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

I. Introductions

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

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

II. Approval of Minutes of November 2006 Meeting

The minutes of the November 2006 meeting were approved.

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

The Appellate Rules Committee had no action items on the agenda for the Standing Committee's January 2007 meeting. Judge Stewart reported to the Standing Committee that the Appellate Rules Committee had tentatively approved proposed amendments to Appellate Rule 4(a)(4)(B) and Appellate Rule 29 and that the Committee would finalize those proposed amendments at its April 2007 meeting. Judge Stewart also reported on the Appellate Rules Committee's work on the Time-Computation project; he provided the Committee's feedback on the time-computation template rule and noted that the Committee's Deadlines Subcommittee was reviewing all appellate rule-based and statutory deadlines with a view to recommending adjustments to some deadlines in the light of the proposed shift to a days-are-days time-counting

approach. Judge Stewart conveyed the fact that some Committee members have misgivings about the advisability of the time-computation project, but also noted that if the other Committees decide to proceed with the project the Appellate Rules Committee stands ready to proceed as well.

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

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

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

After the discussion of the January 2007 Standing Committee meeting, the Reporter reviewed the status of pending Appellate Rules items. New Rule 32.1 (concerning unpublished opinions) and amended Rule 25(a)(2)(D) (authorizing local rules to require electronic filing subject to reasonable exceptions) took effect December 1, 2006. New Rule 25(a)(5) (addressing privacy concerns relating to court filings) is on track to take effect December 1, 2007. A judge member noted that since Rule 32.1 took effect, he has observed an increase in citations to unpublished opinions. In addition, he noted that his court sometimes gets requests to change an opinion's status from unpublished to published.

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

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

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

V. Action Items

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

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

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

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

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

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

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Committee Note

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

Prior to the restyling, subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the

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

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

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

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

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

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

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

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

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

Rule 26. Computing and Extending Time

(a) **Computing Time.** The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

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

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

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

(C) include the last day of the period, but if the last day is a Saturday,

Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

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

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

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

(C) if the period would end on a Saturday, Sunday, or legal holiday, then continue the period until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

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

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

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

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or order in the case, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to

close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

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

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

(B) any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. [The word 'state,' as used in this Rule, includes the District of Columbia and any commonwealth, territory, or possession of the United States.]

Committee Note

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

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d

827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

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

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

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

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

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

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

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

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

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

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

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

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

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such

as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, *Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf*. William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing.

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

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

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 31(a)(1) ("[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing."). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes

of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a).

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

Judge Sutton observed that the Note's discussion of subdivision (a)(2) gives an example using the time "2:30 p.m." He stated that, on consideration, the note should use the example "2:17 p.m.," so as to correspond to the examples used in the notes that will accompany the proposed amendments to the other sets of Rules.

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

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

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

Tennessee). Judge Sutton noted that this issue should also be raised with the other Advisory Committees.

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

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

Judge Sutton next invited the Reporter to present the Subcommittee's recommendations concerning the changes to Appellate Rules deadlines in the light of the shift in time-computation approach.[2] The Reporter highlighted a few aspects of the changes. Time periods stated in terms of "calendar days" will be stated simply in terms of "days." Ten-day deadlines are in most instances lengthened to 14 days; this recommendation differs from the Subcommittee's tentative recommendation last fall. Last fall, the Subcommittee did not suggest lengthening the 10-day deadlines because those deadlines, prior to the 2002 amendments to the Appellate Rules, were computed using a days-are-days approach. But after learning that the other Advisory Committees are applying a robust presumption in favor of setting Rules-based deadlines in multiples of seven days, the Subcommittee reconsidered its position and recommends lengthening the 10-day periods to 14 days. There are three periods, however, for which the Subcommittee's proposals depart from the 7-day-multiple presumption: The 7-day periods in Rules 5(b)(2) and 19 and the 8-day period in Rule 27(a)(3)(A) should become 10 days rather than 14 days because lengthening to 14 days would increase the actual time significantly and would contravene the need for promptness in the contexts covered by these rules. By contrast, the Subcommittee recommends lengthening the 7-day period in Rule 4(a)(6) to 14 days;

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

lengthening to 14 days comports with the 7-day-multiple presumption and does not unduly threaten any principle of repose. It should be noted that lengthening this 7-day period will make it advisable to ask Congress to make a corresponding change in 28 U.S.C. § 2107.

