

**Minutes of Fall 2006 Meeting of
Advisory Committee on Appellate Rules
November 15, 2006
Washington, DC**

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, November 15, 2006, at 8:30 a.m. in the Mecham Conference Center of the Thurgood Marshall Federal Judiciary Building, Washington, DC. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Judge T.S. Ellis III, Dean Stephen R. McAllister, 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 Professor Daniel Coquillette, Reporter to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office (“AO”); and Mr. Joe S. Cecil from the Federal Judicial Center (“FJC”). Professor Philip A. Pucillo attended as an observer. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants and noted his regret that James Bennett was unable to attend.

II. Approval of Minutes of April 2006 Meeting

The minutes of the April 2006 meeting were approved, subject to the correction of a previously noted typo.

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

Several parts of the Standing Committee’s June 2006 meeting were of particular interest to the Appellate Rules Committee. At the June meeting, Joe Cecil reported on the progress of the FJC’s study concerning the use of the 28 U.S.C. § 1292(b) mechanism for interlocutory appeals. The study commenced after concerns were raised that the 1292(b) mechanism was under-used in patent cases. A district judge member explained that these concerns arose from the high rate of appellate reversal of district courts’ *Markman* determinations. The member noted that some district judges have pointed out other possibilities for addressing that reversal rate: The rate would fall if the Patent Office wrote better patents and if the appellate courts treated *Markman* determinations as mixed questions of law and fact so as to trigger deference to the district court’s determination. Mr. Cecil reported that the FJC study has broadened beyond

the context of patent cases to a general study of the use of Section 1292(b); the study will also provide an opportunity to test out certain proxies for measuring cost and efficiency. Mr. Cecil expects that a draft of the study will become available in roughly another six months.

The Appellate Rules Committee had one item on the agenda for the Standing Committee's June 2006 meeting: proposed new Rule 25(a)(5), concerning privacy protection. The Standing Committee approved the new Rule, as did the Judicial Conference at its September 2006 meeting.

The Civil Rules Committee presented a number of notable items at the June 2006 meeting. One significant item, of course, was the package of restyled Rules, which the Standing Committee approved. The Civil Rules Committee also reported on its proposed new Civil Rule 62.1, which would provide a mechanism for structured dialogue between the district court and the Court of Appeals in cases where a party seeks relief in the district court while an appeal is pending. Proposed Civil Rule 62.1 would authorize the district court to indicate that it would (or might) grant the motion for relief if the Court of Appeals were to remand the case. One obvious application of the Rule would be when a party seeks relief under Civil Rule 60(b), but the Rule is written broadly to encompass other situations, such as an interlocutory appeal under 28 U.S.C. § 1292(a)(1) from the grant or denial of an injunction. The Civil Rules Committee is considering two alternative formulations – one authorizing the district court to indicate that it “would” grant relief in the event of a remand, and one authorizing the district court to indicate that it “might” grant relief. The Committee is also open to considering suggested alternatives for the numbering and placement of the Rule (the Committee chose number 62.1 to place the Rule within the section dealing with judgments). The practice that the Rule would formalize does raise a sensitive issue concerning situations when parties are willing to settle pending appeal if and only if the district court will vacate its judgment; but it was pointed out that the Rule itself would only formalize a practice that already exists.

Judge Stewart had noted at the June 2006 meeting that if Rule 62.1 goes forward the Appellate Rules Committee would likely wish to consider adding a cross-reference in the Appellate Rules. At the Appellate Rules meeting, Mr. Letter seconded that point. Mr. Letter recounted that the proposed Rule 62.1 stems from a proposal that Mr. Letter had initially made to the Appellate Rules Committee, on the ground that the provision seemed most appropriate for inclusion in the Appellate Rules. Mr. Letter noted that if instead the provision is to be included in the Civil Rules, it would be helpful to practitioners to include a cross-reference in the Appellate Rules. Mr. Rabiej reported that the Civil Rules Committee has decided to defer requesting Standing Committee approval to publish proposed Rule 62.1 for comment, because it was felt that the bar deserved a break in the pace of rulemaking.

The Civil Rules Committee had also reported to the Standing Committee its decision to take no further action on a proposal concerning Civil Rules 54(d)(2) and 58(c)(2). The proposal stemmed from the existence of a loophole created by the interplay between the two Rules: Theoretically, a party could make a timely posttrial motion for attorneys' fees, and – long after the time to appeal had otherwise run out – the district court could provide that the attorneys' fee

motion extended the time to take an appeal. In 2004, the Appellate Rules Committee had discussed this issue and had referred the matter to the Civil Rules Committee for consideration, with a recommendation that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The Civil Rules Committee asked the FJC to study this question, and the FJC study found little evidence that Rule 58(c)(2) is actually used to grant such extensions. In the light of this study, the Civil Rules Committee concluded that it would be better to live with the existing narrow loophole than to proceed with an amendment that might create further unintended consequences.

