order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the enterprise, executive officer, or director under section 4631(a) or (b) of this title. Such court shall have jurisdiction to issue such injunction.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
12	1833a	(g)(3)	(a) In generalWhoever violates any provision of law to which this section is made applicable by subsection (c) of this section shall be subject to a civil penalty in an amount assessed by the court in a civil action under this section.* * *(g) Administrative subpoenas(1) In generalFor the purpose of conducting a civil investigation in contemplation of a civil proceeding under this section, the Attorney General may--* * *(C) by subpoena, summon witnesses and require the production of any books, papers, correspondence, memoranda, or other records which the Attorney General deems relevant or material to the inquiry. * * * (2) Procedures applicableThe same procedures and limitations as are provided with respect to civil investigative demands in subsections (g), (h), and (j) of section 1968 of Title 18 apply with respect to a subpoena issued under this subsection. * * *. Failure to comply with an order of the court to enforce such subpoena shall be punishable as contempt.(3) LimitationIn the case of a subpoena for which the return date is less than 5 days after the date of service, no person shall be found in contempt for failure to comply by the return date if such person files a petition under paragraph (2) not later than 5 days after the date of service.	Time to make a motion or other filing			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
15	16	(g)	(g) Filing of written or oral communications with the district court Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b) of this section, each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
15	650	(g)(3)(C)	(C) Judicial review of suspension prior to hearing Not later than 10 days after a management official is suspended or prohibited from participation under subparagraph (A), the management official may apply to an appropriate district court for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under paragraph (2).	Time to seek review of agency action			Y			Day	10		
15	1116	(d)(10)(A)	(10)(A) The court shall hold a hearing, unless waived by all the parties, on the date set by the court in the order of seizure. That date shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued, unless the applicant for the order shows good cause for another date or unless the party against whom such order is directed consents to another date for such hearing. At such hearing the party obtaining the order shall have the burden to prove that the facts supporting findings of fact and conclusions of law necessary to support such order are still in effect. If that party fails to meet that burden, the seizure order shall be dissolved or modified appropriately.	Presumptive time for court to act			Y			Day	10		
15	1116	(d)(5)(C)	(5) An order under this subsection shall set forth-- * * * (C) the time period, which shall end not later than seven days after the date on which such order is issued, during which the seizure is to be made;	Time for government to act			Y			Day	7		
15	1118		In any action arising under this chapter, in which a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 1125(a) of this title, or a willful violation under section 1125(c) of this title, shall have been established, the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or, in the case of a violation of section 1125(a) of this title or a willful violation under section 1125(c) of this title, the word, term, name, symbol, device, combination thereof, designation, description, or representation that is the subject of the violation, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed. The party seeking an order under this section for destruction of articles seized under section 1116(d) of this title shall give ten days' notice to the United States attorney for the judicial district in which such order is sought (unless good cause is shown for lesser notice) and such United States attorney may, if such destruction may affect evidence of an offense against the United States, seek a hearing on such destruction or participate in any hearing otherwise to be held with respect to such destruction.	Notice to litigants or other entities			Y	Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
15	2310	(c)(1)	(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect ***	TRO time limit			Y			Day	10		
15	2619	(b)(2)	(b) Limitation No civil action may be commenced-- *** (2) under subsection (a)(2) of this section before the expiration of 60 days after the plaintiff has given notice to the Administrator of the alleged failure of the Administrator to perform an act or duty which is the basis for such action or, in the case of an action under such subsection for the failure of the Administrator to file an action under section 2606 of this title, before the expiration of ten days after such notification.	Prerequisite for suit			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
15	6606	(c)(4)	(a) In general Before commencing a Y2K action, except an action that seeks only injunctive relief, a prospective plaintiff in a Y2K action shall send a written notice by certified mail (with either return receipt requested or other means of verification that the notice was sent) to each prospective defendant in that action. The notice shall provide specific and detailed information about-- (1) the manifestations of any material defect alleged to have caused harm or loss; (2) the harm or loss allegedly suffered by the prospective plaintiff; (3) how the prospective plaintiff would like the prospective defendant to remedy the problem; (4) the basis upon which the prospective plaintiff seeks that remedy, and (5) the name, title, address, and telephone number of any individual who has authority to negotiate a resolution of the dispute on behalf of the prospective plaintiff. *** (c) Response to notice (1) In general Within 30 days after receipt of the notice specified in subsection (a) of this section, each prospective defendant shall send by certified mail with return receipt requested to each prospective plaintiff a written statement acknowledging receipt of the notice, and describing the actions it has taken or will take to address the problem identified by the prospective plaintiff. *** (4) Presumptive time of receipt For purposes of paragraph (1), a notice under subsection (a) of this section is presumed to be received 7 days after it was sent.	Prerequisite for suit			Y			Day	7	presumably not many of these suits will be brought in the future	
15	687e	(c)(3)	(3) Judicial reviewNot later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
15	687e	(c)(3)	(3) Judicial review Not later than 10 days after any management official has been suspended from office or prohibited from participation in the management or conduct of the affairs of a licensee, or both, under paragraph (1), that management official may apply to the United States district court for the judicial district in which the home office of the licensee is located, or the United States District Court for the District of Columbia, for a stay of the suspension or prohibition pending the completion of the administrative proceedings pursuant to a notice of intent to remove served upon the management official under subsection (b) of this section, and such court shall have jurisdiction to stay such action.	Time to seek review of agency action			Y			Day	10		
15	77h-1	(d)(2)	(2) Judicial review Within-- (A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.	Time to seek review of agency action			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
15	78u-3	(d)(2)	(2) Judicial review Within-- (A) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (B) 10 days after the Commission renders a decision on an application and hearing under paragraph (1), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under paragraph (1) of this subsection.	Time to seek review of agency action			Y			Day	10		
15	80a-9	(f)(4)(B)	(B) Judicial reviewWithin--(i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or(ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing,the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
15	80b-3	(k)(4)	(B) Judicial review Within-- (i) 10 days after the date the respondent was served with a temporary cease-and-desist order entered with a prior Commission hearing, or (ii) 10 days after the Commission renders a decision on an application and hearing under subparagraph (A), with respect to any temporary cease-and-desist order entered without a prior Commission hearing, the respondent may apply to the United States district court for the district in which the respondent resides or has its principal place of business, or for the District of Columbia, for an order setting aside, limiting, or suspending the effectiveness or enforcement of the order, and the court shall have jurisdiction to enter such an order. A respondent served with a temporary cease-and-desist order entered without a prior Commission hearing may not apply to the court except after hearing and decision by the Commission on the respondent's application under subparagraph (A) of this paragraph.	Time to seek review of agency action			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
16	4307	(c)(2)	(c) Collection If any person fails to pay an assessment of a civil penalty-- (1) within 30 days after the order was issued under subsection (a) of this section, or (2) if the order is appealed within such 30-day period, within 10 days after court has entered a final judgment in favor of the Secretary under subsection (b) of this section, the Secretary shall notify the Attorney General and the Attorney General shall bring a civil action in an appropriate United States district court to recover the amount of penalty assessed (plus costs, attorney's fees, and interest at currently prevailing rates from the date the order was issued or the date of such final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.	Time for government to act			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
16	539b	(b)(5)	(b) Approved plan for mining operations; requirements; review; modification; suspension of activities Because of the large scale of contemplated mining operations and the proximity of such operations to important fishery resources, with respect to mining operations in the Quartz Hill area of the Tongass National Forest, the regulations of the Secretary shall, pursuant to this subsection, include a requirement that all mining operations involving significant surface disturbance shall be in accordance with an approved plan of operations * * * * * * (5) upon a finding by the Secretary that a mining activity conducted as a part of a mining operation exists which constitutes a threat of irreparable harm to anadromous fish, or other foodfish populations or their habitat, and that immediate correction is required to prevent such harm, he may require such activity to be suspended for not to exceed seven days, provided the activity may be resumed at the end of said seven-day period unless otherwise required by a United States district court.	Time for government to act			Y			Day	7		
16	539m-5	(c)(2)(B)	(c) Disputes involving forest service management and Pueblo traditional uses(1) In generalIn a case in which the management of the Area by the Secretary conflicts with a traditional or cultural use, if the conflict does not pertain to a new use subject to the process specified in subsection (a)(2) of this section, the process for dispute resolution specified in this subsection shall apply.(2) Dispute resolution process(A) In general* * *(B) Disputes requiring immediate resolutionIn the case of a conflict that requires immediate resolution to avoid imminent, substantial, and irreparable harm--(i) the party identifying the conflict shall notify the other party and seek to resolve the dispute within 3 days of the date of notification; and(ii) if the parties are unable to resolve the dispute within 3 days--(I) either party may bring a civil action for immediate relief in the United States District Court for the District of New Mexico; and(II) the procedural requirements specified in subparagraph (A) shall not apply.	Prerequisite for suit			Y			Day	3		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	983	(j)(3)	(j) Restraining orders, protective orders.-- (3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.	TRO time limit			Y	Y		Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
18	1467	(c)	(c) Protective orders.-- * * * (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.	TRO time limit				Y		Day	10	red flag on Westlaw indicates July 27, 2006 amendment to subsection (a)(3); does not appear to affect functioning of (c)	Red flag presumably has nothing to do with the narrowing construction adopted in U.S. v. California Publishers Liquidating Corp., 778 F.Supp. 1377 (N.D. Tex 1991), vacated and remanded in relevant part, 10 F.3d 263 (5th Cir. 1993)
18	1514	(a)(2)	(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title. (2) * * * (E) If on two days notice to the attorney for the Government or on such shorter notice as the court may prescribe, the adverse party appears and moves to dissolve or modify the temporary restraining order, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.	Notice to litigants or other entities			Y	Y		Day	2		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	1514	(a)(2)(C)	(a)(1) A United States district court, upon application of the attorney for the Government, shall issue a temporary restraining order prohibiting harassment of a victim or witness in a Federal criminal case if the court finds, from specific facts shown by affidavit or by verified complaint, that there are reasonable grounds to believe that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.(2) * * *(C) A temporary restraining order issued under this section shall expire at such time, not to exceed 10 days from issuance, as the court directs; the court, for good cause shown before expiration of such order, may extend the expiration date of the order for up to 10 days or for such longer period agreed to by the adverse party.	TRO time limit			Y	Y		Day	10		
18	1963	(d)(2)	(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section-- * * * (2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.	TRO time limit				Y		Day	10		
18	2518		(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.	Notice to litigants or other entities				Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	2518		(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. * * * * * * (5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.	Time for government to act			Y	Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	2518		(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that--(a) an emergency situation exists that involves--(i) immediate danger of death or serious physical injury to any person,(ii) conspiratorial activities threatening the national security interest, or(iii) conspiratorial activities characteristic of organized crime,that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.	Time for government to act			Y	Y		Hour	48		
18	2704	(a)	(a) Backup preservation.--(1) A governmental entity acting under section 2703(b)(2) may include in its subpoena or court order a requirement that the service provider to whom the request is directed create a backup copy of the contents of the electronic communications sought in order to preserve those communications. Without notifying the subscriber or customer of such subpoena or court order, such service provider shall create such backup copy as soon as practicable consistent with its regular business practices and shall confirm to the governmental entity that such backup copy has been made. Such backup copy shall be created within two business days after receipt by the service provider of the subpoena or court order. (2) Notice to the subscriber or customer shall be made by the governmental entity within three days after receipt of such confirmation, unless such notice is delayed pursuant to section 2705(a).	Time for government to act			Y	Y		Day	3	also note period of 'two business days'	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	3060	(b)	(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate judge pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it. (b) The date for the preliminary examination shall be fixed by the judge or magistrate judge at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than-- (1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or (2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.	Time for court to act				Y		Day	10		
18	3125		(a) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that-- (1) an emergency situation exists that involves-- (A) immediate danger of death or serious bodily injury to any person, (B) conspiratorial activities characteristic of organized crime; (C) an immediate threat to a national security interest, or (D) an ongoing attack on a protected computer (as defined in section 1030) that constitutes a crime punishable by a term of imprisonment greater than one year; that requires the installation and use of a pen register or a trap and trace device before an order authorizing such installation and use can, with due diligence, be obtained, and (2) there are grounds upon which an order could be entered under this chapter to authorize such installation and use; may have installed and use a pen register or trap and trace device if, within forty-eight hours after the installation has occurred, or begins to occur, an order approving the installation or use is issued in accordance with section 3123 of this title. (b) In the absence of an authorizing order, such use shall immediately terminate when the information sought is obtained, when the application for the order is denied or when forty-eight hours have lapsed since the installation of the pen register or trap and trace device, whichever is earlier. (c) The knowing installation or use by any investigative or law enforcement officer of a pen register or trap and trace device pursuant to subsection (a) without application for the authorizing	Time for government to act				Y		Hour	48		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
			order within forty-eight hours of the installation shall constitute a violation of this chapter.										
18	3161	(h)	(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence.(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--* * *(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;	Time for government to act				Y		Day	10		
18	3432		A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness, except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.	Notice to litigants or other entities				Y		Day	3	"three entire days"	
18	3486	(a)(9)	(a) Authorization.--(1)(A) In any investigation relating of-- (i)(I) a Federal health care offense; or (II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General, or (ii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, [FN1] if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, the Secretary of the Treasury, may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B). * * * (9) A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(ii) may require production as soon as possible, but in no event less than 24 hours after service of the subpoena.	Notice to litigants or other entities				Y		Hour	24	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	3492	(a)	(a) The testimony of any witness in a foreign country may be taken either on oral or written interrogatories, or on interrogatories partly oral and partly written, pursuant to a commission issued, as hereinafter provided, for the purpose of determining whether any foreign documents sought to be used in any criminal action or proceeding in any court of the United States are genuine, and whether the authentication requirements of the Federal Rules of Evidence are satisfied with respect to any such document (or the original thereof in case such document is a copy). Application for the issuance of a commission for such purpose may be made to the court in which such action or proceeding is pending by the United States or any other party thereto, after five days' notice in writing by the applicant party, or his attorney, to the opposite party, or his attorney of record, which notice shall state the names and addresses of witnesses whose testimony is to be taken and the time when it is desired to take such testimony. In granting such application the court shall issue a commission for the purpose of taking the testimony sought by the applicant addressed to any consular officer of the United States conveniently located for the purpose. In cases of testimony taken on oral or partly oral interrogatories, the court shall make provisions in the commission for the selection as hereinafter provided of foreign counsel to represent each party (except the United States) to the criminal action or proceeding in which the foreign documents in question are to be used, unless such party has, prior to the issuance of the commission, notified the court that he does not desire the selection of foreign counsel to represent him at the time of taking of such testimony. In cases of testimony taken on written interrogatories, such provision shall be made only upon the request of any such party prior to the issuance of such commission. Selection of foreign counsel shall be made by the party whom such foreign counsel is to represent within ten days prior to the taking of testimony or by the court from which the commission issued, upon the request of such party made within such time.	Notice to litigants or other entities				Y		Day	5	see also 10-day limit	
18	3501	(c)	(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.	Time for government to act				Y		Hour	6	red flag on WL - has this portion been invalidated? Apparently not, but need to double-check	1 Fed. Prac. & Proc. Crim.3d § 72 seems to indicate that Dickerson v. U.S., 530 U.S. 428 (2000), invalidated 3501(b) but not 3501(c)

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	3509	(b)(1)(A)	(b) Alternatives to live in-court testimony.--(1) Child's live testimony by 2-way closed circuit television.--(A) In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, or a guardian ad litem appointed under subsection (h) may apply for an order that the child's testimony be taken in a room outside the courtroom and be televised by 2-way closed circuit television. The person seeking such an order shall apply for such an order at least 5 days before the trial date, unless the court finds on the record that the need for such an order was not reasonably foreseeable.	Time to make a motion or other filing				Y		Day	5	red flag on WL - has this portion been invalidated? Apparently not, but need to double-check July 27, 2006 legislation added new subsection (m)	"[F]or more than a decade, circuit courts have recognized that to allow prosecutorial presentation of child witness testimony via two-way closed-circuit television under the Child Victims' and Child Witnesses' Rights Statute, 18 U.S.C. § 3509, the findings of the trial court must satisfy the Craig test in order to satisfy the Confrontation Clause." U S. v. Yates, 438 F.3d 1307, 1313 (11th Cir 2006). This quote, if accurate, indicates that Section 3509's framework still applies, modified by Craig's requirements.
18	3552	(d)	(d) Disclosure of presentence reports.--The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. The court shall provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed.	Notice to litigants or other entities				Y		Day	10		
18	3612	(b)	(b) Information to be included in judgment; judgment to be transmitted to Attorney General.--(1) A judgment or order imposing, modifying, or remitting a fine or restitution order of more than $100 shall include-- *** (2) Not later than ten days after entry of the judgment or order, the court shall transmit a certified copy of the judgment or order to the Attorney General.	Notice to litigants or other entities				Y		Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
18	3664	(d)(5)	(5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.	Time for government to act				Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	3771	(d)	(d) Enforcement and limitations.-- * * * (5) Limitation on relief.--In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if-- (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied, (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged.	Time to make a motion or other filing	Y			Y		Day	10	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning	
18	3771	(d)(3)	(d) Enforcement and limitations.-- (1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter. (2) Multiple crime victims.-- * * * (3) Motion for relief and writ of mandamus.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.	Time for court to act	Y					Hour	72	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	3771	(d)(3)	(d) Enforcement and limitations.--(1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.(2) Multiple crime victims.-- * * *(3) Motion for relief and writ of mandamus.-- * * * The district court shall take up and decide any motion asserting a victim's right forthwith: If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.	TRO time limit				Y		Day	5	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning	
18	4114	(a)	(a) Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return. The Attorney General shall notify the appropriate authority of the country which imposed the sentence, within ten days, of a final decision of a court of the United States ordering the offender released. The notification shall specify the time within which the sentencing country must request the return of the offender which shall be no longer than thirty days.	Notice to litigants or other entities				Y		Day	10		
18	4244	(a)	(a) Motion to determine present mental condition of convicted defendant.--A defendant found guilty of an offense, or the attorney for the Government, may, within ten days after the defendant is found guilty, and prior to the time the defendant is sentenced, file a motion for a hearing on the present mental condition of the defendant if the motion is supported by substantial information indicating that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility. The court shall grant the motion, or at any time prior to the sentencing of the defendant shall order such a hearing on its own motion, if it is of the opinion that there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect for the treatment of which he is in need of custody for care or treatment in a suitable facility.	Time to make a motion or other filing				Y		Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
18	2252A	(c)	(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that-- (1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and (B) each such person was an adult at the time the material was produced; or (2) the alleged child pornography was not produced using any actual minor or minors. No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.	Notice to litigants or other entities				Y		Day	10	red flag on WL - has this portion been invalidated? Apparently not , but need to double-check. July 27, 2006 legislation amended subsection (b) but does not appear to directly affect functioning of (c)	Williams, 444 F.3d 1286, 1309 (11th Cir 2006) found "the PROTECT Act pandering provision, 18 U.S.C. § 2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional". Other negative cases in Keycite do not appear to render subsection c nugatory.
21	853	(e)(2)	(e) Protective orders(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section--* * *(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.	TRO time limit				Y	Y		Day	10	yellow flag on WL -- probably because of proposed legislation, though there are also possible negative decisions which I have not yet reviewed	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
21	880	(d)(3)	(3) A warrant issued pursuant to this section must be executed and returned within ten days of its date unless, upon a showing by the United States of a need therefor, the judge or magistrate judge allows additional time in the warrant. If property is seized pursuant to a warrant, the person executing the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return of the warrant shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person executing the warrant and of the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the person making such inventory, and shall be verified by the person executing the warrant. The judge or magistrate judge, upon request, shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.	Time for government to act			Y	Y		Day	10		
24	326	(a)	(a) Request; determination of right to retain, retention after request If a person who is a patient hospitalized under section 322 or 324 of this title, or his legal guardian, spouse, or adult next of kin, requests the release of such patient, the right of the Secretary, or the head of the hospital, to detain him for care and treatment shall be determined in accordance with such laws governing the detention, for care and treatment, of persons alleged to be mentally ill as may be in force and applicable generally in the State in which such hospital is located, but in no event shall the patient be detained more than forty-eight hours (excluding any period of time falling on a Sunday or legal holiday) after the receipt of such request unless within such time (1) judicial proceedings for such hospitalization are commenced or (2) a judicial extension of such time is obtained, for a period of not more than five days, for the commencement of such proceedings.	Time for government to act			Y			Hour	48	provision explicitly provides for exclusion of Sundays (but not Saturdays) & holidays	
26	5311		It shall be lawful for any internal revenue officer to detain any container containing, or supposed to contain, distilled spirits, wines, or beer, when he has reason to believe that the tax imposed by law on such distilled spirits, wines, or beer has not been paid or determined as required by law, or that such container is being removed in violation of law; and every such container may be held by him at a safe place until it shall be determined whether the property so detained is liable by law to be proceeded against for forfeiture; but such summary detention shall not continue in any case longer than 72 hours without process of law or intervention of the officer to whom such detention is to be reported.	Time for government to act			Y	Y		Hour	72	not clear whether this period would be governed by either the Civil or Criminal Rules	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
26	6861	(g)	(g) Abatement if jeopardy does not exist.--The Secretary may abate the jeopardy assessment if he finds that jeopardy does not exist. Such abatement may not be made after a decision of the Tax Court in respect of the deficiency has been rendered or, if no petition is filed with the Tax Court, after the expiration of the period for filing such petition. The period of limitation on the making of assessments and levy or a proceeding in court for collection, in respect of any deficiency, shall be determined as if the jeopardy assessment so abated had not been made, except that the running of such period shall in any event be suspended for the period from the date of such jeopardy assessment until the expiration of the 10th day after the day on which such jeopardy assessment is abated.	Time for government to act			Y					need to check how this provision works	
26	7429	(b)	(b) Judicial review.--(1) Proceedings permitted.-- * * *the taxpayer may bring a civil action against the United States for a determination under this subsection in the court with jurisdiction determined under paragraph (2).(2) Jurisdiction for determination.--(A) In general.--Except as provided in subparagraph (B), the district courts of the United States shall have exclusive jurisdiction over any civil action for a determination under this subsection.(B) Tax Court.-- * * *(3) Determination by court.-- * * *If the court determines that proper service was not made on the United States or on the Secretary, as may be appropriate, within 5 days after the date of the commencement of the proceeding, then the running of the 20-day period set forth in the preceding sentence shall not begin before the day on which proper service was made on the United States or on the Secretary, as may be appropriate.	Notice to litigants or other entities			Y			Day	5		
26	7482	(a)(2)(A)	(2) Interlocutory orders.-- (A) In general.--When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court.	Time to take appeal from court	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
26	7609		(a) Notice.-- (1) In general.--If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons. (2) Sufficiency of notice.--Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence. * * * (b) Right to intervene; right to proceeding to quash.-- * * * (2) Proceeding to quash.-- (A) In general.--Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons. * * * (h) Jurisdiction of district court; etc.-- (1) Jurisdiction.--The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which may be appealed.	Notice to litigants or other entities			Y			Day	3		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
27	207		The District Courts of the United States, and the United States court for any Territory, of the District where the offense is committed or threatened or of which the offender is an inhabitant or has his principal place of business, are vested with jurisdiction of any suit brought by the Attorney General in the name of the United States, to prevent and restrain violations of any of the provisions of this chapter. Any person violating any of the provisions of section 203 or 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than $1,000 for each offense. The Secretary of the Treasury is authorized, with respect to any violation of this chapter, to compromise the liability arising with respect to such violation (1) upon payment of a sum not in excess of $500 for each offense, to be collected by the Secretary and to be paid into the Treasury as miscellaneous receipts, and (2) in case of repetitious violations and in order to avoid multiplicity of criminal proceedings, upon agreement to a stipulation, that the United States may, on its own motion upon five days' notice to the violator, cause a consent decree to be entered by any court of competent jurisdiction enjoining the repetition of such violation.	Notice to litigants or other entities			Y	Y		Day	5		
28	144		Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.	Time to make a motion or other filing		Y	Y	Y		Day	10		
28	158	note	"(4) Filing of petition with attachment.--A petition requesting permission to appeal, that is based on a certification made under subparagraph (A) or (B) of section 158(d)(2) shall-- "(A) be filed with the circuit clerk not later than 10 days after the certification is entered on the docket of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken; and "(B) have attached a copy of such certification."	Time to take appeal from court	Y					Day	10		temporary provision that will lapse if/when FRAP rule on point takes effect

