Minutes of Fall 2008 Meeting of
Advisory Committee on Appellate Rules
November 13 and 14, 2008
Charleston, SC

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 13, 2008, at 8:30 a.m. at the Charleston Place Hotel in Charleston, South Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Gregory G. Garre joined the meeting after lunch on November 13, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), attended the whole meeting. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel R. 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. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Mr. Timothy Reagan from the FJC and Professor Richard Marcus joined the meeting on the morning of the 14th. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants.

II. Approval of Minutes of April 2008 Meeting

The minutes of the April 2008 meeting were approved.

III. Report on June 2008 Meeting of Standing Committee

Judge Stewart and the Reporter summarized the FRAP-related actions taken by the Standing Committee at its June 2008 meeting. The Standing Committee gave final approval to a

[1] Dean McAllister was present on November 13 but was unable to be present on November 14.

number of proposed amendments. Those amendments, which were also approved by the Judicial Conference in September 2008, are currently on track to take effect on December 1, 2009, assuming that the Supreme Court approves them and assuming that Congress takes no contrary action. The set of amendments include the proposed clarifying amendment to FRAP 26(c)'s three-day rule; new FRAP 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in FRAP 4(a)(4)(B)(ii); an amendment to FRAP 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments. The Reporter noted that the Standing Committee had made a change to the treatment of state holidays in the time-computation rules; had revised the Note to new Rule 12.1; and had decided upon a change to the text of Rule 22. All these changes had been summarized in the Reporter's June 20, 2008 email report to the Advisory Committee.

Judge Rosenthal noted that she and others had met with congressional staffers and had discussed the time-computation project. The staffers indicated their belief that it should not be difficult to secure the passage of legislation to amend the short list of statutes containing time periods that require amendment in the light of the change in time-computation method. The staffers suggested that participants in the rulemaking process return to the Hill in early December 2008 with proposed statutory language; the goal will be to secure legislation that takes effect on the same day as the proposed Rules amendments. Mr. Letter asked whether any of the proposed statutory amendments show signs of being controversial. Judge Rosenthal responded that there have been no signs of controversy.

Judge Rosenthal also noted that there will be a need for local rulemaking activity in order to adjust time periods set by local rules in light of the change in time-computation approach. The Standing Committee plans to communicate on this topic with the chief judges of each district court, and also plans to arrange for the matter to be raised at judges' workshops and conferences.

The Reporter noted that the Standing Committee had approved for publication the proposed amendments to Form 4, Rule 1(b), and Rule 29(a). Those amendments were published for comment in August, along with the proposed amendment to Rule 29(c) (which had previously been approved for publication). So far, the Committee has received one comment in general support of the proposals and two comments critiquing the proposed new Rule 29(c) disclosure requirement. The Washington Legal Foundation (WLF) points out that the proposed requirement that the amicus "identify" all persons who contributed money intended to fund the brief could be read to allow an amicus to say nothing if no such persons exist. However, WLF asserts, the Supreme Court interprets its similarly-worded rule to require, in such instances, a *statement* that no such persons exist. WLF suggests re-drafting the proposed Rule to clarify the point. A member responded that such a clarification might be inserted into the Note. The second comment on the Rule 29(c) proposal comes from Luther Munford, who asks why the rule imposes a disclosure requirement rather than simply setting a conduct rule (as by banning parties from contributing to the preparation of the amicus brief). Mr. Munford will send the Committee a written comment along these lines. Comments are due by February 17, 2009, so the Committee will be in a position to consider the comments at its spring 2009 meeting.

IV. Other Information Items

Judge Stewart noted that he has not received any further responses to his letter to the chief judges of each circuit concerning circuit-specific briefing requirements. He noted that as new judges are appointed to a circuit, it becomes more likely that the circuit may be willing to re-evaluate its existing local rules. Progress in paring down circuit-specific requirements is likely to be incremental.

Judge Stewart reported that he had written to Judge Jerry Smith to apprise him of the Committee's decision not to proceed with Judge Smith's proposal to amend Rule 35(e) so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing. Likewise, Judge Stewart reported, he had written to Judge Alan Lourie to let him know that the Committee had decided not to proceed with Judge Lourie's proposal to amend Rule 28.1(e) to address abuses of the cross-appeal briefing length limits.

V. Discussion Items

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

Judge Stewart invited the Reporter to present an update on issues relating to the Supreme Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

The most recent Supreme Court case implicating appeal deadlines was *Greenlaw v. United States*, 128 S. Ct. 2559 (2008). Greenlaw had appealed his sentence to the court of appeals and the government had failed to cross-appeal. The court of appeals rejected Greenlaw's challenge, and in addition – raising on its own motion the district court's failure to comply with a statutory mandatory minimum – the court of appeals decided that Greenlaw's sentence must be *increased*. When Greenlaw sought review, the United States confessed error and argued for vacatur and remand; but instead, the Supreme Court ordered full briefing and appointed separate counsel to defend the court of appeals' judgment. Ultimately, the Supreme Court vacated the judgment, holding that absent a government appeal or cross-appeal, the court of appeals should not have increased Greenlaw's sentence. Even assuming that there might be circumstances in which the court of appeals could initiate plain error review, such an approach is not appropriate as to sentencing errors which the government did not pursue. The Supreme Court's opinion in *Greenlaw* does not resolve the nature of the cross-appeal requirement. The *Greenlaw* Court's discussion of the deadlines for appeals and cross-appeals is interesting. As the Court puts it, those deadlines are "unyielding," and they serve the goals of finality and notice. In particular, an appellant such as Greenlaw should be able to rely (in formulating his litigation strategy) on the fact that the government has decided not to take a cross-appeal.

Meanwhile, the lower courts continue to examine *Bowles*' implications for various types

of appeal deadlines. Statutory appeal deadlines – such as Section 2107's 30-day and 60-day deadlines for taking civil appeals – are clearly regarded as jurisdictional. Entirely rule-based appeal deadlines, however, appear to be non-jurisdictional claim-processing rules. Examples include the Appellate Rule 4(b)(1)(A) deadline for appeals by criminal defendants and the Civil Rule 23(f) deadline for appeals from decisions concerning class certification. There is a nascent circuit split concerning hybrid deadlines – i.e., deadlines which are set by rule but which affect a deadline set by statute. One set of hybrid deadlines encompasses the Civil Rules deadlines for making motions that toll the time to appeal under Appellate Rule 4(a)(4). The Sixth Circuit views such tolling-motion deadlines as non-jurisdictional, but the Ninth Circuit disagrees. Most recently, the Eighth Circuit confronted a case in which the district court had purported to grant a defendant's (unopposed) motion for an extension of time to file a Civil Rule 50(b) motion. In its opposition on the merits of the motion (and after the time had run out for making a timely Rule 50(b) motion) the plaintiff raised the timeliness objection, and the district court denied the motion. The Eighth Circuit held that the deadline for making Civil Rule 50(b) motions is non-jurisdictional, but that the objection in this case was properly raised and that the untimely motion did not toll the time to appeal. Nor, in the court's view, could the "unique circumstances" doctrine rescue the appeal, because the court viewed such an application of the doctrine as barred by *Bowles*.

A judge member noted that a circuit split concerning the treatment of appeal deadlines is not desirable. He asked whether a proposal should be made to Congress to enact legislation that would adopt a uniform approach to such deadlines. Another judge member stated that if action is to be taken to adopt such an approach, Congress is better positioned to do so than are the rulemaking committees. This member concurred in the notion that it could be useful to make a recommendation to Congress; he suggested that in the preface to such a proposal one should explain the Committee's reasons for thinking that the matter is not amenable to a rulemaking solution.