The final item of particular note to the Appellate Rules Committee was the Standing Committee's discussion concerning the Time-Computation Project. Judge Kravitz reported on the progress of the Project, and the Committee discussed several revisions to the draft template Rule. The Committee also discussed at considerable length the questions surrounding the Project's effect on statutory deadlines. The Civil Rules Committee reported on its progress in reviewing relevant deadlines in the Civil Rules with a view to lengthening those affected by the change to a days-are-days approach. When lengthening affected deadlines, the Civil Rules Committee has adopted a presumption in favor of selecting new deadlines in increments of 7 days so as to minimize instances when a deadline falls on a weekend day. There was consensus on the Standing Committee that such a presumption was useful.

After the discussion of the June 2006 Standing Committee meeting, the Reporter noted the status of the other two 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) will take effect on December 1, 2006 absent contrary action by Congress. The Reporter noted that Rule 32.1 will take effect December 1 but that subdivision (a) of that Rule would operate on a null set that month because it applies only to the citation of opinions issued on or after January 1, 2007. A judge member asked the reason for the discrepancy; Mr. Rabiej responded that the limitation to opinions issued in 2007 or later was a product of compromise on the floor of the Judicial Conference.

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

Judge Stewart summarized the genesis of the letter to the Chief Judges of each circuit concerning circuit-specific briefing requirements. The Committee had considered at some length practitioners' concerns about idiosyncratic briefing requirements in the circuits. The FJC prepared a study summarizing those briefing requirements. The Committee decided not to amend the Appellate Rules in response to those concerns, but instead decided that the Chair of the Committee should write to the Chief Judge of each circuit to express concern over the disparate briefing requirements, to emphasize the need to make each circuit's briefing requirements readily accessible to practitioners, and to urge each circuit to consider whether the circuit's additional briefing requirements are truly necessary. The Committee decided to defer

sending the letter until the controversy over Rule 32.1 died down. Accordingly, Judge Stewart sent the letter out this fall. So far, six circuits have responded to the letter. Judge Stewart circulated copies of the responses from the First, Fourth, Tenth, D.C., and Federal Circuits and reported on the oral response from the Fifth Circuit. Judge Stewart observed that the responses spanned a spectrum from the Federal Circuit, which has stated that the likelihood of eliminating any of the listed Federal Circuit rules is “nil,” to other circuits that have expressed the intention of considering the matter in the future (for instance, in connection with ongoing local rulemaking efforts or at an upcoming circuit retreat). Judge Stewart wrote a follow-up letter to each of the Chief Judges who responded, thanking them for their response on behalf of their courts and for continuing to consider this issue during future court meetings or retreats as they deemed appropriate.

Professor Coquillette noted the history of the Standing Committee’s oversight of local rules. At the time of the 1988 amendments to the Rules Enabling Act, the Judiciary Committee was concerned that local rules had gotten out of hand, and it articulated the principle that such rules were inappropriate unless they could be justified on the basis of variation in relevant local conditions. As to local rules in the district courts, the circuit councils now have responsibility. By contrast, with respect to local rules in the Courts of Appeals, Congress left the task of oversight to the Judicial Conference. Thus, in theory, the Standing Committee has the power to question the propriety of a local appellate rule, to require a response from the relevant Court of Appeals, to hold a hearing on the matter, and, if necessary, to recommend abrogating the rule.

A district judge member stated that he supported the Appellate Rules Committee’s decision to take a hortatory approach; local legal cultures vary widely, and forcing nationwide uniformity on all issues would be a Procrustean approach. Mr. Letter observed that as a practical matter an attempt to force the Courts of Appeals to eliminate their briefing requirements would be unsuccessful, and he noted that in a few instances local variation may be appropriate. For example, because the D.C. Circuit deals with so many regulatory issues it makes sense for that court to require a glossary to explain the acronyms used to refer to various agencies. However, Mr. Letter stated that many local appellate briefing requirements do not stem from true variations in local conditions, and he observed that the variation in briefing requirements makes life difficult for national practitioners. A member stated that he agrees with Mr. Letter as a philosophical matter, but he also agrees with Judge Ellis from a pragmatic standpoint. Another member stressed that even if a circuit is unwilling to abandon its idiosyncratic requirements, it would aid practitioners if each circuit were to summarize those requirements; the member also suggested that it might be salutary for a circuit to review other circuits’ local requirements with a view to adopting any that merit wider implementation. Judge Stewart noted that the FJC’s study is extremely valuable and could aid the circuits in considering best practices. Professor Coquillette noted that the Standing Committee’s main focus has been on local rules that conflict with Rules adopted under the Enabling Act, with statutes, or with the Constitution; apart from such instances of conflict, the Standing Committee has chosen the path of persuasion.