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	636	(b)	(b)(1) Notwithstanding any provision of law to the contrary-- (A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except [lists exceptions]. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law. (B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [FN1] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement. (C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.	Time to take appeal from court			Y	Y		Day	10	yellow flag on WL -- apparently due to proposed legislation, though there's also negative caselaw re (prior version of?) 636(c)	
28	754		A receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title. Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.	Time to make a motion or other filing			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	1292	(b)	(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.	Time to take appeal from court	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	see also 1292(d)(1) & (2) re Court of International Trade and Court of Federal Claims
28	1292	(d)	(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.	Time to take appeal from court	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
28	1292	(d)	(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.	Time to take appeal from court	Y					Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	1453	(c)(1)	(c) Review of remand orders.-- (1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order. (2) Time period for judgment.--If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3). (3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if-- (A) all parties to the proceeding agree to such extension, for any period of time; or (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days. (4) Denial of appeal.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.	Time to take appeal from court	Y					Day	7	"less" or "more"? See 9th Cir opinion	
28	1453	(c)(3)	(c) Review of remand orders.-- (1) In general.--Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order. * * * (3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if-- (A) all parties to the proceeding agree to such extension, for any period of time, or (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days. (4) Denial of appeal.--If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.	Time for court to act	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	1605	(b)(2)	(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That-- (1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and (2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.	Notice to litigants or other entities			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
28	1715	(b)	(b) In general.--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement * * *	Notice to litigants or other entities			Y			Day	10		
28	1867	(a)	(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.	Time to make a motion or other filing				Y		Day	7		
28	1867	(b)	(b) In criminal cases, before the voir dire examination begins, or within seven days after the Attorney General of the United States discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the Attorney General may move to dismiss the indictment or stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.	Time to make a motion or other filing				Y		Day	7		
28	1867	(c)	(c) In civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury.	Time to make a motion or other filing			Y			Day	7		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	2001	(b)	(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.	Notice to litigants or other entities			Y			Day	10		
28	2107	(c)	(c) * * * In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.	Time to take appeal from court	Y		Y			Day	7		
28	2112	(a)	(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. * * * If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply: (1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first	Time to seek review of agency action	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
			instituted. * * * (3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.										
28	2243		A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * *	Presumptive time for court to act			Y			Day	5	what rules apply?	
28	2243		A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto. The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed. The person to whom the writ or order is directed shall make a return certifying the true cause of the detention. When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed. * * *	Time for government to act			Y			Day	3	what rules apply?	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	2284	(b)(2)	(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body. (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows: (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding. (2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.	Notice to litigants or other entities			Y			Day	5		
28	2349	(b)	(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application.	Notice to litigants or other entities	Y					Day	5	also 60 day period	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	3007	(b)	(a) Authority to sell.--If at any time during any action or proceeding under this chapter the court determines on its own initiative or upon motion of any party, that any seized or detained personal property is likely to perish, waste, or be destroyed, or otherwise substantially depreciate in value during the pendency of the proceeding, the court shall order a commercially reasonable sale of such property.(b) Deposit of sale proceeds.--Within 5 days after such sale, the proceeds shall be deposited with the clerk of the court, accompanied by a statement in writing and signed by the United States marshal, to be filed in the action or proceeding, stating the time and place of sale, the name of the purchaser, the amount received, and an itemized account of expenses.(c) Presumption.--For purposes of liability on the part of the United States, there shall be a presumption that the price paid at a sale under subsection (a) is the fair market value of the property or portion.	Time for government to act			Y			Day	5		re federal debt collection procedure
28	3101	(d)(2)	(a) Application.--(1) The United States may, in a proceeding in conjunction with the complaint or at any time after the filing of a civil action on a claim for a debt, make application under oath to a court to issue any prejudgment remedy. * * * [(d)](2) By requesting, at any time before judgment on the claim for a debt, the court to hold a hearing, the debtor may move to quash the order granting such remedy. The court shall hold a hearing on such motion as soon as practicable, or, if requested by the debtor, within 5 days after receiving the request for a hearing or as soon thereafter as possible.	Presumptive time for court to act			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	re federal debt collection procedure
28	3102	(e)(1)	(e) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of attachment shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the levy.	Time for government to act			Y			Day	5		re federal debt collection procedure
28	3105	(f)(1)	(f) Return of writ; duties of marshal; further return.--(1) A United States marshal executing a writ of sequestration shall return the writ with the marshal's action endorsed thereon or attached thereto and signed by the marshal, to the court from which it was issued, within 5 days after the date of the execution.	Time for government to act			Y			Day	5		re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	3202	(d)	(d) Hearing.--By requesting, within 20 days after receiving the notice described in section 3202(b), the court to hold a hearing, the judgment debtor may move to quash the order granting such remedy. The court that issued such order shall hold a hearing on such motion as soon as practicable, or, if so requested by the judgment debtor, within 5 days after receiving the request or as soon thereafter as possible. The issues at such hearing shall be limited-- (1) to the probable validity of any claim of exemption by the judgment debtor; (2) to compliance with any statutory requirement for the issuance of the postjudgment remedy granted; and (3) if the judgment is by default and only to the extent that the Constitution or another law of the United States provides a right to a hearing on the issue, to-- (A) the probable validity of the claim for the debt which is merged in the judgment, and (B) the existence of good cause for setting aside such judgment.	Presumptive time for court to act			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	re federal debt collection procedure.
28	3203	(d)	(d) Levy of execution.-- (1) In general.--Levy on property pursuant to a writ of execution issued under this section shall be made in the same manner as levy on property is made pursuant to a writ of attachment issued under section 3102(d). * * * (3) Records of United States marshal.-- * * * (C) The United States marshal shall make a written return to the court on each writ of execution stating concisely what is done pursuant to the writ and shall deliver a copy to counsel for the United States who requests the writ. The writ shall be returned not more than-- (i) 90 days after the date of issuance if levy is not made, or (ii) 10 days after the date of sale of property on which levy is made.	Time for government to act			Y			Day	10	also note 90 day period	re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	3203	(g)	(g) Execution sale.--(1) General procedures.--An execution sale under this section shall be conducted in a commercially reasonable manner--(A) Sale of real property.--(i) In general.--(I) Except as provided in clause (ii), real property, or any interest therein, shall be sold, after the expiration of the 90-day period beginning on the date of levy under subsection (d), for cash at public auction at the courthouse of the county, parish, or city in which the greater part of the property is located or on the premises or some parcel thereof.(II) The court may order the sale of any real property after the expiration of the 30-day period beginning on the date of levy under subsection (d) if the court determines that such property is likely to perish, waste, be destroyed, or otherwise substantially depreciate in value during the 90-day period beginning on the date of levy.(III) The time and place of sale of real property, or any interest therein, under execution shall be advertised by the United States marshal, by publication of notice, once a week for at least 3 weeks prior to the sale, in at least one newspaper of general circulation in the county or parish where the property is located. The first publication shall appear not less than 25 days preceding the day of sale. The notice shall contain a statement of the authority by which the sale is to be made, the time of levy, the time and place of sale, and a brief description of the property to be sold, sufficient to identify the property (such as a street address for urban property and the survey identification and location for rural property), but it shall not be necessary for the notice to contain field notes. Such property shall be open for inspection and appraisal, subject to the judgment debtor's reasonable objections, for a reasonable period before the day of sale.(IV) The United States marshal shall serve written notice of public sale by personal delivery, or certified or registered mail, to each person whom the marshal has reasonable cause to believe, after a title search is conducted by the United States, has an interest in property under execution, including lienholders, co-owners, and tenants, at least 25 days before the day of sale, to the last known address of each such person.* * *(B) Sale of personal property.--* * *(ii)(I) Except as provided in subclause (II), personal property, or any interest therein, shall be sold after the expiration of the 30-day period beginning on the date of levy under subsection (d).(II) The court may order the sale of any personal property before the expiration of such 30-day period if the court determines that such property is likely to perish, waste, be destroyed, or otherwise substantially depreciate in value during such 30-day period.(iii) Notice of the time and place of the sale of personal property shall be given by the United States marshal by posting notice thereof for not less than 10 days successively immediately before the day of sale at the courthouse of any county, parish, or city, and at the place where the sale is to be made.* * *	Notice to litigants or other entities			Y			Day	10	also note other time periods	re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	3205	(c)(2)	(c) Procedures applicable to writ.-- (1) Court determination.--If the court determines that the requirements of this section are satisfied, the court shall issue an appropriate writ of garnishment. (2) Form of writ.--The writ shall state-- (A) The nature and amount of the debt, and any cost and interest owed with respect to the debt. (B) The name and address of the garnishee. (C) The name and address of counsel for the United States. (D) The last known address of the judgment debtor. (E) That the garnishee shall answer the writ within 10 days of service of the writ. (F) That the garnishee shall withhold and retain any property in which the debtor has a substantial nonexempt interest and for which the garnishee is or may become indebted to the judgment debtor pending further order of the court.	Time to make a motion or other filing			Y			Day	10		re federal debt collection procedure
28	3205	(c)(5)	(5) Objections to answer.--Within 20 days after receipt of the answer, the judgment debtor or the United States may file a written objection to the answer and request a hearing. The party objecting shall state the grounds for the objection and bear the burden of proving such grounds. A copy of the objection and request for a hearing shall be served on the garnishee and all other parties. The court shall hold a hearing within 10 days after the date the request is received by the court, or as soon thereafter as is practicable, and give notice of the hearing date to all the parties.	Presumptive time for court to act			Y			Day	10	see also 20 day period	re federal debt collection procedure
28	3205	(c)(7)	(7) Disposition order.--After the garnishee files an answer and if no hearing is requested within the required time period, the court shall promptly enter an order directing the garnishee as to the disposition of the judgment debtor's nonexempt interest in such property. If a hearing is timely requested, the order shall be entered within 5 days after the hearing, or as soon thereafter as is practicable.	Presumptive time for court to act			Y			Day	5		re federal debt collection procedure
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee. (B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Presumptive time for court to act			Y			Day	10		re federal debt collection procedure

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee.(B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Time for government to act			Y			Day	10		re federal debt collection procedure
28	3205	(c)(9)	(9) Accounting.--(A) While a writ of garnishment is in effect under this section, the United States shall give an annual accounting on the garnishment to the judgment debtor and the garnishee. (B) Within 10 days after the garnishment terminates, the United States shall give a cumulative written accounting to the judgment debtor and garnishee of all property it receives under a writ of garnishment. Within 10 days after such accounting is received, the judgment debtor or garnishee may file a written objection to the accounting and a request for hearing. The party objecting shall state grounds for the objection. The court shall hold a hearing on the objection within 10 days after the court receives the request for a hearing, or as soon thereafter as is practicable.	Time to make a motion or other filing			Y			Day	10		re federal debt collection procedure
29	107		No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect-- *** *** Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. ***	TRO time limit			Y			Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
29	160	(l)	Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b)(7) of this title if a charge against the employer under section 158(a)(2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b)(4)(D) of this title.	TRO time limit			Y			Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
29	662	(b)	(a) Petition by Secretary to restrain imminent dangers; scope of orderThe United States district courts shall have jurisdiction, upon petition of the Secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations, or where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.(b) Appropriate injunctive relief or temporary restraining order pending outcome of enforcement proceeding; applicability of Rule 65 of Federal Rules of Civil ProcedureUpon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this chapter. The proceeding shall be as provided by Rule 65 of the Federal Rules, Civil Procedure, except that no temporary restraining order issued without notice shall be effective for a period longer than five days.	TRO time limit			Y			Day	5		
29	2937	(a)	(1) Petition With respect to any final order by the Secretary under section 2936 of this title by which the Secretary awards, declines to award, or only conditionally awards, financial assistance under his [FN1] chapter, or any final order of the Secretary under section 2936 of this title with respect to a corrective action or sanction imposed under section 2934 of this title, any party to a proceeding which resulted in such final order may obtain review of such final order in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days after the date of issuance of such final order. (2) Action on petition The clerk of the court shall transmit a copy of the review petition to the Secretary who shall file the record on which the final order was entered as provided in section 2112 of Title 28. The filing of a review petition shall not stay the order of the Secretary, unless the court orders a stay. Petitions filed under this subsection shall be heard expeditiously, if possible within 10 days after the date of filing of a reply to the petition.	Presumptive time for court to act	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
30	40		All affidavits required to be made under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of Title 43 may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.	Notice to litigants or other entities			Y			Day	10		
30	818	(b)	(b) Jurisdiction, relief; findings of Commission or Secretary In any action brought under subsection (a) of this section, the court shall have jurisdiction to provide such relief as may be appropriate. In the case of an action under subsection (a)(2) of this section, the court shall in its order require such assurance or affirmative steps as it deems necessary to assure itself that the protection afforded to miners under this chapter shall be provided by the operator. Temporary restraining orders shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce any order under paragraph (1) of subsection (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless prior thereto, the district court granting such relief sets it aside or modifies it. In any action instituted under this section to enforce an order or decision issued by the Commission or the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Commission or the Secretary, as the case may be, if supported by substantial evidence on the record considered as a whole, shall be conclusive.	TRO time limit			Y			Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
30	1734	(c)(2)	(2) Any rent, royalty, or interest recovered by a State under subsection (a) of this section shall be deposited in the Treasury of the United States in the same manner, and subject to the same requirements, as are applicable in the case of any rent, royalty, or interest collected by an officer or employee of the United States, except that such amounts shall be deposited in the Treasury not later than 10 days after receipt by the State.	Time for government to act			Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
31	3542	(a)	(a) A marshal carrying out a distress warrant issued under section 3541 of this title shall seize the personal property of the official and sell the property after giving 10 days notice of the sale. Notice shall be given by posting an advertisement of the property to be sold in at least 2 public places in the town and county in which the property was taken or the town and county in which the owner of the property resides. If the property does not satisfy the amount due under the warrant, the official may be sent to prison until discharged by law.(b)(1) The amount due under a warrant is a lien on the real property of the official from the date the distress warrant is issued. The lien shall be recorded in the office of the clerk of the appropriate district court until discharged under law.(2) If the personal property of the official is not enough to satisfy a distress warrant, the marshal shall sell real property of the official after advertising the property for at least 3 weeks in at least 3 public places in the county or district where the property is located. A buyer of the real property has valid title against all persons claiming under the official.(c) The official shall receive that part of the proceeds of a sale remaining after the distress warrant is satisfied and the reasonable costs and charges of the sale are paid.	Notice to litigants or other entities			Y			Day	10	not entirely clear whether such action by the marshal occurs in the course of a proceeding to which the FRCP would apply	
38	7292	(b)(1)	(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.	Time to take appeal from court	Y					Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
42	1971	(e)	(d) Jurisdiction, exhaustion of other remedies The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law. (e) Order qualifying person to vote; application, hearing, voting referees; transmittal of report and order; certificate of qualification; definitions * * * An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote. * * * The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings * * *. Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.	Time for court to act			Y			Day	10	yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
42	1971	(e)	(d) Jurisdiction, exhaustion of other remedies The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law. (e) Order qualifying person to vote; application, hearing; voting referees; transmittal of report and order; certificate of qualification; definitions * * * An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effectiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote. * * * The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 3331 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings * * *. Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.	Time for government to act			Y			Day	10	yellow flag in WL apparently relates to proposed legislation and perhaps also to July 27, 2006 legislation that named this provision	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
43	1062		It shall be the duty of the United States attorney for the proper district, on affidavit filed with him by any citizen of the United States that section 1061 of this title is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also conferred on any United States district court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this chapter, and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.	Time to make a motion or other filing			Y			Day	5		
45	159		First. Filing of award The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate. Second. Conclusiveness of award, judgment An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties. * * * Fifth. Appeal, record At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.	Time to make a motion or other filing	Y		Y			Day	10		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
45	159		First. Filing of award The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate. Second. Conclusiveness of award; judgment An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties. * * * Fifth. Appeal; record At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.	Time to take appeal from court	Y		Y			Day	10		
46	10706		When a seaman dies in the United States and is entitled at death to claim money, property, or wages from the master or owner of a vessel on which the seaman served, the master or owner shall deliver the money, property, and wages to a district court of the United States within one week of the seaman's death. If the seaman's death occurs at sea, such money, property, or wages shall be delivered to a district court or a consular officer within one week of the vessel's arrival at the first port call after the seaman's death.				Y			Week	1		
47	402	(d)	(d) Notice to interested parties; filing of record Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.	Notice to litigants or other entities	Y					Day	5		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
49	32707	(c)	(c) Service and impoundment of property.--(1) A warrant issued under this section must be served and proof of service filed not later than 10 days after its issuance date. The judge or magistrate may allow additional time in the warrant if the Secretary of Transportation demonstrates a need for additional time. Proof of service must be filed promptly with a written inventory of the property impounded under the warrant. The inventory shall be made in the presence of the individual serving the warrant and the individual from whose possession or premises the property was impounded, or if that individual is not present, a credible individual except the individual making the inventory. The individual serving the warrant shall verify the inventory. On request, the judge or magistrate shall send a copy of the inventory to the individual from whose possession or premises the property was impounded and to the applicant for the warrant.	Time for government to act			Y	Y		Day	10	not clear whether this is a criminal or civil/admin proceeding	
50	1801	(h)	(h) "Minimization procedures", with respect to electronic surveillance, means-- * * * (4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.					Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	
50	1805	(c)(3)	(3) Special directions for certain orders An order approving an electronic surveillance under this section in circumstances where the nature and location of each of the facilities or places at which the surveillance will be directed is unknown shall direct the applicant to provide notice to the court within ten days after the date on which surveillance begins to be directed at any new facility or place, unless the court finds good cause to justify a longer period of up to 60 days, of-- (A) the nature and location of each new facility or place at which the electronic surveillance is directed, (B) the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place at which the electronic surveillance is directed is or was being used, or is about to be used, by the target of the surveillance; (C) a statement of any proposed minimization procedures that differ from those contained in the original application or order, that may be necessitated by a change in the facility or place at which the electronic surveillance is directed; and (D) the total number of electronic surveillances that have been or are being conducted under the authority of the order.	Time for government to act				Y		Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
50	1805	(f)	(f) Emergency orders Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that-- (1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and (2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists; he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.	Time to make a motion or other filing				Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	
50	1821	(4)(D)	(4) "Minimization procedures" with respect to physical search, means--* * * (D) notwithstanding subparagraphs (A), (B), and (C), with respect to any physical search approved pursuant to section 1822(a) of this title, procedures that require that no information, material, or property of a United States person shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1824 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.					Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
50	1824	(e)	(e) Emergency orders (1)(A) Notwithstanding any other provision of this subchapter, whenever the Attorney General reasonably makes the determination specified in subparagraph (B), the Attorney General may authorize the execution of an emergency physical search if-- (i) a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or the Attorney General's designee at the time of such authorization that the decision has been made to execute an emergency search, and (ii) an application in accordance with this subchapter is made to that judge as soon as practicable but not more than 72 hours after the Attorney General authorizes such search. (B) The determination referred to in subparagraph (A) is a determination that-- (i) an emergency situation exists with respect to the execution of a physical search to obtain foreign intelligence information before an order authorizing such search can with due diligence be obtained, and (ii) the factual basis for issuance of an order under this subchapter to approve such a search exists. (2) If the Attorney General authorizes an emergency search under paragraph (1), the Attorney General shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. (3) In the absence of a judicial order approving such a physical search, the search shall terminate the earlier of-- (A) the date on which the information sought is obtained, (B) the date on which the application for the order is denied; or (C) the expiration of 72 hours from the time of authorization by the Attorney General.	Time to make a motion or other filing				Y		Hour	72	yellow flag on Westlaw -- apparently due to proposed legislation	
50	1843	(a)	(a) Requirements for authorization Notwithstanding any other provision of this subchapter, when the Attorney General makes a determination described in subsection (b) of this section, the Attorney General may authorize the installation and use of a pen register or trap and trace device on an emergency basis to gather foreign intelligence information not concerning a United States person or information to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution if-- (1) a judge referred to in section 1842(b) of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to install and use the pen register or trap and trace device, as the case may be, on an emergency basis, and (2) an application in accordance with section 1842 of this title is made to such judge as soon as practicable, but not more than 48 hours, after the Attorney General authorizes the installation and use of the pen register or trap and trace device, as the case may be, under this section.	Time to make a motion or other filing				Y		Hour	48		

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
50	1843	(c)	(c) Effect of absence of order (1) In the absence of an order applied for under subsection (a)(2) of this section approving the installation and use of a pen register or trap and trace device authorized under this section, the installation and use of the pen register or trap and trace device, as the case may be, shall terminate at the earlier of-- (A) when the information sought is obtained, (B) when the application for the order is denied under section 1842 of this title, or (C) 48 hours after the time of the authorization by the Attorney General.	Time for government to act				Y		Hour	48		
50	1861	(f)(2)	(f)(1) In this subsection--(A) the term "production order" means an order to produce any tangible thing under this section, and(B) the term "nondisclosure order" means an order imposed under subsection (d) of this section.(2)(A)(i) A person receiving a production order may challenge the legality of that order by filing a petition with the pool established by section 1803(e)(1) of this title. Not less than 1 year after the date of the issuance of the production order, the recipient of a production order may challenge the nondisclosure order imposed in connection with such production order by filing a petition to modify or set aside such nondisclosure order, consistent with the requirements of subparagraph (C), with the pool established by section 1803(e)(1) of this title.(ii) The presiding judge shall immediately assign a petition under clause (i) to 1 of the judges serving in the pool established by section 1803(e)(1) of this title. Not later than 72 hours after the assignment of such petition, the assigned judge shall conduct an initial review of the petition. If the assigned judge determines that the petition is frivolous, the assigned judge shall immediately deny the petition and affirm the production order or nondisclosure order. If the assigned judge determines the petition is not frivolous, the assigned judge shall promptly consider the petition in accordance with the procedures established under section 1803(e)(2) of this title.(iii) The assigned judge shall promptly provide a written statement for the record of the reasons for any determination under this subsection. Upon the request of the Government, any order setting aside a nondisclosure order shall be stayed pending review pursuant to paragraph (3).	Time for court to act						Hour	72	do Criminal Rules apply? See 50 USC 1803(f)(1). Yellow flag on westlaw -- apparently due to proposed legislation	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
46 App	1710	(h)	(h) Injunction (1) In connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business. (2) After filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the Commission under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit.	TRO time limit			Y			Day	10	yellow flag on Westlaw -- apparently due to proposed legislation	
CIPA	7		(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information. (b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.	Time for court to act	Y			Y		Day	4	see also 10 day limit.	

Title	Section	Subsection	Nature of deadline	Type	App	Bnkr	Civil	Crim	Evid	Length (Unit)	Length (Number)	Issues	Comments
CIPA	7		(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information. (b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.	Time to take appeal from court	Y			Y		Day	4	see also 10 day limit.	

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-03

As discussed at our April meeting, the Department of Justice has proposed that a new FRAP 28(g) be adopted to bar the submission of "pro se" briefs[1] by represented parties (except when counsel has moved to withdraw under *Anders v. California*, 386 U.S. 738 (1967), or when the party seeks appointment of new counsel). Doug Letter's March 20 letter enclosing that proposal is attached. The DOJ points out that in many instances, the litigant – and the adversary system – are better served when counsel winnows down the arguments and presents only those that are strongest. The DOJ notes that the submission of a supplemental "pro se" brief burdens the government by requiring the government to assess and perhaps respond to all the arguments made in both briefs. The DOJ's proposed rule would require the clerk to forward the "pro se brief" to the party's counsel, who could then seek leave to file a supplemental brief if the "pro se" brief drew counsel's attention to a potentially winning argument. This safeguard of course depends on counsel's recognition of the merit of the argument; but the DOJ points out that in the event of an irreconcilable difference concerning briefing strategy, the litigant can seek the appointment of new counsel. The DOJ notes that the circuits vary in their approaches to the question of supplemental "pro se" briefs, and the DOJ argues that uniform treatment in the FRAP is preferable.

At the April meeting, Fritz Fulbruge undertook to survey the clerks of other circuits to ascertain their experience with "pro se" briefs. I attach a copy of Fritz's June 30 letter reporting the results of that survey. Fritz states that in the Third,[2] Fifth[3] and Eleventh[4] Circuits a "pro se"

---

[1] This memo will use the term "'pro se' brief" to denote a brief filed by a represented litigant on his or her own behalf. I place "pro se" in quotes because the brief is filed by the litigant, but the litigant is represented and thus is not pro se in the ordinary use of the term.

[2] Third Circuit Local Appellate Rule 31.3 provides: "Except in cases in which counsel has filed a motion to withdraw under Anders v. California, 386 U.S. 738 (1967), parties represented by counsel may not file a brief pro se. If a party sends a pro se brief to the court, the clerk shall forward the brief to the party's attorney of record. Counsel may choose to include the arguments in his or her brief or may in the unusual case file a motion to file a supplemental brief,

brief requires a motion for leave, and he indicates that the Third and Eleventh Circuits, like the Fifth, grant few such motions (but because those motions are occasionally granted these circuits do not completely bar "pro se" briefs). Fritz, like Doug, groups the Seventh, Eighth, Ninth and Tenth Circuits together as circuits that discourage filing of "pro se" briefs. Fritz then reports in detail on the practice in the more permissive circuits – the First, Second, Fourth and Sixth Circuits. Fritz states that the First Circuit recently rejected a proposal for a local rule similar to the proposed FRAP 28(g).[5] Fritz reports that in the Second Circuit, the "pro se" brief is ordinarily forwarded to counsel, but occasionally such a brief is accepted and the other side is given time to respond. Fritz provides the Fourth Circuit Clerk's detailed response to his inquiry, showing that motions to file a supplemental "pro se" brief are roughly twice as likely to be granted as denied, but that overall there are relatively few such motions each year.[6] The Sixth Circuit Clerk reported to Fritz that when the topic has been broached, some circuit judges have noted discomfort with the idea of banning "pro se" briefs because occasionally those briefs may make key arguments.

Part I of this memo briefly surveys the relevant doctrinal landscape. Part II discusses the costs of permitting "pro se" supplemental filings, while Part III considers the values served by permitting such filings. Part IV considers possible advantages of permitting each court of appeals to retain discretion to select a circuit-specific approach to the question of "pro se" filings. Part V concludes.

---

if appropriate."

[3] Fifth Circuit Rule 28.7 provides: "Unless specifically directed by court order, pro se motions, briefs or correspondence will not be filed if the party is represented by counsel."

[4] Eleventh Circuit Rule 28-4 provides: "When a party is represented by counsel, the clerk may not accept a brief from the party." *See also* Eleventh Circuit Rule 25-1 ("When a party is represented by counsel, the clerk may not accept filings from the party.").

[5] The First Circuit Clerk indicated that three values underlay that rejection: first, that permitting "pro se" briefs promotes the "pro se" filer's sense of a fair hearing; second, that occasionally the "pro se" brief may contain a good argument; and third, that permitting such filings may lead to the resolution of issues, on direct appeal, that otherwise would require court attention on collateral review.

[6] The Fourth Circuit Clerk mentioned that "pro se" briefs may occasionally raise key issues – as with recent appeals raising *Booker* questions – and indicated that the proposed FRAP 28(g) would conflict with circuit practice and precedent.

I. Applicable doctrine

The Sixth Amendment[7] guarantees indigent criminal defendants[8] the right to government-paid counsel.[9] *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938). If instead a defendant wishes to conduct her own defense at trial, the Sixth Amendment guarantees that choice as well. *See* Faretta v. California, 422 U.S. 806, 821 (1975) (holding that "[t]he Sixth Amendment . . . implies a right of self-representation"). "A defendant's right to self-representation . . . encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." McKaskle v. Wiggins, 465 U.S. 168, 174 (1984). "*Faretta* does not require a trial judge to permit 'hybrid' representation," *id.* at 183,[10] but the court has discretion to do so.[11]

---

[7] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

[8] In this overview, I will focus on defendants in federal criminal prosecutions, on the theory that those defendants are the population most likely to seek to file supplemental "pro se" briefs in the federal courts of appeal.

[9] The right extends to felony defendants, as well as to misdemeanor defendants who ultimately are sentenced to incarceration. *See Right to Counsel*, 35 Geo. L.J. Ann. Rev. Crim. Proc. 465, 465 (2006) (citing cases). As is well known, the right has been incorporated against the state governments, *see id.* (citing *Gideon v. Wainwright*), but state proceedings, as noted above, are not the focus of this memo.

[10] *See also, e.g.,* United States v. McKinley, 58 F.3d 1475, 1480 (10th Cir. 1995) ("[I]t is certainly true that there is no constitutional right to a hybrid form of representation."). If the court employs the mechanism of standby counsel, the defendant's *Faretta* rights impose two constraints: "First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. . . . If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded. Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *Wiggins*, 465 U.S. at 178.

