Minutes of Fall 1999 Meeting of

Advisory Committee on Appellate Rules

October 21 & 22, 1999

Tucson, Arizona

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 21, 1999, at 8:30 a.m. at the Westward Look Resort in Tucson, Arizona. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Chief Justice Pascal F. Calogero, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., and Mr. Sanford Svetcov. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge Phyllis A. Kravitch, the liaison from the Standing Committee; Prof. Daniel R. Coquillette, the Reporter to the Standing Committee; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office; Ms. Carol Krafka and Ms. Judith McKenna from the Federal Judicial Center; and Mr. Michael J. Meehan, former member of the Advisory Committee.

Judge Garwood welcomed Mr. Svetcov to the Committee. Mr. Svetcov replaced Mr. Meehan as a member of the Advisory Committee on October 1, 1999.

II. Approval of Minutes of April 1999 Meeting

The minutes of the April 1999 meeting were approved with the following correction: In the last line of

the fourth paragraph on page 26, change "principle" to "principal."

III. Report on June 1999 Meeting of Standing Committee

The Reporter described the Standing Committee's most recent meeting. This Advisory Committee had no action items on the Standing Committee's agenda. However, Judge Garwood told the Standing Committee that this Advisory Committee intended to present a package of proposed amendments to the Standing Committee at its January 2000 meeting. Judge Garwood also communicated this Advisory Committee's views on proposed amendments to the Federal Rules of Civil Procedure ("FRCP") that would authorize electronic service. Those views are described in the minutes of this Advisory Committee's April 1999 meeting.

IV. Action Items

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

Judge Garwood introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right -- When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a) when

(i) it is entered in the civil docket in compliance with Rules ~~58 and~~ 79(a) of the Federal Rules of Civil Procedure and,

(ii) if entry on a separate document is required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure,

when it is set forth on a separate document as required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure, or

150 days after it is entered in the civil docket in compliance with Rule 79(a) of the Federal Rules of Civil Procedure,

whichever comes first.

(B) The failure to set forth a judgment or order on a separate document when required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

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

1. The first circuit split addressed by the amendment concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. Rule 4(a)(7) provides that a judgment or order is "entered" for purposes of Rule 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. Civ. P. 58, in turn, provides that a "judgment" is not "effective" until it is "set forth on a separate document," and Fed. R. Civ. P. 54(a) defines "judgement" as including "any order from which an appeal lies."

Courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is considered entered under Rule 4(a)(7):

First, some courts seem to interpret Rule 4(a)(7) to incorporate the separate document requirement as it exists in the Federal Rules of Civil Procedure. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998); *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 232-33 (1st Cir. 1992) (en banc); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1200-01 (2d Cir. 1987). Read in this manner, Rule 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when -- and only when -- Fed. R. Civ. P. 54(a) and 58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of Rule 4(a) until it is set forth on a separate document. Under this approach, then, whether an order disposing of a Rule 4(a)(4)(A) motion must be set forth on a separate document depends entirely on whether the order is one "from which an appeal lies." If it is, then the order is not entered under Rule 4(a)(7) until it is set forth on a separate document; if it is not, then the order is entered under Rule 4(a)(7) as soon as it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a).

Second, some courts seem to interpret Rule 4(a)(7) *independently* to impose a separate document requirement, and not just when Fed. R. Civ. P. 54(a) and 58 would, but on *all* judgments and orders whose entry is of consequence under Rule 4(a). *See, e.g.*, *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1457-58 (9th Cir. 1989); *Allen ex rel. Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987); *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983); *Calhoun v. United States*, 647 F.2d 6, 8-10 (9th Cir. 1981). Under this approach, all orders disposing of Rule 4(a)(4)(A) motions must be set forth on separate documents before they are considered entered under Rule 4(a)(7). Whether an appeal lies from such an order is irrelevant.

Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. *See, e.g.*, *Copper v. City of Fargo*,

No. 98-2144, 1999 WL 516758, at *3 (8th Cir. July 22, 1999) (per curiam); *Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231-32 (9th Cir. 1989); *Charles v. Daley*, 799 F.2d 343, 346-47 (7th Cir. 1986). These courts reason that, when a post-judgment motion is denied, the original judgment remains in effect, and therefore entry of the order denying the motion on a separate document is unnecessary. When a post-judgment motion is granted, the original judgment is generally altered or amended, and the altered or amended judgment should be set forth on a separate document.

Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies. Indeed, according to the Eleventh Circuit, the separate document requirement does not even apply to an altered or amended judgment. *See Wright v. Preferred Research, Inc.,* 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Rule 4(a)(7) has been amended to adopt the first of these four approaches. Under the amended rule, a judgment or order is treated as entered under Rule 4(a)(7) when it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a), with one exception: If *Fed. R. Civ. P. 54(a) and 58* require that a particular judgment or order must be set forth on a separate document, then that judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or, as explained below, until 150 days after its entry in the civil docket). Thus, whether an order disposing of a post-judgment motion must be set forth on a separate document before it is treated as entered depends entirely on whether the order is one "from which an appeal lies" under the law of the relevant circuit. If it is, then Fed. R. Civ. P. 54(a) and 58 require that it be set forth on a separate document, and it will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or until 150 days after its entry in the civil docket). If it is not, then it will be treated as entered for purposes of Rule 4(a)(7) as soon as it is entered in the civil docket, whether or not it is also set forth on a separate document.

One additional point of clarification: When a court orders that a judgment be entered (or that a judgment be altered or amended), Fed. R. Civ. P. 54(a) and 58, read literally, would seem to require that *both* the order *and* the judgment be set forth on separate documents. Because the parties can waive entry of the judgment on a separate document (as discussed below), an order for judgment (or an order to alter or amend a judgment) would seem to be "an[] order from which an appeal lies," and thus Fed. R. Civ. P. 54(a) and 58 would seem to require that such an order -- as well as any subsequently entered judgment (or altered or amended judgment) -- be set forth on a separate document. However, the Advisory Committee is not aware of any case that so holds. Rather, all courts seem to assume that when an order directs that a judgment (or altered or amended judgment) be entered, only the judgment (or altered or amended judgment) needs to be set forth on a separate document. At that point, both the order and the judgment (or altered or amended judgment) should be treated as entered for purposes of Rule 4(a)(7).

2. The second circuit split addressed by the amendment concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter [the judgment or order on] the [separate] document." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The First Circuit, fearing that "long dormant cases could be revived years after the parties had considered them to be over" if Fed. R. Civ. P. 54(a) and 58 and Rule 4(a)(7) were applied literally, holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket. *Fiore*, 960 F.2d at 236. Other circuits have rejected this three month cap as contrary to the relevant rules, *see, e.g.*, *Haynes*, 158 F.3d at 1331; *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998); *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1072-73 (D.C. Cir. 1997); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc), although no court has questioned the wisdom of imposing such a cap as a matter of policy.

Rule 4(a)(7) has been amended to impose such a cap. As noted above, a judgment or order is treated as entered for purposes of Rule 4(a)(7) when it is entered in the civil docket, unless Fed. R. Civ. P. 54(a) and 58 require the judgment or order to be set forth on a separate document, in which case the judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth. There is one exception: A judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* -- notwithstanding anything to the contrary in Federal Rules of Civil Procedure -- 150 days after the judgment or order is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a). On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58, and even if the judgment or order has not been so set forth.