Mr. Letter suggested that Judge Stewart provide closure on this matter by writing a final letter to the Chief Judges of each circuit thanking them for their attention to the briefing

requirements, expressing the hope that each circuit will continue to review its additional briefing requirements, and urging each circuit, at a minimum to ensure that practitioners can readily ascertain those requirements. Judge Stewart responded that he would not want to send such a letter before each circuit has had a chance to respond to his initial letter; he observed that some circuits seem likely to take up the question at circuit retreats in the near future. Judge Stewart stated that he would continue to update the Committee about the responses he receives from the circuits and that he would keep the matter on the agenda for the Committee's April 2007 meeting.

V. Discussion Items

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

Judge Stewart invited Mr. Letter to summarize his research relating to the timing of amicus briefs. At the April 2006 meeting, the Committee had discussed concerns raised by Public Citizen, which 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. After that discussion, Mr. Letter had undertaken to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting.

Mr. Letter summarized the results of his research, which he had also circulated to the Committee by letter dated November 13, 2006. Mr. Letter sought to identify major amicus filers, and his office contacted some 24 appellate practitioners – including three state Solicitors General, other government attorneys, private attorneys, and public interest lawyers – to ask their views on possible amendments to the timing rules in FRAP 29(e). Mr. Letter received ten responses. The respondents unanimously opposed eliminating the “stagger” – i.e., the time lag between the due date for a party's brief and the due date for an amicus who supports that party. Those responding argued that the stagger helps the amicus to avoid duplicating the party's arguments and sometimes helps the amicus decide whether to file at all. Some respondents asserted that briefing tends to be less coordinated in the Courts of Appeals than it is in the Supreme Court, and they also observed that potential amici at the Supreme Court level have less need to see the party's brief because they can see the prior briefing. While no respondents supported eliminating the stagger, some did express concern that the opposing party might experience a time crunch in preparing its reply brief; accordingly, a few recommended that the Committee extend the deadline for the reply brief.

The Reporter gave a brief overview of the changes in the timing of amicus briefs. Prior to 1998, FRAP 29 required an amicus to file within the time allowed for the brief of the party supported by the amicus. The 1998 amendment to FRAP 29 adopted the 7-day stagger, with the goal of avoiding duplicative arguments. Public Citizen raised concerns about the new timing framework, but after discussion, and investigation by Mr. Letter, the Committee decided not to act on Public Citizen's concerns. FRAP 29 has not been amended since 1998, but the 2002

amendment to FRAP 26(a)'s time-computation provision has affected Rule 29(e)'s operation. Pre-2002, FRAP 29(e)'s 7-day deadlines were computed using a days-are-days approach; post-2002 amendments, those 7-day deadlines are calculated by skipping all intermediate weekends and holidays. In other words, FRAP 29(e)'s deadlines were 7 *calendar* days pre-2002, and are now 7 *business* days. The effective lengthening of those 7-day deadlines has given rise to Public Citizen's current concerns.

The Reporter noted that this question intersects with the issues raised by the Time-Computation Project. If the Project's recommended days-are-days approach is adopted, then short deadlines currently computed as business days will henceforth be computed as calendar days. As discussed later in the meeting, the Appellate Rules Committee's Deadlines Subcommittee has reviewed all such short appellate deadlines to determine whether any of them should be lengthened to offset the change in computation approach. The Deadlines Subcommittee did not take a position on whether FRAP 29(e)'s stagger should be abandoned; but if the stagger is retained, the Deadlines Subcommittee proposes that the stagger remain 7 days (i.e., revert to 7 calendar days).

Mr. Letter noted his impression that Public Citizen would be satisfied if FRAP 29(e)'s deadlines reverted to 7 calendar days. A judge member expressed skepticism about the appellate practitioners' argument that practice in the Courts of Appeals differs significantly from that in the Supreme Court; but the member stated that he would not object to seeing the stagger revert to 7 calendar days. Mr. Letter observed that if timing crunches arise they can be addressed by motion. He also noted that parties should generally be aware ahead of time that an amicus filing is in the offing, because under FRAP 29(a) amici other than certain government entities must obtain party consent or else move for permission to file.