It was noted that the *Bowles* issues also affect the other Advisory Committees and that coordination with those Committees will be essential. Judge Rosenthal observed that a legislative proposal, if one were to be formulated, would presumably include two components – first, a list of existing statutory appeal deadlines and a method for determining how to treat them, and second, a method for establishing the treatment of statutory appeal deadlines enacted in the future. She noted that in assessing the desirability of such a proposal, it would be useful to see possible language. Professor Coquillette agreed that sample language would be very useful for purposes of evaluating this possibility. He also noted that in order to be successful any such proposal would need the support of the DOJ. Mr. Letter promised to raise the question with Solicitor General Garre. Judge Rosenthal wondered whether proposed legislation that changes the treatment of existing statutory appeal deadlines would be controversial. Mr. Letter responded that he did not think so. An appellate judge suggested that in drafting proposed statutory language, it would be advisable to avoid use of the term "jurisdictional." A judge member suggested that it would be worthwhile to consider the Court's reasoning in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) (in holding "that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional

issue," suggesting a clear statement rule for determining when "a threshold limitation on a statute's scope shall count as jurisdictional").

The Committee resolved by consensus that the Reporter will ask the Reporters for the other Advisory Committees to raise the general issue with a view to obtaining the views of the Advisory Committees concerning the possibility of coordinating on this project. The Reporter will draft (for the Committee's review) possible language for a proposed statute that would identify which statutory deadlines are to be treated as jurisdictional and which are not. The Reporter's charge includes developing a list of existing statutory deadlines the status of which should be clarified by the proposed statute, and also developing proposed statutory language that would govern the treatment of deadlines set by statutes that are enacted in the future.

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

Judge Stewart invited the Reporter to introduce the discussion of this item, which concerns the problems that could be caused by belated tolling motions in cases where the district court has failed to comply with Civil Rule 58's separate document requirement. The concern is as follows: suppose that a separate document is required but not provided; that an appeal is commenced; and that a party subsequently files a tolling motion which is timely (due to the lack of a separate document) and which suspends the effectiveness of the notice of appeal. The Committee's discussion of this problem at the Spring 2008 meeting resulted in several requests that members make additional inquiries. Judge Hartz undertook to discuss these issues with the Tenth Circuit Clerk. Fritz Fulbruge agreed to survey the circuit clerks for their views. Marie Leary was asked to check with the Federal Judicial Center to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. And the Committee directed the Reporter to consult the Chair and Reporter of the Civil Rules Committee for their views.

The results of those inquiries are, overall, encouraging. Judge Hartz reported that he had raised the matter at a Tenth Circuit judges' meeting in May, and that the Tenth Circuit Clerk had subsequently contacted the district court clerks to encourage compliance with the separate document requirement. The outreach to the Tenth Circuit's district clerks produced a marked increase in compliance. Judge Hartz noted, however, that the problem of noncompliance may be more widespread than the Committee realizes, since the problem is a hidden one.

A district judge member reported that, after reading the agenda book materials, he made inquiries within his district. He learned that failure to comply with the separate document requirement is common, particularly in connection with the entry of summary judgment. The member suggested that the first step to take is to raise the matter with the district clerks' offices. Judge Rosenthal observed that compliance with the separate document requirement is not difficult. Mr. Letter noted the importance of the separate document requirement in making clear, to practitioners, the point at which the district judge considers the case to be at an end (and thus

ripe for appeal).

Judge Stewart suggested that compliance could be improved by raising awareness of the issue, for example, by placing an item on the agenda at meetings for district judges. A letter from the chief judge to the district judges in the district could highlight the issue. Judge Rosenthal noted that if the Committee believes such a reminder would be helpful, it could be useful for the Committee to make a recommendation along those lines. For example, the Committee might ask the Director of the AO to send out such a letter, with examples of documents that comply with the separate document provision. Mr. Rabiej noted that such a letter could be sent to both judges and district clerks. Mr. McCabe noted that there are a number of possible additional avenues for distributing the information, for example, through newsletters. Perhaps it might also be possible to insert a measure into the CM/ECF system that would prompt users to comply. A district judge member suggested that the Director's letter could be followed by another letter from a judge. Judge Rosenthal suggested that the letter could present the matter as a problem which is easy to solve.

Mr. Letter moved that the Committee recommend to the Standing Committee that appropriate steps be taken to raise awareness of the problem, in coordination with the Civil Rules Committee and Bankruptcy Rules Committee. The motion was seconded and was approved by voice vote without objection.

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

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning Judge Wood's proposal with respect to Rule 4(c)(1)'s inmate filing rule. At the Committee's Spring 2008 meeting, members raised a number of questions about institutional practices with respect to inmate legal mail – and, in particular, the extent to which indigent inmates have access to funds for postage for use on legal mail. Mr. Letter has made inquiries concerning the policy of the federal Bureau of Prisons. He reports that the issues raised by Judge Wood are not currently of concern to federal agencies or to the DOJ. The Bureau of Prisons has special procedures for legal mail; it provides indigent prisoners with a reasonable supply of postage for use on legal mail; and it requires the prisoners to affix the postage themselves. Thus, if Rule 4(c) were interpreted or amended to require prepayment of postage when an inmate uses an institution's legal mail system, that would not alter existing practice within the Bureau of Prisons. Mr. Letter has also put the Reporter in touch with an official who can provide information concerning the practice in immigration facilities; the Reporter will follow up with her directly.

The Reporter noted that researching the practices in state and local facilities is challenging because of the variety of policies and because many institutions' policies do not seem to be memorialized in readily accessible documents. Some institutions provide set, periodic sums to indigent prisoners; some institutions instead state that they will allow indigent

inmates a reasonable amount of free postage; some institutions advance money for postage to such inmates and then seek to recoup the money once there is a balance in the inmate's account.

The caselaw appears to recognize that indigent prisoners have a federal constitutional right to some amount of free postage in order to implement the inmate's right of access to the courts. The Supreme Court's 1977 decision in *Bounds v. Smith*, 430 U.S. 817 (1977), provides authority for this view. However, *Bounds* has been narrowed in some respects by *Lewis v. Casey*, 518 U.S. 343 (1996). The caselaw from the different circuits varies, and the decisions are very fact-specific; however, common themes appear to be that indigent inmates do have a right to some free postage for legal mail – but also that the constitutionally required amount may not be very large.

Mr. Fulbruge noted that roughly 40 percent of the Fifth Circuit's docket consists of cases involving prisoner litigants. A district judge member asked whether the high percentages of inmate filings in the Fifth and Ninth Circuits are atypical. Mr. Fulbruge responded that, nationwide, the percentage of appellants in the courts of appeals who are pro se is roughly 40 per cent, and that most of those pro se litigants are inmates. The Ninth, Fifth and Fourth Circuits have the greatest proportion of inmate litigation, and the Eleventh Circuit has a large share of inmate litigation as well.

Mr. Letter noted that he sympathizes with Judge Wood's original inquiry: the Rule could definitely be written more clearly. A member noted that the Rule's use of the word "inmate" might be misleading, to the extent that the Rule is intended to cover other institutionalized persons such as people in mental institutions; he suggested that a broader term would be "person" rather than "inmate." A judge member agreed that the Rule should be clarified. An attorney member wondered whether it might be useful to take a more global look at the inmate-filing rule, as opposed to treating only the question of postage. Judge Hartz noted that a related but distinct issue is raised by cases such as *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal – even though it was undisputed (and shown by the postmark) that he had deposited his notice of appeal with the prison mail system within the time for filing the appeal – merely because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid.