This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not. In the words of the First Circuit, "When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties." *Fiore*, 960 F.2d at 236.

3. The third circuit split addressed by the amendment concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Such an order would

not be "effective" -- that is, the time to appeal the order would not begin to run, and thus a potential appellant would not *have* to appeal. However, such an order would be a "final decision" -- and thus, a potential appellant *could* appeal if it wanted to.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir.), *cert. denied*, 119 S. Ct. 353 (1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994); *Whittington v. Milby*, 928 F.2d 188, 192 (6th Cir. 1991); *Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 926 F.2d 92, 96 (1st Cir. 1991); *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 515 n.2 (8th Cir. 1990); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 430 (2d Cir. 1989). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994)*; Mitchell v. Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay. The appellant would return to the trial court, ask the court to enter the judgment or order on a separate document, and appeal again. "Wheels would spin for no practical purpose." *Mallis*, 435 U.S. at 385.

4. The final circuit split addressed by the amendment concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit held that the appeal was premature, in that the time to appeal the May 6 order had never begun to run because the May 6 order had not been set forth on a separate document. However, the Fifth Circuit said that it had to dismiss the appeal, rather than consider it on the merits, even though the parties were willing to waive the separate document requirement. The Fifth Circuit reasoned that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). By dismissing the appeal, the Fifth Circuit said, it was giving the plaintiff the opportunity to return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756

n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Rubin*, 110 F.3d at 1253; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990)*; Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989); *Gregson & Assocs. Architects v. Virgin Islands*, 675 F.2d 589, 593 (3d Cir. 1982) (per curiam). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B Charles Alan Wright et al., Federal Practice and Procedure § 3915, at 259 n.8 (3d ed. 1992).

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

Judge Garwood said that, after this Committee had struggled for almost two years with various issues raised by the application of the separate document requirement of FRCP 58 to orders that dispose of the post-judgment motions listed in FRAP 4(a)(4)(A), he had asked the Reporter to thoroughly research these issues over the summer. The Reporter had done so, and his conclusions were contained in a lengthy research memo included in the agenda book. Judge Garwood then asked the Reporter to discuss the amendment and Committee Note that he had drafted.

The Reporter said that the draft amendment and Committee Note attempted to address four questions, all of which were the subject of circuit splits. The first two questions were addressed by new FRAP 4(a)(7)(A); the second two questions were addressed by new FRAP 4(a)(7)(B).

1. When, if ever, should the separate document requirement apply to orders that dispose of post-judgment motions? Under FRAP 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. The circuits have divided on the question whether an order disposing of a post-judgment motion must be set forth on a separate document before it is deemed to be entered.

At past meetings of this Committee, we have noted the circuit split on this issue, but we have not fully

understood it. We have assumed that the extent to which the separate document requirement applies to orders disposing of post-judgment motions is solely a function of FRAP 4(a)(7), which currently provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." We have further assumed that FRCP 58 itself only imposes the separate document requirement on what are traditionally regarded as "judgments." We have failed to recognize that, in FRCP 54(a), "judgment" is defined broadly to include any appealable order -- including appealable orders that dispose of post-judgment motions. Thus, the separate document requirement is imposed on at least some orders disposing of post-judgment motions by *two* separate sources: FRAP 4(a)(7) and FRCP 54(a)/58.

Case law does not clearly address how FRAP 4(a)(7) and FRCP 54(a)/58 interact in the context of orders disposing of post-judgment motions. As the draft Committee Note describes, courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is deemed to be entered for purposes of FRAP 4(a). First, some courts seem to interpret FRAP 4(a)(7) to incorporate the separate document requirement as it exists in the FRCP. Read in this manner, FRAP 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when -- and only when -- FRCP 54(a)/58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of FRAP 4(a) until it is set forth on a separate document. Second, some courts seem to interpret FRAP 4(a)(7) *independently* to impose a separate document requirement, and not just when FRCP 54(a)/58 would, but on *all* judgments and orders whose entry is of consequence under FRAP 4(a). Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies.

Under the draft amendment, FRAP 4(a)(7) would adopt the first of these four approaches -- the "incorporation" approach. FRAP 4(a)(7) would not itself impose a separate document requirement on anything. Rather, it would simply incorporate the separate document requirement precisely as it exists in FRCP 54(a)/58. Parties would have to worry only about one separate document requirement, rather than two. And, although problems would still exist -- such as the often difficult problem of ascertaining whether an order disposing of a post-judgment motion is appealable and therefore required to be set forth on a separate document under FRCP 54(a)/58 -- at least FRAP will not be *adding* to the problems that already exist under the FRCP.

2. Should a Fiore*-type cap be adopted so that parties do not have forever to appeal when a judgment or order is required to be set forth on a separate document but is not?* No matter what this Committee does with regard to the first question, a separate document requirement will continue to exist in some form, because FRCP 54(a)/58 will continue to exist. And thus, no matter what this Committee does, there will continue to be occasions on which a judgment or order should be set forth on a separate document but is not. All of the circuits -- save one -- have made it clear that, in these circumstances, the parties have forever to bring an appeal. The First Circuit is the exception. In *Fiore v. Washington County Community*

Mental Health Ctr., 960 F.2d 229, 236 (1st Cir. 1992) (en banc), the First Circuit imposed a "cap" on the time that a litigant has to appeal a judgment or order that should have been set forth on a separate document but was not. The First Circuit held that, if a party fails to request that a judgment or order be set forth on a separate document within three months after the entry of that judgment or order in the civil docket, the party will be deemed to have waived its right to a separate document, and the time to appeal will be deemed to have expired. Several circuits have expressly rejected the *Fiore* approach as inconsistent with the relevant rules, but no court has questioned it as a matter of policy.

The draft amendment and Committee Note incorporate a 150 day cap that works a bit differently than the *Fiore* cap. Under *Fiore*, a party is deemed to have waived its right to *request* entry of a judgment or order on a separate document after three months. Under the draft amendment, the judgment or order is deemed to have been *entered* for purposes of FRAP 4(a) 150 days after the judgment or order is entered in the civil docket. At that point, the 30 (or 60) day deadline for filing a notice of appeal begins to run.

Judge Garwood asked the Reporter to stop at this point so that the Committee could discuss the first two questions -- the ones that are addressed in new FRAP 4(a)(7)(A). Several members of the Committee expressed support for the amendment and appreciation for the Reporter's work over the summer. No member of the Committee objected to adopting the "incorporation" approach in the first bulleted paragraph of new FRAP 4(a)(7)(A)(ii). Similarly, no member of the Committee objected to adopting a *Fiore*-type cap in the second bulleted paragraph of new FRAP 4(a)(7)(A)(ii). The only substantive disagreement was over whether the "cap" should be set at 150 days or at some shorter period of time.