Another member expressed support for eliminating the stagger, because the FRAP should where possible conform to Supreme Court practice; the member stated that it is not that hard for an amicus to coordinate its briefing with that of the party it supports. Mr. Letter noted, however, that this is not the case when the party in question is the Department of Justice: Because the draft usually undergoes revision up until the last minute, the DOJ almost never shares its draft with potential amici in advance. A practitioner member noted that Supreme Court practice differs because the amici have the benefit of a "preview" of the parties' briefs (based on their filings below and regarding certiorari). The member also argued that having adopted the stagger relatively recently (in 1998), the Committee should follow the principle of "stare decisis" and not alter the rule unless there seems to be a real problem with it. A judge member agreed that the rulemakers should not go back and forth on the issue (though he also found it implausible that the stagger actually eliminates duplicative arguments).

A practitioner member wondered whether it would be worthwhile to consider addressing the "time crunch" by extending the time for the reply brief. Mr. Letter responded that such a solution would be overbroad, because it would prolong the briefing schedule in many cases where it turns out that no amici file briefs. Mr. Fulbruge noted statistics that support this point: During calendar year 2005 in the Fifth Circuit, there were some 125 amicus filings and a total of

some 9,000 appeals. Moreover, many of those amicus filings were at the en banc stage rather than during initial briefing.

A judge member proposed that the Committee wait to see what happens with the Time-Computation Project before considering what, if any, changes to make to FRAP 29(e). If the Time-Computation Project goes forward, that will alter the landscape in significant ways. It was proposed that Judge Stewart write to Mr. Wolfman of Public Citizen to state that the Committee, like other advisory committees, is currently considering changes to the time-computation rules, and that the Committee plans to defer further consideration of Public Citizen's proposal until after the time-computation matter is resolved. The proposal was moved and seconded, and carried by voice vote without opposition.

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

The Reporter recapitulated the issue raised by Judge Leval in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). Judge Leval identified ambiguities in FRAP 4(a)(4) as the Rule applies to cases in which a party files a notice of appeal and the district court subsequently alters or amends the judgment. Among other scenarios, Judge Leval raised the possibility that a court might read the 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 April 2006 meeting, the Committee had asked the Reporter to look into the amendment that produced the current language in FRAP 4(a)(4).

The Reporter noted that the current language resulted from the 1998 restyling, but observed that it is useful to go a bit further back, to the 1993 amendments. Prior to 1993, a notice of appeal filed before disposition of a timely post-trial motion had no effect. Lawyers evidently disregarded that fact to their detriment, and the rulemakers decided to address their plight by amending the Rule. The 1993 amendments provided that an initial notice of appeal ripened into effectiveness once the post-trial motions had been resolved. However, if the appellant wished to challenge an alteration or amendment of the judgment, then the appellant had to amend the initial notice of appeal. Specifically, 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” It appears that the restyling deliberations did not focus on the fact that the new reference to “a judgment altered or amended” appeared to broaden the scope of the requirement.

With exceptions not relevant here, the 1998 amendments were intended to be stylistic only, so a court ought to conclude that the current language does not require an appellant to amend a prior notice of appeal when all the appellant wishes to do is to challenge aspects of the

judgment that are unchanged by the disposition of the post-trial motion. But one might argue that it should not be necessary to research the pre-restyling law in order to determine the meaning of the current Rule. The Reporter noted that the problem introduced by the restyled language could be addressed by amending 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 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.

One judge member noted that cautious litigants would avoid the trap posed by the current rule by taking the precaution of filing an amended notice of appeal after the disposition of the post-trial motions; another questioned whether the scenarios described in the *Sorensen* opinion have ever actually arisen. An attorney member, however, noted that the restyling inadvertently produced what does appear to be a problem in the current Rule. Judge Stewart noted that this inadvertent change provides a cautionary lesson concerning the need for care in adopting changes for reasons of style. A judge member conceded that the proposed fix is a straightforward one, but questioned the need for an amendment when there are other, more pressing, matters to address. An attorney member moved to adopt the amendment described by the Reporter; the motion was seconded, and carried by a vote of five to four.