[11] *See, e.g.*, U.S. v. Bergman, 813 F.2d 1027, 1030 (9th Cir. 1987) ("A criminal defendant does not have an absolute right to both self-representation *and* the assistance of counsel. . . . The decision to allow such hybrid representation is within the sound discretion of the judge."); U.S. v. Nivica, 887 F.2d 1110, 1121 (1st Cir. 1989) ("A defendant has no right to hybrid representation. . . . That is not to say that hybrid representation is foreclosed; rather, it is to be employed sparingly and, as a rule, is available only in the district court's discretion."); Cross

The Constitution does not provide a "right to self-representation on direct appeal from a criminal conviction." *Martinez v. Court of Appeal of California, Fourth Appellate District*, 528 U.S. 152, 163 (2000).[12] However, a litigant's right to appear *pro se* in the federal courts has been guaranteed by statute since 1789,[13] and "[i]t is arguable that this language encompasses appeals as well as trials." *Martinez*, 528 U.S. at 158. The *Martinez* Court asserted that the statutory language limits any such right:

> Assuming it does apply to appellate proceedings, however, the statutory right is expressly limited by the phrase "as by the rules of the said courts." 1 Stat. 92. Appellate courts have maintained the discretion to allow litigants to "manage their own causes"--and some such litigants have done so effectively. That opportunity, however, has been consistently subject to each court's own rules.

---

v. U.S., 893 F.2d 1287, 1291-92 (11th Cir. 1990) ("[A]n individual does not have a right to hybrid representation. . . . Rather, the decision to permit a defendant to proceed as co-counsel rests in the sound discretion of the trial court."); U.S. v. Chavin, 316 F.3d 666, 671 (7th Cir. 2002) ("We recognize, along with all other circuits that have considered the question, that there is no Sixth Amendment right to hybrid representation; rather, whether a defendant may act as co-counsel along with his own attorney, is a matter within the discretion of the district court.").

[12] When appellate counsel seeks to withdraw on the ground that the defendant has no colorable arguments for reversal, *Anders* indicates that the defendant has a constitutional right to file a supplemental pro se brief:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court–not counsel–then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Anders v. California, 386 U.S. 738, 744 (1967).

[13] *See* Act of Sept. 24, 1789, § 35, 1 Stat. 73, 92, *currently codified at* 28 U.S.C. § 1654.

Martinez, 528 U.S. at 158.[14]

Any right to self-representation on appeal is by definition a limited right when the appellant is incarcerated. "[A] lay appellant's rights to participate in appellate proceedings have long been limited by the well-established conclusions that he has no right to be present during appellate proceedings, *Schwab v. Berggren*, 143 U.S. 442 (1892), or to present oral argument, *Price [v. Johnston]*, 334 U.S. [266,] 285-286 [(1948)]." *Martinez*, 528 U.S. at 163-64. On some occasions, a court wishing to appoint appellate counsel (due to the complexity of the issues) has served the litigant's interest in proceeding pro se by permitting the litigant to file a supplemental "pro se" brief. *See, e.g., U.S. v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1985) ("Since [an] appellant has a constitutional right to effective assistance of counsel on appeal, but merely a limited statutory right to proceed *pro se*, the procedure adopted by the court strikes an appropriate balance of these potentially conflicting interests: counsel was appointed to brief the case and present oral argument, while appellant was allowed to submit a supplemental brief.") As noted above, in each circuit the court retains discretion to permit the filing of a supplemental "pro se" brief; some circuits have stated their unwillingness to do so, some discourage attempted "pro se" filings, and some take a somewhat more permissive approach.

II. Costs of permitting the filing of "pro se" briefs by represented parties

In a world of limited resources, permitting "pro se" filings by represented parties is not costless. As the DOJ has pointed out, such filings may impose costs on the court, the government and the "pro se" filer.

A. Costs to the court

Courts already burdened with heavy docket pressures may be hard pressed to sort through the arguments made in a "pro se" filing. However, the additional burden imposed by

---

[14] The *Martinez* Court's reading of the language of the First Judiciary Act may not be entirely persuasive. The relevant text provided "[t]hat in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein." 1 Stat. 92. A plausible alternative reading would be that the "rules" in question are those that pertain to "such counsel or attorneys at law as . . . shall be permitted" to litigate in federal court.

In any event, given the Court's reading of the First Judiciary Act's language, a similar conclusion would apply concerning the language of the current statute, which provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654.

supplemental "pro se" filings may be modest relative to the overall number of pro se filings: The number of supplemental "pro se" briefs filed in a circuit is likely to be quite small relative to the number of filings by true pro se litigants.[15] In at least some circuits, the court may rely upon staff attorneys or pro se clerks for help in sifting through the arguments in pro se filings.[16]

It should also be noted that the costs of permitting supplemental "pro se" briefs pale in comparison to the costs that may flow from self-representation, or hybrid representation, at the trial level. For example, trials in which both the defendant and stand-by counsel participate in the presentation of the case are rife with opportunities for prejudicial error to occur in the presence of the jury. If such hybrid representation can be managed at the trial level, the challenge posed by supplemental "pro se" appellate briefs may not be insurmountable. Indeed, permitting supplemental "pro se" filings may sometimes conserve court resources: It is possible that a rule banning supplemental "pro se" briefs might lead to at least a slight increase in the number of requests for appointment of new counsel.[17]

B. Costs to the government

If a court permits a supplemental "pro se" filing, it is natural for the government to feel obliged to respond. Many of the arguments made in such filings may be refuted summarily; but a winning argument may occasionally surface in a "pro se" filing. And such filings may raise a large number of contentions. Those filings, then, will increase the government's workload.

It might be argued, however, that this cost might be counterbalanced to some extent by the considerations discussed in Part II.C. below: To the extent that a "pro se" filing detracts from the persuasiveness with which the defendant's viewpoint is presented, that factor seems likely to benefit the government, in at least some cases, by reducing the defendant's chances of prevailing.

---

[15] "Appeals filed by litigants unrepresented by counsel make up a large part of appellate court filings (more than 40%)." Judith A. McKenna et al., *Case Management Procedures in the Federal Courts of Appeals* 24 (Federal Judicial Center 2000).

[16] *See* McKenna et al., *supra* note 15, at 24-25.

[17] Courts that permit the filing of a supplemental pro se brief sometimes note that fact when denying the appellant's request for a change of counsel. *See, e.g.*, People v. LaValle, 97 N.Y.2d 721,722, 770 N.E.2d 1004, 1004, 744 N.Y.S.2d 114, 114 (N.Y. 2002) ("[T]his Court's decision to allow defendant an opportunity to file a supplemental pro se brief insures that all issues defendant wishes to argue will, in fact, be before the Court for its consideration.").

C. Costs to the would-be "pro se" filer

As the DOJ notes, in many instances the "pro se" filer's strategic interests would be better served if no "pro se" filing were made. Experienced counsel know that briefs are more effective when they press only the strongest reasons for reversal and omit the others.[18] If counsel has made the right judgment calls concerning the relative strength of the potential arguments on appeal, then counsel's brief will focus only on the strongest arguments. In such cases, filing a supplemental "pro se" brief can distract from, and dilute the force of, the appellant's most promising arguments.

In addition, to the extent that the filer's lawyer must devote time and attention to the arguments advanced in the "pro se" filing – rather than to arguments selected by the lawyer – the lawyer's overall performance may suffer. This is particularly likely to be true if the lawyer already faces serious time constraints. On the other hand, one might argue that a ban on "pro se" supplemental filings would require the lawyer to spend more rather than less time addressing the arguments that the client wishes to make, since the client's only options would be to try to persuade the lawyer to assert those arguments – or to seek appointment of new counsel.

III. Values served by permitting the filing of "pro se" briefs by represented parties

Writing with respect to trial-level proceedings, the Court has observed that "[t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *McKaskle v. Wiggins*, 465 U.S. 168, 176 (1984) (holding, with respect to trial-level proceedings, that "[b]oth of these objectives can be achieved without categorically silencing standby counsel"). Similar values may be served by permitting a represented defendant to file a supplemental "pro se" appellate brief.

A. Raising valid arguments

Though many instances may be found in which a court of appeals summarily rejects the arguments made in a supplemental "pro se" brief,[19] every so often such a brief makes a winning

---

[18] *See, e.g.*, Mark I. Levy, "Effective Briefs," National Law Journal, September 21, 2006 (citing judges who have made this point).

[19] Sometimes the court mentions the arguments made in a supplemental "pro se" brief only to reject them in short order. *See, e.g.*, United States v. Betancourt-Arretuche, 933 F.2d 89, 96 (1st Cir. 1991). At other times, the court devotes a paragraph or two to explaining why it rejects arguments made in the "pro se" brief. *See, e.g.*, Enwonwu v. Gonzales, 438 F.3d 22, 28 n.5 (1st Cir. 2006).

argument that counsel failed to assert. For example, in *Chacon v. Wood*, the petitioner asserted a due process violation arising from "misrepresentations which induced him to enter an involuntary guilty plea." *Chacon v. Wood*, 36 F.3d 1459, 1466 (9th Cir. 1994), *superseded on other grounds by* 28 U.S.C. § 2253(c). "Chacon's appointed counsel appear[ed] to assume that the district court's grant of a certificate of probable cause, which was explicitly limited to the ineffective assistance issue, prevent[ed the Court of Appeals] from hearing the due process claim." *Id.* The court rejected "the manifestly erroneous concession in the initial brief prepared by appointed counsel," *id.* at 1467 n.4, and credited instead the argument pressed by Chacon in his supplemental "pro se" brief, *see id.* at 1466. Addressing the merits, the court held that Chacon was entitled to an evidentiary hearing on his due process claim. *See id.* at 1470.

B. Resolving issues on direct appeal

Permitting the filing of a supplemental "pro se" brief would enable the court to address, on direct appeal, arguments that otherwise might be asserted in a collateral proceeding. An attorney's refusal to assert such an argument on direct appeal may not constitute ineffective assistance of counsel. *See Jones v. Barnes*, 463 U.S. 745, 754 (1983) (holding that counsel's failure "to raise every 'colorable' claim suggested by a client" did not constitute ineffective assistance). If a court on collateral review were to consider the argument procedurally defaulted because petitioner's counsel on direct review had refused to raise it – and if the court also held that counsel's performance was not constitutionally ineffective and thus did not provide a ground for showing "cause" for the default – then that attorney's decision would have denied the petitioner the opportunity to obtain review of the argument.[20] It is, however, possible that a court would fail to find procedural default if the petitioner had attempted to file a supplemental "pro se" brief raising the issue.[21] In that event, it is possible that the petitioner could raise the

---

[20] *See* United States v. Frady, 456 U.S. 152, 167 (1982) (holding that the *Sykes* cause-and-prejudice standard applies in collateral-review proceedings under 28 U.S.C. § 2255).

[21] The case of Eric Clemmons is illustrative. Clemmons was convicted of stabbing a fellow inmate in Missouri state prison, and he was sentenced to death. *See* Clemmons v. Delo, 124 F.3d 944, 945 (8th Cir. 1997). His federal habeas petition was denied by the district court on the ground of procedural default. *See id.* The Court of Appeals initially affirmed, but then granted panel rehearing, reversed, and remanded with instructions to grant Clemmons' petition. *See id.* at 956. The Court of Appeals held that there had been both a *Brady* violation and a violation of the Confrontation Clause – violations that Clemmons' counsel had refused to assert in his brief to the Missouri Supreme Court on appeal from the denial of state postconviction relief. *See id.* at 948, 954. In the federal habeas proceeding, the State asserted that both claims were procedurally barred by Clemmons' counsel's failure to raise them on appeal. The Court of Appeals, however, noted that Clemmons had attempted to file a supplemental pro se brief raising a large number of claims, including the *Brady* and Confrontation Clause issues:

argument on collateral review – with a cost to finality that would have been avoided if the petitioner had been permitted to make the supplemental "pro se" filing on direct review.

C. Contributing to the defendant's sense of procedural fairness

Permitting courts the flexibility to accept supplemental "pro se" filings, then, may sometimes help to ensure that the court reaches the right outcome. But such filings may also serve important purposes even if they do not affect the disposition of the appeal.

> . . . Clemmons . . . specifically stated that he wanted all of his issues preserved. Appointed counsel, however, filed a brief in the 29.15 appeal without giving Clemmons an opportunity to review it and without including in the brief all of the issues previously raised in the trial court. Petitioner then wrote counsel and instructed him to file a supplemental brief raising the additional issues. . . . Counsel refused, stating that he had "made every argument on your behalf that I felt could be supported by law and evidence." . . . . Clemmons then made a motion in the Missouri Supreme Court for leave to file a supplemental brief pro se. This motion recites that appointed counsel had filed a brief raising only six points . . . . The motion further states that no fewer than 130 additional points should have been raised. It asks the Court to accept a number of documents "as a supplemental brief in this cause," including the original and first amended 29.15 motions, both of which documents, presumably, were in the record before the Missouri Supreme Court. The Court denied the pro se motion without comment.

Id. at 948. The Court of Appeals held that by attempting to file the supplemental pro se brief, Clemmons had avoided procedural default:

> [D]id Clemmons fairly present his *Brady* claim in the state courts? In the perhaps unique circumstances of this case, we think the answer is yes. It is perfectly true that counsel does not have to present every issue appearing in the record. In fact, it could be bad lawyering to do so, especially when there are so many potential issues. . . . The client, however, is and always remains the master of his cause. Here, Clemmons did the only thing he could do: he tried to bring the issue to the attention of the Missouri Supreme Court himself. We do not criticize that Court for refusing leave to file the supplemental brief. Such matters are within the Court's discretion. Our own practice is usually to refuse leave to file supplemental briefs in cases in which counsel has appeared. The fact remains that Clemmons called the attention of the Missouri Supreme Court to his *Brady* claim, among many others. . . . We therefore hold that the claim was fairly presented, and that the merits are now open for decision on federal habeas corpus.

Id. at 948-49.

Both experimental and field studies have shown that people are more likely to accept an outcome if they believe the process employed to reach that outcome was fair; this is true even when the outcome is adverse to the person surveyed.[22] Admittedly, some have questioned whether the experimental studies' results generalize to the criminal justice context, since the experiments typically involved university students faced with low-stakes proceedings.[23] But studies of participants in the criminal justice system produce similar evidence: Criminal defendants' perceptions concerning procedural fairness impact their acceptance of the outcome.[24] Elements of procedural fairness may include whether the defendant feels he or she was treated

---

[22] *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 284 (2003) (summarizing psychological research suggesting "that people's willingness to accept the constraints of the law and legal authorities is strongly linked to their evaluations of the procedural justice of the police and the courts").

[23] *See, e.g.*, Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 Law & Soc'y Rev. 483, 484 (1988) (noting that reliance on "laboratory simulations, typically using college student subjects," has "led to concerns about the external validity of such research").

[24] Casper et al. (1988) describe the results of a "panel study of male defendants charged with felonies in three cities: Baltimore, Detroit, and Phoenix." Casper et al., *supra* note 23, at 487. The investigator interviewed subjects soon after their arrest and also after the case was concluded; the 1988 article analyzed the interviews with "a subsample of 411 defendants whose cases resulted in conviction by trial or plea." *Id.* at 487-88. The study collected data on "three basic measures of sentence severity: months incarcerated . . . , sentence type, and deviation from expected sentence." *Id.* at 490. The interviewers elicited "the defendant's evaluation of how his sentence compared with those of similar defendants convicted of the same crime." *Id.* at 491. The interviewers asked a number of questions designed to reveal the defendant's view of the fairness of the criminal procedure. *See id.* at 492. And the interviewers asked three questions designed to measure the defendant's satisfaction with the outcome. *See id.* at 492-93. Based on their statistical analysis of the responses, the authors conclude that "[a]cross all three measures of litigant satisfaction, procedural justice makes a significant and independent contribution." *Id.* at 494.

Tyler and Huo (2002) describe a 1998 study based on over 1,600 telephone interviews with people living in Oakland and Los Angeles. *See* Tom R. Tyler & Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation with the Police and Courts 30 (Russell Sage Found'n 2002). The interviewees each had had at least one "personal contact with a legal authority" within the past year, *see id.* – calling the police, being stopped by the police, bringing a court action, or responding to one, *see id.* at 32. 10 percent of the respondents indicated that their most recent such contact involved being a defendant in court. *See id.* at 33 table 3.2. After running regressions on results that included responses to questions designed to elicit views on fairness of procedures, the authors conclude that "[p]rocedural justice is in fact the primary factor that shapes acceptance [of decisions] . . . , and it has more influence than does outcome fairness . . . or outcome favorability . . . . It is also central to satisfaction with decision makers." *Id.* at 55.

with dignity, and whether the defendant believes that his or her voice was heard in the proceeding.[25]

The studies mentioned above focused on respondents' experiences with police and in the plea or trial process, rather than on appeal. Thus, data directly relevant to the question of supplemental "pro se" briefs do not appear to exist. But it seems plausible to infer from the available evidence that when a defendant is convinced that certain arguments should be asserted – and the defendant's counsel refuses to assert those arguments – the defendant is more likely to believe that he had a fair hearing if he has been permitted to file a supplemental "pro se" brief.

This consideration is independent of whether a court believes that the defendant's strategic interests would be best served by omitting the "pro se" brief. It could be argued that a defendant ought not to perceive a ban on "pro se" briefs as unfair, since in many or most cases "pro se" briefing will not actually help the defendant's case. Thus, the *Martinez* Court asserted that "[t]he requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court." *Martinez*, 528 U.S. at 163. But a defendant who is convinced that a certain argument is worth pressing may be more satisfied with a process in which that argument is considered and rejected than with a process in which that argument is ignored because the defendant's counsel refused to assert it and because supplemental "pro se" briefs are banned.

IV. The courts of appeals' discretion concerning supplemental "pro se" filings

As discussed in Part II, supplemental "pro se" filings by represented defendants impose costs on the court, the government and, often, the defendant. But as Part III has noted, a court's willingness to accept such filings may sometimes help the court to reach the right result; may help to aid the resolution of issues on direct rather than collateral review; and may help to give the defendant a sense that the appellate procedure was fair. This Part considers factors suggesting that it may be useful for the courts of appeals to retain discretion to determine how to handle supplemental "pro se" filings.

How the costs and benefits balance out may vary from circuit to circuit, depending partly

---

[25] For example, the Tyler and Huo study asked a question designed to elicit whether respondents felt that they had input into the proceedings ("I had an opportunity to describe my situation before he/she made a decision about how to handle it."). *Id.* at 85. Labeling this "process control," the authors ran regressions designed to test whether this attribute had independent impact on respondents' acceptance of outcomes. The authors found that "[a]lthough control judgments have no direct influence on decision acceptance, they have an indirect influence in that they affect judgments of trust and procedural justice, the quality of decision making procedures, the quality of the treatment received, and outcome favorability and fairness." *Id.* at 86.

on such factors as the circuit's caseload, the court resources available to handle pro se filings, and the quality of lawyering by those representing criminal defendants on appeal. This diversity is reflected in the differing approaches adopted by the circuits. Nor does the need for nationwide uniformity seem as compelling here as in the case of divergent briefing requirements. Circuit-to-circuit differences in the treatment accorded a supplemental "pro se" filing appear unlikely to trip up an unsuspecting practitioner who practices in multiple circuits. Such differences will not result in any lawyer's brief being bounced. And the lawyers involved (both for the government and for the defense) are likely to be experienced attorneys who are familiar with the practice in the relevant circuit.

Martinez, of course, does not speak directly to the question at issue here; but its discussion of related issues is instructive. Though some aspects of the *Martinez* Court's reasoning do support an argument against supplemental "pro se" appellate briefs, the decision can also be read to support the notion that decisionmaking concerning such filings should be decentralized – and thus that discretion to accept such filings should remain in the federal courts of appeals.

In *Martinez*, the Court examined three arguments that underpinned the holding in *Faretta*, and found two of those three arguments unpersuasive in the context of appeals. First, the Court held that the historical pedigree of self-representation on appeal was weaker than that of self-representation at trial.[26] *See* 528 U.S. at 158-59. Second, "[t]he *Faretta* majority's reliance on the structure of the Sixth Amendment" was irrelevant, because "[t]he Sixth Amendment does not include any right to appeal." *Id.* at 160. The Court conceded that the third consideration – "respect for individual autonomy" – was, "of course, also applicable to an appellant seeking to manage his own case": "On appellate review, there is surely a similar risk that the appellant will be skeptical of whether a lawyer, who is employed by the same government that is prosecuting him, will serve his cause with undivided loyalty. Equally true on appeal is the related observation that it is the appellant personally who will bear the consequences of the appeal." *Id.* at 160. But because the Sixth Amendment is inapplicable, the only possible source of a constitutional right to self-representation on appeal would be the Due Process Clause. "Under the practices that prevail in the Nation today," the Court was "entirely unpersuaded that the risk of either disloyalty or suspicion of disloyalty is a sufficient concern to conclude that a constitutional right of self-representation is a necessary component of a fair appellate proceeding." *Id.* at 161.

The *Martinez* Court gave a number of reasons in support of its holding that there is no due process right to self-representation on appeal. It stated that even a bad lawyer will usually do

---

[26] The *Martinez* Court seemed dubious about the *Faretta* Court's historical argument, even as applied to trial-level proceedings: "[W]hile *Faretta* is correct in concluding that there is abundant support for the proposition that a right to self-representation has been recognized for centuries, the original reasons for protecting that right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need--although not always the desire--for self-representation." *Martinez*, 528 U.S. at 158.

a better job than a pro se litigant. *See id.* The Court noted that "[e]ven at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer": The right must be timely asserted; the court can appoint standby counsel; and the court need not tutor the pro se defendant in court procedure. *Id.* at 162. On appeal, the Court observed, the defendant no longer enjoys the presumption of innocence, and it is the defendant, not the government, who has haled the parties before the appellate court. *See id.* at 162-63. Thus, the Court concluded that the balance tipped against recognition of a constitutional right:

> Considering the change in position from defendant to appellant, the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*. Yet the overriding state interest in the fair and efficient administration of justice remains as strong as at the trial level. Thus, the States are clearly within their discretion to conclude that the government's interests outweigh an invasion of the appellant's interest in self-representation.

Id. at 163.

This discussion highlights a salient difference between the *Martinez* issue and the question that forms the focus of this memo. When the question is whether to recognize a constitutional right to self-representation on appeal, the Court is undoubtedly mindful of federalism concerns. Whether the Constitution requires states to permit self-representation on appeal is a quite different question from whether federal courts of appeals should have discretion to permit supplemental "pro se" briefs. Recognition of a constitutional right would impose on state appellate courts an approach that may differ from the one they would themselves select. The *Martinez* decision leaves with the states the authority to structure their appellate practice. Seen from this angle, the analogous approach to the present question arguably would be to leave authority on the question of supplemental "pro se" briefs where it currently lies: with the courts of appeals.

V. Conclusion

The factors discussed above suggest reasons why the different circuits might reasonably take divergent approaches to the filing of supplemental "pro se" briefs. Such considerations might lead to the conclusion that a national rule banning supplemental "pro se" briefs is undesirable. If the Committee were to reach that conclusion, though, it should consider whether an alternative measure might address the DOJ's concerns. One possibility – as suggested at the April meeting – might be to create a rule that requires the court to notify the DOJ in the event that the court is inclined to consider granting relief on the basis of an argument made only in the

supplemental "pro se" filing.[27] Under such a rule, the DOJ would not have to address arguments made only in a supplemental "pro se" filing unless and until the court directed the DOJ to brief the relevant questions.

Encls.

---

[27] *Cf.* FRAP 40(a)(3) ("Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.").

06-03

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7513
Washington, D.C. 20530

DNL

Douglas N. Letter
Appellate Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

March 20, 2006

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Re: Proposed Amendments to FRAP Concerning Pro Se Briefs Filed by Represented Parties

Dear Patrick:

I am attaching a proposal approved by the Solicitor General for an amendment to the Federal Rules of Appellate Procedure. As you can see from the attachment, this proposal involves a problem faced by many of our United States Attorneys' Office when parties who are represented by counsel nevertheless file their own pro se briefs in addition to the briefs filed by their attorneys. The procedure in the Circuits varies on how to deal with this situation, with several of them barring the practice by rule. For the reasons stated in our proposal, we believe that a uniform federal rule is warranted to make clear that these briefs should not be accepted by the courts. To provide a 'safety valve,' we propose that the briefs should be forwarded by the clerks' offices to the counsel for the party involved. I look forward to discussing this proposal with you and the FRAP Committee.

I have included both a proposed new rule and an explanation for it.

Sincerely,

Douglas N. Letter

Douglas N. Letter
Appellate Litigation Counsel

Memorandum on Proposed Amendment 28(g) of the Federal Rules of Appellate Procedure, Regarding the Filing of Pro Se Briefs by Represented Parties

Proposed Rule 28(g):

> (g) **Pro Se Briefs**. A party represented by counsel may not file a pro se brief, motion, or other paper, except (1) in response to counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), or (2) to seek the appointment of new counsel. The clerk shall forward any pro se brief, motion, or other paper sent to the court to the party's attorney of record.

In addressing pro se filings by those already represented by counsel, the federal courts of appeals have inconsistent and even contradictory policies. The discrepancies in Circuit practice demonstrate a need for a uniform policy regarding such filings. Because the majority of Circuits generally reject hybrid representation – such a policy has been established by rule in three Circuits and largely accepted in four more – the Federal Rules of Appellate Procedure would benefit from the proposed amendment above.

A. Three Circuits (the Third, Fifth, and Eleventh) have rules precluding the filing of pro se briefs by represented defendants. Specifically, Third Circuit Local Rule 31.3 states:

> Except in [*Anders cases*], parties represented by counsel may not file a brief pro se. If a party sends a pro se brief to the court, the clerk shall forward the brief to the party's attorney of record. Counsel may choose to include the

> arguments in his or her brief or may in the unusual case file a motion to file a supplemental brief, if appropriate.

The Fifth Circuit likewise prohibits the filing of pro se briefs by those already represented by counsel. Fifth Circuit Local Rule 28.7 states: "unless specifically directed by court order, pro se motions, briefs, or correspondence will not be filed if the party is represented by counsel." The Fifth Circuit's prohibition is further elaborated in case law. *See Myers v. Johnson*, 76 F.3d 1330, 1335 (5th Cir. 1996) (holding that there is no constitutional right to hybrid representation on appeal: "[b]y accepting the assistance of counsel the criminal appellant waives his right to present pro se briefs on direct appeal."); *United States v. Ogbonna*, 184 F.3d 447, 449 (5th Cir. 1999) ("allowing the submission of a pro se brief should be discouraged when the appellant is represented by counsel," because, in part, such briefs may contain "frivolous arguments," which "constitute sanctionable conduct."). Finally, the Eleventh Circuit states in Local Rule 25-1: "When a party is represented by counsel, the clerk may not accept filings from the party."