Some members argued for a shorter period of time. They argued that after a judgment or order is entered in the civil docket -- but not set forth on a separate document -- parties do not need the equivalent of six months to appeal (150 days before the time to appeal begins to run, and then 30 or 60 days thereafter). Parties should not be able to "sit on their rights" for such a lengthy period of time; it creates delays in the system and is unfair to appellees. Some members of the Committee suggested that, in these circumstances, the time to appeal should begin to run 60 or 90 days after entry of the judgment or order in the civil docket.

Other members of the Committee disagreed. They reminded the Committee that the 150 day period had been approved at the Committee's April 1999 meeting and argued that, for several reasons, the period should not be changed. First, the separate document requirement is a notice provision; it is designed to give parties clear notice that the time to appeal has begun to run. If parties do not *get* that notice, then it is unreasonable to expect them quickly to file an appeal. Second, the 150 day period (which would require an appeal to be brought within 180 or 210 days, depending upon whether the government is a party) has a close analog in FRAP 4(a)(6)(A), which gives a party who has not been given notice of the entry of a judgment or order 180 days to move to reopen the time to file an appeal. Third, new appellate counsel are often brought in after a trial is concluded, and they need some "motion time" to get familiar with the case

and then take steps to protect their client's interests. It is not unreasonable to give appellate counsel six months to become familiar with a case, ascertain whether the judge is finished with the case, discover that a judgment or order that should have been set forth on a separate document was not, and then file either a notice of appeal or a motion for entry of the judgment or order on a separate document. Fourth, appellees can always protect themselves; at any time, they can move for entry of the judgment or order on a separate document, and the time to appeal will begin to run upon such entry. And finally, parties now have *forever* to appeal a judgment or order that should have been set forth on a separate document but was not; cutting that period to 180 (or 210) days is obviously a major improvement.

One other concern was raised: A member expressed concern that, under new FRAP 4(a)(7)(A), an appealable interlocutory order may be entered in the course of a trial, the party against whom the order was entered may not appeal it, the trial may continue for several more months, and then, after the trial is concluded, the party may find itself foreclosed from appealing the interlocutory order. Other members had a couple of responses. First, case law is clear that a party *may* appeal an appealable interlocutory order but does not *have* to. If a party does not appeal, the order is subsumed within the final judgment, and can be reviewed on appeal from that final judgment. Nothing in new FRAP 4(a)(7)(A) should change that. Second, because the separate document requirement can be waived -- as new FRAP 4(a)(7)(B) will make clear -- a party that is in doubt can always protect itself by bringing an appeal. The worst that can happen in those circumstances is that the appeal will be dismissed as premature, permitting the party to seek review of the order later.

Judge Garwood asked the Reporter to move on to the two remaining questions, which are addressed in new FRAP 4(a)(7)(B).

3. Should FRAP 4(a) be amended to incorporate the one-way waiver doctrine? In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the separate document requirement may be waived. As long as a judgment or order is a "final decision" for purposes of § 1291 -- or as long as appellate jurisdiction exists under another statute -- the parties do not have to wait for the judgment or order to be set forth on a separate document. Rather, they can choose to appeal the judgment or order immediately.

New FRAP 4(a)(7)(B) is intended to codify the *Mallis* decision. It is also intended to resolve a circuit split over who can waive the separate document requirement. Some circuits hold that, since the purpose of the separate document requirement is to give the appellant notice of when the time to appeal begins to run, the decision to waive the requirement should be the appellant's. Other circuits hold that all of the parties must consent to the waiver. If the appellee objects, the appellant must return to the district court, request entry of the judgment or order on a separate document, and then appeal. New FRAP 4(a)(7)(B) is intended to adopt the former view -- that is, to deprive the appellee of the right to object to an attempt by the appellant to waive the separate document requirement.

4. Should FRAP 4(a) be amended to resolve the "Townsend issue"? In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the Fifth Circuit held, in essence, that if the parties wish to waive the separate document requirement, then the appeal must be brought within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. After the 30 (or 60) day period has expired, the parties may not waive the separate document requirement; instead, they must return to the district court, seek entry of the judgment or order on a separate document, and then appeal within 30 (or 60) days of that entry. A couple of circuits have adopted the *Townsend* approach. Most, though, have rejected it, holding that the parties may appeal any time after entry in the civil docket of a judgment or order that should have been set forth on a separate document but was not. New FRAP 4(a)(7)(B) -- and especially the Committee Note -- are intended to adopt the majority position.

Judge Garwood invited questions and comments on new FRAP 4(a)(7)(B).

A member expressed support for new FRAP 4(a)(7)(B). She said that incorporating the waiver doctrine -- and giving the right to waive to the appellant -- were particularly important given what we have done in new FRAP (a)(7)(A). Because we have incorporated the separate document requirement as it exists in FRCP 54(a)/58, whether an order must be set forth on a separate document before the time to appeal begins to run will now turn upon the appealability of the order. That is often difficult to determine. A party may not *know* whether a particular order is appealable (and therefore is defined as a "judgment" by FRCP 54(a), and therefore must be set forth on a separate document under FRCP 58). Thus, it is particularly important that parties be able to protect themselves by filing appeals without waiting for separate documents.

Prof. Coquillette asked the Reporter what amendments to FRCP 54(a)/58 were needed to completely "fix" the problems caused by the separate document requirement. The Reporter said that two came immediately to mind: First, the FRCP could use a signal other than entry on a separate document. There is some confusion about what qualifies as a separate document. Second, FRCP 54(a) could be amended so that "judgment" is not defined to include all appealable orders. One option would be to limit the definition of "judgment" -- and thus the application of the separate document requirement -- to what lawyers traditionally refer to as "judgments." However, given that FRCP 58 is not the only civil rule that addresses judgments, tinkering with the definition of "judgment" might create unforeseen problems. A second option would be to more carefully define which orders must be set forth on separate documents. Making the question turn on the *appealability* of the order is problematic, as sometimes the time to appeal a judgment begins to run upon the entry of *unappealable* orders that dispose of post-judgment motions.

The Reporter stressed, though, that regardless of what the Civil Rules Committee might do, FRAP 4(a)(7) still has to be amended to make it clear that FRAP does not impose a separate document requirement independent of that imposed by the FRCP. New FRAP 4(a)(7)(A), by simply incorporating the separate document requirement as it exists in the FRCP, does not in any way constrain the Civil Rules Committee from making whatever changes it desires to FRCP 54(a)/58.

At Judge Garwood's request, the Reporter briefly addressed one additional matter. In the past, the Committee has considered amending not only FRAP 4(a)(7), but also FRAP 4(a)(4)(A), 4(a)(4)(B)(i), and FRAP 4(a)(4)(B)(ii). These amendments were intended to address a theoretical concern that had been raised by former Committee member Luther Munford. The Reporter said that, upon reflection, he had decided that amending these provisions was unnecessary. The Reporter said that the explanation for his conclusion was fully set forth in his research memo. Basically, though, Mr. Munford's concerns were grounded upon the assumption that when a court enters an order for judgment (or an order for an amended judgment), *both* the order *and* the judgment (or amended judgment) must be set forth on separate documents. The Reporter said that he had read over 500 published and unpublished opinions related to the separate document requirement, and he was not aware of a single case that so held. Rather, courts seem to require only that the judgment (or amended judgment) be set forth on a separate document -- and when the judgment (or amended judgment) is so set forth, courts treat the order for judgment (or order for amended judgment) as "entered." Given that, Mr. Munford's theoretical concern is unlikely to arise in practice.