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

Judge Stewart noted that at its June 2006 meeting the Standing Committee had extensively discussed the Time-Computation Project, giving particular attention to the question of statutory deadlines. Judge Stewart noted that at the Appellate Rules Committee's April meeting he had appointed a Deadlines Subcommittee to consider short appellate deadlines that would be affected by the proposed change in time-computation approach. The Deadlines Subcommittee is chaired by Judge Sutton and includes Ms. Mahoney, Mr. Levy and Mr. Letter; Professor Struve serves as its reporter. Judge Stewart reported that the Time-Computation Project is moving forward. The goal for the present meeting, he stated, was to discuss where the project stands and to consider the report by the Deadlines Subcommittee. This Committee and the other advisory committees will report to the Standing Committee at its January meeting and receive feedback at that time. Assuming that the project goes forward, this Committee should plan to consider formal proposals (concerning the time-computation template and any related changes to appellate deadlines) at the April 2007 meeting, with a view to requesting action by the Standing Committee at its June 2007 meeting.

Judge Stewart invited the Reporter to summarize developments in the overall Time-Computation Project. The Reporter noted that in addition to feedback on the current version of the time-computation template, the Time-Computation Subcommittee is interested in receiving

feedback on several issues. One concerns after-hours filing. Subdivision (a)(4) of the current template draft explicitly refers to the possibility of filing after hours by personal delivery to a court official. This possibility arises from cases interpreting 28 U.S.C. § 452, which provides that federal courts “shall be deemed always open” for the purpose, inter alia, of filing papers. The problem with the current draft is that it highlights the possibility of in-person after-hours filing, and thereby increases the likelihood that litigants will seek to avail themselves of that method – a prospect that raises obvious security concerns. The Civil Rules Committee has proposed alternative language that omits any reference to in-person after-hours filing; if this language were adopted, the Note could explain that the Rule text is not meant to alter the caselaw that has developed under Section 452. Mr. Fulbruge expressed strong agreement with the view that the Rule text should not refer to after-hours filing; such a reference could encourage such filings by pro se litigants and could raise security concerns.

The Reporter noted that a second issue is whether the time-computation template should attempt to define what “inaccessibility” of the clerk’s office means for the electronic filer. Local rules take a variety of approaches to e-filing untimeliness that results from court-end and user-end technical failures. The template could leave the question to be dealt with by those local rules. Alternatively, the template could define inaccessibility for purposes of electronic filing. It might provide, for example, that the clerk’s office is inaccessible in the event of court-end system failure, but not in the event of user-end technical failure; under that approach, court-end technical failure would extend deadlines by operation of subdivision (a), but user-end technical failure would only provide a ground for discretionary relief (if appropriate) under subdivision (b). A judge member broadened the discussion by asking why, in the era of electronic filing, the clerk’s office should ever be regarded as closed. A district judge member responded that there will still be those who make paper filings, and serious security concerns would arise if one were to allow members of the public to enter the courthouse on weekends or to use drop boxes. He recalled that his court decided to close its drop box and close to the public on weekends due to security concerns. Mr. Fulbruge noted that the appellate courts that are going to go onto CM/ECF are supposed to do so during 2007; he observed that consideration of the proposed time-computation changes should take account of this fact.

The third issue noted by the Reporter is the question of whether the template should deal with dates certain. Currently the template only addresses deadlines that must be computed, and not deadlines set by picking a certain date. A litigator has pointed out to the Subcommittee that there is a circuit split over whether the current time-computation rules cover the interpretation of date-certain deadlines. It would be relatively straightforward to draft a subdivision addressing date-certain deadlines; the question is whether members feel that such a provision is needed. A member expressed the view that the time-computation rules need not address date-certain deadlines; rather, that question can be left to the courts. A district judge member agreed that there is no need for the rule to address such deadlines.

Mr. Fulbruge noted that the Fifth Circuit recently had to address the 72-hour deadline set by the Justice For All Act, and stated that the deadline had proven problematic in application.

Mr. Fulbruge also raised questions about the inclusion of state holidays in the template definition of legal holiday. Members noted that Rule 26(a)'s definition would differ somewhat from Rule 6(a)'s definition because, in the appellate context, it makes sense to take account of both the state in which the main Court of Appeals Clerk's Office is and also the state within which sits the district court from which the appeal is taken.

Judge Stewart invited Judge Sutton to present the report of the Deadlines Subcommittee. Judge Sutton noted that the report encompassed two main issues: one of mechanics (which short appellate deadlines should be adjusted assuming the time-computation project goes forward) and one of policy (concerning the project's approach to the question of statutory deadlines and the project's overall advisability). Judge Sutton first addressed the Subcommittee's conclusions on the mechanics question. The Deadlines Subcommittee was aware of the Standing Committee's preference for a presumption in favor of 7-day increments, and the Subcommittee did employ that presumption; but Judge Sutton noted that it is a rebuttable presumption and in certain instances the Subcommittee deviated from that presumption.