Judge Sutton, Dean McAllister, and Mr. Letter agreed to work with the Reporter to formulate some possible options for the Committee's consideration at the next meeting.

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

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. At the

Committee's Spring 2008 meeting there was no consensus on whether a national rule would be desirable, but members did suggest that circuits should consider adopting local rules on the issue. Members noted that it would be useful to ask judges in circuits which do not currently have a local rule on point why no such local rule exists. Members also observed that circuits without local rules on the subject are most likely to adopt such rules if attorney groups advocate their adoption.

Accordingly, the Committee's discussion at the Spring 2008 meeting gave rise to a number of lines of inquiry. Mr. Letter raised the issue with the federal appellate chiefs from around the country to see what their experience has been and whether the lack of local rules on the topic seems problematic. Judge Sutton raised the issue with the Sixth Circuit's local rules committee and also contacted some judges in the circuits that do not have a local rule on point to inquire why they do not have one. And Mr. Fulbruge consulted his fellow Circuit Clerks for their input on the practice in their respective circuits.

Mr. Letter reported that the question of amicus filings in connection with rehearing is not much of an issue for the United States Attorney offices; the question is much more likely to arise for the litigating divisions in Main DOJ. He noted that the DOJ does find local rules like those of the Ninth and Eleventh Circuits useful, because they provide needed clarity on whether motions are required in order to file such amicus briefs and on questions of brief length and timing.

Judge Sutton contacted circuit judges in the circuits (First, Second, Fourth, Sixth, and Eighth) which do not currently have a local rule on point. In his conversations with those judges, a number of themes emerged. Judges noted that even without a local rule on point a would-be amicus can always make a motion for leave to file the brief. Most circuits will usually grant such a motion unless the filing would cause a recusal. (The Eighth Circuit, he noted, may be somewhat less receptive and does not always grant leave.) Some judges feel that adopting a local rule would be undesirable because it could encourage amicus filings. And in courts which do not generally allow additional briefing after granting rehearing en banc, permitting amicus filings at that point would create a need to review the court's policy with respect to party filings at that stage as well.

Mr. Fulbruge's survey of the circuit clerks disclosed that some seven of the clerks who responded do not favor the adoption of a national rule. Two clerks see no need for a local rule, but two other clerks feel that it would be useful for circuits to consider adopting one.

Mr. Levy stated that even though the Committee does not seem inclined to adopt a national rule, it would be useful to encourage the adoption of local rules. Though this would not achieve uniformity, it would bring clarity to an area where questions frequently arise. A judge member observed that judges and practitioners have different perspectives on this issue. He suggested that local rules would be useful, and that the best way to encourage their adoption would be for the suggestions to come from attorney organizations.

Mr. Levy asked whether each circuit has a local rules committee. Judge Stewart stated that each circuit technically does have such a committee, and that he had identified those committees for the purpose of sending them copies of his letter to the chief judges concerning circuit-specific briefing requirements. Mr. Fulbruge noted that the Fifth Circuit's local rules committee is not used as much as those in some other circuits (such as the Seventh Circuit).

A district judge member stated that he opposes the adoption of a national rule, and he also questioned why the Committee should encourage the adoption of local rules on this topic. An attorney member responded that local rules could usefully provide answers to the questions that attorneys commonly have about such briefs (concerning the need for a motion, and concerning length and timing); she wondered whether an appropriate measure might be a letter from the Advisory Committee to the chairs of the circuits' local rulemaking committees.

Professor Coquillette observed that, in general, the Standing Committee's policy has been not to encourage local rulemaking as a solution unless there is a good reason for local variation. An appellate judge observed that there are indeed variations in local circuit culture that affect the courts' treatment of amicus briefs in connection with rehearing.

Mr. Fulbruge noted that circuit clerks who oppose adoption of a local rule on this point are concerned that a local rule would encourage amicus filings. Mr. Levy noted that a local rule, if adopted, need not encourage filings; for example, it could state that party consent is not enough and that a motion is required. Mr. Levy observed that one important function of local rules is to instruct practitioners. Mr. Letter agreed that this issue comes up constantly in his practice and that having a local rule would inform practitioners as to what they are supposed to do.

Professor Coquillette asked whether the adoption of local rules on this point would be justified by circuit-to-circuit variation – for example, by variations in the size of the circuit, the circuit's geographical range, and the types of litigation commonly seen in the circuit. Mr. Levy responded that in his view such variation does exist. A district judge member disagreed; he suggested that at most, the Committee might send the minutes of the meeting to the chief judges of each circuit (so as to apprise them of the discussion) but without any recommendation by the Committee. Then, he suggested, practitioners who are interested in the adoption of such local rules can work to seek their adoption. An appellate judge responded that he sees things somewhat differently, since there is already a lot of local variation in briefing practice. The district judge member responded that it is one thing for the Committee to tolerate variation, and another for the Committee to recommend the proliferation of local rules. The appellate judge member responded that his research had brought to light some rather surprising local practices. For example, some circuits which require a motion for leave send that motion to the original panel – the members of which might be expected to be unreceptive to the arguments of an amicus who wishes to submit a brief in support of rehearing en banc. The appellate judge member agreed, though, that the key factor in the adoption of local rules on this issue will be the support of practitioners who push for the adoption of such rules.

Mr. Levy noted that the D.C. Circuit has an active practitioners' committee; he suggested that it would be useful for the Appellate Rules Committee to state that the issue is worth thinking about. A member countered, however, that the recent experience with the issue of local circuit briefing rules weighs against the notion of asking the Chair to write a letter to the chief judges of the circuits; the member noted that such a letter would only be useful if it contained a detailed suggestion, yet if the letter were to contain a detailed suggestion that might make it seem that the Committee is promoting the adoption of local rules on the issue. Professor Coquillette noted that the response in his home circuit indicates that Judge Stewart's letter on local briefing rules has had an effect. Professor Coquillette reviewed some relevant history concerning local rules. Local rules are adopted without the report-and-wait process which is used for the national rules, and thus in 1988 Congress became concerned about the proliferation of local rules because such rules are adopted without congressional oversight. Professor Coquillette observed that on occasions when the Committees have considered an issue important enough for a national rule, the Committees have not been persuaded by the argument that the issue is one treated differently in different circuits due to local legal culture (he cited the example of new Appellate Rule 32.1 concerning unpublished opinions). He also noted that the ABA's Section on Litigation has tended to prefer the adoption of uniform national rules rather than local rules because the need to look at local rules is a burden on practitioners.

An attorney member asked whether – if the Committee were to communicate directly with the local rules advisory committees – that would offend the judges in the relevant circuit. An appellate judge observed that contacting the practitioners who serve on local rules committees may not be particularly useful, because lawyers who are accustomed to practicing in a given circuit are less likely to seek clarification of a circuit's practices than lawyers who practice nationwide. Mr. Levy noted that one relevant national organization would be the American Academy of Appellate Lawyers.