Judge Garwood said that he had asked the Reporter to include a paragraph in the Committee Note that was designed to encourage courts to continue on this path and thus to minimize the chances that Mr. Munford's concern would materialize in real life. That paragraph appears as the third full paragraph on page 3 of the draft Committee Note. Several members expressed the view that the paragraph should be removed. They argued that, without a full explanation of the very complicated problem that concerned Mr. Munford, the paragraph was more confusing than helpful. One member disagreed, arguing that the explanation was helpful.

A member moved that the amendment to FRAP 4(a)(7) be approved. The motion was seconded. A member suggested that the amendment would read better if the word "when" was moved from the end of line 4 to the beginning of line 5 (before the word "it"). Other members agreed. The suggestion was accepted as a friendly amendment.

A member asked that the Committee vote separately on new FRAP 4(a)(7)(A) and new FRAP 4(a)(7)(B), as he had objections to the latter, but not to the former. By consensus, the Committee agreed to vote first on new FRAP 4(a)(7)(A). The motion to approve new FRAP 4(a)(7)(A) carried.

A member moved that new FRAP 4(a)(7)(B) be approved. The motion was seconded.

A member objected. He argued that, as drafted, new FRAP 4(a)(7)(B) seemed to "take away" what was accomplished by new FRAP 4(a)(7)(A). The Reporter disagreed. New FRAP 4(a)(7)(A) defines when a party *must* bring an appeal; it specifies when the separate document requirement applies and when the time to appeal begins to run on judgments or orders that are supposed to be set forth on separate documents but are not. New FRAP 4(a)(7)(B), by contrast, defines when a party *may* bring an appeal -- that is, whether and when the parties can choose to appeal without waiting for entry of a judgment or order on a separate document.

Another member said that, while he agreed with the Reporter, he wondered whether new FRAP 4(a)(7)(B) could be drafted more clearly. Couldn't the rule state something along the lines of, "The appellant can appeal a judgment or order, even if it hasn't been set forth on a separate document." The Reporter responded that he had considered similar formulations, but he was concerned about two things. First, they might be too broad, in that they may be read as wiping out more than the separate document requirement. Second, they might be too narrow; the rule should make clear that, if an otherwise proper appeal has been filed, no party may rely in any way upon the absence of a separate document.

The Reporter conceded, though, that, as drafted, new FRAP 4(a)(7)(B) requires litigants to think a step ahead. FRAP 4(a)(7)(B) is really a response to an objection. In other words, the purpose of FRAP 4(a)(7)(B) may not be clear until one first considers objecting to an appeal for lack of a separate document, and then realizes that, under FRAP 4(a)(7)(B), all such objections have been eliminated. The member said that he was satisfied with the Reporter's explanation. Another member pointed out that this language had been approved by the Committee twice before at prior meetings.

The motion to approve new FRAP 4(a)(7)(B) carried.

A member moved that the Committee Note be approved, with the exception of the third full paragraph on page 3 (beginning "One additional point of clarification"). The motion was seconded.

The Committee then debated at some length whether the Note was too long. Those members who favored shortening the Note said that it contained more explanation than a judge or practitioner would likely

need. For example, the description of the four-way circuit split on how the separate document requirement applies to orders disposing of post-judgment motions is important for this Committee, but the bench and bar probably do not need such a "peeling of the onion." Other members pointed out that in the West paperback compilations that are popular with practitioners -- *Federal Civil Judicial Procedure and Rules* and *Federal Criminal Code and Rules* -- all Committee Notes are reproduced in full. Long Notes result in thick books, which inconveniences practitioners who not only have to read the Notes, but carry them around.

Other members and the Reporter argued in favor of retaining the Note as written. They pointed out that the amendment to FRAP 4(a)(7) addresses four circuits splits over very, very complicated issues. This Committee needs to remember that it has lived with these issues for two years; judges and practitioners are going to need a lot of help understanding what the Committee has done. The potential benefit to judges and practitioners of the additional explanation outweighs the minor inconvenience of a few more paragraphs in the West volumes. The Reporter also stressed that any judge or lawyer reading the amendment is going to want to know whether and to what extent the law of his or her circuit was changed. Many of the courts of appeals do not even recognize that there *are* circuit splits, much less where their circuits fit within the splits. The Reporter pointed out that the Standing Committee has approved far longer Notes explaining far simpler amendments. A member agreed; he said that while he generally loathes long Committee Notes, this was an exceptionally complicated problem -- a problem that had befuddled this Committee for two years and that took a law professor three months to straighten out. This was a rare case in which a long Note was justified.

A member asked whether the Reporter and two or three Committee members could work overnight to draft a shorter version of the Note. Judge Garwood responded that he would first like to put the longer version of the Note to a vote. If the Note was approved, that would not foreclose anyone from proposing a shorter alternative tomorrow.

The motion to approve the Committee Note as drafted, with the exception of the third full paragraph on page 3, carried.

Judge Garwood asked Judge Alito, Mr. Thomas, and Mr. McGough to meet with the Reporter this evening about the possibility of shortening the Note and, if they deemed it advisable, to present a shorter version of the Note for the Committee's consideration tomorrow.

B. Item Nos. 97-05 & 99-01 (FRAP 24(a) -- conflicts with PLRA)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

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

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

(B) claims an entitlement to redress; and

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

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

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

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

(B) the law requires otherwise.

Committee Note

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

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

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g.*, *Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule

24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

The Reporter explained that this amendment is designed to eliminate potential conflicts between FRAP 24 and the Prison Litigation Reform Act ("PLRA"). The amendment to FRAP 24(a)(2) was approved in both form and substance at the Committee's April 1998 meeting, and the amendment to FRAP 24(a)(3) was approved in substance at the Committee's April 1999 meeting. At the Committee's request, the Reporter drafted language to implement the change to FRAP 24(a)(3).

A member moved that the amendment and Committee Note be approved. The motion was seconded. The motion carried.

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (c). A petition for permission to appeal, a cross-petition for permission to appeal, and an

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

The Reporter explained that this amendment was designed to correct a typographical error that arose during the restyling of the appellate rules. The substance of this change to FRAP 5(c) was approved by the Committee at its April 1999 meeting. The Reporter was asked to draft an amendment and Committee Note to implement the change.

A member moved that the amendment and Committee Note be approved. The motion was seconded. The motion carried.

D. Item Nos. 97-31 & 98-01 (FRAP 47 -- uniform effective date for local rules/require filing with AO)

Judge Garwood introduced the following proposed amendment and Committee Note:

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Adoption and Amendment.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with --

but not duplicative of -- Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is ~~promulgated~~ adopted or amended. A local rule must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule -- or any change to any local rule -- prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

Judge Garwood said that this amendment would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office ("AO"). Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

Judge Garwood reminded the Committee that it had approved this amendment and Committee Note at its April 1998 meeting. Judge Garwood apologized for asking the Committee to reconsider the amendment, but said that he was uncomfortable presenting it to the Standing Committee without further discussion. Judge Garwood said that he has a couple of concerns.