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

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

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

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

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

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

Rule 29. Brief of an Amicus Curiae

* * * * *

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

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

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; ~~and~~

(5) a certificate of compliance, if required by Rule 32(a)(7)~~.~~; and

(6) except in briefs filed by the United States, its officer or agency, a State, Territory, or Commonwealth, or the District of Columbia, a statement that, in the first footnote on the first page:

(A) indicates whether a party's counsel authored the brief in whole or in part; and

(B) identifies every person or entity — other than the amicus curiae, its members, or its counsel — who contributed money toward

preparing or submitting the brief.

* * * * *

Committee Note

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

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

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

The Reporter noted that the Committee had approved this amendment in principle at its November 2006 meeting, and needed only to determine how to implement the change. Although the Committee decided to track the disclosure requirement in Supreme Court Rule 37.6, certain adjustments are necessary in order to adapt the provision to the context of the Appellate Rules. Supreme Court Rule 37.6 exempts entities that are permitted under Supreme Court Rule 37.4 to file amicus briefs without court permission. Likewise, the proposed amendment to Rule 29(c) exempts entities that are permitted under Rule 29(a) to file amicus briefs without court permission or party consent. A member suggested that a cleaner way to accomplish this would be to refer to "an amicus listed in the first sentence of Rule 29(a)" instead of to "the United States, its officer or agency, a State, Territory, or Commonwealth, or the District of Columbia."

It was also suggested that the corporate disclosure requirement imposed by the third sentence of Rule 29(c) should be moved into the numbered list as a new subdivision (c)(6); the new disclosure requirement concerning authorship and monetary contributions then becomes new subdivision (c)(7). Another member noted that the numbering of the list will not follow the order in which the requisite components must be placed in the amicus brief. It was suggested that the Note could clarify the question of appropriate ordering.

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

VI. Discussion Items

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

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

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

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

A judge noted that filing a notice of appeal does not require a great deal of work, and that the courts can provide extensions if needed. The judge observed that the extra time in cases involving federal government litigants makes sense because the United States carefully considers

policy concerns prior to taking an appeal; Mr. Letter agreed with this assessment.

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

B. Items Awaiting Initial Discussion

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

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

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

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

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

district court has decided the motion on remand.]

Committee Note

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

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

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

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk [when the motion is filed in the district court and again when the district court rules on the motion] [if the district court states that it [might or] would grant the motion]. If the district court states that it [might or] would grant the motion, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b).

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g.*, *Browder v. Dir., Dep't of Corrections*

of Ill., 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

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

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

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

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

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

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

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

A key question concerns the nature of the indicative ruling that would be necessary before a remand occurs. The Civil Rules Committee has debated at length the relative merits of requiring the district judge to state that he or she "would" grant the motion in the event of a remand, versus requiring merely a statement that the district judge "might" grant the motion. The Civil Rules Committee intends to publish its Civil Rule 62.1 using the formulation "[might or] would." A judge member expressed a preference for "would," but he noted that the Committees will obtain further feedback on this issue when the proposed rules are published for comment. An attorney member likewise expressed a preference for "would" rather than "might." Another attorney member, though, noted that "would" would require a lot of work on the part of the district court. A judge observed that requiring "would" might make the district court feel that it needs full briefing before issuing the indicative ruling. An attorney member responded that the district court would have the indicative-ruling motion before it. A judge member noted that the district court's docket pressures might preclude it from providing a full treatment of the issue in an expeditious fashion; but he also noted that "might" did not seem like a useful standard. Another judge member suggested that if a district judge's indicative ruling merely said the district judge "might" grant the motion, the court of appeals would probably not remand the case – unless the appeal presented very difficult issues. An attorney member suggested that even an indicative ruling that used "might" could give the appellate court useful information. Another attorney member suggested that wording other than "might" could be preferable.

The proposed Rule 12.1 contains alternative options concerning the timing of the

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

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

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

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

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

that, whether or not the Committee voted to adopt Rule 12.1, he would convey to the Civil Rules Committee the concerns discussed by members of the Appellate Rules Committee. By a vote of 5 to 3, the Committee voted to adopt a proposed Appellate Rule concerning indicative rulings.