Judge Sutton next reviewed the question of statutory deadlines; he noted that the problems raised in connection with that issue had prompted the Subcommittee members to wonder whether the project is worth doing. Judge Sutton reported Subcommittee members' views that there doesn't seem to be a problem with the current time-computation approach, and that it may be better to take a wait-and-see approach to time-computation given the advent of electronic filing. Judge Sutton also noted that the two main options for dealing with statutory deadlines – supersession and legislation – seem to have disadvantages. He observed that if legislation is the solution of choice, it will be important to coordinate the adoption and effective dates of the legislative and rules packages.

Professor Coquillette noted that the Standing Committee's working assumption, at this point, is that the rulemakers will present Congress with a package of conforming amendments. An attorney member of the Deadlines Subcommittee expressed the view that the current time-computation system works quite well, but also stated that, in the end, the Appellate Rules should follow the time-computation approach taken in the courts below. A district judge member of the Committee agreed with both these points. Professor Coquillette recalled that the time-computation project was initiated because the ABA's Litigation Section had expressed the view that the current time-computation system is a mess. Professor Coquillette stated that in his view the main issue facing the Project is whether the rulemakers ought to defer the Project to see how electronic filing plays out. Mr. Letter echoed the views of the other members of the Deadlines Subcommittee; he stated that the proposed days-are-days approach is a terrible idea, but that the Appellate Rules should follow the approach taken in the courts below. Mr. Letter suggested that Judge Stewart relay to Judge Kravitz that the Committee will follow the approach that other advisory committees decide to take but that the Committee views the days-are-days approach as a bad idea. Mr. Fulbruge, however, observed that both members of his staff and pro se litigants have trouble computing time under the current system. Judge Sutton offered two observations: First, he is skeptical whether the current system is really a problem. Second, he questioned whether the rulemakers should undertake at the present time a project that requires so much

coordination with Congress, when it is likely that the rulemakers will need to go back to Congress with additional proposals relating to electronic filing. A Committee member seconded the view that the Committee should express skepticism concerning the project; he pointed out that practitioners understand the current system.

Judge Stewart noted that he would provide feedback on the Project at the Standing Committee meeting. Judge Stewart also promised that an update on the time-computation issues would be circulated well in advance of the April 2007 meeting so as to give members an ample opportunity to consider them.

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

Judge Stewart invited Mr. Letter to review the DOJ's proposal concerning "pro se" filings by represented parties. At the April 2006 meeting, Mr. Letter had undertaken to investigate the approach to this question in the Supreme Court; accordingly, he began by reporting the results of that investigation. The Supreme Court sometimes receives both a certiorari petition written by counsel and a "pro se" certiorari petition; the Court's usual practice is to send the "pro se" petition to the attorney and inquire which of the two briefs the Court should file. Once the Court has granted certiorari, the merits brief is always filed by an attorney. Having reported these results, Mr. Letter stated that the DOJ would like to table its proposal. The motion was made to table the proposal; the motion was seconded, and passed by voice vote.

E. Items Awaiting Initial Discussion

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

The Reporter described the proposal by Chief Judge Michel and Judge Dyk of the Federal Circuit to amend the FRAP to add a disclosure requirement for amicus briefs. The proposed provision is based upon Supreme Court Rule 37.6, which requires amicus briefs to indicate 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 and its counsel) who contributed monetarily to the brief's preparation or submission. (Supreme Court Rule 37.6 excludes from its disclosure requirement amicus briefs filed by various government entities.) No circuit currently has such a disclosure rule. The rule might deter the practice of ghost-writing amicus briefs in order to circumvent page limits or present an appearance of broad support for a party's position. In a circuit that takes a restrictive approach to motions for leave to file an amicus brief (i.e., the Seventh Circuit), the disclosures could assist the court in determining whether to grant the motion. In all circuits, the disclosures could help the court to assess what weight to give to amicus filings. And adopting such a rule would promote uniformity by conforming the FRAP to the Supreme Court Rules. On the other hand, the evidence of ghost-writing is anecdotal, so the need for the rule may not be clear-cut. And adopting the rule would raise questions concerning

how to apply it in borderline cases. However, it is notable that Supreme Court Rule 37.6 was adopted in 1997 and there appear to be no complaints about its operation.