First, at a recent Standing Committee meeting, Judge Paul Niemeyer (the Chair of the Civil Rules Committee) and Prof. Edward Cooper (the Reporter to the Civil Rules Committee) pointed out that amending any of the rules of practice and procedure to prescribe a uniform effective date for changes to local rules might violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." Judge Garwood asked the Standing Committee for guidance on this problem, but none was forthcoming.

Second, the AO has expressed concern that conditioning the enforcement of local rules upon their receipt by the AO would trigger a flood of inquiries to the AO, as nervous attorneys who were about to try a case or argue an appeal would want to make certain that the local rules had not recently changed.

Judge Garwood asked the Committee for guidance. Does the Committee want him to present the amendment and Committee Note to the Standing Committee in January, as planned? Should he present only one of the two changes? Should we just drop the whole topic?

Mr. Rabiej encouraged the Committee not to drop the proposal altogether, but instead to postpone presenting it to the Standing Committee until after the other Advisory Committees had considered similar amendments to their rules. Prof. Coquillette agreed. He said that the proliferation of local rules was far less of a problem in the appellate courts than in the trial courts. Both the Civil Rules Committee and the Criminal Rules Committee are working on similar proposals, and this Committee should wait for them to act before going forward with the proposed amendment to FRAP 47(a)(1). If § 2071(b) proves to be a problem, the Judicial Conference can seek help from Congress.

Some members agreed with Mr. Rabiej and Prof. Coquillette. One member said that, until the problem with § 2071(b) was resolved, we should not propose any type of a uniform effective date. Another

member said that, putting aside the § 2071(b) problem, he did not think that the uniform effective date would do much good. Many judges are stubbornly independent, and they will use the "immediate need" loophole to enact changes in local rules whenever they want. A third member pointed out that even if all judges acted in good faith, the uniform effective date would not help practitioners much, as they would still need to monitor the local rules for changes that were prompted by legitimate "immediate need."

Other members disagreed. They argued, in essence, that "every little bit helps." Even if some judges would abuse the "immediate need" loophole, others would not. The fewer rules that take effect on a date other than December 1, the easier life will be for practitioners. Indeed, these members said, they would favor the amendment even if it were watered down to establish only a *presumptive* effective date of December 1. That would eliminate the conflict with § 2071(b) and would hopefully encourage courts to make changes to local rules effective on December 1.

As to the filing requirement, Mr. Rabiej stressed that the AO did not object to the *concept* that local rules should not be enforced until they are readily available to the bar. District courts are presently required to provide the AO with copies of all local rules, but many district courts ignore this requirement. At present, there is no single repository for all current local rules -- and, at present, an attorney has no alternative but to call the clerk's office if he or she wants to be certain that there have been no recent changes to the local rules.

According to Mr. Rabiej, the AO's objection is solely to the *means* of implementing this concept. The AO does not want to condition the effectiveness of a local rule on its receipt by the AO. Rather, the AO would prefer to condition the effectiveness of a local rule on its being posted by the court on a website -- or even upon its being provided to the AO *and* posted on the AO's website. The AO simply wants the event upon which the effectiveness of a local rule depends to be an event that can be verified by attorneys without calling the AO.

A member moved that the amendment to FRAP 47(a)(1) not be presented to the Standing Committee in January and that this Committee postpone any further action on this matter until the Civil Rules Committee and Criminal Rules Committee have acted upon the similar proposals now pending before them. The motion was seconded. The motion carried.

E. Final review of all items to be submitted to Standing Committee in January 2000

At Judge Garwood's request, the Reporter included in the agenda book copies of all of the amendments

and Committee Notes that this Committee has previously approved for presentation to the Standing Committee in January 2000, with the exception of the amendment to FRAP 47(a)(1) just discussed. Judge Garwood pointed out that the Committee Note to the amendment to FRAP 31(b) that appeared in the agenda book failed to reflect two changes that had been made to the Note. First, the heading should be "Committee Note," not "Advisory Committee Note." Second, the final two sentences in the Note should be deleted.

Judge Garwood said that he was prepared to entertain a motion that all of the amendments and Committee Notes be presented to the Standing Committee at its January 2000 meeting. A member said that he wanted to propose a change to the amendment to FRAP 32(d), which, as approved by the Committee, reads:

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys. The party or attorney who signs the paper must also state the signer's address and telephone number (if any).

The member said that he wanted to amend the second sentence of proposed FRAP 32(d) so that a party would have to state, in addition to its address and telephone number, its fax number and e-mail address. Mr. Fulbruge said that such a requirement would be helpful to the clerks. Other members objected to the proposal, arguing, inter alia, that attorneys should not be required to disclose e-mail addresses and open themselves up to unwanted electronic communications.

A member pointed out that the second sentence of proposed FRAP 32(d) was actually superfluous. Current FRAP 32(a)(2) requires that the cover of every brief contain "the name, office address, and telephone number of counsel representing the party for whom the brief is filed," and current FRAP 32(c)(2) requires that "other papers" must "contain the information required by Rule 32(a)(2)." In light of that fact, the second sentence of proposed FRAP 32(d) is unnecessary.

A member moved that the second sentence of proposed FRAP 32(d) be deleted. The motion was seconded. The motion carried.

A member moved that all amendments and Committee Notes be approved for presentation to the Standing Committee at its January 2000 meeting. The motion was seconded. The motion carried.

V. Discussion Items

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

Prof. Coquillette gave the Committee an update on the Standing Committee's efforts to draft "Federal Rules of Attorney Conduct" or "FRAC."

Prof. Coquillette began by stressing that he and everyone involved in the FRAC project recognized that the appellate courts were not experiencing a problem in this area. FRAP 46(b)(1)(B) establishes a single national standard -- "conduct unbecoming" -- and, although this standard is vague, there is no evidence that it is creating a problem for the bench or bar. Attorneys simply do not misbehave much in the courts of appeals. The Subcommittee on Attorney Conduct -- which is composed of representatives of the Standing Committee and each of the Advisory Committees (including Judge Alito and Mr. Thomas) -- is focusing its efforts on the many conflicting local rules governing attorney conduct in the *district* courts.

Prof. Coquillette reported that a "FRAC 1," drafted by Prof. Cooper, was currently being circulated for comments. Draft FRAC 1 is a "dynamic conformity" rule. It essentially provides that state rules of professional responsibility will govern the conduct of attorneys in federal court, except that valid federal procedural rules would still apply and "trump" any state rules of professional responsibility to the contrary. Federal courts would be put out of the business of regulating attorney conduct. At the same time, a mechanism would exist for protecting important federal interests. Conduct expressly authorized by court order could not be the basis of state disciplinary action -- and, of course, a "FRAC 2" or "FRAC 3" could always be promulgated to protect specific federal interests.

Prof. Coquillette said that this general topic -- and Prof. Cooper's draft FRAC 1 -- continue to be the subject of much controversy. Prof. Coquillette briefly reviewed the latest efforts on Capitol Hill to undo the "McDade Amendment," under which federal prosecutors are required to comply with both state rules and local federal rules (even though the two sets of rules often conflict).