Beyond the three Circuits with established rules prohibiting pro se briefs from represented parties, four more (the Seventh, Eighth, Ninth, and Tenth Circuits) widely discourage the practice. Specifically, the Seventh Circuit has held that pro se briefs should not be accepted on appeal when a party already has counsel. *See United States*

v. Oreye, 263 F.3d 669, 673 (7th Cir. 2001) ("we don't allow representation on appeal * * * because hybrid representation confuses and extends matters."). In the Eighth Circuit, there is a general policy to "refuse to consider pro se filings when a party is represented by counsel." *Hoggard v. Purkett*, 29 F.3d 469, 472 (8th Cir. 1994). The Ninth Circuit has stated in particular cases that individuals may not file pro se briefs if they are already represented. *See, e.g., United States v. Messinger*, 2000 WL 959605, n.3 (9th Cir. 2000) ("Because Messinger is represented by counsel, we do not consider the contentions presented in his pro se brief"). Lastly, the Tenth Circuit has held in several cases that hybrid representation is impermissible. *See United States v. Pearl*, 324 F.3d 1210, 1216 (10th Cir. 2003) ("As Mr. Pearl is represented by counsel, we deny his motion to file an additional pro se supplemental brief which the court received but did not file"); *United States v. Guadalupe*, 979 F.2d 790, 795 (10th Cir. 1992) ("Defendant has brought before us a pro se motion for leave to file a supplemental brief. Because he is represented by thoroughly competent counsel, his motion is out of order and denied").

Although these four Circuits have case law prohibiting pro se filings by represented defendants, these courts recognize exceptions. *See, e.g., United States v. Boyd*, 208 F.3d 638, 641 (7th Cir. 2000), *cert. granted and judgment vacated in part on other grounds*, 531 U.S. 1135 (2001) ("It goes without saying that a

represented litigant has no right to file a pro se brief * * *, and although we can permit such a filing in appropriate circumstances * * *, given the lateness of the filing and the repetitive character of the motion the circumstances are not appropriate"); *Hayes v. Hawes*, 921 F.2d 100, 102 (7th Cir. 1990) ("nothing precludes an appellate court from accepting the pro se brief and considering the arguments contained therein for whatever they may be worth"); *United States v. Sanders*, 341 F.3d 809, 821, n.2 (8th Cir. 2003), *cert. denied*, 540 U.S. 1227 (2004), ("Sanders submitted his own pro se brief to supplement the work of his defense counsel * * *. Even though 'it is not the court's practice to consider pro se briefs filed by parties represented by counsel' * * *we have considered these claims and summarily reject them" quoting *United States v. Peck*, 161 F.3d at 1175 n.2 (1998)); *United States v. Clayton*, 1999 WL 1079627, **3 (10th Cir. 1999) ("We granted defendant's motion for leave to file a supplement pro se brief even though he is represented by counsel"). Despite the occasional exceptions, overall these four Circuits have generally adhered to their policies prohibiting hybrid representation.

While the majority of Circuits have restricted pro se filings by parties with counsel, some Circuits (the First, Second, Fourth, and Sixth Circuits) routinely, by contrast, allow such parties to file pro se briefs. Furthermore, these Circuits have permitted supplemental pro se filings even after the Government has filed its response

to the opening brief filed by counsel.

In short, the Circuits have varying rules and practices with regard to allowing or disallowing represented defendants to file pro se briefs. We believe that this type of conflicting procedural practice is inappropriate. We can see no legitimate reason for the Circuits to treat litigants differently on this type of matter. Therefore, we propose one uniform rule in the form of an amendment to FRAP 28(g). The optimal amendment would give deference to policies accepted by the majority of Circuits. Thus, the Federal Rules of Appellate Procedure should be amended to prohibit additional filings by an individual who is already represented by counsel, except to change or keep counsel, as stated in our proposal above.

B. Adopting such an amendment violates no constitutional rights and would help preserve our current adversarial system.

A defendant has "no right to hybrid representation" at the trial level. *United States v. Nivica*, 887 F.2d 1110, 1121 (1st Cir. 1989). *See also McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984) ("A [pro se] defendant does not have a constitutional right to choreograph special appearances by counsel"). In reviewing claims that the district court erred in denying hybrid representation at trial, courts of appeals have recognized that the right to counsel and the corresponding right to proceed without counsel are "mutually exclusive," *Nivica*, 887 F.2d at 1121, and have held that a

district court should allow such representation at trial "sparingly." *Ibid.*

The Supreme Court's decision in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), suggests that hybrid representation, available in rare circumstances at trial, should not be available on appeal. In *Martinez*, the Supreme Court held that a defendant has no constitutional right to self representation on appeal. 528 U.S. at 163. In so ruling, the Court found that, at the appellate level, the Government's interest in ensuring the integrity and efficiency of the appellate process outweighs the defendant's interest in self-representation. 528 U.S. at 162. (We note that, in the federal system, there is a statutory right to self-representation (*see* 28 U.S.C. § 1654), which the Supreme Court assumed, without deciding, might extend to appeals. But the Court made the point that, if this statute does so apply, it allows the courts of appeals to limit pro se appearance by rule. 528 U.S. at 158.) Given *Martinez* and the case law on hybrid representation at the trial level, it seems logical to conclude that a defendant has no right to such representation on appeal.

Beyond there being no constitutional right to hybrid representation on appeal, there is a good reason to prohibit it: to protect the main goals of the adversarial system.

First and foremost, supplemental pro se submissions ignore the vital role that appellate counsel play in selecting the appropriate issues for appeal. *See Jones v.*

Barnes, 463 U.S. 745, 751-52 (1983). An appellate attorney has no duty to raise every possible claim. 463 U.S. at 751. Indeed, appealing a multitude of issues "runs the risk of burying good arguments * * * in a verbal mound made up of strong and weak contentions." 463 U.S. at 753. The "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986), quoting *Jones*, 463 U.S. at 751. Allowing represented defendants to file pro se briefs raising claims beyond those deemed appropriate by counsel interferes with counsel's ability to perform this vital winnowing role, dilutes counsel's arguments, and ultimately undermines counsel's ability to present an effective, coherent, and professional defense.

Second, a system that allows represented defendants to file supplemental briefs freely undermines the courts' efforts to maintain efficient functioning. With limited resources, appellate courts can best manage their massive case loads by focusing on the most important claims in each case, rather than being required to sift through numerous superfluous, unmeritorious, or repetitive claims. The practice already followed in seven Circuits means that counsel and clients must make efforts to resolve disputes prior to the filing of appellate briefs, while continuing to protect the rights of the defendant. Our suggested amendment still permits a party to seek

replacement counsel when counsel and the party are unable to reach agreement about the handling of the appeal, or when the attorney/client relationship otherwise fails. Furthermore, the proposed rule in no way prohibits appellate counsel from seeking leave to file a supplemental brief when, in an extraordinary circumstance, it becomes apparent that a viable argument has been missed; the rule is narrowly tailored to preclude only wasteful hybrid representation, while guarding party rights with regard to counsel.

Third, the necessity to respond to issues and arguments raised in pro se briefs unduly burdens counsel for the United States. Allowing a defendant to file his own separate brief often leads to improper supplementation of the issues, confusion, and evasion of page limits and legal requirements for preserving issues for proper appellate review.

C. Our proposed rule would also be beneficial to parties who might otherwise undermine their appeals. In every stage of our justice system – both in trial and on appeal – parties face numerous serious challenges when representing themselves. Regarding defendants acting pro se at trial, the Supreme Court stated that it is "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Faretta v. California*, 422 U.S. 806, 834 (1975). The difficulties encountered by pro se litigants are only

exacerbated on appeal. According to the Supreme Court of Wisconsin, "rejecting * * * hybrid representation promotes orderly postconviction relief proceedings for several reasons." *State of Wisconsin v. Debra A.E.*, 188 Wis.2d 111, 138 (1994). Primarily, "the arguments raised in a pro se brief may contradict and undermine the issues advanced in the counsel's brief * * *." *Ibid.* And, as detailed in *Ogbonna*, "[t]he brief submitted by Ogbonna plainly demonstrates why allowing the submission of a pro se brief should be discouraged when the appellant is represented by counsel. The argument in Ogbonna's supplemental brief relies on [a] defunct holding * * *." *Ogbonna*, 184 F.3d at 449. Therefore limiting a defendant's ability to file pro se briefs when already represented by counsel would ensure that the defendant does not undermine the coherent set of arguments being presented on his behalf.

D. Finally, for a defendant's interest, it is critical that key safeguards remain in place during the appellate process. Because counsel do sometimes overlook viable issues on appeal, it is imperative that parties be able to file papers with the clerk to forward to counsel, which is provided for in our proposal.

* * * * * * * *

In sum, because of the current procedural conflict among the Circuits, a uniform national rule against hybrid appellate representation is warranted. Our proposed rule should help efficient court functioning, while protecting the interests

of parties, both when their attorneys have made appropriate professional judgments regarding the appeal, and when their attorneys have made mistakes.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK OF COURT

TEL. 504-310-7654
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 30, 2006

Professor Catherine T. Struve
University of Pennsylvania School of Law
3400 Chestnut Street
Philadelphia, PA 19104

Dear Professor Struve:

At the April 28, 2006, Appellate Rules Committee meeting Doug Letter, Department of Justice, proposed an amendment to FED. R. APP. P. 28(g) regarding the filing of pro se briefs by represented parties, in non-Anders type cases.

At the committee's request I have surveyed the other appellate court clerks on this proposal. Mr. Letter notes that the Third, Fifth and Eleventh Circuits have rules "precluding the filing of pro se briefs by represented defendants." The word "precluding" however may overstate the effect of our rule at least. In practice, a represented party can move for permission to file a pro se brief. Although we grant very few of these motions, we do not foreclose completely a represented litigant from getting access to the court via a pro se brief. I understand the Third and Eleventh Circuits have similar practices.

Mr. Letter further notes the Seventh, Eighth, Ninth and Tenth Circuits, have case law which "widely discourage[s]" represented parties from filing pro se briefs. Again, there is no absolute preclusion of a represented litigant from ever filing a pro se brief. However, the Eighth Circuit clerk states that "we generally do not permit any pro se briefing after the government has filed its brief." This measure presumably protects the government from not being able to refute an argument raised in a pro se brief.

Finally, Mr. Letter comments the First, Second, Fourth and Sixth Circuits "routinely ... allow such parties to file pro se briefs." Because these circuits are the most liberal in allowing such filings, I provide expanded comments.

1. The First Circuit clerk reports that in January 2003, the United States Attorneys' Offices in that circuit sent a joint letter proposing a local rule change to prohibit represented defendants from filing pro se supplemental briefs. The arguments presented were substantially similar to those by Mr. Letter. The court discussed the

proposal and decided they did not want to change their policy. The clerk stated:

> I think the court believes that there is institutional value in permitting a defendant faced with a long prison term the opportunity to express his/her own views and that, in addition, on rare occasions a pro se criminal defendant may raise a valid argument not recognized by counsel .... Plus, there is a certain efficiency in having the pro se supplemental arguments raised and addressed on direct appeal rather than in a collateral proceeding, which itself, will result in an appeal.

2. The Second Circuit clerk responded that in practice they generally send a pro se filing to the counsel providing representation and advise the party the filing has been forwarded. There are times when the pro se filing is sent to a panel for consideration and a decision whether the government needs to respond. If so, the panel routinely grants additional time. The clerk believes the court needs flexibility to consider a pro se filing because the litigant may come up with a valid argument.

3. The Fourth Circuit Clerk provided the most detailed response. She reports that in 2005 the court granted 23 motions to file pro se supplemental briefs and denied 10 such motions. In 2004, the numbers were similar with 22 granted and 13 denied. The clerk then stated in part that:

> A rule that would entirely remove the Court's discretion to accept a pro se filing, especially in a criminal context where failure to raise an argument results in a waiver, would significantly change the landscape. For example, we received Booker remands from the Supreme Court where the Booker claim was raised only by the defendant pro se in a petition for rehearing or a certiorari petition. Although reviewing and ruling on motions to file pro se supplemental briefs takes some time, the filings are not so numerous that they could be considered a significant workload factor. Generally, the pro se supplemental briefs fail to raise any non-frivolous issues, and it would be extremely rare for the government to be called upon to respond (or feel they needed to respond) to a pro se supplemental brief. The court defers the motion for leave to file pending review on the merits and typically rules on the motion when it issues the opinion--either granting it and finding the arguments raised to be without merit or denying leave to file. Upon receipt of the Booker Supreme Court remands, the Court did direct supplemental briefing where needed on the Booker issue.
>
> Under our current rules and practice, the DOJ proposal would conflict with Local Rule 46(d), which provides the criminal defendant with an opportunity to respond before the Court rules on counsel's motion to withdraw on the basis that the filing of a petition for writ of certiorari would be frivolous. It would also conflict with our current practice of accepting pro se petitions for rehearing in criminal cases--a practice similar to that of the Supreme Court in accepting pro se petitions for certiorari. It would also be at odds with our decision in United

States v. Gillis, 773 F.2d 549 (4th Cir. 1985), which stated that a pro se brief can provide a means of protecting the limited statutory right to proceed pro se on appeal.

Although DOJ's proposed amendment has not been formally considered by the Court, I do not have the impression that the current motions to file pro se supplemental briefs are so burdensome that there is a perceived need for change.

4. The Sixth Circuit clerk reports:

> Whenever the subject has come up several of our judge have expressed enough discomfort with a policy that would disallow pro se briefs by represented litigants, except in Anders cases, attempts to have counsel replaced, or in unusual circumstances, that no change in policy has resulted .... We had a criminal case ... in which the appellant filed his own brief (with leave of the panel) and made a very persuasive argument on an issue which counsel had either ignored or not given enough attention ...[T]his certainly fortified the feeling among some judges that pro se briefs by represented litigants probably ought not be prohibited.

I recognize that the clerks' comments and observations do not represent the final word of the judges of the respective courts, and no clerk has reported a vote by the judges on any of the courts on this specific proposal. Nonetheless, I would like to think that the clerks have a good sense of their court's views.

No clerk reports that handling requests by represented litigants to file a pro se brief is an onerous burden and all suggest that when a request is granted, some allowance is made for the government to file a response, if deemed necessary. If DOJ has specific instances where they believe their interests were adversely affected by allowance of a pro se brief, I believe the clerks would be interested in this information.

Please let me know if you would like further information or a more detailed response.

Sincerely,

Fritz Fulbruge

cc: Judge Carl E. Stewart
Mr. Peter McCabe
Mr. Douglas Letter

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-04

As we briefly discussed at our April 2006 meeting, Chief Judge Michel and Judge Dyk of the U.S. Court of Appeals for the Federal Circuit have proposed that the FRAP be amended to require that amicus briefs indicate whether counsel for a party authored the brief and to identify persons who contributed monetarily to the preparation or submission of the brief.

Part I of this memo reviews the model for such a rule – Supreme Court Rule 37.6 – and notes that no circuit currently appears to impose a similar requirement. Part II reviews arguments for adopting the proposed requirement, and for adopting it in the FRAP rather than on a circuit-by-circuit basis. Part III considers possible counter-arguments. Part IV concludes that the proposed rule is well worth considering.

I. Supreme Court Rule 37.6

The model for the proposed rule is Supreme Court Rule 37.6, which provides:

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

Rule 37.6's reference to Rule 37.4 exempts amicus briefs filed by the Solicitor General, by federal agencies permitted by law to appear before the Court, by the Attorney General of a state, commonwealth, territory or possession, and by the authorized representative of a municipal entity. Rule 37.6's disclosure requirement is of relatively recent vintage, but it is not clear what motivated its adoption in 1997:

> The Court provided no rationale for these new disclosure requirements. The changes could mean simply that the Justices want to know if an amicus brief is

> written or financed by one of the parties so that they can more appropriately evaluate the contents of the brief for possible bias. Alternatively, the changes could reflect a perception by the Justices that some parties are funding or ghost-writing amicus briefs to get around the page limits that apply to the parties' briefs on the merits. Or, the amendments could reflect a growing concern on the part of the Justices that amicus filings are being manipulated in order to create an impression of widespread political support for a particular position.

Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 766-67 (2000).

A quick search of the local circuit rules, handbook provisions and IOPs available in the "USC" database on Westlaw indicates that no circuit currently has a provision similar to Supreme Court Rule 37.6.[1] I searched the "USC" database for the terms "amicus" or "amici," and reviewed all hits in circuit rules, circuit handbook provisions, or circuit IOPs. I found nothing pertinent[2] in any of these sources.

---

[1] Interestingly, some amici nonetheless include a disclosure in their brief. The examples I have seen were disclosures denying any authorship by counsel for the parties or support by outsiders. See, e.g., Brief Amicus Curiae of the Institute for Justice in Support of Appellants (Dec. 29, 2005), Merrifeld v. Melton, No. 05-16613 (9th Cir.), 2005 WL 4678924, at *1 n.1 ("Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief."); Brief of Amici Curiae Consumer Project on Technology, Electronic Frontier Foundation, and Public Knowledge in Support of Defendant-Appellant (Oct. 17, 2005), Integra Lifesciences I, Ltd. v. Merck KGAA, Nos. 02-1052, 02-1065 (Fed. Cir.), 2005 WL 3569316, at *vi n.1 (similar disclosure); Amicus Curiae Brief of American Bar Association in Support of Appellants and Reversal of Judgment (June 17, 2005), Spargo v. New York State Comm'n on Judicial Conduct, No. 03-7250(L), 03-7289(XAP) (2d Cir.), 2005 WL 1985223, at *i n.1 (similar disclosure).

[2] The D.C. Circuit, Fourth Circuit, Sixth Circuit, Seventh Circuit, Eleventh Circuit and Federal Circuit impose certain disclosure requirements on amici. See D.C. Circuit Rule 26.1; Fourth Circuit Appendix of Forms, Form A; Sixth Circuit Rule 26.1; Seventh Circuit Rule 26.1 (disclosure of true name and of law firms that have appeared or will appear); Eleventh Circuit Rule 26.1-1 (certificate of interested persons and corporate disclosure statement); Federal Circuit Local Rules 29(a) & 47.4 (certificate of interest and corporate disclosure statement). Except as indicated in the parentheticals, these requirements seem to parallel those already imposed on corporate amici by FRAP 29(c) ("If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.").

The Federal Circuit requires that "each amicus curiae must appear through an attorney authorized to practice before this court and must designate one attorney as the principal attorney of record," and provides that "[a]ny other attorney assisting the attorney of record must be

II. Should the FRAP be amended to include a provision like Supreme Court Rule 37.6?

To assess whether the FRAP should be amended to incorporate a rule similar to Supreme Court Rule 37.6, it is necessary to consider both whether such a rule is desirable and whether the rule should be adopted as part of the FRAP.

A. Is such a rule desirable?

A disclosure rule might be useful in at least four ways. First, requiring disclosure might deter undesirable litigant and amicus behavior. Second, disclosure might assist the court in deciding whether to permit the filing of an amicus brief. Third, assuming that the amicus is permitted to file the brief, the disclosure might help the court assess what weight to give the brief. Fourth, the values of predictability and simplicity are served by conforming practice in the courts of appeals with Supreme Court practice.[3]

As Kearney and Merrill suggest, litigants and their counsel might ghost-write an amicus brief to circumvent page limits on the parties' briefs, or to help create a misleading impression of outside support for their position.[4] Writing for the panel majority in a recent Eleventh Circuit

---

designated as 'of counsel.'" Federal Circuit Local Rule 47.3(a). I have seen nothing to indicate, however, whether "assisting" encompasses the sort of work on a brief that would be within the scope of the proposed rule.

Fifth Circuit Rule 29.2 provides in part that an amicus brief "must include a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief." But that Rule, which focuses on unearthing those amici whose financial interests might cause recusals, does not function in the same manner as Supreme Court Rule 37.6.

[3] The fourth rationale suggests that a rule, if adopted, should mirror Supreme Court Rule 37.6's language. Commentators have observed that "[n]ot all questions about required disclosure are answered by the literal language of Rule 37.6." Robert L. Stern et al., Supreme Court Rules: The 1997 Revisions 6 (1997). If the Committee decides to propose the adoption of a disclosure requirement, it will of course need to consider whether to add to (or otherwise depart from) the text of Rule 37.6. The Committee Note might provide a means for addressing some predictable questions about the rule's application.

[4] "In the past it has been in no way unusual for parties to a case to stir up amicus support and to undertake to bear the monetary costs which the amicus would otherwise have to pay for having a brief prepared and filed. Likewise, it has not been unusual for a party to say to the prospective amicus that the party will be glad to have the party's lawyers prepare a draft of an amicus brief which the amicus can then file in its own name." Bennett Boskey & Eugene Gressman, *The 1997 Restatement and Revisions of the Supreme Court 's 1995 Rules*, 170 F.R.D.

decision,[5] Judge Carnes noted the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs." *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (citing *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J., chambers op.)).[6] Admittedly, there is nothing wrong, in current practice, with an amicus possessing an interest in the relevant issues. The notion of the amicus as "impartial" became "outdated long ago." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J., chambers op.). Thus, courts have rejected the "argument that an amicus must be an impartial person not motivated by pecuniary concerns." *Id.* at 132; *see also Funbus Systems, Inc. v. State of Cal. Public Utilities Com'n.*, 801 F.2d 1120, 1125 (9th Cir. 1986) ("[T]here is no rule that amici must be totally disinterested."). However, an amicus ought to add something distinctive to the presentation of the issues, rather than serving as a mere conduit for the views of one of the parties.[7] Moreover, some judges might find it meaningful that

---

30, 32 (1997).

[5] The passage quoted in the text forms part of the court's explanation why "[t]he district court ought not allow the plaintiffs any compensation for time their counsel spent in connection with amicus briefs supporting their position." Glassroth v. Moore, 347 F.3d 916, 918 (11th Cir. 2003). In *Glassroth*, plaintiffs' fee application under 42 U.S.C. § 1988 included "a request for reimbursement for work that lead counsel for the plaintiffs . . . did . . . . enlisting various organizations to appear as amici; suggesting potential signatories for the briefs; working on, supervising, and reviewing the amicus briefs; and seeing that they were mailed on time." Id. at 918-19.

[6] *See also* National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir. 2000) ("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."); Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., chambers op.) ("The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse.").

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

an amicus cared sufficiently about the issue to sustain the cost and effort of filing an amicus brief; to such a judge, one or more amicus filings on the issue might shed light on the range of support, by groups other than the parties, for a particular viewpoint.[8] Though some might dispute the relevance of such considerations, to the extent that a judge might give them weight it would be important for the judge to know whether the amicus contributions were actually funded by a party.[9] In short, a disclosure requirement might deter the inappropriate use of amicus filings, since litigants and counsel would anticipate that the tactics could backfire if the court is made aware of them – and those filings that were not deterred would at least be more amenable to well-informed evaluation.

In a circuit that takes a restrictive approach to amicus briefs, a disclosure requirement might assist the court in assessing whether to grant permission to file an amicus brief. The Seventh Circuit, and in particular Judge Posner, have taken a relatively narrow view of the circumstances under which amicus briefs should be permitted. The decision whether to permit an amicus filing is "with immaterial exceptions, a matter of judicial grace." *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). "Courts value submissions not to see how the interest groups line up, but to learn about facts and legal perspectives that the litigants have not adequately developed." *Sierra Club, Inc. v. E.P.A.*, 358 F.3d 516, 518 (7th Cir. 2004). "No matter who a would-be amicus curiae is, therefore, the criterion for deciding whether to permit the filing of an amicus brief should be the same: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., chambers op.). The policy of the Seventh Circuit is "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." *Scheidler*, 223 F.3d at 617. Knowing whether an amicus brief was ghost-written by a party's counsel or financed by a party may help the court to assess whether any of those criteria is met.

Most circuits appear to take a significantly less restrictive approach than the Seventh

---

[8] *Cf.* Grutter v. Bollinger, 539 U.S. 306, 330-32 (2003) (citing amicus filings as evidence of the importance of diversity in student bodies, businesses, and the military).

[9] See Boskey & Gressman, 170 F.R.D. at 32 (noting that the disclosures required by Rule 37.6 provide "information helpful in assessing the credibility to be attached to the views submitted by the amicus").

Circuit's.[10] In *Neonatology Associates*, then-Judge Alito noted the difficulty of assessing the usefulness of an amicus brief early in the appellate process, and he suggested that the best course was to err on the side of permitting the filing, since the panel hearing the merits can always disregard an unhelpful brief:

> The decision whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful. Indeed, it is frequently hard to tell whether an amicus brief adds anything useful to the briefs of the parties without thoroughly studying those briefs and other pertinent materials, and it is often not feasible to do this in connection with the motion for leave to file. Furthermore, such a motion may be assigned to a judge or panel of judges who will not decide the merits of the appeal, and therefore the judge or judges who must rule on the motion must attempt to determine, not whether the proposed amicus brief would be helpful to them, but whether it might be helpful to others who may view the case differently. Under these circumstances, it is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed, the merits panel, after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief.

Neonatology Associates, 293 F.3d at 132-33. Once an amicus brief is accepted, a court assessing the usefulness of the brief's assertions might be aided by the knowledge that the brief was funded or authored by a party or its counsel.

A disclosure rule, then, may serve useful functions – as the Supreme Court has evidently concluded. Interestingly, though, none of the circuits has yet adopted a similar rule. This might be due to the relative novelty of the disclosure rule (as noted above, the Supreme Court adopted Rule 37.6 less than a decade ago), or it might reflect inertia, or it might arise from doubts concerning the usefulness of a disclosure rule.

Several arguments against the proposed rule suggest themselves. One argument might be that the court should give an amicus brief the weight it deserves, based on the merit of its contents; on this view, knowing who funded or drafted the brief does not advance the court's assessment of the quality of the brief's contents. But judges who take that view can simply ignore the disclosure. It might also be argued that there should be a presumption against adding another briefing requirement; adherents to this view might want to see evidence of a need for the proposed rule. Admittedly, the evidence for the practices at which the disclosure requirement

---

[10] "There is little evidence . . . that Judge Posner's views are widely shared. Outside of the Seventh Circuit, judges freely permit amicus briefs to be filed." 16A Wright, Miller, Cooper & Schiltz, Federal Practice & Procedure § 3975.

would be aimed tends to be more anecdotal than quantitative.[11] But even without such quantitative evidence, an argument can be made for adopting a disclosure rule, since conforming the requirements applied in the courts of appeals to those imposed by the Supreme Court would arguably simplify appellate practice.[12] Another objection might be that the rule's application to borderline cases might be unclear – as where an amicus is unsure whether a litigant's counsel should be viewed as having "authored" the brief "in part."[13] But here the experience under the Supreme Court's rule should be informative. A final possible concern might be whether the requirement would impinge on First Amendment values by requiring disclosure of the identity of the contributors to an organization that files an amicus brief. But a rule modeled on Supreme Court Rule 37.6 would avoid this problem, because it would exempt the amicus' members from the group of contributors whose monetary contributions must be disclosed.