An attorney member stated that clients often ask whether they can contribute money toward the preparation of an amicus brief; the member tells the clients not to do so, citing Supreme Court Rule 37.6 by analogy. This member noted that the proposed rule would provide an answer to a frequently asked question. Another member said that the proposal is a sensible one, and he noted that the general counsel of a very large trade association has told him that ghost-writing of amicus briefs is a very real problem. A member stated that if the Committee proceeds with this proposal, the new provision should track the text of the Supreme Court rule. Professor Coquillette noted that the disclosure, when it denies any party or other involvement in the amicus' brief, actually helps the brief to seem more persuasive. An attorney member noted that no court of appeals has yet adopted such a disclosure requirement, and he wondered whether the proposal is ripe for adoption in the FRAP. Another member countered that the Committee should not encourage local variations. A judge member responded that the need for a disclosure rule might be greater in the Federal Circuit than in other circuits. He also observed that in some instances a party can evade the disclosure rule by becoming a member of the amicus; this would be the case, for instance, when the amicus is a trade association with a membership formed of companies of the litigant's type. An attorney member responded that this would not always be true, because not all parties would be eligible for membership in the relevant amicus. Judge Stewart observed that judges have varying views of the usefulness of amicus briefs. A district judge member stated that it is very important to require disclosure of whether counsel for a party authored the amicus brief.

Mr. Letter observed that he would be guided, in his view of this proposal, by what *judges* think of it, since judges are the intended audience for amicus briefs. Judge Stewart observed that some judges would probably find the disclosure rule useful. A judge member voiced support for the rule, noting that parties frequently solicit an amicus brief and then try to impart to that brief an aura of objectivity. Another judge responded that one can discern who is behind an amicus brief by reading it. A member asked whether adoption of the proposed rule could usefully preempt the proliferation of local rules on the subject. A judge member suggested deferring consideration of the proposal; another judge member observed that since the rule may be more useful in the Federal Circuit, it makes sense to let that circuit try out the rule. Judge Stewart expressed reluctance to encourage adoption of a local circuit rule on the topic; and he questioned whether delaying consideration of the proposal would enable the Committee to shed any new light on the proposal.

A member moved to adopt the proposed rule; the motion was seconded, and passed by a vote of seven to one. Mr. Rabiej noted that the Committee can follow the practice of requesting publication of the proposed rule at a deferred date, so that consideration of a number of proposals can be bundled together.

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

The Reporter summarized the proposal by Judge Michael Baylson of the Eastern District of Pennsylvania for a rule modeled on Pennsylvania Rule of Appellate Procedure 1925(b). The proposed rule would permit the district judge to require the appellant to file a statement of issues on appeal within a short time after filing the notice of appeal. That, in turn, would enable the district judge to write an opinion responding specifically to the arguments that will be the focus of the appeal. The Pennsylvania provision is enforced by a waiver rule, and has been controversial (especially because of the strictness with which the waiver rule has been applied); a proposal to alter some features of the Pennsylvania rule was recently published for comment. Some attorneys argue that it is hard for the appellate lawyer to formulate the issues so quickly; the appellate lawyer may not have litigated the case below, and the transcript may not yet be available. Supporters of the proposed rule argue that it could enable the district court to point out key issues to the Court of Appeals; that it may avoid the need for remands; and that it enables the district judge to address issues while they are fresh in his or her mind. On the other hand, the rule could pose a hardship for counsel, could make the trial judge seem less neutral, and might blur the transition from trial to appellate jurisdiction. One possible alternative to the proposed rule might be a requirement that briefs on appeal be provided to the district judge as well as the parties and the Court of Appeals.

A judge member reacted against the proposal, noting that district judges are very busy and that such a rule would lead to debates between the district judge and the appellant. Another judge member observed that he could understand the impetus for the rule, in the sense that it can be frustrating for a district judge when the court of appeals seems to have reviewed on appeal an entirely different case from the one that was litigated at the trial level; but the member stated that he nonetheless opposed the proposal. A third judge member stated opposition to the proposal. By consensus, the proposal was removed from the study agenda.

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)

The Reporter described the proposal by William Thro, the Virginia State Solicitor General, to amend FRAP 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. The proposal is supported by Mr. Thro's counterparts in 33 other states, Puerto Rico, and the District of Columbia. The proponents argue that states, like the federal government, need time to review the merits prior to deciding whether to appeal or to request rehearing. These choices may involve complex issues and multiple decisionmakers. It could also be argued that states should enjoy parity with the federal government. However, adopting the new rule would impose some costs. The bench and bar would have to adapt to the amendment; and, in the case of the time to take an appeal, the proposal would require conforming legislation to amend 28 U.S.C. § 2107. In affected cases, the time to take an appeal would double, and the time before the court's mandate issued (once the appeal was decided) would more than double. The universe of cases to which the amendments would apply is a large one. If the Committee pursues these

amendments, it will confront a question of scope: Should the amendments extend beyond states, and if so, to what other types of government entities? The proposed amendments would also need to be coordinated with an already-pending proposal to amend FRAP 4(a)(1)(B) and 40(a)(1); the pending proposal clarifies the rules' application to individual-capacity suits against federal officers or employees.