Prof. Coquillette said that he did not think that any of the Advisory Committees would be asked to take formal action on proposed rules of attorney conduct for another year. During the next year, it is likely that the Subcommittee on Attorney Conduct will host at least one conference to get the widest input possible on this general issue and on draft FRAC 1.

Prof. Coquillette said that he would be happy to answer questions.

One member noted that the dispute over the application of Model Rule 4.2 to federal prosecutors is a substantial part of the motivation to come up with federal rules governing attorney conduct. His concern with draft FRAC 1 is that it does not address the Rule 4.2 problem. Rather, it simply leaves the problem for another day. The member urged that the Justice Department be asked to draft a rule that would address its concerns and that the rule be voted upon. The issue should be resolved, one way or another.

Several members said that district court judges will never agree to a rule that deprives them of authority to discipline misconduct that occurs in the course of litigation pending before them, even if that conduct does not violate a federal statute or rule of practice or procedure. A district judge may sit in a state in which a certain type of conduct is not addressed by the rules of professional responsibility -- or is specifically *authorized* by the rules of professional responsibility -- and yet, if the district judge views the conduct as unacceptable in his or her courtroom, the district judge should be able to sanction attorneys for engaging in it.

Prof. Coquillette said that the view of these members is widely shared. Everyone agrees that district courts will retain the power to decide who may appear before them. The concern is to make it clear that district courts cannot suspend or disbar an attorney from the *practice of law* for conduct that does not violate state standards. The district courts will remain free to sanction conduct in other ways, such as under FRCP 11.

Mr. Letter said that the Department of Justice is not just concerned about Rule 4.2, but also "outlier" states that might implement rules or interpretations of rules that are radically out of step with the mainstream. For example, the State of Oregon takes the position that an Assistant United States Attorney commits "fraud or deception" in violation of the rules of professional conduct when he or she participates in an undercover FBI sting operation. Federal law enforcement interests are seriously threatened by the McDade Amendment.

A member said that he sympathized with the Department of Justice. He also pointed out that the Department is bearing the brunt of this problem only because it has the largest national practice. However, with national practices becoming more and more common, the types of problems now experienced by federal prosecutors will increasingly be experienced by private practitioners. The Standing Committee needs to work diligently on this problem and recognize that the tradition of local autonomy in norms of attorney conduct may have to give way to the reality of growing national practices.

A member said that he was disturbed by the complicated choice-of-law provisions in the Cooper draft. In particular, he did not understand why, in an appeal from a district court in "State A" in which one of the parties hires appellate counsel from "State B" to argue the case in a court of appeals that sits in "State C," the professional responsibility rules in "State A" should govern the attorney's conduct before the court of appeals. The attorney may never have stepped foot in "State A," and any misconduct that he commits will occur in "State C."

Prof. Coquillette thanked the Committee for their helpful comments.

B. Item No. 98-03 (FRAP 29(e) & 31(a)(1) -- timing of amicus briefs)

Mr. Letter introduced this item. Mr. Letter said that when the appellate rules were restylized, FRAP 29 was amended so that, instead of an amicus brief being due at the same time as the principal brief of the party being supported, an amicus brief is now due seven days after the filing of the principal brief of the party being supported. Public Citizen Litigation Group has raised two concerns about this change: First, an appellant might have to file a reply brief before being able to read the brief of an amicus supporting the appellee. Second, an amicus supporting an appellee might not be able to see the appellee's brief until just before the amicus's brief is due, and thus the amicus might not be able to take account of the arguments made by the appellee in its brief.

Mr. Letter said that he wrote to several organizations that frequently file amicus briefs in the courts of appeals to solicit their suggestions about how FRAP 29 might be amended to fix these problems. He received virtually no response to his letter. He also talked to several appellate attorneys in the Department of Justice. None of them had experienced the problems feared by Public Citizen Litigation Group.

Mr. Letter urged that Item No. 98-03 be removed from the Committee's study agenda. If these problems materialize in the future, the Committee can address them at that time. For the present, though, no action was necessary.

A member moved that Item No. 98-03 be removed from the Committee's study agenda. The motion was seconded. The motion carried.

C. Item No. 98-06 (FRAP 4(b)(3)(A) -- effect of filing of FRCrP 35(c) motion on time to appeal)

Mr. Letter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right -- When Taken

- **Appeal in a Criminal Case.**

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

Committee Note

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(c) permits a district court, acting within seven days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some

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

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(c) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

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

Mr. Letter said that the Committee had approved the substance of this amendment at its April 1999 meeting, subject to one concern: The Committee wondered what would happen if the *government* brought a FRCrP 35(c) motion and then on, say, the sixth day after imposing sentence, the district court granted the motion. If a new judgment was not entered, the defendant might have only a couple of days to file a notice of appeal.

Mr. Letter said that he had investigated the matter and learned that when a FRCrP 35(c) motion is granted, a new judgment is always entered, and either party then has 10 days to appeal the new judgment. He said that the proposed Committee Note confirms this understanding in the final sentence, although he asked whether the Committee might want to remove that sentence, given that it really addresses an issue of criminal rather than appellate procedure. A couple of members expressed support for leaving the sentence in the Note, as the sentence makes clear the assumption upon which the Committee acted in approving the amendment.

A member moved that the amendment and Committee Note be approved. The motion was seconded. The motion carried.

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

FRAP 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F. Ripple has suggested that FRAP 22(a) be amended to permit circuit judges to deny habeas petitions. At the Committee's October 1998 meeting, Judge Garwood asked the Department of Justice to study this issue and make a recommendation to the Committee.

Mr. Letter said that the Justice Department has been working on this issue, but the issue is a complicated one, and the Department will not be prepared to present a formal proposal until at least the April 2000 meeting.

A member moved that further discussion of this matter be postponed until the April 2000 meeting. The motion was seconded. The motion carried.

The Committee adjourned for lunch at 11:55 a.m. and reconvened at 1:30 p.m.

E. Item No. 97-32 (FRAP 12(a) -- require caption to identify only the parties to the appeal)

Mr. Fulbruge introduced this item. Mr. Fulbruge discussed at length the manner in which appellate cases are docketed and otherwise processed by clerks' offices. He highlighted three key events:

- Promptly after the notice of appeal is received from the district clerk, the appellate clerk's office dockets the case. In the Fifth Circuit, the clerk's office tries to docket every case

within 24 hours after receipt of the notice of appeal. The appellate clerk's office is required by FRAP 12(a) to "docket the appeal under the title of the district-court action." Under FRCP 10(a), the title to the district court action includes every one of the parties to that action.

- No later than 10 days after the notice of appeal is filed, the attorney who filed the appeal must file a representation statement under FRAP 12(b). Only the attorney who files the notice of appeal must file a representation statement, and that attorney is required to identify only "the parties that the attorney represents on appeal."

- Several weeks later, the appellant files its brief. Often it is not until this point that the appellate clerk's office and the parties are able to identify which parties to the district court action are parties to the appeal.