A district judge member expressed opposition to the idea of contacting local rules advisory committees directly; he suggested that, instead, practitioners should be the ones to make such contacts. At most, he stated, he would be willing to support communicating with the chief judges of the circuits, not with the local rules advisory committees. Judge Rosenthal noted that she did not recall any instances in which an Advisory Committee or the Standing Committee communicated directly with local rules advisory committees. She noted that it would be interesting to consider the 1990s experience under the Civil Justice Reform Act. Mr. Levy suggested that perhaps a first letter could be sent to the chief judges of the circuits, and then that letter could be followed by one to the local rules advisory committees. Mr. McCabe questioned whether the AO has a current list of the local rules advisory committee members; Mr. Rabiej noted that the AO does have a list of the local rules committees for the district courts.

An attorney member concurred in the prior observation that practitioners on the local rules advisory committees are unlikely to advocate the adoption of local rules on the issue. He suggested that – given the low probability that a letter from the Committee would lead to the adoption of local rules on the point – if the Committee has an institutional interest in not encouraging the proliferation of local rules, the Committee should take no action.

Mr. Levy moved that the Committee resolve to draft a letter (the specifics of which the Committee could consider at its Spring 2009 meeting) to the chief judges of each circuit advising them of the Committee's discussion and asking them to consider adopting a local rule on amicus briefs with respect to rehearing. He suggested that the letter might include a copy of sample local rules on the subject. Mr. Letter seconded the motion. A district judge member stated that he would vote against such a motion because he expected to disagree with what he anticipated Mr. Levy would suggest including in the substance of the letter. Mr. Levy responded that if the motion were to pass, it would be possible to prepare proposed alternative drafts of the letter. The motion failed by a vote of five to three. No further motions were made with respect to this item.

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

Judge Stewart invited the Reporter to introduce the topic of Rule 7 bonds for costs on appeal. The Reporter noted that, at its spring 2008 meeting, the Committee had discussed the pending proposal to amend Rule 7 to address the inclusion of attorney fees among the costs for which a Rule 7 bond can be required. There was consensus that the Committee should seek the views of the Civil Rules Committee concerning the role of appeal bonds in class litigation. Members also expressed interest in seeking the views of knowledgeable practitioners concerning this question.

The input received since then from Judge Kravitz and Professor Cooper has been very helpful. Professor Cooper provided some preliminary observations which underscore the challenges of moving forward with a proposal to address class-action appeals through an amendment to Rule 7. He notes that to the extent that a commentator takes the view that rulemaking action is warranted to respond to perceived problems with the behavior of certain class action objectors, one might question whether the best way to address such behavior is through Rule 7's appeal bond provision. He points out that it is difficult to craft rules that will distinguish accurately between objectors who are raising useful objections and objectors who are not. Professor Cooper has also identified a number of subsidiary issues which would require attention in drafting an amendment to Rule 7. He agrees that any such proposal should be developed in coordination with the Civil Rules Committee. But he also notes that this general topic could pose additional issues for the Civil Rules Committee. This is because the reasoning of *Marek v. Chesny*, 473 U.S. 1 (1985), has played a key role in the lower courts' discussions of the Appellate Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68's reference to "costs" includes attorney fees where there is statutory authority for the award of attorney fees and the statute in question defines "costs" to include attorney's fees. To the extent that the Committees contemplate revising Appellate Rule 7 to address the treatment of attorney fees as part of Rule 7 "costs," and to the extent that such a revision to Appellate Rule 7 entails the consideration of possible amendments to the Civil Rules, the question may arise whether (and how) to address *Marek*'s treatment of attorney fees as "costs" under Civil Rule 68. And the latter issue would not be uncontroversial. In the event that the Committee wishes to proceed with its consideration of an amendment to Rule 7, Professor Cooper has provided a very helpful list of litigators who have in the past assisted the Civil Rules Committee in its

consideration of issues relating to class actions.

An attorney member asked whether there would be any downside if the Committee were to decide not to amend Rule 7. Judge Stewart noted that the Committee had, in a prior year, voted to approve for publication a proposal to amend Rule 7 to exclude attorney fees from the costs for which an appeal bond can be required; that proposal did not, however, focus on the question of class actions. Judge Rosenthal stated that Professor Cooper's comments summarize well the difficulty of attempting to address by rule the role of class action objectors – a question that has become more prominent since the adoption of Civil Rule 23(f) (which authorizes interlocutory appeals by permission from class certification rulings). Another attorney member suggested that the Committee let the matter continue develop through caselaw; crafting a rule amendment would be highly complex and would risk unintended consequences. A district judge member expressed agreement with this view, but also noted that such a disposition should not be taken as intended to discourage the Civil Rules Committee from considering this set of issues in the first instance. The question was posed whether the Appellate Rules Committee would like to ask the Civil Rules Committee to continue to monitor developments in this area. A member responded that such a course of action should be left up to the judgment of the Civil Rules Committee. Another member moved to remove Item 03-02 from the Committee's study agenda. The motion was seconded and passed by voice vote without opposition.

F. 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 Mr. Letter to introduce the DOJ's revised proposal concerning the possibility of an amendment to address the treatment of litigation involving federal officers or employees. Mr. Letter noted that the DOJ had wished to clarify the treatment of litigation involving federal officers sued in their individual capacity and also to clarify the treatment of litigation involving federal employees. The courts have never clearly explained the distinction between a federal "officer" (as used in Rules 4(a)(1)(B) and 40(a)(1)) and federal employees in general. Civil Rule 12 was amended in 2000 to make clear that the additional time that Rule provides for answers by a United States litigant covers federal officers or employees, including officers or employees sued in their individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Some years ago, the DOJ proposed that similar changes be made in Appellate Rule 4(a)(1)(B) and Appellate Rule 40(a)(1). The Committee approved those proposals for publication, but the proposals were held in order to await publication along with other proposals. The result was that the proposals were still under consideration at the time that the Supreme Court decided *Bowles*. In the light of *Bowles*, a problem arises with the proposed amendment to Rule 4(a)(1)(B): Because the amendment to Rule 4(a)(1)(B) would not change the corresponding statutory language (concerning civil appeal deadlines) in 28 U.S.C. § 2107, amending Rule 4(a)(1)(B) would not provide practitioners with the certainty that the amendment was originally designed to achieve. Accordingly, the DOJ has decided to withdraw its proposal to amend Rule 4(a)(1)(B), but the DOJ still feels that it is worthwhile to amend Rule 40(a)(1). Rule 40(a)(1)'s deadlines concerning rehearing petitions

are entirely rule-based and therefore *Bowles* creates no problem for the proposed Rule 40(a)(1) amendment. The proposed amendment would bring certainty to the application of Rule 40(a)(1) and would bring that Rule into conformity with the approach taken in Civil Rule 12(a).

A judge member asked why amending Rule 40 would not raise similar *Bowles* issues – i.e., is Rule 40's use of the term "officer" mirrored in a statute? The Reporter responded that 28 U.S.C. § 2101(c), which sets the 90-day period for seeking certiorari review, does not say anything about rehearing petitions, and it is, instead, Supreme Court Rule 13.3 that provides for an extension of the time to seek certiorari when a petition for rehearing is timely filed. This means, the Reporter said, that *Bowles* does not raise the same sort of problem for an amendment to Rule 40(a)(1) that it raises for an amendment to Rule 4(a)(1)(B). The judge member questioned whether it is clear that it would be inappropriate to proceed with the proposed amendment to Rule 4; if the Committee were to make clear what the *Bowles*-related issue is, and if the Supreme Court were nonetheless to approve the amendment to Rule 4, then, the member suggested, litigants could fairly rely upon the amended Rule.