A member stated support for the proposal and noted that in his view the extension of the time to seek rehearing was the more important of the two changes. Mr. Fulbruge noted that he had sent a note to the Clerks of the various Courts of Appeals to seek their views on the proposal. Mr. Fulbruge noted that the figures provided in Mr. Thro's October 31 letter – showing relatively modest numbers of appeals taken by various state-government litigants – failed to give a sense of the likely impact of the proposal: Because the states win the overwhelming majority of habeas and Section 1983 cases, the great majority of appeals in such cases will be taken by the *non-state* party. Marcia Waldron, the Third Circuit Clerk, pointed out that the proposed amendments would raise definitional problems, because they would extend deadlines in cases involving state-government litigants but not local-government litigants, and because the status of the government litigant in a given type of case may vary state-to-state. Thus, for example, the respondent in a state prisoner's habeas case may or may not be a state official.

Professor Coquillette noted that the proposal raises a variety of scope questions, and if the Committee were to proceed with the proposal it would need to justify its decisions concerning scope. A member questioned why the rulemakers should proceed with Mr. Thro's proposal if the appeal time is set by statute. Judge Stewart queried whether a state that needs additional time, under the current system, couldn't seek additional time from the court. A judge member expressed ambivalence concerning the proposal. He could understand why state solicitors general might want states treated equally to federal litigants, and he noted that in some instances the extra time would assist a state solicitor general in persuading the relevant agencies that it was better not to take an appeal. On the other hand, the member expressed curiosity concerning the fact that the New York and Illinois solicitors general had not joined the proposal; he would want to know their thoughts. Mr. Letter agreed that the extra time would be useful in cases where the state solicitor general wants to persuade the relevant decisionmakers not to take the appeal. As to the extension of the time to seek rehearing, Mr. Letter observed that if the DOJ is unable to decide within the allotted time whether to seek rehearing, it will file the motion as a protective measure – which increases the burden on the court. Another member observed that the symbolism of the proposed amendments would be important, in that they treat states with parity to the federal government.

A member suggested that the proposal might be unripe for a vote. Mr. Letter agreed that it would be useful to take additional time to study the proposal. Mr. Rabiej noted that because legislation would be sought concerning 28 U.S.C. § 2107, it would be important to consider whether there are any groups that would oppose the proposal. Professor Coquillette observed that during the consideration of the proposed legislation, groups excluded from the scope of the Committee's proposal could seek inclusion. A judge member suggested that the Committee

consult Richard Ruda, the chief counsel of the State and Local Legal Center. By consensus, the matter was left on the study agenda. Judge Stewart appointed an informal subcommittee to consider the proposal. The subcommittee will be chaired by Dean McAllister and will also include Mr. Letter and Mr. Levy.

VI. New Business

Judge Stewart invited the Reporter and Mr. Rabiej to update the Committee on a proposal that is making its way through the Criminal Rules Committee. The proposal would amend Rule 11 in the sets of rules governing 2254 and 2255 proceedings, and would necessitate conforming changes to the Appellate Rules. The proposal will likely reach a formal vote during the Criminal Rules Committee's spring meeting. The proposed conforming changes will thus come before the Appellate Rules Committee at its spring meeting.

Mr. Levy suggested that it would be useful to consider amending the FRAP to provide a rule governing amicus briefs with respect to rehearing en banc. Mr. Letter noted that the Ninth Circuit is currently considering a proposed local rule on this issue; Mr. Levy noted that the Eleventh Circuit is also considering such a proposal.

Mr. Letter sought input on whether it would be useful for the Committee to consider addressing a problem that the DOJ has encountered in the Ninth Circuit. The problem arose when the government's appeal in a *Bivens* action was dismissed by a motions panel. The government wished to seek rehearing or rehearing en banc, and was told that its only recourse was to seek reconsideration from the motions panel or to persuade the motions panel to submit the matter to the en banc Court. Mr. Fulbruge noted that while a purely procedural matter would stay with the motions panel, when an appeal is dismissed that is a merits determination and the would-be appellant should be able to seek en banc rehearing.

VII. Date and Location of Spring 2007 Meeting

The spring 2007 meeting will take place on April 26 and 27, 2007 at a location to be announced.

VIII. Adjournment

The Committee adjourned at 1:00 p.m.

Respectfully submitted,

Catherine T. Struve
Reporter