Mr. Fulbruge said that Item No. 97-32 focuses only on the first step -- the docketing of the appeal by the clerks' offices. The requirement that appeals be docketed "under the title of the district-court action" causes considerable inconvenience for the clerks' offices, which are trying to handle more and more cases with less and less resources. Often, there may be dozens or even hundreds of parties to a district court action. Someone in the clerk's office has to manually enter the names of all of these parties, even though only a few of them may be parties to the appeal In order to avoid this waste of resources, the appellate clerks have proposed that FRAP 12(a) be amended so that titles would identify only the parties to the appeal.

Mr. Fulbruge answered a number of questions from the Committee about the mechanics of docketing appeals. For example, Mr. Fulbruge clarified the difference between *docketing* an appeal and *captioning* an appeal. Although FRAP 3(c)(1)(A) permits a "short title" to be used in the *caption* -- e.g., "Smith, et al. v. Jones, et al." -- FRAP 12(a) requires that a "full title" be used in *docketing* the case -- that is, that every party to the district court action be entered into the appellate court's computer. Mr. Fulbruge conceded, however, that some of the clerks' offices do not enter the names of all parties to the district court action when docketing an appeal.

In the course of the discussion, members of the Committee raised three concerns about the proposed amendment to FRAP 12(a):

1. Under the amendment, the clerks, when docketing a case, would need only to "identify in the title the appellant or appellants and the appellee or appellees." However, at the time a case is docketed, no one -- including the party who filed the notice of appeal -- may *know* who will be the "appellants," who will be the "appellees," and who will not be involved in the appeal at all. In some cases, the parties do not know

whether they will participate in the appeal -- and, if so, in what capacity -- until the appellant's brief is filed and it becomes clear what is being challenged and on what grounds.

A member pointed out that the appellate clerks' proposal is, in some respects, a reflection of a broader problem. It is sometimes difficult to know who is a "party" to an appeal. For example, a district court case may involve 12 plaintiffs, only one of whom appeals. The other 11 plaintiffs may not want to file appeals, but they may want to play some role in the appeal, depending upon what arguments are made by the appellees. Can those 11 plaintiffs be considered "parties" to the appeal, even though they have not filed notices of appeal, and even though they are not adverse to the one plaintiff who has appealed? Supreme Court Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court" and that "[a]ll parties other than the petitioner are considered respondents." Perhaps a similar provision should be incorporated into FRAP.

2. In some cases, the court of appeals is required to take action before the appellant's brief is filed. For example, the court may have to rule upon a motion. This makes it necessary for judges to be able to determine whether they should be recused from a case before the appellant's brief is filed -- that is, before it is clear who will be participating in the appeal. Because all of the parties to the district court action are *potential* parties to the appeal, all of those parties must be identified so that the appropriate recusal check can be run. In some courts, computers are used to assist judges with their recusal obligations. Thus, even if FRAP 12(a) was changed as the circuit clerks request, the names of all of the parties to the district court action would *still* have to be entered in the court of appeals' computer so that recusal checks could be run early in the case.

For this reason, an option suggested by one member -- entering the name of the appellant and *some* of the potential appellees, and then adding names as parties make appearances -- will not work. If a motion is filed three or four days after a case is filed, judges must be able to determine if they need to recuse themselves from ruling on the motion. To do that, judges need to know *all* of those who were parties in the district court.

3. This entire problem will disappear once the computers of the district courts are able to "talk" to the computers of the circuit courts. When that happens, it will no longer be necessary for appellate clerks manually to enter the names of all parties to the district court action. Rather, those names will be transmitted electronically with the touch of a button. The AO is presently working on this issue and expects that, within the next couple years, the technological problem will be solved. That being the case, any amendment to FRAP 12(a) would probably not take effect until after the problem that gave rise to the amendment had disappeared.

The Committee reached a consensus that no action should be taken on the clerks' proposal. A member moved that Item No. 97-32 be removed from the Committee's study agenda without prejudice to the clerks raising the proposal again if the software promised by the AO does not materialize. The motion was seconded. The motion carried.

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

Mr. Fulbruge introduced this item.

FRAP 12(b) presently requires only the attorney who files a notice of appeal to submit a representation statement and requires that attorney to identify only himself and his clients. The appellant's attorney is not asked to identify the appellees or their attorneys, and no other party is required to file a representation statement. This lack of information sometimes makes it difficult for the clerks to identify all of the parties and attorneys. To remedy this problem, the clerks have proposed amending FRAP 3(c)(1)(A) to require a party filing a notice of appeal to simultaneously submit "a separate statement listing all parties to the appeal, the last known counsel, and the last known addresses for counsel and unrepresented parties."

At the Committee's April 1999 meeting, some members suggested that, instead of amending FRAP 3(c) (which specifies the contents of the notice of appeal), the Committee should consider amending FRAP 12(b) (which specifies the contents of the representation statement). FRAP 12(b) could be amended to require that the representation statement identify the likely appellees and their counsel.

Mr. Fulbruge said that changing the contents of the representation statement will not help the appellate clerks. The clerks need help figuring out who the parties and counsel are at the time of docketing. The representation statement is often not filed until several days after the case is docketed.

Members responded in a couple of ways. First, several members expressed strong reservations about amending FRAP 3(c). The Supreme Court has repeatedly held that the requirements of FRAP 3 are

"mandatory and jurisdictional"; routine information-gathering provisions should appear somewhere else in FRAP. One member pointed out that the representation statement provision was intentionally put in FRAP 12 rather than FRAP 3 precisely so that the provision would not be considered "mandatory and jurisdictional." Second, FRAP 12(b) could be changed not only to expand the information that must be contained in the representation statement, but also to require the statement to be filed with the notice of appeal. One member said that the local rules of some courts -- including the Ninth Circuit -- require "civil docketing statements" or similar forms to be filed at the time of the notice of appeal.

Some members questioned whether an expanded representation statement filed at the time of the notice of appeal would be helpful, given that it is sometimes impossible to identify who will be appellees until the appellant's brief is filed. An appellant who is required to identify likely appellees and their counsel might have to engage in a lot of guesswork. Mr. Fulbruge responded that the appellate clerks will "take what we can get." Someone has to do guesswork at the time the appeal is docketed, and the appellant is in a better position to guess than the clerks.

The Reporter volunteered to work with Mr. Fulbruge to draft an appropriate amendment to FRAP 12(b). By consensus, the Committee agreed to postpone further consideration of Item No. 97-33 until April 2000.

G. Items Awaiting Initial Discussion

1. Item No. 99-04 (FRAP 32(a)(7) -- Microsoft Word counting glitch)

FRAP 32(a)(7)(B) sets forth the type-volume limitations on briefs, requiring, for example, that a principal brief not exceed 14,000 words. FRAP 32(a)(7)(C) specifically provides that the parties may "rely on the word or line count of the word-processing system used to prepare the brief" in certifying that the brief meets the type-volume limitations.

In *DeSilva v. DiLeonardi*, 185 F.3d 815 (7th Cir. 1999) (per curiam), the Seventh Circuit issued an opinion warning practitioners of a glitch in the Microsoft Word 97 program. Apparently, when text within a document is "selected" and the program is asked to count the words within the selected text, the program does not count words in footnotes unless the user specifically instructs the program to do so. As

a result, parties may unintentionally file briefs that exceed the type-volume limitations.