The Committee adjourned its discussion of this item in order to break for lunch. The discussion of this item resumed later in the afternoon, after Solicitor General Garre had joined the meeting. In the meantime, a copy of the proposed language for the Rule 40(a)(1) amendment had been distributed. The language of the proposed amendment was the same as the language that was published for comment in August 2007 except that the members approved the deletion of one sentence in the Note (which in the published version had referred to the concurrent proposed amendment to Rule 4(a)(1)(B)). That sentence is bracketed in the proposal shown here:

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. [(A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)] In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

The Reporter noted that the Committee should decide whether any further changes to the proposal should be made, and whether republication of the proposal is needed. On the latter point, Mr. Rabiej noted that the criterion for whether to republish a proposal is whether there has been a substantive change in the proposal (compared to the published version); the underlying practical concern is whether republication (and the resulting public comment) would be helpful in the consideration of the proposal. A district judge member stated that republication was not needed since the Committee had not made a substantive change in the proposed Rule 40 amendment.

The Committee discussed whether to change the proposal's language in response to Chief Judge Easterbrook's comments. Chief Judge Easterbrook states that it is incorrect to use "United States" as an adjective; he would prefer that the Rule use the adjective "federal." It was noted that this is a matter of style, and that adopting Chief Judge Easterbrook's proposed change would render amended Rule 40(a)(1) inconsistent with the language used in restyled Civil Rule 12(a).

The Committee also discussed the Public Citizen Litigation Group's concern that the language in the proposed Rule 4 and Rule 40 amendments could be read to exclude instances

when the court of appeals ultimately concludes that the federal officer's or employee's act did not occur "in connection with duties performed on the United States' behalf." Public Citizen argues that the wording should be changed to make clear that the extended time periods' availability turns on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. Public Citizen suggests that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with." Mr. Letter expressed opposition to Public Citizen's proposed wording change; the time period for rehearing should not turn on the way in which the complaint was framed. The Reporter pointed out that the uncertainty which concerns Public Citizen would presumably be less in connection with Rule 40(a)(1) (compared to the concern over Rule 4(a) and appeal time) because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. A member noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

A motion was made to give final approval to the proposed Rule 40(a)(1) amendment, as published, subject to the deletion of the sentence in the Note that had referred to the concurrent proposed amendment to Rule 4(a)(1)(B). The motion was approved by voice vote without opposition.

After that vote was taken, Mr. Garre asked whether the Committee would be inclined to recommend to Congress that it amend 28 U.S.C. § 2107 so as to permit a corresponding change to Rule 4(a). Judge Rosenthal noted that such a request would require coordination between the rulemaking process and the legislative process.

An appellate judge member asked whether there is any precedent for proposing a rule that would clarify an ambiguity in a statute (as the proposed Rule 4(a) amendment would do). The Reporter noted that there is some loosely analogous past history with Rule 4 and Section 2107; in particular, when the 1991 amendments to Rule 4 went through the rulemaking process, the attention of Congress was called to the desirability of amending Section 2107 in order to make the statute correspond to the 1991 changes in Rule 4(a), and shortly after the 1991 amendments to Rule 4 took effect, Congress did enact a corresponding amendment to Section 2107.

VI. Additional Old Business and New Business

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

Judge Stewart invited the Reporter to introduce the study item concerning Appellate Rule 3(d). This item was drawn to the Committee's attention by Judge Kravitz, who passed along a suggestion by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee"). The CBA Local Rules Committee points out that

in a district which permits the notice of appeal to be filed electronically through the CM/ECF system, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals."

At the present time, not all the district courts which are on CM/ECF for filing permit the notice of appeal to be filed electronically. Moreover, the appellate courts' transition to electronic filing is still in process. The CBA Local Rules Committee is correct that where the CM/ECF system is fully operational there is no need for the clerk to serve paper copies of the notice of appeal. But even in those instances, it would be necessary to have paper copies of the notice for the purpose of serving litigants who are not on the CM/ECF system, and inmate filings would continue to be in paper form. It would also continue to be necessary for the district clerk to notify the court of appeals of district-court filings that post-date the notice of appeal. In the light of the ongoing transition to CM/ECF, it would be reasonable to take a wait-and-see approach to Rule 3(d) at this time. That is particularly true in the light of the Committee's practice of holding proposed amendments until such time as there is a critical mass of them to publish for comment.

Mr. Fulbruge observed that the district courts do not always notify the circuit clerk electronically of the filing of a notice of appeal. An attorney member suggested that, given time, this issue is likely to work itself out. Judge Stewart noted the likelihood that the Committee on Court Administration and Case Management (CACM) will also consider the issue.

By consensus, this item was retained on the study agenda.

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

Judge Stewart invited the Reporter to present the issues relating to the "three-day rule." Rule 26(c) provides that when a deadline is measured after service of a paper on a party, and the paper is served electronically or is not delivered on the date of service, then three days are added at the end of the prescribed period. Rule 26(c) is the subject of a pending amendment that is currently on track to take effect December 1, 2009, and that will clarify the mechanics of the three-day rule. During the time-computation project, comments were received which suggest that the three-day rule should be abolished. Chief Judge Frank Easterbrook observes that the three-day rule will thwart the time-computation project's expressed preference for periods that are set in multiples of 7 days. And he argues that the three-day rule makes particularly little sense when a paper is served electronically (and thus instantaneously).

The Reporter suggested that the Committee should coordinate its work on this issue with that of the Civil, Criminal and Bankruptcy Rules Committees. She observed that the Committees have been debating the merits of the three-day rule, on and off, since at least the spring of 1999. Some of the concerns that have been expressed over that time seem less weighty now than they once did – for example, the concern that technical glitches will occur in the course

of electronic service. Moreover, since the CM/ECF system is set up to require those using it to consent to electronic service, it is less plausible to argue that applying the three-day rule when service is made electronically is important in order to preserve the incentive to consent to electronic service. However, another concern has been that if the three-day rule were eliminated parties would engage in the undesirable tactic of serving papers electronically just before a weekend or holiday in order to disadvantage their opponent; the developments noted above do not mitigate that particular concern.

A judge member queried whether a decision to maintain the three-day rule, for the present time, even in cases of electronic service might result in a situation – a few years hence – in which the availability of the extra three days has come to be viewed by practitioners as an entitlement. An attorney member stated that she did not think so, because the extra three days are currently viewed more as a gift than as a right. Another attorney member stated that it makes sense to wait to address this issue until the CM/ECF system matures. Another attorney member agreed that it makes sense to coordinate the Appellate Rules Committee's consideration of this issue with the other Advisory Committees. A motion was made to defer action on this item but to encourage the other Advisory Committees to consider it. The motion was seconded and passed by voice vote without opposition.

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

Judge Stewart invited the Reporter to summarize the various proposals to amend Rule 4(a)(4). One such proposal comes from Peder Batalden, who points out that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, he suggests, the judgment might not be issued and entered until well after the entry of the order. One such scenario concerns remittitur: Suppose the court orders a new trial unless the plaintiff agrees to accept a reduced award of damages, and gives the plaintiff 40 days to consider that choice. Another scenario concerns complex injunctive relief: suppose that the court, having entered a judgment containing an injunction, subsequently grants a motion for reconsideration and directs the parties to attempt to agree on the form of an amended judgment that includes narrower relief than the initial judgment. In either of these instances, the time to appeal from the *order* might actually run out before the *amended judgment* is actually issued and entered. These scenarios apparently would work differently in the Seventh Circuit, because that Circuit has read Civil Rule 58's reference to orders "disposing of a motion" to mean orders "denying a motion" – with the result that a separate document would be required by Civil Rule 58 for orders *granting* motions listed in Civil Rule 58(a)(1) - (5).