B. Should such a rule be incorporated into the FRAP?

As the letters Judge Stewart recently sent to the chief judge of each circuit underscore, undue local variation in briefing requirements carries significant costs. Thus, if a disclosure rule is desirable, incorporating the rule into the FRAP would carry the benefit of uniformity. (And, as noted above, adopting the rule in the FRAP would also benefit uniformity by conforming practice in the courts of appeals to Supreme Court practice.)

It might be argued that some of the purposes served by the disclosure rule carry different

---

[11] See, e.g., Stern et al., Supreme Court Practice, at 661 (noting "known instances where counsel for a party not only solicited or inspired the filing of an *amicus* brief but also wrote all or substantial portions of that brief").

[12] The fact that some litigants currently make the disclosure in briefs filed in the courts of appeals suggests that they may assume the requirement exists in those courts already.

[13] As Boskey and Gressman observed when the Supreme Court adopted Rule 37.6:

> Of course, there may be borderline cases, particularly as to "whether counsel for a party authored the brief in whole or in part." Consider, for example, the situation where counsel for the amicus prepares a complete draft of the brief, then shows the draft to counsel for a party, and then accepts a suggestion from the party's counsel that a sentence or two be deleted from the draft or be modified, or that a paragraph be added. Do these come within the intent of the Rule? We would advise that, at least for the time being, even such limited participation–in essence borderline situations–be treated as if within Rule 37.6 and so calling for disclosure.

Boskey & Gressman, 170 F.R.D. at 33.

weight depending on the circuit. For instance, assisting the court in determining whether to permit an amicus filing is likely more important in a circuit, such as the Seventh, which is less willing to grant such permission. However, other goals served by the disclosure rule would seem to have more universal appeal: It seems unlikely, for example, that any circuit would look kindly on the use of an amicus filing as an end-run around the page limits on the parties' briefs; and in all circuits courts must assess the weight to give to the assertions in any amicus briefs that are permitted.

It might also be argued that nationwide adoption of a disclosure rule should not take place until the rule has been tried in one or more circuits. However, there is now almost a decade of experience with Supreme Court Rule 37.6, and the dearth of criticism of that rule in the literature suggests that the rule has not caused difficulties in practice.

III. Conclusion

Though I was not able to gather empirical data on these issues, it seems likely that some litigants may sometimes attempt to use an amicus' brief to evade page limits, and it seems possible that, at least occasionally, a litigant might drum up amicus briefs (by contributing money or by ghostwriting the briefs) in an attempt to create a misleading appearance of support for the litigant's position. The frequency of these events is not clear, and thus the corresponding benefits of a disclosure rule are uncertain. It does seem likely, though, that adopting for the courts of appeals the same disclosure rule that applies to Supreme Court practice could contribute -- modestly – to the simplification of appellate practice. To reap the benefits of such simplification, a nationally applicable rule in the FRAP would be preferable to local circuit-by-circuit adoption. Finally, there do not appear to be significant downsides to the disclosure rule; Supreme Court Rule 37.6 has been in effect for almost a decade, and I was unable to find in the (admittedly sparse) literature any complaints concerning it.

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-05

Judge Michael Baylson has suggested that the Appellate Rules Committee consider proposing a new Appellate Rule modeled loosely on Pennsylvania Rule of Appellate Procedure (PRAP) 1925. That Rule currently provides in relevant part:

> **(a) General rule.** Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.
>
> **(b) Direction to file statement of matters complained of.** The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

Judge Baylson points out that PRAP 1925(b) enables the trial judge to ascertain the issues the appellant intends to raise on appeal, and thus gives the trial judge the opportunity to write an opinion that responds specifically to those contentions. As Judge Baylson observes, the resulting opinion may point out record evidence or other matters that may turn out to be key to the appellate court's resolution of the case (and that the appellee's counsel and the appellate court might otherwise overlook).

Part I of this memo describes PRAP 1925 and current proposals to amend it. Part II briefly notes that New Jersey has a similar rule. Part III considers whether such a rule would be appropriate for federal appellate practice. Part III.A. considers possible benefits; Part III.B. notes potential problems with such a rule; and Part III.C. reviews a possible alternative that might serve a similar purpose while avoiding some of the difficulties canvassed in Part III.B.

I. Pennsylvania Rule of Appellate Procedure 1925

The Pennsylvania Supreme Court has explained that strict enforcement of PRAP 1925(b) is "necessary to insure trial judges in each appealed case the opportunity to opine upon the issues which the appellant intends to raise, and thus provide appellate courts with records amendable [sic] to meaningful appellate review." Com. v. Castillo, 888 A.2d 775, 779 (Pa. 2005).

The sequence of events contemplated by PRAP 1925(a) and (b) is as follows. Pennsylvania state trial judges often do not write opinions unless and until the losing party notices an appeal. The notice of appeal triggers the trial judge's PRAP 1925(a) duty to indicate the bases for the disposition (if those reasons do not already appear in the record); but PRAP 1925(a) does not require the judge to write an opinion at that point. Rather, the trial judge can order the appellant to file a PRAP 1925(b) statement of issues on appeal.[1] The PRAP 1925(b) statement "aids the trial judge in identifying which issues to write upon." Com. v. Butler, 571 Pa. 441, 448, 812 A.2d 631, 635 (Pa. 2002) (Castille, J., concurring).[2]

A waiver rule enforces the PRAP 1925(b) requirement, and – contrary to the impression given by the word "may" in PRAP 1925(b) – waiver is a mandatory, not discretionary, result of failure to comply with the Rule. See Com. v. Lord, 553 Pa. 415, 420, 719 A.2d 306, 309 (Pa. 1998) ("Any issues not raised in a 1925(b) statement will be deemed waived."); Com. v. Butler, 571 Pa. 441, 445, 812 A.2d 631, 633 (Pa. 2002) ("[W]aiver under Rule 1925 is automatic."); see also Com. v. Phinn, 761 A.2d 176, 178 (Pa. Super. 2000) ("The rule announced in *Lord* has been strictly applied by our appellate courts."), *appeal denied*, 785 A.2d 89 (Pa. 2001).[3]

---

[1] The duty that PRAP 1925(b) imposes upon the appellant does not attach until the trial court has specified the reasons for the court's order (if those reasons do not already appear of record). See Ryan v. Johnson, 522 Pa. 555, 560, 564 A.2d 1237, 1239 (Pa. 1989) ("When one seeking to appeal has no basis in the record to discern the basis for the order being challenged, Pa.R.A.P. 1925(b) must not be employed as a trap to defeat appellate review, requiring specifically stated challenges to the resolution of issues before there has been any revelation as to how the issues have been resolved.").

[2] See also Com. v. Lord, 553 Pa. 415, 419, 719 A.2d 306, 308 (Pa. 1999) ("Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal."); Sharff v. Humphrey's Pest Control Co., Inc., 20 Pa. D. & C.4th 105, 107 (Ct. Com. Pl. 1993) (stating that the Rule is designed "to provide the trial court with a statement adequately specific to permit the trial court to address the issues on appeal, correct its own errors, if any, and prepare an opinion"), *appeal dismissed*, 436 Pa. Super. 676, 648 A.2d 1243 (Pa. Super. 1994).

[3] This waiver rule, however, does not apply where a criminal defendant claims that the failure to include an issue in the 1925(b) statement constituted ineffective assistance of counsel. See Com. v. Johnson, 565 Pa. 51, 60, 771 A.2d 751, 756 (Pa. 2001)) (plurality op.) ("[T]he

Controversy has surrounded PRAP 1925(b) in recent years.[4] Criticism has focused particularly on the mandatory waiver rule recently reaffirmed in *Castillo*. Commentators argue that waiver should be found only when an appellant's failure to comply with PRAP 1925(b) has thwarted the Rule's purpose – i.e., only when the failure prevented the trial court from effectively addressing in its opinion the issues ultimately raised on appeal. Critics point out that compliance with PRAP 1925(b) can be difficult, because the statement must often be drafted before the lawyers see any written opinion by the trial judge and before the lawyers have access to a trial transcript. Moreover, the short PRAP 1925(b) deadline falls particularly hard upon new counsel retained for appeal, since such counsel will be unfamiliar with the record and proceedings in the trial court.

This summer, the Philadelphia Bar Association adopted comments and proposed amendments designed to address perceived problems with PRAP 1925. The proposal would amend the rule to "provide[] clear notice of the requirements and consequences of the rule as interpreted" and to "provide[] the trial court with discretion to permit the appellant to file a supplemental 1925(b) statement or to enlarge the time period within which the appellant must file a 1925(b) statement." Under the proposal, the statement of issues would be deemed to include subsidiary issues "fairly comprised" in the statement, as well as issues raised by the trial court's opinion. Waiver would not be found if neither the trial judge nor any party contends that the waiver provision should be enforced.

In September, Pennsylvania's Appellate Court Procedural Rules Committee published for comment proposed amendments to PRAP 1925 which are similar in some (though not all) respects to the Philadelphia Bar Association proposal.[5] The proposed amendments would extend the deadline for filing the statement of issues from 14 to 21 days, and would empower the trial judge to grant extensions and/or permit the filing of a supplemental statement; both the trial judge and the appellate court would have authority (in circumscribed circumstances) to permit the filing of a statement of issues *nunc pro tunc*. The amendments would require the trial judge's

---

purpose of a 1925(b) Statement . . . is to aid the trial court in drafting an opinion identifying and focusing on those issues that the parties plan to raise on appeal. . . . Such a purpose does not concern ineffective assistance of appellate counsel claims raised in the Superior Court, as such claims are never subject to the benefit of a trial court opinion.").

[4] But see Franklin S. Van Antwerpen et al., *Plugging Leaks in the Dike: A Proposal for the Use of Supplemental Opinions in Federal Appeals*, 20 Cardozo L. Rev. 1233, 1243 (1999) (stating that PRAP 1925(b) "has been proven very successful").

[5] In addition to the aspects mentioned in the text, both the Bar Association proposal and the amendments published for comment provide a procedure for remand so that the appellant can file a statement of issues and the trial judge can respond to that statement. The amendments published for comment also address situations in which a criminal defendant's counsel intends to file an *Anders* brief.

order to make clear that failure to comply "shall" result in waiver. Under the amendments, a statement's reference to a ruling would be deemed to include subsidiary issues "fairly included therein."

II. New Jersey Rule 2:5-1

Though I have not attempted a complete survey of the practice in all the states, I am aware of only one state other than Pennsylvania that provides for an opinion by the trial judge directed specifically to the issues raised on appeal.[6] In New Jersey, Rule 2:5-1 of the Rules Governing Appellate Practice in the Supreme Court and the Appellate Division of the Superior Court provides in relevant part:

> **(b) Notice to Trial Judge or Agency.** In addition to the filing of the notice of appeal the appellant shall mail a copy thereof, with a copy of the Case Information Statement annexed, by ordinary mail to the trial judge. . . . Within 15 days thereafter, the trial judge . . . may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to R. 1:2-2. If there is no such prior statement, opinion or memorandum, the trial judge . . . shall within such time file with the Clerk of the Appellate Division and mail to the parties a written opinion stating findings of fact and conclusions of law. The appellate court shall have jurisdiction of the appeal notwithstanding a failure to give notice to the trial judge . . . as required by this rule.

III. Assessing the possibility of adopting a rule similar to PRAP 1925(b) for federal appellate practice

Obviously, federal appellate practice differs from Pennsylvania appellate practice in key ways; this section begins by canvassing some of those differences. It then assesses the benefits and costs of adopting a rule similar to PRAP 1925(b), and considers a possible alternative.

The typical federal appellate practice timeline differs from the timeline in Pennsylvania state practice – particularly if one focuses upon the time by which the appellant must formulate the issues on appeal.

---

[6] New Mexico requires the appellant to provide a statement of the issues on appeal relatively promptly after noticing the appeal, but the New Mexico requirement does not appear to contemplate a response by the trial judge. See N.M. R. App. Proc. 12-208(B) & (D) (requiring appellant to serve docketing statement within 30 days after filing notice of appeal, and requiring docketing statement to include, inter alia, "a statement of the issues presented by the appeal").

Under the FRAP, the timeline for an appeal proceeds roughly as follows.

- FRAP 4 sets the deadline for filing a notice of appeal. For example, the deadline in a civil case with no federal government parties is 30 days from entry of the judgment or order appealed from. See FRAP 4(a)(1)(A). The notice of appeal is a skeletal document that does not specify the issues to be raised on appeal. See FRAP 3(c).

- 10 days after filing the notice of appeal, the appellant must either order a transcript or file a certificate stating no transcript will be ordered. See FRAP 10(b)(1). If the appellant does not order the entire transcript, the appellant must also, within the 10-day deadline, file a statement of the issues that the appellant intends to present on appeal. See FRAP 10(b)(3). The reporter must prepare the transcript; if the reporter cannot complete the transcript within 30 days after receiving the order, the reporter may ask the circuit clerk to grant additional time. See FRAP 11(b)(1)(B). Once the record is complete, the district clerk must forward it to the circuit clerk. See FRAP 11(b)(2). Upon receiving the record, the circuit clerk must file it. See FRAP 12(c).

- The appellant must serve and file its brief within 40 days after the record is filed. See FRAP 31(a)(1).

If one adds up the number of days entailed in this process, assuming no extensions or other delays, the total is 30 + 10 + 30 + 40 = 110 days. Absent some additional requirement imposed by a particular circuit,[7] and assuming the appellant orders the entire transcript, the

---

[7] For example, in the Eighth Circuit, "the appellant must complete an Appeal Information Form (Form A), submit it with the notice of appeal to the clerk of the district court, and serve a copy on the appellee. The appellee may file and serve a supplemental statement (Form B) within three days after receiving service of Form A." Eighth Circuit Rule 3B. Form A directs the appellant to "LIST ISSUES ON APPEAL (For administrative purposes.)." http://www.ca8.uscourts.gov/newcoa/forms/forma.pdf, last visited October 1, 2006. But that requirement appears not to carry a draconian penalty for noncompliance, and the form is not intended to generate a response by the district court:

> The filing of the Appeal Information Form is not a jurisdictional requirement; the district court clerk may not refuse to file a notice of appeal merely because the Appeal Information Form does not accompany the notice. . . . The court requires the Appeal Information Form for three reasons: (1) the form enables the court to monitor the nature of the court's caseload more effectively; (2) the form provides the director of the prehearing conference program with information necessary to conduct prehearing proceedings, see 8th Cir. R. 33A; and (3) the form calls attention to the provision of Federal Rule of Appellate Procedure 4(a)(4) which provides that a notice of appeal filed while a pretrial motion specified in FRAP 4(a)(4) is pending is premature and does not terminate the district court's

appellant need not specify the issues on appeal until some 110 days after the entry of judgment.[8] This provides significantly more time than the appellant is likely to get under Pennsylvania's current system. This fact is discussed further in Part III.B. below.

A. Potential benefits

Judge Baylson's proposal aptly points out the benefits of a rule like PRAP 1925(b). By apprising the trial judge of the issues to be raised on appeal and providing the judge with an opportunity to write an opinion focused specifically on those issues, the rule ensures that the court of appeals will have the benefit of the trial judge's insights on the key issues. As Judge Baylson notes,

> [i]n the appellate court, it is quite possible that one of the attorneys may overlook some part of the record, such as a ruling by the trial judge in the middle of the trial, or may have overlooked some waiver or admission that is contained in the record. Although appellate judges are certainly careful in reviewing the entire record, it is possible that some arguments made on appeal are not appropriate considering the proceedings that took place in the district court, and the appellate court's task would be facilitated if the trial judge had the opportunity to respond to any issues raised on appeal but not fully covered in the existing memorandum/opinion.

To reap these benefits, it is necessary for the trial judge to receive the statement of issues early enough so that the trial judge has time to write in response to those issues and so that the parties' appellate briefs can take into account the trial judge's response. Moreover, from the trial judge's perspective, the sooner the statement is received, the better, since the judge will be better able to respond to the statement if the trial-level proceedings are fresh in the trial judge's mind. On the other hand, as noted below, the earlier the statement must be provided, the more likely it

---

jurisdiction.

Eighth Circuit Internal Operating Procedure I.C.2.

[8] Even if the appellant orders less than the entire transcript and thus must file a statement of the issues on appeal, that statement (required by FRAP 10(b)(3)) is evidently geared toward facilitating other parties' decisions about what parts of the transcript to order, see FRAP 10(b)(3)(B), rather than toward eliciting any further opinion from the district court. See, e.g., Controlled Demolition, Inc. v. F.A. Wilhelm Const. Co., Inc., 84 F.3d 263, 270 (7th Cir. 1996) ("The point of Rule 10 is to give notice to the adverse party of issues which will be raised on appeal. Having been given notice of the issues which will be raised, the adverse party can ensure that parts of the transcript which it deems supportive of its case will appear in the record on appeal.").

becomes that the requirement will impose a hardship on the appellant's counsel.

Judge Van Antwerpen of the Third Circuit shares Judge Baylson's view that a rule like PRAP 1925(b) should be adopted for use in the federal courts.[9] In addition to the effects mentioned by Judge Baylson, Judge Van Antwerpen argues that the rule would benefit appellate decisionmaking in several other ways:

> In some cases, the proposed rule could also make the appellate process more efficient by avoiding multiple remands. . . . Under the proposed rule, the district judge could provide needed factual findings before the circuit court considers the appeal, thereby streamlining the entire process. . . . [The] rule would minimize the need for the circuit court to guess at the district judge's reasoning. . . . [The] rule would also reduce the likelihood that the circuit court would be misled by misstatements made by the appealing parties. . . . By speeding up the appellate process . . . , the proposed rule would help reduce the pressure on the circuit courts created by their ever-expanding workload.

Van Antwerpen et al., 20 Cardozo L. Rev. at 1239-40. Judge Van Antwerpen states that the rule would benefit trial judges as well; to the list of benefits noted by Judge Baylson, Judge Van

---

[9] In a 1999 law review article, Judge Van Antwerpen and two of his former law clerks proposed the following new subdivision to FRAP 10:

> **(f) Clarification of Basis for Decision on Appeal.** Within 7 days of the filing of the notice of appeal, the appellant shall file with the district court a statement of the issues complained of on appeal. Within 14 days after the appellant's statement of the issues is filed, the district court may, on its own initiative, file and serve the parties with an amplification of any prior written or oral statement, opinion, memorandum, ruling, order, or findings pertaining to the issues complained of. If there is no such prior statement, opinion, memorandum, or findings, the district court shall file and serve the parties with the same within 14 days of the filing of the statement of the issues. At any time after an appeal is filed, the circuit court may order the district court to file and serve the parties, within such time as the circuit court may establish, with a statement, opinion, memorandum or findings relating to any issue raised in the appeal.

Franklin S. Van Antwerpen et al., Plugging Leaks in the Dike: A Proposal for the Use of Supplemental Opinions in Federal Appeals, 20 Cardozo L. Rev. 1233, 1238 (1999). As Judge Van Antwerpen stated, "The proposed addition provides federal district court judges with the same authority to supplement their findings as trial court judges in Pennsylvania and New Jersey enjoy. The proposed language also expands the authority of the appellate courts by allowing them to require such additional findings without formally remanding the case to the trial court." Id. at 1239.

Antwerpen adds the following:

> Since trials require numerous evidentiary rulings that are not always fully explained in the record, the proposed rule would also provide the district judge an additional opportunity to elaborate on verbal rulings made during the course of a trial. . . . Since the proposed rule allows the district judge to respond to alleged errors as soon as an appeal is filed in the circuit court, these issues would be fresh in the judge's mind. This rule also makes it more likely that a district judge could discuss issues raised in the appeal with the same law clerks who were present when the issues were originally decided. . . . [The rule] allows district court judges to correct, sua sponte, any errors which escaped notice during trial. . . . [I]t is only natural to want to know about alleged errors in a case in which one has invested substantial time and energy. . . . [I]f the district judge feels that there is any merit to an appellant's complaint, the judge need not wait until the appellate process is complete before deciding to proceed differently in future cases.

Id. at 1240-41.

B. Potential costs

The controversy surrounding PRAP 1925(b) sheds light on the possible costs of adopting a similar rule for federal practice. Some potential downsides might be avoided by careful tailoring of the rule, but other problems may be less tractable.

A rule such as PRAP 1925(b) can pose significant logistical problems for counsel.[10] PRAP 1925(b)'s deadline of 14 days after the trial judge orders the statement of issues on appeal appears to have imposed hardship in a number of cases. The trial transcript may not yet be available; new appellate counsel may just have been retained and may not have had a chance to become familiar with the trial proceedings; and counsel may not yet have had time to assess which issues are most likely to provide a chance for success on appeal.

Those logistical problems appear to be exacerbated by certain features of PRAP 1925(b) as currently applied and interpreted. The mandatory waiver feature, as noted above, arguably renders the Rule overbroad by enforcing waiver in circumstances where the Rule's purpose has already been served. The changes recently proposed by the Philadelphia Bar Association

---

[10] Judge Van Antwerpen and his coauthors disagree, stating that "The actual burden imposed upon counsel for appellants is relatively light . . . ." Van Antwerpen et al., 20 Cardozo L. Rev. at 1242. It is notable that, in contrast to PRAP 1925(b) as currently interpreted, the rule they propose would not entail a mandatory waiver. See id. at 1242-43 ("The threat of waiver would only exist if an appellant's counsel violated the rule outright by failing to file a statement of issues with the district court, and even this sanction would be applied with great caution.").

illustrate ways in which the Rule could be improved – for example, by providing clear notice of the risk of waiver, by providing for extensions of time and for discretionary rather than mandatory enforcement of the waiver rule, and by providing that subsidiary issues fairly encompassed with a statement or actually addressed by the trial court are preserved for appellate review. The proposed amendments recently published for comment appear likely to make some of these improvements.

On a conceptual level, the PRAP 1925(b) procedure might present some tension with current views concerning the role of the trial judge vis-a-vis arguments made on appeal. In a system within which the trial judge writes specifically in response to the issues to be raised on appeal – rather than writing in the light of the arguments made at the trial level – it seems possible that some might perceive the trial judge as a slightly less neutral figure.[11] In addition, a rule such as PRAP 1925 blurs the line demarcating the transition from trial-court to appellate jurisdiction. "[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per curiam). Thus, filing the notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Id. One practical goal underlying this rule is the need to avoid the "danger a district court and a court of appeals would be simultaneously analyzing the same judgment." Id. at 59. But there are of course exceptions to this rule, so it is important not to overstate the possible tension that would arise from adopting a rule akin to PRAP 1925(b). The trial court can consider a timely post-trial motion listed in FRAP 4(a)(4)(A).[12] In some circuits, the trial court can deny a Rule 60(b) motion filed after the deadline set in FRAP 4(a)(4)(A), though all circuits would agree that the trial court cannot grant such a motion without a remand from the court of appeals.[13] The Civil Rules Committee is currently considering a proposed new Civil Rule 62.1 that would expand that concept beyond the context of Rule 60(b) motions; thus, it is certainly not impossible

---

[11] Though mandamus proceedings obviously raise very different issues in that regard, the following observation concerning the mandamus context is perhaps noteworthy: "[I]f a writ application is used to seek review of the merits of a ruling, rather than to attack conduct of the trial judge that is somehow more personal, the participation of the judge is–and properly should be–nominal. Active involvement of the respondent judge, indeed, may create such an appearance of partisanship as to require disqualification from further proceedings." 16 Wright, Miller & Cooper, Federal Practice & Procedure § 3932.2.

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

[13] See generally 11 Wright, Miller & Kane, Federal Practice & Procedure § 2873 (collecting cases).

to envision "a structured dialogue between the trial court and the appellate court"[14] taking place after the filing of the notice of appeal.

C. An alternative possibility

The discussion above indicates that the proposed rule's benefits would be counter-balanced by disadvantages, not all of which could be eliminated by minor changes to the rule's operation.[15] Thus, it may be worthwhile to consider whether alternative possibilities exist that could further the goals that underpin Judge Baylson's proposal.

One possibility might be to require that the briefs on appeal must be provided to the district judge as well as to the parties and the court of appeals. The requirement could be imposed within the regular briefing schedule. This would give the trial judge an opportunity – though perhaps an abbreviated one – to catch any key points mischaracterized by the appellant and overlooked by the appellee. The rule could provide for the trial judge, if so inclined, to draft a supplemental opinion responding briefly to any such points.

Such an approach would provide the trial judge's insights to the appellate court without forcing the appellant to formulate the issues on appeal within a severely short time frame. Whereas a trial judge writing an opinion under the PRAP 1925 system would feel obliged to address all points raised in the statement of issues, the trial judge under this alternative possibility could wait to see what points are made by the appellee, and only write a supplemental opinion if the appellee failed to point out the key bases for affirmance. Admittedly, a trial judge might well not have time to read carefully all briefs filed by parties taking appeals from judgments entered by that judge. However, by scanning the table of contents, statement of issues and summary of argument, the trial judge could look quickly for instances in which further information from the trial judge would assist the appellate court's understanding.

The approach would, however, be less attractive from certain other angles. The events in the trial court might not be as fresh in the judge's mind. The judge would have only a limited time in which to read the briefs and determine whether and how to draft an opinion in response. And formally involving the trial judge in the appellate briefing process might seem to render the trial judge somewhat less neutral and detached.

---

[14] Minutes, Civil Rules Advisory Committee, May 22-23, 2006, at 30.

[15] The currently-proposed amendments to PRAP 1925 would still permit the trial court to require the statement of issues at an early stage, and would still enforce that requirement by means of a waiver provision.

IV. Conclusion

Experience with PRAP 1925 suggests that trial and appellate judges find the rule useful (though they may disagree concerning the details of its appropriate enforcement). Recent statements by members of the bar indicate, by contrast, that some litigators find the rule harsh and unfair (though it is possible that the most serious complaints arise from the severe manner in which the Pennsylvania Supreme Court currently interprets the Rule). A proposal to incorporate a similar requirement into federal appellate practice could arouse opposition from the bar. Given the benefits and costs of such a rule, the Committee may wish to consider whether some alternative means could serve the goals identified by Judge Baylson while avoiding the problems that have been experienced under PRAP 1925.

Encls.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
4001 United States Courthouse
Independence Mall West
Sixth and Market Streets
PHILADELPHIA, PENNSYLVANIA 19106-1741

Chambers of
Michael M. Baylson
United States District Judge

(267) 299 - 7520

June 13, 2006

Catherine Struve, Professor of Law
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Re: Appellate Rules Advisory Committee

Dear Cathie:

Congratulations on your appointment as reporter for this committee. As we discussed, I would like to propose that your committee consider the following addition to the Federal Rules of Appellate Procedure.