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

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

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

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

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

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

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

* * * * *

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

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure — or a motion for reconsideration under Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 — ~~;~~ the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

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

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

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

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

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

* * * * *

Committee Note

Subdivision (a)(4)(A). New Rule 11(b) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 concerns motions for reconsideration in Section 2254

and 2255 proceedings. Subdivision (a)(4)(A) is revised to provide that a timely motion under Rule 11(b) has the same effect on the time to file an appeal as the other motions listed in subdivision (a)(4)(A).

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or~~ , if any, and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not

issue has been moved from subdivision (b)(1) to Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255. Subdivision (b)(1) continues to require that the district clerk send the certificate, if any, and the statement of reasons for grant or denial of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

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

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

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

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

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

Rule 1. Scope of Rules; <u>Definition;</u> Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

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

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

Committee Note

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

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

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

A member asked how the Committee's decision not to proceed at this time with the proposed definition would affect the time-computation project. The Reporter responded that Rule 26(a) can be published for comment with the definition of the term "state" in subdivision

26(a)(6)(B). Although the proposed overarching definition of "state" in Rule 1(b) presumably will not catch up with the time-computation package (assuming that package continues to move forward), if the Committee later decides to proceed with the overarching definition it can make a conforming change to Rule 26(a)(6)(B) at that time.

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

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

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

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

An attorney member stated that the proposed rule might be useful to lawyers but also that it makes sense to defer to the views of the judges on this issue. Another attorney member noted that the proposed rule would be useful with respect to recusal requests. For example, a Department of Justice attorney may represent (in an unrelated proceeding) a judge who turns out to be on an argument panel in another case the attorney is litigating. Knowing the panel's identity in advance would assist with handling recusal requests. A judge agreed that the proposed rule might help with recusal requests, but he asked whether the same goal could not be

accomplished by requiring attorneys to list the circuit judges who should not sit to hear a case. The attorney member responded that the latter approach would be of little use in a circuit in which a great deal of time elapses between briefing and argument.

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

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

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

Judge Stewart invited the Reporter to summarize the suggestions made by Robert Kantowitz concerning the recently-adopted Appellate Rule 32.1. The Reporter's memo attaching Mr. Kantowitz's suggestions detailed the following considerations. Mr. Kantowitz's proposal that the Rule be clarified to make clear that its ban on restriction or prohibition of citation applies both to the issuing court and to other courts is unnecessary, since the Rule is clear on that point. Mr. Kantowitz's second suggestion is that the Rule be amended to require the courts of appeals to permit citation of pre-2007 unpublished opinions under certain circumstances. But the question of retroactivity was fully aired during the debate over Rule 32.1 and it seems unlikely that one would wish to revisit the question at this point. Mr. Kantowitz also raises issues relating to state court practice and to the citation of foreign court opinions; it is not evident, though, that rulemaking on those issues is called for. Finally, Mr. Kantowitz asks whether a panel or circuit could suspend Rule 32.1(a) in a particular case or in general under the authority of Rule 2. It is clear that Rule 2 does not authorize a general suspension of Rule 32.1(a), and suspensions of Rule 32.1(a) in a particular case seem unlikely.

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

VII. Additional Old Business and New Business

A. Status of previously approved amendments

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

approved amendments as well.

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

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

However, there are two reasons why the adoption of the proposed time-computation changes will not render Item 01-03 moot. First, the Civil Rules Committee already adopted a parallel amendment to Civil Rule 6, and it is worthwhile for the Appellate Rules' approach to parallel that taken in the Civil Rules. Second, the proposed amendment will clarify the approach to be taken when a time period (computed without reference to the three-day rule) ends on a weekend or holiday. Suppose the period ends on a Saturday: Should one count forward to the Monday, and then add three days for an end point of Thursday? Or should one just add three days counting from the Saturday, for an end point of Tuesday? The proposed amendment will make clear that one should employ the former, not the latter, approach.

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

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

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

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

By consensus, the Committee decided to retain the proposed amendment on its study

agenda rather than sending it forward to the Standing Committee at this time.

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

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

A member stated that the amendments concerning federal officers or employees should be sent forward without awaiting the Committee's further deliberations concerning the treatment of state-government litigants. By consensus, the Committee decided to request permission to publish Item 03-09 in summer 2007.

B. New Business

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

VIII. Date and Location of Fall 2007 Meeting

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

IX. Adjournment

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

Respectfully submitted,

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Catherine T. Struve
Reporter