To address the problem he identifies, Mr. Batalden suggests that Rule 4(a)(4)(B)(ii) be amended by deleting "or a judgment altered or amended upon such a motion," so that the Rule would read: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A) must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of

the last such remaining motion." This change would remove the requirement that the notice of appeal challenging the judgment's alteration or amendment be filed within 30 days from entry of the order disposing of the motion. But in the scenarios described above, this change would not remove the incongruity concerning the timing of a notice of appeal challenging the order itself; Rule 4(a)(4)(B)(ii) would still purport to direct that such a notice of appeal be filed within 30 days after entry of the order, even if there is not yet a final and appealable judgment on that 30th day.

The other suggestions come from Public Citizen and from the Seventh Circuit Bar Association. They suggest that Rule 4(a) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent order disposing of a postjudgment motion. It is interesting to note that Rule 4(b)(3)(C) provides that a notice of appeal in a *criminal* case encompasses challenges to subsequent orders disposing of the post-verdict motions listed in Rule 4(b)(3)(A). The contrasting approaches taken in Rules 4(a) and 4(b) date from the same set of 1993 amendments to Rule 4; the minutes from the relevant Committee meeting do not explain the reason for the difference in approaches. As Public Citizen recognizes, one of the questions to be considered in assessing the proposal is whether the appellee would have sufficient notice of the nature of the appeal under a regime which permits the initial notice of appeal to encompass challenges to subsequent dispositions of post-judgment motions.

With respect to the issues raised by Mr. Batalden, an attorney member stated that he had not seen such scenarios in his practice. Another attorney member agreed, but also noted that Rule 4(b)'s approach holds some appeal. A third attorney member stated that he had seen the remittitur scenario in his practice. A judge member suggested that the Committee continue to study the issues. Another judge member noted that even if problems in this area are rare, such problems are very serious when they arise. An attorney member asked whether the three sets of proposals are linked (in the sense that, for example, adopting Public Citizen's proposal would address Mr. Batalden's concerns). The Reporter suggested that the answer to that question would be difficult to predict.

By consensus, these items were retained on the Committee's study agenda. The Reporter was asked to report the substance of the discussion to the Civil Rules Committee.

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

Judge Stewart invited the Reporter to introduce Mr. Levy's suggestion concerning the "manufactured finality" doctrine. This doctrine concerns situations in which the district court dismisses with prejudice fewer than all the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in order to obtain an appealable judgment. 28 U.S.C. § 1291 authorizes appeals from final decisions of the district courts, and the Supreme Court has defined final decisions as those that end the litigation on the merits and leave nothing for the court to do but execute the judgment. The policies behind the final judgment rule include the need to conserve appellate resources, avoid piecemeal appeals, and curb the delay that such piecemeal

appeals could cause in the district court.

There exist some safety valves that can mitigate the occasional harshness of the final judgment rule. Civil Rule 54(b) permits the district judge to direct entry of a final judgment as to fewer than all claims or parties if the district judge expressly determines that there is no just reason for delay. 28 U.S.C. § 1292(b) permits an interlocutory appeal to be taken if there are both (1) a certification from the district judge that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation and (2) permission from the court of appeals.

The manufactured finality doctrine, where it applies, can provide an additional option for seeking an immediate appeal. The circuits take varying approaches to this doctrine. The variations can be briefly summarized by reviewing various points along the spectrum of possible fact situations. Each scenario involves the district court's dismissal of the plaintiff's central claim, followed by the plaintiff's dismissal of the remaining peripheral claims. When the plaintiff dismisses its remaining (peripheral) claims with prejudice, all circuits (except perhaps the Eleventh Circuit) treat the resulting judgment as final and appealable. What if the plaintiff "conditionally" dismisses the peripheral claims with prejudice – i.e., dismisses them on the understanding that the dismissal is with prejudice unless the dismissal of the central claims is reversed on appeal? The Second Circuit treats such a conditional dismissal as creating an appealable judgment, but the Third and Ninth Circuits do not. In situations when the peripheral claims are dismissed without prejudice but the facts are such that those claims can no longer be asserted (for example, due to the statute of limitations), at least three circuits treat the resulting judgment as appealable. In cases where the peripheral claims are dismissed without prejudice and that dismissal completely removes a particular defendant from the suit, the Eighth and Ninth Circuits consider the resulting judgment to be appealable. In other instances when the peripheral claims are dismissed without prejudice, some six circuits treat the resulting judgment as not final and therefore not appealable, but two or more other circuits disagree. The Ninth Circuit has added a further nuance by inquiring whether there was evidence of litigant intent to manipulate the court of appeals' jurisdiction.

There could be a value to achieving a nationally uniform approach to this issue, and one could make a policy argument in favor of recognizing a judgment as appealable in some of the manufactured-finality scenarios just described. If such a result seems desirable, there is the further question of how best to achieve that result. 28 U.S.C. § 2072(c) provides that rules adopted through the rulemaking process can define when a judgment is final for purposes of appeal. There is also the question of which Committee – Civil or Appellate – is best situated to take the lead in considering such possible solutions.

Mr. Levy noted that this is an area in which clarity is very important. He suggested that 28 U.S.C. § 1292(e), which authorizes the adoption through the rulemaking process of rules permitting interlocutory appeals, could be another source of authority for a rulemaking solution in this area. Mr. Levy suggested that the two Advisory Committees should consider whether

Civil Rule 54(b) is intended to occupy the field, or whether Rule 54(b) should not be read to preclude other mechanisms for permitting immediate appeals.

A district judge member stated that he would like to hear more from persons who believe that the status quo is a problem. He stated that the existing framework already provides a means for addressing these issues. One existing rule is Civil Rule 54(b). Another relevant rule, he suggested, is Civil Rule 58: where Civil Rule 41 requires the district court's permission for the dismissal of the peripheral claims, the district judge can determine whether the situation warrants a final judgment and whether to issue a judgment under Civil Rule 58. The judge member suggested that, therefore, the problems identified by Mr. Levy should come up only with respect to very early dismissals. The Reporter agreed that where Civil Rule 41 requires district judge approval of the dismissal of the peripheral claims, one can argue that the district court's approval of the dismissal should weigh in favor of the conclusion that the resulting judgment is final and appealable. However, she suggested, there are some cases where, regardless of the district court's view on the matter, the court of appeals has refused to recognize a final judgment.

An attorney member suggested that these issues might more appropriately be tackled by the Civil Rules Committee in the context of the Civil Rules (such as Civil Rule 54(b)). She also wondered whether it is unduly ambitious for the Committee to take on the task of adopting a rule in order to resolve a circuit split concerning the proper interpretation of Section 1291. A judge member agreed that the matter is one for consideration by the Civil Rules Committee; he stated that if he were required at this point to decide whether to take any action on this matter, he would favor doing nothing. He wondered whether the conditional-dismissal branch of the manufactured finality doctrine raises problems similar to those that arise with respect to hypothetical jurisdiction.

A motion was made to communicate the Committee's discussion to the Civil Rules Committee; seek the Civil Rules Committee's input; and continue to study the matter. The motion was seconded and it passed by voice vote without opposition.