Most federal judges file a memorandum/opinion at the time they enter an appealable order, such as granting a motion for summary judgment, granting a motion to dismiss and/or a ruling on post-trial motions. When an appeal is taken, the trial judge is never advised of what issues are being raised on appeal. In the appellate court, it is quite possible that one of the attorneys may overlook some part of the record, such as a ruling by the trial judge in the middle of the trial, or may have overlooked some waiver or admission that is contained in the record. Although appellate judges are certainly careful in reviewing the entire record, it is possible that some arguments made on appeal are not appropriate considering the proceedings that took place in the district court, and the appellate court's task would be facilitated if the trial judge had the opportunity to respond to any issues raised on appeal but not fully covered in the existing memorandum/opinion.

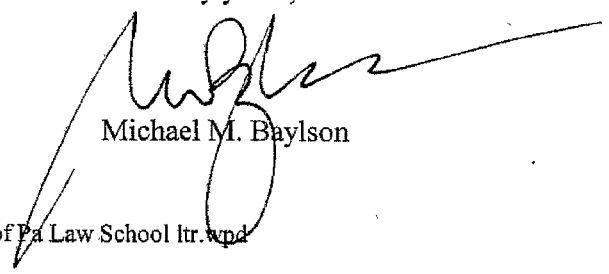
I request that your committee consider adopting a rule something akin to the Pennsylvania Rule of Appellate Procedure 1925, which allows the trial judge, upon receipt of a notice of appeal, to require the appellant to serve on the trial judge a statement of the issues to be raised on appeal, and then allows the trial judge to file of record an opinion responding to those issues, if the trial judge has not already done so.

If such a rule were adopted for federal courts, a district court judge may conclude that the memorandum/opinion already on file adequately cover the issues to be raised on appeal. However, if the trial judge concludes that some of the issues raised have not been adequately dealt with, or that the record contains important matters that were not discussed in the existing

memorandum/opinion of the trial judge, the trial judge could then file a supplemental memorandum/opinion for the benefit of the appellate court.

Please advise if you would like any further information on this point.

Sincerely yours,



Michael M. Baylson

MMB:lm
O:\Letters - personal\Struve, Catherine, U. of Pa Law School ltr.wpd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
4001 United States Courthouse
Independence Mall West
Sixth and Market Streets
PHILADELPHIA, PENNSYLVANIA 19106-1741

Chambers of
Michael M. Baylson
United States District Judge

(267) 299 - 7520

July 10, 2006

Catherine Struve, Professor of Law
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Re: Appellate Rules Advisory Committee

Dear Cathie:

With regard to my proposal about an amendment to the Federal Rules of Appellate Procedure, I am enclosing for your information a recent article from the *Legal Intelligencer* about the Pennsylvania rule.

Best regards.

Sincerely yours,

Michael M. Baylson

MMB:lm
enclosure

O:\Letters - personal\Struve, Catherine, U. of Pa Law School ltr II.wpd

Legal Intelligencer

A LAW JOURNAL IN THE UNITED STATES 1843-2006

THURSDAY, JULY 6, 2006 VOL 233 • NO. 128 $3.00 ALM

Criticism Grows Over Appellate Rule

BY ASHER HAWKINS
Of the Legal Staff

Though many Pennsylvania lawyers have long bemoaned the perceived murkiness of Pennsylvania Rule of Appellate Procedure 1925(b), it would seem that the criticism has now reached a fever pitch.

Late last week, the Philadelphia Bar Association's Board of Governors unanimously passed a resolution that supports a host of amendments to the rule's key provisions concerning the length and timeliness of appellate statements filed in Pennsylvania.

The amendments were prepared by a group comprised not only of members of the Philadelphia association's appellate courts-related committee, but also the Pennsylvania Bar Association's and Allegheny County Bar Association's as well.

Critics of Rule 1925(b) as currently written argue that its call for a "concise" statement of matters to be complained of on appeal has generated a stream of conflicting opinions from Pennsylvania's intermediate appellate courts. Sometimes an appeal will be quashed because a 1925(b) statement is too long; other times, apparently, because it is not long enough.

At last week's board meeting of the Philadelphia Bar Association, a number of members expressed displeasure with the rule and the precedent that has attempted to interpret it.

"It's become a rule that is troubling to many, many lawyers," Charles Becker of Reed Smith, who chairs the association's appellate courts committee and co-presented the resolution, told the board members.

The amendments ultimately approved by the board would extend the filing deadline for 1925(b) statements and create a more detailed explanation of how long/short such a statement should be.

Becker told the board he hopes the resolution will help send a message to the state Supreme Court, and its Appellate Courts Procedural Rules Committee, "that the state of this rule has become intolerable."

Following Becker's presentation, Philadelphia Bar Association Chancellor Alan M. Feldman described 1925(b) as "a rule that can really ambush you."

Scott Cooper of Blank Rome, who serves as the association's treasurer, inquired about the possibility that the rule could one day be scrapped altogether.

Carl Solano of Schnader Harrison Segal & Lewis, a member of the team that drafted the proposed amendments and a co-presenter of the resolution, said that although there might be many who would support completely doing away with the rule, he does not believe such a measure would have much of a chance of succeeding at this point in time.

Instead, Solano said, he hopes the changes will "ameliorate some of the more draconian aspects of the rule."

Recent decisions in a number of closely watched cases have brought Rule 1925(b) to the attention of the bar at large.

As reported in yesterday's edition of *The Legal*, the underlying fee dispute in the case captioned *Kanter v. Epstein* sparked a 100-plus-point appeal that was dismissed by the Superior Court as too lengthy in December 2004.

Spector Gadon & Rosen — the then-unsuccessful defendant in *Kanter*, which recently settled — later sued Pennsylvania's appellate court system in federal court, arguing that the Superior Court had violated the firm's due process rights when it dismissed the appeal.

Spector Gadon has since filed a professional negligence suit against Saul Ewing, which represented a firm attorney on appeal before the Superior Court, the complaint

Appellate Rule continues on 6

Appellate Rule

continued from 1

suggests a failure to follow the provisions of Rule 1925(b).

Additionally, late last year, in a holding stemming from a pair of consolidated cases, the state Supreme Court reminded Pennsylvania's practitioners of the existence of a bright-line rule holding that parties automatically waive their appellate rights upon failing to file a timely statement of appellate issues with the trial judge and court clerk.

In *Commonwealth v. Castillo* and *Commonwealth v. Schofield*, the majority expressed its disapproval with the tendency of certain intermediate appellate court panels to address issues that should have been deemed waived pursuant to the high court's 1998 holding in *Commonwealth v. Lord* and 2002 reaffirmation in *Commonwealth v. Butler*.

In an interview yesterday, Becker said that comments made at his committee's meetings made it clear that people were very concerned about this rule."

An ad hoc statewide committee was formed to draft a set of amendments, Becker said.

The representatives from Philadelphia's bar were Solano and Sean Sullivan of Buchanan Ingersoll & Rooney; from the PBA, Charles Craven of Marshall Dennehey Warner Coleman & Goggin in Philadelphia and Robert Graci, a former Superior Court judge who now practices out of Eckert Seaman Cherin & Mellott's Harrisburg office; and from Allegheny County, Kim Watterson of Reed Smith in Pittsburgh and William Stang of Fox Rothschild in Pittsburgh.

Becker said he hopes the PBA and ACBA will both come out in favor of the proposed amendments, as Philadelphia's association has.

Calls to the PBA seeking comment were not immediately returned.

ACBA executive director David Blaner said his association has not yet taken an official position on the suggested changes to Rule 1925(b).

According to Becker, there are three main sets of amendments put forward by the statewide ad hoc committee.

• The first major amendment would change the rule's filing deadline from 14 days to 20 days, and also grants trial courts the leeway to extend the deadline if they so choose. Becker said the amendments' creators hope the extra time will help appellate counsel arrive at a truly concise statement of matters to be complained of on appeal.

• As far as length, the second set of amendments would have practitioners advised to state their issues "in brief and general terms." But the new version of the rule, if adopted, would also provide that an "appellant's statement will be deemed to include every subsidiary issue fairly comprised therein and those raised by the trial court's opinion, if any."

• And thirdly, there is a set of what Becker refers to as "release valves," among them, permission for trial courts to accept and address a late-filed statement and a provision that an unchallenged 1925(b) deficiency will not result in waiver.

"Whatever happens with this [proposal] ... the process of the three bar association committees' working together was very productive," Becker said.

He added that an earlier version of the amendments had been forwarded to heads of the Pennsylvania Supreme Court's Appellate Courts Procedural Rules Committee.

Dean Phillips of Elliott Greenleaf & Siedzikowski in Blue Bell, Pa., who serves as counsel to that committee, said that the committee is aware of the proposal, but declined to comment on the committee's agenda.

Phillips did stress that when the committee has created a set of recommendations for the justices' consideration, it generally publishes them for perusal by the bench and bar.

State Supreme Court Chief Justice Ralph J. Cappy did not immediately respond to a call seeking comment about the proposed amendments to Rule 1925(b). •

MEMORANDUM

DATE: October 16, 2006

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-06

William Thro, the State Solicitor General of the Commonwealth of Virginia – writing on his own behalf and on that of his counterparts in thirty-three other states and Puerto Rico – has proposed that FRAP 4(a)(1)(B) and FRAP 40(a)(1) be amended to accord to states the same treatment accorded to the federal government.[1] In brief, Mr. Thro argues that the same considerations that support lengthening the time to file a notice of appeal or to file a petition for panel rehearing or rehearing en banc,[2] when a federal entity is a party, also support such lengthening when a state entity is a party.

Part I of this memo summarizes the history of Rules 4(a)(1)(B) and 40(a)(1), and compares the treatment of federal and state government litigants in the Appellate, Civil and Supreme Court Rules. Part II considers the costs and benefits of the proposed amendments. Part III considers how best to implement the proposal if the Committee considers the proposal worth pursuing. Among other issues, Part III notes the existence of pending amendments to Rules 4(a)(1) and 40(a)(1) to clarify their application to individual-capacity suits. I attach a copy of those amendments, which the Advisory Committee approved in November 2004 but which has not yet been submitted to the Standing Committee.

I. Federal and state government litigants – overview of treatment in FRAP and elsewhere

This section first summarizes the history of the two provisions to which the proposal is directed. The relevant aspects of the provisions date from a 1948 amendment to Civil Rule 73 (in the case of Rule 4) and a 1994 amendment to the FRAP (in the case of Rule 40). The disparate appeal time for cases involving federal government litigants is also reflected in 28

---

[1] Mr. Thro's proposal is attached.

[2] Altering the FRAP 40(a)(1) time period for seeking rehearing will also alter the period for seeking rehearing en banc. See FRAP 35(c) ("A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.").

U.S.C. § 2107, adopted as part of the Judicial Code of 1948.

Next, this section surveys the landscape of provisions in the Appellate Rules, the Civil Rules, and the Supreme Court Rules, and considers the extent to which federal and state litigants are treated differently. This survey discloses a number of instances in which federal and state litigants are treated the same. In a number of other instances, federal litigants are singled out for favorable treatment; some of these instances reflect statutory mandates, and some likely reflect conditions placed by the United States on its submission to suit. A few other instances show differences between the treatment of federal and state litigants, but in ways that do not clearly favor federal litigants.

A. A brief history of Rules 4(a)(1)(B) and 40(a)

1. Rule 4(a)(1)(B)

Rule 4(a)(1)(A) sets a presumptive 30-day time limit for filing a notice of appeal in a civil case. However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." Rule 4(a)(1)(B). The 60-day provision for cases involving U.S. parties has existed in substantially the same form ever since the adoption of the original Appellate Rules in 1968.[3] The 1967 Advisory Committee Note explained that FRAP 4(a) was derived from Civil Rule 73(a) "without any change of substance." The Civil Rule 73(a) to which the 1967 Note referred is no longer extant. The relevant Civil Rule 73(a) provision was adopted in 1948, three months before the enactment of the 1948 Judicial Code, and the Code included a similar provision, 28 U.S.C. § 2107, that exists to this day.

Acting at the suggestion of the Judicial Conference of Senior Circuit Judges, the Civil Rules Advisory Committee took up, in the mid-1940s, the question of appeal time. The Advisory Committee explained the resulting proposal to amend Civil Rule 73(a) as follows:

> Subdivision (a) as amended will fix the time for appeal in all cases, including those from the District of Columbia, at thirty days from the date of the entry of the judgment, unless a shorter period is provided by Act of Congress, but in any case in which the United States, or an officer or agency thereof, is a party, sixty days is allowed from the date of entry of the judgment. The three-months period now allowed by the statute in most cases is too long. . . . The shortened appeal time is in line with developments in state appellate practice; indeed, some states prescribe even shorter periods. . . .

---

[3] See Federal Rules of Appellate Procedure with Conforming Amendments to Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure, effective July 1, 1968, 43 F.R.D. 61, 69.

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties.

Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 485. The Supreme Court acted favorably upon the amendments in 1946, and the amendments were reported to Congress in 1947. See Amendments to Federal Rules of Civil Procedure, 6 F.R.D. 229. The amendments evidently took effect in March 1948.[4]

Three months later, the Judicial Code of 1948 was enacted. Section 2107 of the newly adopted Code mirrored Civil Rule 73(a)'s treatment of appeal time:

> Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgemnt, order or decree.
>
> In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

Act of June 25, 1948, c. 646, 62 Stat. 869, 963. A review of the provisions cited as precursors of this section of the Judicial Code[5] discloses no precedent for the 1948 Act's distinctive treatment

---

[4] Though this is difficult to determine as to Civil Rule 73 because the relevant Civil Rule 73 no longer exists, the effective date of the amendments to other rules amended in the same package is March 19, 1948.

[5] The Revision Notes to the 1948 Act state that Section 2107 was "[b]ased on Title 28, U.S.C., 1940 ed., §§ 227a, 230, and section 1142 of Title 26, U.S.C., 1940 ed., Internal Revenue Code (Mar. 3, 1891, c. 517, § 11, 26 Stat. 829; Mar. 3, 1911, c. 231, § 129, 36 Stat. 1134; Feb.

of U.S. litigants – suggesting that the provision made its way into the Code through the example provided by (or as part of the same process that led to the adoption of) Civil Rule 73(a).

The relevant version of Civil Rule 73(a) no longer exists, but the cognate provisions persist in both FRAP 4(a) and 28 U.S.C. § 2107. The latter currently provides in relevant part:

> (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> (b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

2. Rule 40(a)(1)

FRAP 40(a)(1) provides: "Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time."

The 45-day period for cases involving federal government litigants was added in 1994. The 1994 Advisory Committee Note explained: "This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." The amendment was modeled on a D.C. Circuit Rule and a Tenth Circuit Rule. See 1994 Advisory Committee Note. The minutes of the Advisory Committee's April 1993 meeting contain a brief discussion of the two comments received after publication of the proposed amendment to Rule 40. As far as can be gleaned from that discussion and from the description in the ensuing Advisory Committee Report, neither commentator raised the question of whether the extended time period should also be available in cases involving state government litigants, and it appears that the Advisory Committee did not discuss that question. See April 1993 Advisory Committee Minutes, at 3-4; May 1993 Advisory Committee Report at 53.

13, 1925, c. 229, § 8(c), 43 Stat. 940; Feb. 28, 1927, c. 228, 44 Stat. 1261; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54; Feb. 10, 1939, c. 2, § 1142, 53 Stat. 165; Oct. 21, 1942, c. 619, Title V, § 504(a), (c), 56 Stat. 957)."

B. Treatment of federal and state litigants elsewhere in the Appellate Rules

Apart from Rules 4 and 40, I found only one other instance – Rule 39(b) – in which the Appellate Rules single out federal litigants for treatment different than that accorded to state litigants. In other Appellate Rules – Rules 22(b)(3), 29, and 44 – state and federal litigants share favorable treatment.

1. Rule 39(b)

Rule 39(b) provides that "[c]osts for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law." This provision has existed in substantially the same form since the adoption of the FRAP.[6] The 1967 Advisory Committee Notes explained the special treatment of the United States by reference to then-prevailing practice in the courts of appeals and to 28 U.S.C. § 2412:

> The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.
>
> The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966 . . . , which amended 28 U.S.C. § 2412, the former general bar to the award of costs against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended § 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are "otherwise specifically provided (for) by statute." . . . .

2. Rule 22(b)(3)

Rule 22(b) concerns the requirement that a habeas petitioner obtain a certificate of appealability. Rule 22(b)(3) provides that "[a] certificate of appealability is not required when a state or its representative or the United States or its representative appeals."

---

[6] See FRAP 39(b), 43 F.R.D. 61, 102.

3. Rule 29(a)

Rule 29(a) requires would-be amici to obtain consent of the parties or leave of court, but exempts from this requirement briefs filed by "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia." The exemption for those entities has existed in substantially the same form since the adoption of the FRAP,[7] except that the District of Columbia was added to the list of exempt entities in 1998.

4. Rule 44

Rule 44 provides a procedure for notifying government authorities when the constitutionality of a statute is challenged. As initially adopted in 1968, Rule 44 applied only to appeals in which "the constitutionality of any Act of Congress" was questioned and "to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, [was] not a party." 43 F.R.D. 61, 106. The 1967 Advisory Committee Note explained that Rule 44 was adopted "in response to" 28 U.S.C. § 2403, "which requires all courts of the United States to advise the Attorney General of the existence of an action or proceeding of the kind described in the rule."

In 1976, Congress amended Section 2403, adding a new subsection (b) that provides a notification and intervention procedure (for state attorneys general) in cases in which a state statute's constitutionality is questioned. See P.L. 94-381, §§ 5 & 6, August 12, 1976, 90 Stat. 1119, 1120. Roughly a quarter-century later, the rulemakers conformed FRAP 44 to this change by adding FRAP 44(b). See FRAP 44, 2002 Advisory Committee Note.

C. Treatment of federal and state litigants in the Civil Rules

The Civil Rules, like the Appellate Rules, currently place states and the federal government on the same footing with respect to suits involving challenges to the constitutionality of a statute. New Civil Rule 5.1 (which will take effect December 1 absent congressional action to the contrary) provides for notice to the federal government or to the appropriate state government, and for intervention by that government, in litigation challenging the constitutionality of a federal or state statute.[8]

---

[7] As originally adopted in 1968, Rule 29 required would-be amici to obtain written consent of all parties or leave of court, "except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth." 43 F.R.D. 61, 94.

[8] New Civil Rule 5.1 incorporates and broadens similar provisions that were formerly part of Civil Rule 24(c).

In other instances, however, the Civil Rules accord advantages to federal government litigants but not to state government litigants.[9] In some instances, the provisions were designed to track existing statutory provisions.[10] Though I have not traced the roots of all the provisions, it seems likely that a number of them implemented conditions that the federal government placed upon suits brought against itself.[11] A view of these provisions as reflections of a sovereign's ability to impose conditions on a suit against itself in its own courts may help to explain why they operate only to the advantage of federal government entities. A few other provisions exempt federal government litigants from posting various sorts of security required of other litigants.[12]

---

[9] A couple of rules – Civil Rules 4(i) & (j) and Civil Rule 15(c)(3) – single out the U.S. for different treatment but do not appear to confer a particular advantage on the U.S.

[10] Civil Rule 12(a)(1)(A) and 12(a)(2) set 20-day time limits for responding to a complaint or a cross-claim. But for federal government defendants, Civil Rule 12(a)(3) sets a time limit of 60 days. State government defendants do not get the benefit of this extended deadline. The 1937 Advisory Committee Note explains that the 60-day limit for federal government defendants was designed to track similar provisions in certain federal statutes.

[11] Examples in this category include the following:

- Civil Rule 13(d) states that "[t]hese rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof."
- Civil Rule 39(c)'s authorization of the use of juries by consent excepts "actions against the United States when a statute of the United States provides for trial without a jury."
- Civil Rule 54(d)(1) provides in relevant part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law."
- Civil Rule 55(e) provides that "[n]o judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court."

[12] Examples of this are found in Civil Rules 45, 62 and 65:

- Civil Rule 45(b)(1) provides that "[w]hen [a] subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered."
- Civil Rule 62(e) provides that "[w]hen an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant."
- Civil Rule 65(c) provides in relevant part: "No restraining order or preliminary injunction

D. Treatment of federal and state litigants in the Supreme Court Rules

Like both the Appellate Rules and the Civil Rules, the Supreme Court Rules include similar provisions concerning challenges to state and federal statutes.[13] And like the Appellate Rules, the Supreme Court Rules equate state and federal litigants by permitting either to file amicus briefs without a motion for leave.[14] Parity is also accorded to state and federal litigants with respect to timing: Supreme Court Rule 13.1 sets a 90-day time limit for certiorari petitions, and does not provide an extended time limit for cases involving the U.S. or other governmental litigants.[15]

II. Should state and federal litigants be treated the same for purposes of determining appeal time and time to move for panel rehearing or rehearing en banc?

Mr. Thro's letter helpfully sets forth the major arguments in favor of treating states the same as the federal government. States, like the federal government, need time to review the merits prior to deciding whether to appeal, or to request a rehearing. For states, as for the federal government, these decisions may involve complex legal, policy and strategic choices. Multiple decisionmakers within state government will often be involved. Extra time would assist states in conducting those deliberations.

It might also be argued that states should enjoy parity with the federal government, and that this consideration weighs in favor of extending to states the treatment accorded the federal government in Rules 4(a) and 40(a). This argument, however, seems weaker than the practical

---

shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

[13] See Supreme Court Rules 29.4(b) & (c).

[14] See Supreme Court Rule 37.4. Interestingly, this rule includes not only federal and state governments, and commonwealths, territories or possessions, but also municipal governments.

[15] The one distinction the Supreme Court Rules draw between federal and state litigants can be traced to the question, discussed above, of costs in cases involving the United States: Supreme Court Rule 43.5 provides: "To the extent permitted by 28 U.S.C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders."

arguments pressed by Mr. Thro.[16] Nor does an argument for parallelism with other sets of Rules seem relevant here: The treatment of federal and state litigants in the Civil Rules and the Supreme Court Rules provides room to argue for equal treatment, but also provides examples of differing treatment.

Adoption of the proposal would impose two types of costs. One set of costs concerns implementation. As discussed below, a legislative amendment would be necessary to conform Section 2107 to the amended Rule 4(a). And the bench and bar would incur the usual cost of adjusting to a new amendment. The other cost would be that of the delays imposed by doubling the time for filing a notice of appeal, and more than doubling the time before the court's mandate issues once an appeal is decided. Though I do not have figures with which to illustrate this point, it is clear that the universe of cases to which the amendments would apply is large. It includes all habeas cases concerning state prisoners,[17] all Section 1983 cases involving at least one state official sued in his or her official capacity, and – assuming that the Committee applies the approach taken in the pending amendments discussed in Part III.C. below – all Section 1983 cases involving at least one state official sued in his or her individual capacity for actions taken in connection with official duties.

III. Crafting the proposed amendments

Assuming that Mr. Thro's similar-treatment proposal is desirable, three issues present themselves. First, because Rule 4(a)(1)'s time periods are intertwined with a statute (Section 2107), it would be advisable to seek a conforming amendment to Section 2107 if the proposed amendment to Rule 4(a)(1) goes forward. Second, there is a question of scope: Should governments other than states be included? If so, which other governments? Third, another scope question concerns the meaning of the term "officer"; there currently exists diversity of opinion in the caselaw as to whether that term encompasses officials sued in their individual capacities, but this question would be settled by proposed amendments that the Advisory

---

[16] In considering the proposal that states be treated with parity for the sake of parity, it may be relevant to note that foreign states are often not treated the same as the United States. See, e.g., Dadesho v. Government of Iraq, 139 F.3d 766, 767 (9th Cir. 1998) (noting that the Foreign Sovereign Immunities Act "gives a foreign state sixty days to file an answer to a complaint, in contrast to the twenty days given most civil defendants under Fed. R. Civ. P. 12(a)," but observing that foreign states do not get extra time to file a notice of appeal under Appellate Rule 4(a)).

[17] FRAP 4(a)(1)'s 30-day deadline applies to appeals in habeas cases involving state prisoners. See Houston v. Lack, 487 U.S. 266, 269 (1988). In federal prisoners' Section 2255 proceedings, the 60-day period set in FRAP 4(a)(1)(B) applies. See Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules.").

Committee approved in November 2004.

A. If Rule 4(a)(1) is amended, Section 2107 should be amended as well

As noted above, FRAP 4(a)(1)'s dichotomous treatment of U.S. litigants and other litigants is mirrored in the distinction drawn in 28 U.S.C. § 2107. If the proposed amendment to FRAP 4(a)(1) is adopted, the rulemakers should suggest, at the time that the proposed amendment is forwarded to Congress, that Congress enact conforming changes to Section 2107.

B. Entities to be covered by the proposed amendments

Mr. Thro writes on behalf of thirty-four states and the Commonwealth of Puerto Rico. He obviously intends Puerto Rico to be included among the entities that would get the benefit of the amendment. He does not discuss, however, whether other entities should also be included. Presumably, the District of Columbia would appropriately be grouped with the states. Though I have not had a chance to research the question, the same might be said of the Northern Mariana Islands, American Samoa, Guam, and the Virgin Islands.[18] Foreign nations, by contrast, might appropriately be excluded from this proposal: They presumably litigate far less frequently in federal court than do the states.

Some Native American tribes may be frequent litigants, and at least a few tribes may face caseloads and decisional challenges that are somewhat similar to those shouldered by a state litigant. But Native American tribes vary widely in their population and resources, and tribal governments vary in their size and complexity. The Navajo Nation, for example, will resemble a state government litigant much more closely than a smaller tribal government would. The great variation among tribal governments might thus lead to the conclusion that tribes should be excluded from the provision. On the other hand, it might be argued that a small tribal government might need the extra time even more, because its lack of resources would render it a less nimble decisionmaker.

Once the Committee reaches a view on the proper scope of the amendments, it will need to decide how to make that scope clear. It seems doubtful that the proposed amendments drafted by Mr. Thro would cover entities other than the fifty states unless a definition is added to make

---

[18] It is interesting to note that the members of the National Association of Attorneys General include not only the attorneys general of the fifty states but also "the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands." http://www.naag.org/naag/about_naag.php, last visited September 28, 2006.

that clear.[19] Or – perhaps more straightforwardly – the amendments could be redrafted to refer to all the intended beneficiaries. Thus, for example, FRAP 29(a) refers not merely to a "State" but also to a "Territory, Commonwealth, or the District of Columbia."

C. Individual-capacity suits

It is currently unclear whether the existing federal-litigant provisions in FRAP 4(a) and 40(a) apply to cases involving federal officials sued in their individual capacities. Cf. 16A Wright, Miller, Cooper & Schiltz, Federal Practice & Procedure § 3950.2, fn. 42 (noting "[t]he problem of the ambiguous role often played by United States officers as defendants").

The Second Circuit has taken a relatively narrow view. As the court explained in a case arising out of a car accident involving a federal employee driving a government-owned vehicle on government business:

> The action was brought against him in his individual capacity and the judgment against him was entered against him as an individual. Although the United States Attorney appeared in his behalf, Smith could have chosen private counsel. Moreover, [i]f Smith had decided to appeal from the judgment against him he would not have needed the approval of any government department. Therefore, the reasons for which the usual 30 day time limit for filing an appeal was extended to 60 days in cases in which the 'United States or an officer or agency thereof' is a party are not applicable to Smith.

Hare v. Hurwitz, 248 F.2d 458, 462 (2d Cir. 1957) (construing Civil Rule 73(a)).

---

[19] Some procedural provisions expressly define "State" to include the Commonwealth of Puerto Rico, the District of Columbia, and/or U.S. territories and possessions. See, e.g., 28 U.S.C. § 1332(e) ("The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."); 28 U.S.C. § 1367(e) ("As used in this section, the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."); 28 U.S.C. § 1369(c)(5) (definition similar to Section 1367(e)); 28 U.S.C. § 1738A(b)(8) (same); 28 U.S.C. § 3002(14) ("'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, or any territory or possession of the United States."); 28 U.S.C. § 3701(5) ("[T]he term 'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States").

Some procedural provisions define state to encompass, in addition, Native American tribes. See 28 U.S.C. § 1738B(b) ("'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).").

Some other circuits have given the provisions a broader application. The Ninth Circuit has explained that

> Congress intended the reference to officers of the United States to be read in context with their activities, authority, and duties. A workable rule would be one that looks at who represents the parties and the relationship of the parties to each other and to the government during the course of the conduct that gave rise to the action. Whenever the alleged grievance arises out of a government activity, the 60-day filing period of Rule 4(a) applies if: (a) the defendant officers were acting under color of office, or (b) the defendant officers were acting under color of law or lawful authority, or (c) any party in the case is represented by a government attorney.

Wallace v. Chappell, 637 F.2d 1345, 1347-48 (9th Cir. 1981) (en banc, per curiam decision); Buonocore v. Harris, 65 F.3d 347, 352 (4th Cir. 1995) (applying *Wallace* and concluding that 60-day period applied in case involving *Bivens* claims against officers sued in personal capacities, because officers were acting under color of law, one officer had been represented by government counsel, and the U.S. had been for some period of time a named party to the proceedings below); Williams v. Collins, 728 F.2d 721, 723-24 (5th Cir. 1984) (following *Wallace*).

Provisions setting the time within which to appeal should be clear, and in the case of individual-capacity suits, current Rule 4(a)(1)(B) seems to fall short of that goal. In fact, as you know, the Advisory Committee has already approved proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) to clarify the rules' application to individual-capacity suits. The proposed amendments are attached to this memo.

IV. Conclusion

As Mr. Thro notes, the decisional challenges faced by state government litigants provide an argument for treating those litigants the same as federal government litigants, with respect to the time for filing the notice of appeal or seeking rehearing. The Committee should weigh that argument against the likely costs of the proposal: the costs of transition to the new rule, and the delays imposed by making the extended deadlines available in a greater range of cases. If the Committee decides to adopt the proposal, it should consider how to incorporate the requisite changes into the currently pending proposals to amend Rules 4(a) and 40(a). It should also consider what entities (e.g. commonwealths, territories, possessions) should be encompassed in addition to states, and it should consider asking Congress to adopt a conforming amendment to 28 U.S.C. § 2107.

Encls.

Proposed amendments approved by the Advisory Committee in November 2004:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

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

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

(a) the United States;

(b) a United States agency;

(c) a United States officer or employee sued in an official capacity; or

(d) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, a petition for panel rehearing may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
804-371-8947 TDD

September 22, 2006

Via Electronic Mail as PDF Attachment with Original Via U.S. Mail

Advisory Committee
FEDERAL RULES OF APPELLATE PROCEDURE
c/o Professor Catherine T. Struve
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

RE: Suggested Amendments to the Federal Rules of Appellate Procedure

Ladies and Gentlemen:

I serve as State Solicitor General of the Commonwealth of Virginia. On behalf of my counterparts in Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, Wisconsin, and Puerto Rico, I write to propose amendments to the Federal Rules of Appellate Procedure. Our proposed amendments are designed to ensure that the States are treated in the same manner as the National Government for purposes of: (1) filing a Notice of Appeal in a civil case; and (2) seeking a panel rehearing or rehearing en banc in a civil case.

Specifically, we propose that Federal Rule of Appellate Procedure 40(a)(1) be amended by adding the following italicized language:

> Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States, *a State*, or *an* officer or agency *of the United States or a State* is a party, the time within which any party may seek rehearing is 45 days after the entry of judgment unless an order shortens or extends the time.

Similarly, we propose that Federal Rule of Appellate Procedure 4(a)(1)(B) be amended by adding the following italicized language:

> When the United States, *a State*, or *an* officer or agency *of the United States or a State* is a party, the notice of appeal may be filed within 60 days after the judgment or order appealed from is entered.

The rationale for seeking these changes is to recognize that individual States, like the United States, need time to conduct a thorough review of the merits of a case before filing a Notice of Appeal or requesting a rehearing. This happens to be the exact rationale used by the Advisory Committee when the Rules were amended to give more time to the United States to seek rehearing, and in turn the rationale for Rule 4(a)'s later deadline for a Notice of Appeal. *See Advisory Committee Notes to the 1994 Amendments to Rule 40(a)* ("This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing.").

First, with respect to the suggested amendment to Rule 40(a), like the National Government, the States frequently have lengthy review processes for Petitions for Rehearing. For example, in Indiana, the lawyer handling the appeal would first need to refer the case to the Solicitor General, who would then need to consult the relevant client agencies, and then make a recommendation to the Attorney General. In some cases, depending on the profile of the issue, the Attorney General may arrange a meeting with the relevant public official to discuss alternative strategies before making a decision. Similarly, in Colorado, Petitions for Rehearing in non-habeas cases generally require consultation with the Governor's office, a meeting involving the Attorney General, Chief Deputy Attorney General, or Solicitor General, and, if the decision is to seek rehearing, approval of the draft by the Solicitor General or Attorney General. Because travel schedules and commitments frequently make it difficult for everyone to meet, North Carolina has experienced problems with the time limits regarding Petitions for Rehearing, particularly with respect to habeas corpus matters that entail complex public policy considerations.

In these States and others, this process can be particularly time consuming, but it is important because in most States executive and administrative governmental responsibilities are divided among separately elected officials, including the Governor, Attorney General, Treasurer, Auditor, Secretary of State, and others. Indeed, States frequently will have a situation where the Attorney General is from one party and the Governor or other elected-official client is from another. Consequently, there is often a great need for Attorneys General or their senior deputies to consult with individual agency heads or elected officials before reaching an important decision concerning the appeal. It should not be surprising that this process can be difficult to complete in fourteen days.

Second, with respect to the suggested amendment to Rule 4(a), many of the same difficulties that exist in the rehearing context also arise when States must determine whether to file a Notice of Appeal. While the longer period of time (thirty days instead of fourteen) and the comparative simplicity of preparing a Notice of Appeal alleviate these difficulties to some degree, it is still necessary for multiple deputy Attorneys General to review the district court decision, make a recommendation, and, in many instances, consult with agency heads or other elected state officials before reaching a final decision.

Furthermore, when officials at the United States Department of Justice consider whether to recommend appealing a district court decision, and when the Solicitor General of the United States makes a final determination whether to appeal, these officials are not merely considering the narrow issue whether the government can win the case or whether the potential benefit of winning outweighs

the cost of committing more resources to the case. Rather, these officials are cognizant that they are formulating legal policy for the entire federal government. They must therefore consider whether pursuing the appeal is in the best interests of the United States. This means considering not only the interests of the particular agency whose case is before them, but also the potentially competing interests of other government agencies, and, of course, the cause of justice in general. That is why decisions to prosecute an appeal, but not to defend an appeal, ultimately must be made by the Solicitor General.

The same is true for state Attorneys General and their senior deputies. A decision to appeal represents a decision about legal policy. No less than the Solicitor General of the United States, state government officials often must confront complex and weighty issues of legal policy and legitimate competing agency or public interests, not to mention the need to weigh the likelihood and benefits of winning against the cost of additional resources, when deciding whether to appeal. The current deadline for States to undertake those considerations short-circuits state processes compared with the time afforded the National Government.

The sheer size of the federal bureaucracy does not justify treating state government differently from the National Government for purposes of Rules 40(a) and 4(a) of the Federal Rule of Appellate Procedure. The National Government is allotted more time because its decisions in this regard are important and oftentimes difficult. The same is true for appeal and rehearing decisions by States, and the rules should reflect that and accommodate States as much as the National Government.

In closing, I thank the committee for its attention to our proposed amendments. If you have any questions, or if my counterparts and I can provide any additional information, please do not hesitate to contact me at (804) 786-2436 or wthro@oag.state.va.us.

Sincerely,

/s/ William E. Thro

William E. Thro
State Solicitor General

cc: State Solicitors General (or their equivalents) of Participating States

Dan Schweitzer, Esq., Supreme Court Counsel
National Association of Attorneys General

Calendar for March 2007 - May 2007 (United States)

March 2007

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

April 2007

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

May 2007

Su	Mo	Tu	We	Th	Fr	Sa
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

Holidays and Observances

Mar 31	Prophet's Birthday (Islamic)	Apr 9	Easter Monday (Christian)
Apr 3	First day of Passover (Jewish)	Apr 10	Last day of Passover (Jewish)
Apr 6	Good Friday (Christian)	May 13	Mother's Day
Apr 8	Easter Sunday (Christian)	May 28	Memorial Day

Calendar generated on www.timeanddate.com/calendar

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

November 2, 2006
Via Email

MEMORANDUM TO THE APPELLATE RULES COMMITTEE

SUBJECT: *Supplemental Agenda Materials re FRAP 4 and 40; Update on Proposed Amendments to Rule 11 of the Rules Governing §§ 2254 and 2255 Cases and new Criminal Rule 37*

Attached are letters from Todd Kim, Solicitor General of the District of Columbia, and William E. Thro, Solicitor General of the Commonwealth of Virginia, providing some empirical data on the proposal to amend Appellate Rules 4(a)(1)(B) and 40(a)(1), which is behind Tab V-E-3 of your agenda book.

Also attached are related agenda materials from the recent Criminal Rules Committee meeting regarding a Department of Justice proposal to amend the Rules Governing §§ 2254 and 2255 Cases and the Federal Rules of Criminal Procedure. Specifically, the Department recommends amending Rule 11 of the § 2254 and § 2255 Rules to create the exclusive means by which a litigant may seek reconsideration of a court's ruling in a § 2254 and § 2255 case. The Department also proposed a new Criminal Rule 37, dealing with extraordinary and ancient writs. At its meeting last month, the Criminal Rules Committee discussed briefly the proposal to amend Rule 11. (The committee spent much more time considering proposed new Criminal Rule 37.) Although no formal action was taken on the proposal to amend Rule 11, the committee expressed general agreement with it. It is expected that the Criminal Rules Committee will consider the proposed amendments to Rule 11 and new Criminal Rule 37 at its April 2007 meeting.

Finally, as a reminder, the Appellate Rules Committee meeting will be held on Wednesday, November 15, in the Mecham Conference Center of the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., and will start at 8:30 a.m. The committee dinner will be held on Tuesday, November 14, at Teatro Goldoni, 1909 K Street, N.W.

John K. Rabiej

Attachments

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF THE SOLICITOR GENERAL

October 25, 2006

BY E-MAIL AND REGULAR MAIL

Advisory Committee
Federal Rules of Appellate Procedure
c/o Professor Catherine T. Struve
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

RE: Proposed additions to suggested amendments to the Federal Rules of Appellate Procedure to include appeals and petitions by the District of Columbia government

Dear Professor Struve and other members of the Committee:

I am the Solicitor General for the Office of the Attorney General for the District of Columbia. In a letter to you dated September 22, 2006, William E. Thro, Solicitor General for the Commonwealth of Virginia, suggested that Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1) be amended to provide the same filing deadlines for state governments as are presently provided for the United States government for purposes of filing appeals and petitions for rehearing. His proposal would extend the times from 30 to 60 days for appeals and 14 to 45 days for petitions for rehearing.

I support this proposal for the reasons stated in Mr. Thro's letter. I also suggest that, if the proposal is adopted, it be modified to provide similar treatment to appeals and petitions for rehearing by the District of Columbia government. Congress, in enacting the District of Columbia Self-Government and Governmental Reorganization Act, PUB. L. NO. 93-198, 87 Stat. 774 (1993); D.C. Code § 1-201.01 *et seq.* (2001), has created a government for the District of Columbia that has responsibilities like those of a state government, and the reasons stated by Mr. Thro for extending appeal and rehearing times for state governments justify extending those times for the District of Columbia as well. If the committee accepts the proposal to increase the filing times under the Federal Rules

441 Fourth Street, N.W., Suite 600 South, Washington, D.C. 20001 • Phone (202) 724-6609 • Fax (202) 724-0431

of Appellate Procedure for states, it would be appropriate and fair to include the District of Columbia as well.

Therefore, building upon Mr. Thro's proposal, I propose that Rules 4(a)(1)(B) and 40(a)(1) be amended by inserting the underscored language:

Rule 4(a)(1)(B):

> When the United States, a State, or the District of Columbia or an officer or agency of the United States, a State, or the District of Columbia is a party, the notice of appeal may be filed within 60 days after the judgment or order appealed from is entered.

Rule 40(a)(1):

> Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States, a State, or the District of Columbia or an officer or agency of the United States, a State, or the District of Columbia is a party, the time within which any party may seek rehearing is 45 days after the entry of judgment unless an order shortens or extends the time.

Thank you for considering these additions to the amendments proposed by Mr. Thro. If you have any questions, please feel free to contact me at (202) 724-6609 or at todd.kim@dc.gov.

Sincerely yours,

/s/ Todd S. Kim

Todd S. Kim
Solicitor General
Office of the Attorney General
One Judiciary Square
441 4th Street, N.W.
Suite 600 South
Washington, D.C. 20001

cc: William E. Thro, Esq.
Solicitor General for the Commonwealth of Virginia
Office of the Attorney General
900 East Main Street
Richmond, VA 23219

Dan Schweitzer, Esq.
National Association of Attorneys General
750 First Street, N.E.
Suite 1100
Washington, D.C. 20002

COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
804-371-8947 TDD

October 31, 2006

Via Electronic Mail as PDF Attachment with Original Via U.S. Mail

Professor Catherine T. Struve
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3400 Chestnut Street
Philadelphia, Pennsylvania 19104

RE: Suggested Amendments to the Federal Rules of Appellate Procedure

Dear Professor Struve:

As you requested, I have asked my colleagues in other States regarding the volume of appeals that might be affected by the States' proposed revisions to the Federal Rules of Appellate Procedure. Although some States do not track this information or only track non-habeas corpus or non-inmate appeals, I was able to gather some information. I write to pass that information on to you and the Committee.

Arkansas (Eighth Circuit)—Arkansas has had eight habeas appeals during 2006. There is no data on non-habeas appeals.

Arizona (Ninth Circuit)—From July 1, 2005 through June 30, 2006, Arizona had ninety-five non-habeas appeals. There is no data on habeas appeals.

Connecticut (Second Circuit)—In the past five years, Connecticut has averaged about eight non-habeas appeals per year. There is no data on habeas appeals.

Kentucky (Sixth Circuit)—Kentucky averages about thirty habeas appeals per year. There is no data on non-habeas appeals.

Illinois (Seventh Circuit)—Illinois averages about eighty-five non-habeas appeals per year. There is no data on habeas appeals.

Massachusetts (First Circuit)-Massachusetts averages twenty-one non-habeas appeals and fourteen habeas appeals.

New Jersey (Third Circuit)—New Jersey averages seventy-two non-habeas appeals and twenty-seven habeas appeals.

Oklahoma (Tenth Circuit)—Oklahoma currently has seventy-nine habeas appeals pending in the Tenth Circuit. There is no data on non-habeas appeals.

Pennsylvania (Third Circuit)—Pennsylvania currently has approximately 125 non-habeas appeals and fifty habeas appeals.

Puerto Rico (First Circuit)—Puerto Rico handles approximately ninety civil appeals per year. There is no break down on habeas or non-habeas cases.

Virginia (Fourth Circuit)—Virginia averages about 200 habeas appeals per year, seventy-nine non-habeas appeals involving inmates, and about twenty appeals that are neither habeas nor involve inmates.

Wyoming (Tenth Circuit)—Wyoming averages about ten non-habeas appeals per year. In the most recent year, Wyoming had seven habeas appeals.

In closing, I want to thank you and the committee for your attention to our proposed amendments. If you have any questions, or if my counterparts and I can provide any additional information, please do not hesitate to contact me at (804) 786-2436 or wthro@oag.state.va.us.

Sincerely,

/s/ William E. Thro

William E. Thro
State Solicitor General

CIRCUITS RESPONDING AS OF NOVEMBER 10, 2006

****

FEDERAL CIRCUIT

D.C. CIRCUIT

FIRST CIRCUIT

FOURTH CIRCUIT

TENTH CIRCUIT

United States Court of Appeals
for the Federal Circuit

717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

CHAMBERS OF
CHIEF JUDGE PAUL R. MICHEL

October 2, 2006

Honorable Carl E. Stewart
Chair, Advisory Committee on Appellate Rules
United States Court of Appeals for the Fifth Circuit
2299 U.S. Court House
300 Fannin Street
Shreveport, LA 71101

Dear Judge Stewart:

This letter further responds to your letter dated September 13, 2006 regarding four minor requirements that our local rules levy beyond those imposed by the Federal Rules of Appellate Procedure (FRAP). You asked whether our court might consider reducing or eliminating these local requirements. As I stated preliminarily in my September 19, 2006 response, I believe our court cannot sensibly reduce or eliminate any of them because each uniquely serves an important purpose. A more detailed explanation follows.

The four local requirements are:

- A Certificate of Interest must be included within the brief. Fed. Cir. R. 28(a)(1).
- A statement of related cases must also be included. Fed. Cir. R. 28(a)(4).
- The Statement of the Case required by Fed. R. App. P. 28 must include the citation to any published decision of the trial tribunal. Fed. Cir. R. 28(a)(7).
- The trial tribunal's judgment and opinion must be appended to the opening brief. Fed. Cir. R. 28(a)(12).

Note that these four requirements are all contained within the same subpart of a single local rule, Rule 28, and consist of about 10 lines of print on one page (p. 49, Federal Circuit Rules of Practice). Regarding the content of briefs, counsel need only read one rule, even though that rule cross-references Fed. Cir. R. 47.4 and 47.5 for a more detailed description. We therefore do not force counsel through a maze of rules before they can file their briefs.

These local requirements have been in effect for more than a decade. They provide information necessary either to manage and decide the case or to determine if recusal may be appropriate.

1. Requirement for a Certificate of Interest

Under both Fed. R. App. P. 28(a)(1) and Fed. R. App. P. 26.1(b), a party must file a corporate disclosure statement with each principal brief. The only difference our local rule creates is that this court refers to the statement as a Certificate of Interest and requires some additional information. See Fed. Cir. R. 47.4. The court supplies the parties with a form they may use to fulfill the FRAP and local rule requirement. See Form 9 in our local rules.

When counsel fail to comply with Fed. Cir. R. 28(a)(1), they also fail to comply with Fed. R. App. P. 28(a)(1) and Fed. R. App. P. 26.1(b). Thus, the problem is that counsel are not following either FRAP or our local rule. This requirement is the first requirement listed in both the FRAP and the local briefing rules. Deleting this local requirement would not help counsel comply with the similar requirement of FRAP.

As you are aware, courts face increasing scrutiny from Congress and the media regarding recusals. Certainly, the framers of FRAP recognized this when they required a corporate disclosure statement. Such statements provide a picture of the status of corporate holdings and relationships, and of course counsel are required by Fed. R. App. P. 26(b)(1) to update the statement whenever necessary. Our local rule requires as well information about the real party in interest and the names of all law firms, partners and associates that have appeared for the party.

Information regarding the real party in interest is required because in appeals coming from the Patent and Trademark Office (PTO), often the appellants are not the true parties in interest. The patent may be owned, for example, by a major corporation, but under the rules of the PTO, the patent is prosecuted solely under the names of the inventors. It is vital that we know the real parties in interest in these cases.

The information regarding counsel who represented the parties in the trial tribunal is vital for recusal purposes. Many of our judges had significant legal practice before joining the court and must be able to determine when to recuse based on that previous practice or because of a relationship to one of the attorneys involved in a case. Often, especially in patent cases, we face appellate specialists. Because only that attorney enters an appearance in a case on appeal, if we are not otherwise informed of counsel who previously represented the parties, judges of our court could unwittingly accept a case in which recusal might be appropriate.

2. Requirement of a Statement of Related Cases

Our court requires a statement of related cases. Fed. Cir. R. 28(a)(4) refers a reader to Fed. Cir. R. 47.5, which clearly lists the required information. This information is vital both for recusal purposes and for efficient management of the court's docket.

We require that the statement of related cases include the previous history of the case on review and information concerning other cases in our court or any other court that could be directly affected by this court's decision in the appeal. Often, for example, there may be multiple patent infringement actions against various defendants in different trial fora. If the appeal in this court concerns one defendant, because our decision could directly affect the disposition against other defendants, we need that information. This is especially true in patent cases, for if we hold that a patent claim must be construed in a particular manner, then that claim construction may be applicable to all other cases because claim construction is an issue of law. A decision of noninfringement based upon claim construction in one case could also lead to a determination of noninfringement in another case currently under review. In addition, a trial court will often designate one case as a lead case and stay proceedings in the other cases pending disposition of the lead case and any review by our court.

Similarly, in other areas of our jurisdiction we may use lead cases to decide an issue that is applicable to several other appeals. For example, our court has jurisdiction to review decisions of the Court of Appeals for Veterans Claims. Presently, one lead case in our court presents an issue that will affect more than 200 other pending veterans' appeals.

3. Citation of Trial Tribunal's Published Decision

The court requires that the Statement of the Case include the citation to any published decision of the trial tribunal. Fed. Cir. R. 28(a)(7). The Statement of the Case is clearly required by FRAP. Fed. R. App. P. 28(a)(6). Our local rule merely requires that counsel cite the trial tribunal's published decision within the Statement of the Case.

4. Addendum Including Trial Court's Judgment and Opinion

The court requires that the initial brief of the appellant or petitioner include, as an addendum, the trial tribunal's judgment and opinion. As you are aware, Fed. R. App. P. 28(f) requires that a brief include, as an addendum or in a pamphlet, the relevant parts of any statute, regulation or rule that is necessary for the court's determination of the issues presented. Because most of our cases involve review of a judge's or agency's decision, because the opinions are often quite thorough, and because we must apply the appropriate standard of review to the findings and conclusions, we deem the judgment and opinion to be just as relevant as any statute or regulation, if not more so. Thus, we require that it be included in the addendum.

Additionally, in part because of its national jurisdiction, our court usually does not receive the full record from the district court. Instead, the parties compile a Joint Appendix of only the items they cite in their briefs. Nonetheless, the joint appendices can be huge. Often a judge would prefer to first read the briefs only, in conjunction with the relevant statutes, rules, and the trial tribunal's express determinations. Due to the court's caseload and the complexity of the cases we hear, our judges routinely take work home and elsewhere. Because the addendum includes the judgment and opinion

of the trial forum, the judge can transport the relevant papers simply by taking the briefs, without carrying voluminous appendices.

I am informed by the clerk's office that of the ten most common reasons for rejection of briefs, five concern noncompliance with the Federal Rules of Appellate Procedure. It does not appear that the problem is counsel's difficulty understanding local rules; the problem is counsel's failure to even consult either set of rules.

As our requirements are well-known, counsel should be expected to comply. We post the rules on our court's website, publish a copy of the rules on a CD-ROM that includes hyperlinks to the underlying authority, and provide counsel with paper copies of the rules at all our judicial conferences and upon request. Even our orders rejecting briefs for noncompliance remind counsel of the rules' requirements and thus serve an educational purpose.

Having reviewed your letter carefully, I understand it to ask us to review our rules with an eye to eliminating unnecessary requirements. Having undertaken such a review, I am convinced that for the reasons stated above the four requirements identified in your letter are necessary and therefore I would not anticipate that any would be reduced or eliminated. I do not see how in good conscience I could urge the court to do so. Even if I did, I would expect the court not to agree.

If you determine that a further review or more formal action by our court is required, please so advise. Otherwise, I will consider the matter closed.

Sincerely,

Paul R. Michel

cc: Judge Alan D. Lourie

United States Court of Appeals
District of Columbia Circuit
Washington, DC 20001

Douglas H. Ginsburg
Chief Judge

Telephone (202) 216-7190
Facsimile (202) 273-0678

October 13, 2006

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

Dear Judge Stewart,

I write in response to your letter of September 13, 2006 requesting the court to review whether the additional requirements on briefing imposed by the D.C. Circuit might be reduced or eliminated. As the court noted in its response to the Federal Judicial Center's (FJC) briefing requirements survey in 2004, all of our local briefing rules were promulgated to serve particular purposes and the court is not inclined to eliminate these rules. For your convenience I have attached a copy of the D.C. Circuit's response to the FJC questionnaire.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Douglas H. Ginsburg

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
QUESTIONNAIR RE: APPELLANTS BRIEFS

Section I. Contents of Appellant's Brief

Identification of Requirements not specified in FRAP 28. Federal Rule of Appellate Procedure 28(a) governs the contents of appellant briefs. In summary, FRAP 28(a) provides that an appellant's brief must contain (1) a corporate disclosure statement if required; (2) a table of contents; (3) a table of authorities; (4) a jurisdictional statement; (5) a statement of the issues; (6) a statement of the case; (7) a statement of facts; (8) a summary of the argument; (9) the argument; (10) a short conclusion; (11) the certificate of compliance, if required. In addition, FRAP 28 imposes requirements regarding such matters as references to parties, references to the record, and appending copies of statutes or rules to a brief.

Our research has identified the following rules and/or requirements in your circuit which impose restrictions on an appellant's brief in addition to those specified in FRAP 28:

DC Circuit Rule 28 Briefs

(a) Contents of Briefs: Additional Requirements. Briefs for an appellant/petitioner and an appellee/respondent, and briefs for an intervener and an amicus curiae, must contain the following in addition to the items required by FRAP 28:

(1) **Certificate.** Immediately inside the cover and preceding the table of contents, a certificate titled "Certificate as to Parties, Rulings, and Related Cases," which contains a separate paragraph or paragraphs, with the appropriate heading, corresponding to, and in the same order as, each of the subparagraphs below.