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

Judge Stewart invited the Reporter to summarize this item, which relates to a suggestion made by Professor Daniel Meltzer during the June 2008 Standing Committee meeting. During the consideration of the time-computation project, there was some discussion of the timing of postjudgment motions. During that discussion, Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions which seek reconsideration of matters already decided. If such concerns exist, he suggested, the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be made, though the Committees should also weigh the need not to unduly foreclose the appropriate uses of post-trial motions.

The Reporter noted that the Civil Rules Committee has primary jurisdiction with respect

to the appropriate scope of post-judgment motions, but that it would be useful to be able to convey to the Civil Rules Committee any views that Appellate Rules Committee members might have on this question. An attorney member stated that he makes frequent use of post-judgment motions and he considers them very useful; and he noted that the district court's ruling on the post-judgment motion can inform the court of appeals' review of the issue. A district judge member noted that a meritorious post-judgment motion gives the district judge an opportunity to correct a ruling that may have been made hastily during the heat of trial; this opportunity is especially valuable given that most trials of any length involve hundreds of decisions. An appellate judge member agreed that post-judgment motions give the district judge a salutary opportunity to examine the relevant issue and either correct or otherwise address it.

By consensus, the Committee resolved that the Reporter should convey the substance of the Committee's discussion to Professor Cooper.

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

Judge Stewart invited the Reporter to summarize this item, which concerns the rules implications of the Judicial Conference's Mandatory Conflict Screening Policy. The Judicial Conference Committee on Codes of Conduct has tentatively raised with the Standing Committee three questions which may have implications for practice under Appellate Rule 26.1. Rule 26.1 requires certain disclosures that are designed to help judges determine whether a conflict requires their recusal from hearing an appeal. Such recusal determinations are informed by Canon 3C(1) of the Code of Conduct for United States Judges.

Two of the three questions primarily concern the Bankruptcy and Criminal Rules, respectively. The other question does implicate the Appellate Rules; in particular it implicates the interaction among Appellate Rule 26.1, any local circuit disclosure requirements, and the requirements imposed by the CM/ECF system in those circuits where CM/ECF is already operational. But an inquiry into this question would be premature at this stage for a couple of reasons. First, the Committee on Codes of Conduct has been asked for additional information concerning some of its questions, and a response from the Committee on Codes of Conduct is expected late this year. Second, the courts of appeals are still in the process of making the transition to CM/ECF, so the question of overlap between disclosures required by prompts in the CM/ECF system and disclosures required by Rule 26.1 is one as to which the facts are still developing.

By consensus, the Committee retained this item on its study agenda.

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

Judge Stewart invited the Reporter to introduce this item, which relates to concerns raised by Public.Resource.Org about the presence of social security numbers and alien registration

numbers in federal appellate opinions. Public.Resource.Org points out that the inclusion within appellate opinions of social security numbers or alien registration numbers raises privacy concerns, and Public.Resource.Org proposes a number of measures to address this concern. These suggestions have been referred to the Court Administration and Case Management Committee of the Judicial Conference (CACM), which has primary jurisdiction over the Conference's privacy policy. CACM will consider the suggestions at its meeting on December 4-5, 2008.

The Reporter briefly summarized the history of the privacy provisions in Appellate Rule 25(a)(5) and the other sets of Rules. Pursuant to the E-Government Act, the rules were amended in 2007 to include provisions concerning privacy. The privacy Rules are similar to the Judicial Conference's privacy policy. They require the redaction from filings of names of minor children, birth dates, and all but the last four digits of Social Security numbers, taxpayer I.D. numbers, and financial-account numbers; in criminal cases Criminal Rule 49.1 also requires redaction of all but the city and state of an individual's home address. Appellate Rule 25(a)(5) adopts for proceedings in the courts of appeals whatever the privacy rule was that applied below; for proceedings that come directly to the court of appeals, Civil Rule 5.2 governs, except that Criminal Rule 49.1 governs when an extraordinary writ is sought in a criminal case. The rules do not mention alien registration numbers, and it does not appear that they were much discussed in the advisory committee deliberations.

In summarizing Public.Resource.Org's concerns, the Reporter indicated that she would focus on the question of alien registration numbers, because there is consensus that social security numbers should not be included in judicial opinions and because the data provided by Public.Resource.Org do not indicate that the disclosure of social security numbers in judicial opinions is a significant problem. Alien registration numbers are provided to immigrants by the Bureau of Immigration and Customs Enforcement, which uses them for purposes of tracking and identification. It appears that a person's A-number could be used to obtain information about their immigration case (including information that might allow an asylum seeker to be located by one wishing to do him or her harm). A person's A-number might also be used by one wishing to create false identification documents for a person in the United States illegally. Not only would the existence of such false I.D.s pose a law enforcement problem, but also a false I.D. might jeopardize the status of the person to whom the A-number was issued (for instance, if the holder of the false I.D. were carrying it when apprehended for the commission of a crime).

Against such privacy concerns, one should balance the possible costs of protecting A-numbers from disclosure in appellate opinions. A blanket requirement for redaction of A-numbers could impose costs on courts that currently include those numbers in their opinions, as well as on attorneys wishing to keep track of their own cases or to research decisions in other cases. Including A-numbers in the court of appeals opinion links that opinion readily to the relevant Board of Immigration Appeals (BIA) decision. And redaction could burden the Clerk's office, particularly in circuits – such as the Ninth – which deal with a huge volume of immigration appeals. Some of the circuit clerks have noted that eliminating the use of A-numbers in connection with immigration appeals could result in a net harm to aliens if the

redaction significantly increased the risks of erroneous determinations due to confusion concerning the identity of the alien involved in the appeal. One might also question whether requiring redaction of A-numbers from court of appeals opinions would even render those numbers inaccessible to Internet users. The BIA publishes its precedential decisions on the Internet. If an A-number is listed in an opinion published on the BIA website, then redacting that A-number from the court of appeals opinion would not seem to make that A-number less accessible to Internet users.

There is, however, one category of case in which the BIA currently does appear to redact A-numbers: A quick look at some of the precedential opinions on the BIA's website suggests that the BIA does not include A-numbers when publishing a precedential opinion in an asylum case.

Mr. Fulbruge noted that there is some concern among the Circuit Clerks with respect to the possibility of mis-identification. He noted that a case has been mentioned in which mistaken identity resulted in the wrong person being deported. A district judge member agreed that the concern over confusion and mistaken identity is a real one.

Mr. Rabiej noted that CACM has been collecting issues relating to the E-Government Act. In the future a subcommittee may be formed to consider those issues. Judge Rosenthal observed that these issues concern multiple committees.

Mr. Fulbruge noted that Public.Resource.Org's algorithm appears to have picked up an over-inclusive set of results – i.e., it has picked up not just opinions that list social security numbers or alien numbers but also opinions listing other similarly formatted numbers such as insurance policy numbers. The Reporter noted that Public.Resource.Org's search might be also be underinclusive in some respects (in the sense that it does not appear to pick up "unpublished" opinions that are available on Westlaw).

Solicitor General Garre stated that the DOJ would confer with the relevant federal officials concerning these issues.

By consensus, the Committee resolved to await input from CACM and to retain the item on its study agenda.

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

Judge Stewart invited the Reporter to summarize the questions relating to Form 4 (concerning applications to proceed in forma pauperis). Proposed amendments to Form 4 designed to conform to the new privacy requirements are currently out for comment. In addition, the Committee has expressed interest in considering other possible amendments to Form 4. Meanwhile, in October 2008 the Forms Working Group approved a revised version of Form AO 240 and also approved a newly created form AO 239. Form 239 was created because some

judges feel that AO 240 does not request enough detail from non-inmate IFP applicants.