(A) Parties and Amici. The appellant or petitioner must furnish a list of all parties, interveners, and amici who have appeared before the district court, and all persons who are parties, interveners, or amici in this court. An appellee or respondent, intervener, amicus may omit from its certificate those persons who were listed by the appellant or petitioner, but must state: "[Except for the following,] all parties, interveners, and amici appearing [before the district court and] in this court are listed in the Brief for _____."

Any party or amicus which is a corporation, association, joint venture, partnership, syndicate, or other similar entity must take the disclosure required by DC Circuit Rule 26.1

(B) **Rulings Under Review.** Appropriate references must be made to each ruling at issue in this court, including the date, the name of the district court judge (if any), the place in the appendix where the ruling can be found, and any official citation in the case of a district court or Tax Court opinion, the Federal Register citation and/or other citation in the case of an agency decision, or a statement that no such citation exists. Such references need not be included if they are contained in a brief previously filed by another person, but the certificate must state: "[Except for the following,] references to the rulings at issue appear in the Brief for _____."

(C) **Related Cases.** A statement indicating whether the case on review was previously before this court or any other court and, if so, the name and number of such prior case. The statement must also contain similar information for any other related cases currently pending in this court or in any other court of which counsel is aware. For purposes of this

1. **Is this listing correct for your circuit? Are these rules and requirements still in effect?**

   Yes, these rules and requirements are correct and currently in effect.

2. **Have we identified every local rule, requirement, or practice in your circuit that imposes upon briefs restrictions that are not specified in FRAP 28?** If not, please describe any additional rules, requirements or practices.

   There are no additional requirements.

Please respond to the following inquiries regarding the **implementation history** and **enforcement** of your circuit's rules, requirements or practices for an appellant's brief not specified in FRAP 28. The boxes below each question contain a summary of these rules or requirements the relevant text of which was provided above. The questions in italics following the main questions in bold are meant to illustrate the type of information we are seeking in the main bolded questions and do not necessitate individual responses.

3. **When were the rules, requirements or practices adopted?** *For example, was the local rule recently approved by a unanimous vote of the court? Or was the rule or practice imposed many years ago at the behest of a single judge who has perhaps retired or past away?*

   Most of the requirements set out in D.C. Cir. Rule 28 appear to have been adopted by 1968. A 1968 version of the local rules contains, with some language variance, nearly all of the current requirements. An annotation in that edition notes that the requirement to mark authorities principally relied on with an asterisk, (D.C. Cir. R. 28(a)(2), was adopted in 1960. Some of the requirements appear in versions of the local rules issued in the 1950's and a version of Rule 28(a)(5), concerning the presentation of statutory or regulatory materials, can be found in a 1941 edition of the Circuit's local rules. Two of the current requirements do have a more recent pedigree. The glossary requirement and the instruction to include a summary of argument in all briefs, including reply brief, were included when the Court adopted a major revision of the local rules in 1993.

   As to the "legislative history" of these various requirements, I have been unable to uncover helpful records for changes made before 1970. The 1993 changes were discussed at a Judges' Meeting, were vetted before our lawyers Committee on Procedures and were adopted without dissent.

Please address each requirement separately if necessary and include any rules or practices that we missed but you mentioned above.

Summary of Additional Restrictions

(1) Specific order for brief contents as required in **Handbook of Practice and Internal Procedures**, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)
(2) Certificate as to Parties, Rulings, and Related Cases as required by D.C. Cir. R. 28(a)(1).
(3) Principal authorities identified with an asterisk in table of authorities as required by D.C. Cir. R. 28(a)(2).
(4) Glossary of uncommon abbreviations as required by D.C. Cir. R. 28(a)(3).
(5) Additional statement required if jurisdiction is in dispute as required by **Handbook of Practice and Internal Procedures**, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)
(6) Pertinent statutes and regulations included in brief or as an addendum as required by D.C. Cir. R. 28(a)(5).
(7) References to oral argument as required by D.C. Cir. R. 28(a)(7).
(8) Copies of any unpublished dispositions must be included in an addendum as required by D.C. Circuit Rule 28(c)(3).

4. **Why were the rules, requirements, or practices adopted?** *For example, was the local rule intended to solve a serious problem that was affecting the clerk's office or all of the circuit's judges? Or was the rule a reflection of the personal preferences of one or two judges?*

With respect to the answers below, please note that none of our Judges or staff served during the times when most of these requirements were adopted and, as noted above, we have been unable to locate useful documentation concerning changes prior to 1970.

(1) Specific order for content of briefs: This guides counsel and ensures that the judges can always find what they are looking for in the same place. It seems to be a common sense requirement that is helpful to bench and bar.

(2) Certificate as to parties, rulings, and related cases: This serves three important purposes. First, the listing of parties provides both the Clerk's Office and Chambers with an efficient way to check for possible recusals. Second, the listing of rulings identifies for the Court exactly what has been appealed. Third, the listing of related cases may allow the Court to group cases together for efficient handling or give the Court notice that sister circuits are considering related issues.

(3) Principal authorities identified with an asterisk: As noted above, this requirement was adopted in 1960. It is helpful in a number of respects. By noting which cases or statutes are marked, the reader can get a quick

sense of how the party views the case. At least for one judge, the marked authorities indicated which cases to have printed out for closer review .

(4) Glossary: This is a recent requirement and has proved most useful. Briefs in the D.C. Circuit, perhaps due to the heavy Federal regulatory and statutory caseload, are replete with acronyms. Readers, trying to remember what each acronym meant, previously had to search back in the brief for the first reference. The glossary requirement remedies this inconvenience.

(5) Additional statement required if jurisdiction is in dispute: This focuses the parties and attempts to ensure that the Court does not overlook a jurisdictional defect.

(6) Pertinent statutes and regulations included in the brief or as an addendum: As noted above, this requirement has been in place at least since 1941. Its utility is obvious to anyone who has to read appellate briefs in this Circuit on a regular basis.

(7) References to oral argument: This requirement which asks litigants to put the scheduled argument date, if known, at the top of the first page of the brief, is for administrative convenience and is useful both in Chambers and the Clerk's Office.

(8) Copies of unpublished dispositions cited in the brief must be included in an addendum: This provision was essential when unpublished dispositions were not available on-line or in volumes such as the *Federal Appendix* and remains a convenience to the reader.

Please address each requirement separately if necessary and include any rules or practices that we missed but you mentioned above. **Note**: Please be as detailed as possible when stating the reasons your circuit adopted the rules or requirements or practices. The Committee is very interested in learning about any problems your rules were intended to address.

Summary of Additional Restrictions

(1) Specific order for brief contents as required in **Handbook of Practice and Internal Procedures,** United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)
(2) Certificate as to Parties, Rulings, and Related Cases as required by D.C. Cir. R. 28(a)(1).
(3) Principal authorities identified with an asterisk in table of authorities as required by D.C. Cir. R. 28(a)(2).
(4) Glossary of uncommon abbreviations as required by D.C. Cir. R. 28(a)(3).

(5) Additional statement required if jurisdiction is in dispute as required by **Handbook of Practice and Internal Procedures**, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)
(6) Pertinent statutes and regulations included in brief or as an addendum as required by D.C. Cir. R. 28(a)(5).
(7) References to oral argument as required by D.C. Cir. R. 28(a)(7).
(8) Copies of any unpublished dispositions must be included in an addendum as required by D.C. Circuit Rule 28(c)(3).

5. **To what extent does your court enforce each of the rules, requirements or practices listed above that are not found in FRAP 28?** *For example, does the clerk's office reject briefs that do not comply with the local rule or practice (contrary to FRAP 25(a)(4)[1])? Does the clerk's office instead file the brief and order the party to correct the violation of the local rule or practice? Or does the clerk's office generally "look the other way" if the local rule or practice is violated?*

Please address each requirement separately if necessary.

All requirements are strictly enforced and our Judges are not reluctant to call enforcement lapses to the attention of the Clerk. We enforce the requirements in accordance with FRAP 25. This is, we accept defective briefs and contact the party, usually by phone, explain the problem and work through a solution.

[1] FRAP 25(a)(4) states that "[t] he clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required . . . by any local rule or practice."

Summary of Additional Restrictions

(1) Specific order for brief contents as required in **Handbook of Practice and Internal Procedures**, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)
(2) Certificate as to Parties, Rulings, and Related Cases as required by D.C. Cir. R. 28(a)(1).
(3) Principal authorities identified with an asterisk in table of authorities as required by D.C. Cir. R. 28(a)(2).
(4) Glossary of uncommon abbreviations as required by D.C. Cir. R. 28(a)(3).
(5) Additional statement required if jurisdiction is in dispute as required by **Handbook of Practice and Internal Procedures**, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002).
(6) Pertinent statutes and regulations included in brief or as an addendum as required by D.C. Cir. R. 28(a)(5).
(7) References to oral argument as required by D.C. Cir. R. 28(a)(7).
(8) Copies of any unpublished dispositions must be included in an addendum as required by D.C. Circuit Rule 28(c)(3).

Section II. Contents of the Cover of Appellant's Brief

Identification of Requirements not in FRAP 32. Federal Rule of Appellate Procedure 32(a)(2) governs the contents of the front cover of an appellant's brief. FRAP 32(a)(2) provides that the front cover must contain: (A) the number of the case centered at the top;(B) the name of the court; (C) the title of the case; (D) the nature of the proceeding 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.

Our research indicates that your circuit requires the front cover of an appellant's brief to contain the following information in addition to those items listed in FRAP 32(a)(2):

Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002).

> In addition to the requirements set out in FRAP 32(a), the Handbook includes one additional item that the front cover of the brief must set forth: "(6) the date on which the case has been scheduled for oral argument." See Section IX.A.5.

1. **Is this listing correct for your circuit? Are these rules still in effect?**

   This is essentially the same requirement that is set out in D.C. Cir. Rule 28(a)(7). Please see above.

2. **Have we identified every local rule or practice in your circuit that imposes upon brief covers requirements that are not found in FRAP 32?** If not, please describe any additional rules or practices below.

Please respond to the following inquiries regarding the **implementation history** and **enforcement** of your circuit's rules, requirements or practices you identified above that require the front cover of an appellant's brief to contain information not required by FRAP 32. The questions in italics following the main questions in bold are meant to illustrate the type of information we are seeking in the main bolded questions and do not necessitate individual responses.

2. **When was the rule or practice enacted?** *For example, was the local rule recently approved by a unanimous vote of the court? Or was the rule or practice imposed many years ago at the behest of a single judge who has perhaps retired or past away?*

   Please address each requirement separately if necessary and include any rules or practices that we missed but you mentioned above.

Summary of Additional Restrictions
(1) Date on which case has been scheduled for oral argument (as required by **Handbook of Practice and Internal Procedures**, Section IX.A.5, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)).

3. **Why was the rule or practice enacted?** *For example, was the local rule intended to solve a serious problem that was affecting the clerk's office or all of the circuit's judges? Or was the rule a reflection of the personal preferences of one or two judges?*

   Please address each requirement separately if necessary and include any rules or practices that we missed but you mentioned above. **Note**: Please be as detailed as possible when stating the reasons your circuit adopted the rules. The Committee is very interested in learning about any problems your rules were intended to address.

Summary of Additional Restrictions
(1) Date on which case has been scheduled for oral argument (as required by **Handbook of Practice and Internal Procedures**, Section IX.A.5, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)).

4. **To what extent does your court enforce each of the rules, requirements or practices you listed above that are not found in FRAP 28?** *For example, does the clerk's office reject briefs that do not comply with the local rule or practice (contrary to FRAP 25(a)(4)[2])? Does the clerk's office instead file the brief and*

[2] FRAP 25(a)(4) states that "[t] he clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required . . . by any local rule or practice."

order the party to correct the violation of the local rule or practice? Or does the clerk's office generally "look the other way" if the local rule or practice is violated?

Please address each requirement separately if necessary.

Summary of Additional Restrictions

(1) Date on which case has been scheduled for oral argument (as required by **Handbook of Practice and Internal Procedures**, Section IX.A.5, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002)).

Section III. The Current Federal Rule and Future Changes to Rules or Practices

Note: Please answer the following questions based upon your own personal experience. We are not expecting you to survey the judges in your circuit in order to respond to these inquiries.

1. Does your circuit have any immediate plans to change your local rules, requirements or practices with regards to the content of appellant briefs and their covers? If so, please describe the proposed changes and the reasons for the changes.

   No.

2. Even if your circuit has no immediate plans to enact new rules, is your circuit experiencing any problems that you feel could be alleviated with additional requirements for the content of briefs and their covers?

   A number of our judges have questioned the utility or purpose of the "statement of the case" section required by FRAP 28 and have suggested that the Court might wish to consider exempting practitioners in this Circuit from that requirement.

3. Do you have any reason to feel that or experience which would lead you to believe that FRAP 28 needs to be amended so that circuit's are prohibited from imposing additional content requirements for appellant briefs and their covers?

   No. In fact my twenty years at the Court of Appeals leads me to believe that the FRAP committee ought to allow circuits reasonable leeway to use local rules to address unique needs and to experiment with innovative approaches. For example, the D. C. Circuit was the first circuit to adopt word-limits, in lieu of page limits, as a local rule. Due, in part, to the success of our local rule, FRAP abandoned page limits and substituted word limits nationally. It would have been unfortunate had a rigid national rule precluded the D.C. Circuit's valuable pioneering of the use of word limits. Another example where local variation can meets the needs of the courts is the D.C. Circuit's glossary requirement. Other circuits, with very different caseloads, might find such a requirement of minimal value. It has, however, proved quite useful in this Circuit.

4. If FRAP 28 is amended to include additional requirements for the content and covers of appellant briefs, what requirements that FRAP 28 and 32 do not currently impose do you feel should be added to the rule?

   If an amended FRAP 28 will preclude any local additional requirements, then I would favor adding all of the D.C. Circuit's current requirements.

Thank you so very much for providing us with information on your circuit's practices regarding appellant briefs. This information will help the Appellate Rules Committee decide what, if any, action to take in this area.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
MICHAEL BOUDIN
CHIEF JUDGE

JOHN JOSEPH MOAKLEY
UNITED STATES COURTHOUSE
1 COURTHOUSE WAY, SUITE 7710
BOSTON, MA 02210
(617) 748 - 4431

September 25, 2007

Honorable Carl E. Stewart
Chair, Advisory Committee
on Appellate Rules
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101

Dear Judge Stewart:

Thank you for your letter of September 13, 2006, addressing the problem of additional requirements for briefs in local circuit rules.

My recollection is that all four of our requirements for documents to be included in an addendum to the appellant's brief are designed to give the judges easy access to the rulings below and to critical supporting material. Most of the circuit judges are not based in Boston, travel a considerable amount, and want to be able to work easily while on the road without carrying along what is often a multi-volume appendix.

This access is of sufficient importance to our overworked judges that I am not certain that they will be willing to dispense with it. It is on top of but in no way inconsistent with FRAP itself. But I will raise the issue with them and I think that three of the four requirements are marginal and could arguably be eliminated without compromising the main aim.

Let me say how much I appreciate your committee's work to keep the flourishing local rule garden adequately pruned. I will discuss the matter at my next meeting with my colleagues which is scheduled for early October.

Sincerely,

Michael Boudin

cc: Honorable David F. Levi, Chair
Peter G. McCabe, Esquire, Chair

"Catherine T. Struve"
<cstruve@law.upenn.edu>

09/27/2006 01:33 PM

To Carl_Stewart@ca5.uscourts.gov

cc

bcc

Subject Conversation with Patricia Connor re Fourth Circuit Rules

Dear Judge Stewart,

I just had a very interesting conversation with Patricia Connor, the Fourth Circuit Clerk. She was calling in response to your letter, and wanted to find out what aspects of Fourth Circuit Local Rule 28(b) led to the inclusion of that provision in your letter. I thought I'd send you a brief summary of the conversation (this email will be a bit hasty because I am running to a meeting -- but I wanted to update you):

I stressed that I could not speak for you or the Committee, but that I was happy to share my thoughts about this issue and to relay her thoughts to you and the Committee. I pointed out two ways in which Fourth Circuit Local Rule 28(b) departs from the FRAP:
--FRAP 28(f) permits the materials it lists to be included in the brief, in an addendum, or in a separate pamphlet. Local Rule 28(b) permits those materials to be included in the brief or an addendum, but not in a pamphlet.
--If a party wishes to include, in the addendum, material other than that specified in Local Rule 28(b), the party must move for leave.

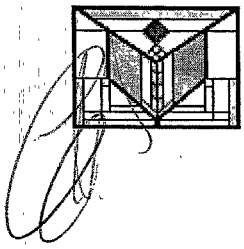
Pat explained that the reasoning behind the requirement of a motion for leave is that some lawyers want to put non-record materials in the addendum. She acknowledged that some practitioners might run afoul of the local rule by including in the addendum the opinion below, without moving for leave to do so; she noted that this wasn't what the requirement of a motion for leave was really designed to prevent. I got the sense that if a lawyer mistakenly included something from the record (e.g., the opinion below) in the addendum without moving for leave, the clerk's office would not bounce the brief. Pat was not sure what the Circuit will decide to do with Local Rule 28(b), but I got the sense that the Circuit might well delete the requirement of the motion for leave from Local Rule 28(b), but keep that as an item in the Circuit's "Checklist for Briefs and Appendices." I mentioned that my sense was that the Appellate Rules Committee wanted to encourage circuits to provide as much notice as possible to lawyers of any distinctive briefing requirements, so I hadn't necessarily understood the Committee's intent to be to drive those requirements from the Local Rules to the briefing checklist. On the other hand, my sense from the conversation with Pat is that if the requirement is deleted from the Local Rules but remains in the briefing checklist, that will mean that briefs won't be bounced for failure to comply -- but that lawyers who read the checklist will (it is to be hoped) comply.

The other interesting thing that Pat mentioned is that the Fourth Circuit has another distinctive requirement (one that the FJC report did not mention, and which accordingly did not make it into your letter!): If transcript pages are included in the appendix, the transcript must not be in "condensed" format (with multiple pages on a single sheet). The motivation for this is that the print in the condensed format is hard to read. I got the sense that this requirement is one that some practitioners complain about. I suspected that our list might not be exhaustive!

At any rate, it seems clear that the Fourth Circuit is responding conscientiously to your letter. I look forward to hearing about the other responses you've received!

Best regards,

Cathie



Betsy Shumaker/CA10/10/USCOURTS
09/21/2006 02:25 PM

To Judge Deanell R Tacha/CA10/10/USCOURTS@USCOURTS
cc CA10ml_All Circuit Judges 10th Cir, Carl_Stewart@ca5.uscourts.gov, Dave Tighe/CA10/10/USCOURTS@USCOURTS, Niki Heller@USCOURTS
bcc
Subject Re: Local Rules

Judges-

I will look into the history of the local rules cited and will provide all of you with the results of that research. I believe all of the requirements cited in Judge Stewart's letter have been in place longer than I have been here (so--more than [almost] 17 years). In addition, please note that we do provide links on our website to the practitioners' guide and the local and FRAP rules. We have a "Rules" tab which directs practitioners to all of the materials noted in the committee's letter. Thanks.

Betsy Shumaker
U. S. Court of Appeals for the Tenth Circuit
1823 Stout Street
Denver, Co. 80257
303-335-2824

Judge Deanell R Tacha/CA10/10/USCOURTS

09/21/2006 12:49 PM

To CA10ml_All Circuit Judges 10th Cir
cc Carl_Stewart@ca5.uscourts.gov@USCOURTS, Dave Tighe/CA10/10/USCOURTS@USCOURTS, Betsy Shumaker/CA10/10/USCOURTS@USCOURTS, Niki Heller@USCOURTS
Subject Local Rules

[attachment "localrules.pdf" deleted by Betsy Shumaker/CA10/10/USCOURTS]

Please see the attached from Judge Tacha.

Honorable Deanell Reece Tacha
U.S. Court of Appeals, Tenth Circuit
785.842.8556

United States Court of Appeals
Tenth Circuit

Deanell Reece Tacha
Chief Circuit Judge
643 Massachusetts Street, Suite 301
Lawrence, Kansas 66044-2292

Telephone
(785) 842-8556

September 21, 2006

TO: Tenth Circuit Judges

RE: Local Rules

Dear Colleagues:

Some of you will recall that Judge Hartz gave us a "heads-up" at the recent Judicial Council meeting about the concerns of the Advisory Committee on the Federal Rules of Appellate Procedure regarding the proliferation of local rules. I have just received the attached letter from Judge Carl Stewart pointing out to us that our local rules add briefing requirements which are not published under the E-Government Act of 2002. I do not recall that we have discussed all of these rules in depth recently. Thus, I will put these on the agenda for our December Retreat.

In the meantime, I would appreciate it if Betsy would provide any insights that she has on the importance of these additional briefing requirements and any history that she or others may remember about them. We are asked by the FRAP Committee to see if we can consider reducing or eliminating these additional briefing requirements. I will look forward to any views that any of you have, but we will make no decisions until the Retreat.

Yours very truly,

Deanell

Deanell Reece Tacha
Chief Circuit Judge

Attachment

cc: Honorable Carl E. Stewart
Dave Tighe
Betsy Shumaker
Niki Heller

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., NW, Room 7513
DNL Washington, D.C. 20530

Douglas N. Letter
Appellate Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

November 13, 2006

Honorable Carl E. Stewart
United States Court of Appeals
2299 United States Court House
300 Fannin St.
Shreveport, LA 71101-3074

Re: Possible Amendment for Amicus Brief Filing Times

Dear Judge Stewart:

At the FRAP Committee's last meeting, we discussed a proposal made by the Public Citizen Litigation Group concerning the timing for filing of amici briefs. During that discussion, the Committee raised the question whether we should consider recommending that the practice in the courts of appeals be changed to match that of the Supreme Court, where amici briefs are due on the same day as the party they are supporting. I agreed to poll various offices that often file amici briefs, and report to the Committee on this idea. As explained below, the feedback was unanimously against adopting the Supreme Court practice in the courts of appeals.

For background, it is important to know that, prior to 1998, FRAP 29(e) required amici curiae to file their briefs on the same day as the briefs being supported. In 1998, however, the Supreme Court changed this rule to allow a "7-day stagger" between the amicus brief and the principal brief it supports. As amended, FRAP 29(e) provides:

> An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

The Committee had recommended this change in order "to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument." Advisory Committee Notes, Fed. R. App. P. 29(e). The Committee also noted that the 7-day period is "short enough that . . . [t]he opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading." Ibid.

Last year, the Committee received a letter from the Public Citizen Litigation Group expressing concern that the 7-day delay makes it difficult for appellants to adequately respond in their reply briefs to arguments made by amici in support of appellees. While the 2002 amendment of FRAP 26(a)(2) increased the period for amicus briefs from 7 calendar days to 7 business days, the 14-day time frame for reply briefs continues to be measured in calendar days, creating a situation in which appellants could receive opposing amici briefs shortly before they must submit their reply briefs.

The Committee accordingly decided to consider recommending amendment of FRAP 29(e) to require, as it did prior to 1998, that amici curiae submit their briefs at the same time as the briefs being supported. Such a change would bring the FRAP in line with Supreme Court practice and provide opposing parties with more time to incorporate rebuttal arguments into their briefs.

Ms. Kelsi Corkran of my office and I contacted approximately two dozen appellate practitioners—including three state Solicitor Generals, several private practice and government attorneys, and the legal directors of various public interest organizations—and asked for their feedback regarding a possible change to FRAP 29(e). We received responses from the following: Mitch Bernard, Litigation Program Director of the National Resources Defense Council; Ted Cruz, State Solicitor General of Texas; Roy Englert, partner at Robbins, Russell; Marcia Greenberger, Co-President of the National Women's Law Center; Ayesha Khan, Legal Director of Americans United for Separation of Church and State; Manuel Medeiros, State Solicitor General of California; Richard Samp, Chief Counsel of the Washington Legal Foundation; Stephen Shapiro, Legal Director of the American Civil Liberties Union; Evan Tager, partner at Mayer Brown Rowe & Maw; and Brian Wolfman, Director of Public Citizen Litigation Group.

The respondents unanimously opposed adopting the Supreme Court practice in the courts of appeals. Consistent with the reasoning expressed in the Advisory Committee Notes, most of the respondents cited non-duplication as the primary benefit of providing amici with a later filing date. Several people noted the difficulty of obtaining advanced drafts of principal briefs and the importance of reviewing the principal brief in order to fashion amicus arguments that avoid redundancy. Potential amici sometimes also wait until after the principal brief has been filed before deciding whether to submit an amicus brief at all. As one State Solicitor General explained, "it may transpire that the issue the [amicus] was concerned about was handled just fine, obviating the [amicus] brief altogether; on the other hand the principal brief may be so bad that you'd spill your tea reaching for the phone to request consent to file."

Many of the respondents pointed to distinctions between Supreme Court and court of appeals

briefing that make simultaneous filing more appropriate at the Supreme Court level. Several people described Supreme Court briefing as a more "highly coordinated process" in which parties frequently exchange drafts prior to the filing date. Draft-sharing is less common at the court of appeals level. One public interest attorney also noted that amici in the Supreme Court "are virtually always aware of the issue in the case and what the parties are going to say more-or-less shortly after review is granted [because] the cert petition and [opposition to cert] are available, as are the briefs below." Similarly, another public interest attorney observed, in contrast to the courts of appeals, the Supreme Court clearly defines the issues for review (i.e., through the "Questions Presented") well before the filing date for the appellant's principal brief.

There was some disagreement among respondents about the impact of the delayed amicus filing date on the opposing principal party. Several people took the position that the delay has little effect on opposing parties, and that any time crunch created by amici submissions is "outweighed by the positives" of allowing the 7-day stagger. One private practice attorney, however, reiterated Public Citizen's concern that, with only 14 calendar days between filing dates for the appellee's brief and the appellant's reply brief, amicus briefs in support of appellee sometimes arrive to appellants after they have already completed their reply brief and circulated it among clients, co-counsel, and other interested parties. Although none of the respondents supported amending FRAP 29(e) to require simultaneous filing by principal parties and supporting amici, a few recommended that the Committee adjust the reply brief deadline to ensure that appellants have time to respond to arguments made by amici in support of appellee.

In sum, none of the appellate practitioners that we contacted favored adopting the Supreme Court approach to amicus brief filing dates in the courts of appeals. I hope that this information is helpful to the Committee.

Sincerely,

Douglas N. Letter

Douglas N. Letter