The AO has posted WordPerfect and Word-compatible versions of Form 4 on the www.uscourts.gov website. However, Timothy Dole of the AO points out that it could also be helpful to post a text-fillable PDF version on the public judiciary forms page. Many circuits provide an electronic version of Form 4, but not all of those versions are text-fillable. Also, providing a text-fillable version of Form 4 might usefully assist the circuits in employing a form that is up-to-date. For example, as of fall 2008, not all circuits have removed from their forms both the request for full names of minor dependents and the request for the applicant's social security number. It was also noted that some circuits caption their circuit-specific forms with the name of the court of appeals; this contrasts with Form 4, which is captioned with the name of the relevant district court.

Another issue has to do with Question 10 on current Form 4. The Committee has noted that in future it may wish to consider revising that question, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. In the past, some have argued that these questions seek information that is protected by the attorney-client privilege. Most recently, similar arguments have been made in connection with the Forms Working Group's publication of proposed new Form AO 239.

By consensus, the Committee retained this item on its study agenda.

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

Judge Stewart invited the Reporter to present the proposal concerning Rule 6(b)(2)(A)(ii). It turns out that Rule 6(b)(2)(A)(ii) contains an ambiguity similar to the ambiguity in Rule 4(a)(4) that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). An amendment designed to remove the Rule 4(a)(4) ambiguity is currently on track to take effect December 1, 2009. The amendment would alter Rule 4(a)(4)(B)(ii) as follows: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." During the course of research this summer, the Reporter became aware of a similar ambiguity in Rule 6(b)(2)(A)(ii), dealing with the effect of motions under Bankruptcy Rule 8015 on the time to appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 ... measured from the
entry of the order disposing of the motion." Before the 1998 restyling of the FRAP, the comparable subdivision of Rule 6 instead read "A party intending to challenge an alteration or

amendment of the judgment, order, or decree shall file an amended notice of appeal ….”

The Reporter suggested that the Committee may wish to consider amending Rule 6(b)(2) for reasons similar to those that led the Committee to propose the pending amendment to Rule 4(a)(4)(B)(ii). She noted that she had benefited from very helpful discussions on this issue with Professor Gibson, the Reporter to the Bankruptcy Rules Committee. A judge member stated that the Committee should ask the Bankruptcy Rules Committee for its views on this question.

By consensus, the Committee determined to seek the views of the Bankruptcy Rules Committee concerning Rule 6(b)(2)(A)(ii).

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

Judge Stewart invited the Reporter to present this item concerning interlocutory appeals in tax cases. The Reporter stated that in the course of research concerning Appellate Rules 13 and 14, she noticed an apparent quirk concerning interlocutory appeals in tax matters. In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court. In 1986, Congress responded to *Shapiro* by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)’s system for interlocutory appeals from the district courts. When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what Rules govern an interlocutory appeal by permission under
Section 7482(a)(2). As of 2008, though, Tax Court Rule 193(a) states in part: “For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure.” This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5. The Reporter therefore wondered whether it might be useful to remove a source of potential confusion by amending Appellate Rule 14 to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2) (with references to the “district court” in Appellate Rule 5 being treated as references to the Tax Court). But before suggesting such a proposal to the Committee, the Reporter thought it best to try to ascertain whether the current framework causes problems in practice. With Judge Stewart’s permission, the Reporter made an informal inquiry seeking this information (while emphasizing that she was asking only on her own behalf and that the Committee had not yet considered the issue). That inquiry has not, however, turned up any information yet.

Mr. Letter undertook to make inquiries on this issue with tax litigators within the DOJ. By consensus, the matter was retained on the Committee’s study agenda.

K. Discussion of long-range planning issues

Judge Stewart led a discussion of issues relating to long-range planning. There has been a shift in thinking concerning long-range planning; one recent development is that the Chairs of the Advisory Committees are now involved in the long-range planning process. This provides an opportunity to consider, in a coordinated fashion, issues that relate to the work of more than one Committee. The goal is to identify cross-cutting issues with potentially far-reaching consequences; examples include questions relating to electronic filing; immigration appeals; and ongoing changes in the courts. At the most recent Judicial Conference long-range planning meeting (in September), participants assessed the Judicial Conference committees' long-range planning process. Each committee is asked to incorporate long-range planning into their discussions. The notion is to have a short-term plan that is operational and a longer-term plan that is strategic. Judge Stewart expressed confidence that as the Advisory Committee proceeds in its future meetings, it will keep an eye on long-range planning issues.

L. Discussion of draft Best Practices Guide to Using Subcommittees

Judge Stewart introduced the topic of the draft Best Practices Guide to Using Subcommittees, which was included among the agenda book materials. He noted that the Appellate Rules Committee has not made frequent use of formal subcommittees. He observed that the underlying concern is that subcommittees not take on a life of their own.

It was suggested that the Judicial Conference Executive Committee's concerns may largely be directed at committees other than the rules committees. Some other committees, it was suggested, may rely unduly on subcommittees and not engage in a sufficient degree of independent review of the subcommittee recommendations. This is a particular concern with respect to committees that rely heavily on staff and may lack transparency and public input. It was suggested that it will be important, in commenting on the draft Guide, to make clear that the rules committees' use of subcommittees has differed from the uses to which a number of other committees have put their subcommittees.

Judge Rosenthal suggested that the Committee consider concurring in a recommendation that the AO Director be authorized to act on behalf of the Chief Justice to designate one or more non-committee members to serve on subcommittees. Such instances, she stated, should arise rarely, but in appropriate instances the procedures should not require the Chief Justice personally to make the designation. By consensus, the Committee members resolved to concur in this recommendation.

The Reporter briefly summarized a few additional suggestions on the drafting of the Best Practices Guide. One concerns the draft Guide's alternative statement (at the bottom of page 2) that "[c]ommunication with AO staff should be through the chair." This would alter the way in which the Appellate Rules Committee Reporter has ordinarily worked; under current practice, she communicates directly with the AO staff on various issues, while always making sure to

communicate to Judge Stewart any matters of substance arising from those communications. It would be cumbersome if the practices were changed to require all such communications to go through the Chair. This aspect of the draft Best Practices Guide may be a better fit for Judicial Conference committees other than the Rules committees; Judge Rosenthal observed that most Judicial Conference committees, other than the Rules committees, do not have reporters. Another question is what the proposed draft Best Practices Guide means when it states that "[t]he chair of the full committee should sign any committee-related communication to recipients who are not members of the committee." The draft would appear to be targeting communications that are sent on the Committee's behalf – yet "committee-related communication" could be read more broadly than that. One possible way to narrow this broad language might be to refer to "any communication on behalf of the committee or any subcommittee." No Committee members expressed dissent from the idea of conveying the Reporter's suggestions on those points.

VII. Schedule Date and Location of Spring 2009 Meeting

Possible dates for the Committee's Spring 2009 meeting were discussed. One option might be April 16-17, 2009; a possible alternative might be April 2-3, 2009. More details concerning the meeting's date and location will follow.

VIII. Adjournment

Judge Stewart thanked Mr. Rabiej and the AO staff, the Federal Judicial Center, Mr. Fulbruge, and all the Committee members for their work. He expressed appreciation to Solicitor General Garre for joining the meeting. And he noted with regret the fact that Justice Holland had been unable to attend.

The Committee adjourned at 9:50 a.m. on November 14, 2008.

Respectfully submitted,

Catherine T. Struve
Reporter