The Reporter said that he did not think this glitch or any other glitches in particular versions of particular software should be addressed through amendments to FRAP. By the time an amendment can take effect, the particular version of the particular software will likely be obsolete. A better solution is to do what the Seventh Circuit did in this case: warn the bar of the glitch and ask the manufacturer of the software to fix it. A member said that he has been told that Microsoft has already corrected the problem described by the Seventh Circuit.

The Reporter said that other glitches had been brought to his attention. For example, if a "hard space" is used between two words, some word processing programs will count the two words as one. In theory, a party could put hard spaces between all words and file a "one word" brief. The Reporter said that, if glitches continue to cause problems, the Committee may want to consider eliminating the provision in FRAP 32(a)(7)(C) that authorizes reliance on the word count of word processing programs. Parties could still *use* that feature in assessing whether their briefs met the type-volume limitations -- and, indeed, parties would have an incentive to make certain that they got as accurate a count as possible. But, at the end of the day, parties would have to bear responsibility for meeting the type-volume limitation. A member pointed out that the standard certificate of compliance that this Committee approved in April 1998 requires parties to state the exact number of words in their briefs. As long as that is true, the member said, parties should be able to rely on their word processing programs to count words.

A member moved that Item No. 99-04 be removed from the study agenda. The motion was seconded. The motion carried.

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

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

The Sixth Circuit divided over this question in *Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en

banc). The majority, citing the admonition in FRAP 3(c)(4) that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal," held that such a notice of appeal "name[d] the court to which the appeal is taken" as a *practical* matter, as there was only one appellate court to which an appeal could lie. The dissenters, citing Supreme Court decisions characterizing the requirements of FRAP 3 as "mandatory and jurisdictional," argued that the problem with such a notice of appeal is not *informality*, but rather that it does not "name the court to which the appeal is taken" *at all*.

The Reporter suggested that this item be removed from the study agenda. The Sixth Circuit's decision was reasonable. To the Reporter's knowledge, the decision does not conflict with any decision of any court of appeals, and it is consistent with at least one other decision that addressed the same issue. The Reporter recommended postponing any action on this issue unless and until a circuit split develops.

Mr. Letter disagreed. He said that he thought the issue was at least worthy of further study. He offered to have the Department of Justice look at the issue and report back to the Committee at its April 2000 meeting. By consensus, the Committee agreed to postpone further action on Item No. 99-05 until April 2000.

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

Prof. Coquillette introduced this item.

The *Kansas City Star* and the *Washington Post* recently published articles identifying cases in which federal judges neglected to recuse themselves even though they had a financial interest in one of the parties or in a parent company of one of the parties. In response, the Judicial Conference's Committee on Codes of Conduct asked the Standing Committee to examine whether the rules of practice and procedure should be amended to ensure better compliance with recusal standards. The Standing Committee, in turn, has asked the Civil Rules Committee, the Criminal Rules Committee, and the Bankruptcy Rules Committee to consider whether a provision patterned on FRAP 26.1 should be incorporated in their respective rules.

The Civil Rules Committee considered this issue at its meeting last week. Some members of that Committee argued that a rule *broader* than FRAP 26.1 should be added to the FRCP; these members said

that FRAP 26.1 required too little information from the parties and encouraged too much local rulemaking. Other members disagreed and said that they would object to financial disclosure obligations broader than those imposed under FRAP 26.1. Still other members said that *no* rule regarding financial disclosure should be included in the FRCP; rather, this matter should be left to the local rules, which are more flexible and can be changed more quickly. These members also pointed out that including a "FRAP 26.1" in the FRCP would have done nothing to prevent the errors that were the subject of the *Kansas City Star* and *Washington Post* articles.

Prof. Coquillette agreed with this latter point. In virtually all of the cases identified by the *Kansas City Star* and *Washington Post*, the problem was not that the judges had insufficient information about the parties; the problem was that the judges failed to act upon the information that had been provided to them. Amendments to the rules of practice and procedure cannot force judges to be more diligent in meeting their recusal obligations. Rather, this is a problem that should be addressed through better administrative support -- such as better software.

In any event, Prof. Coquillette said, although there was a lot of disagreement among members of the Civil Rules Committee about FRAP 26.1, the notion of incorporating a provision based upon FRAP 26.1 into the FRCP was not rejected, and no one proposed a specific alternative. Prof. Coquillette warned, though, that it is possible that one of the other Advisory Committees might approve a financial disclosure rule that is broader than FRAP 26.1, in which case this Committee might be asked to approve conforming amendments to FRAP 26.1.

Ms. Krafka spoke next. She said that, at the request of the Standing Committee, the Federal Judicial Center ("FJC") had collected and analyzed all of the local rules that addressed financial disclosure. The FJC found that 9 of the 13 courts of appeals require parties to disclose more information than is required by FRAP 26.1, although in some cases the differences were minimal. The district courts have a dizzying array of local rules addressing financial disclosure. Ms. Krafka referred the Committee to the FJC's report for a detailed description of the local rules.

Ms. Krafka agreed with Prof. Coquillette that judges who fail to recuse themselves when they should almost always do so inadvertently. The problem is rarely that judges do not have information that they need to make an informed decision. Rather, the problem is almost always that, for one reason or another, judges neglect to act upon information that has already been provided to them. The AO recently released enhanced software that is designed to help judges meet their recusal obligations.

Mr. Rabiej said that, at the Standing Committee's January 2000 meeting, the Reporters will be asked to try to draft a financial disclosure rule that may or may not be patterned after FRAP 26.1. If the Reporters

can come up with such a rule, that rule might be presented to all of the Advisory Committees at their spring meetings. Mr. Rabiej said that one of the most controversial issues is the extent to which courts should be able to use local rules to require disclosure beyond that required by FRAP 26.1. Some have argued that the many current local rules are unnecessary, create a substantial burden to the parties, and result in too many recusals.

A member said that this Committee had considered a version of FRAP 26.1 that would have precluded local rulemaking, but dropped the idea in the face of strong opposition from the chief judges. Another member said that he would object to any attempt to preclude local rulemaking unless the national rules require parties to provide all of the information that judges need to meet their recusal obligations. If judges are required to recuse themselves for "x" reason, but the national rules don't require the parties to tell judges whether "x" reason exists, then local rulemaking is necessary.

Mr. Rabiej and Ms. Krafka said that another alternative being considered is to amend all of the rules of practice and procedure to require that the parties submit a financial disclosure form approved by the Judicial Conference. In this way, the Judicial Conference could "fine tune" financial disclosure obligations without going through the time-consuming Rules Enabling Act process.

One member said that this problem could be solved if judges would simply make public their investments. The burden could then be placed on the parties to identify the judges who should be recused. Judge Garwood responded that, several years ago, the Judicial Conference soundly defeated a proposal to make information about the investments of judges more readily available. A member also pointed out that, in the courts of appeals, such a system would be difficult to implement, given that parties often don't know which judges will hear their cases until the day of argument, and given the widespread use of visiting and district judges on panels.

Prof. Coquillette thanked the Committee for its helpful input.

The Committee adjourned for the day at 3:45 p.m.

The Committee reconvened on Friday, October 22, at 8:30 a.m. Judge Garwood announced that, with respect to Item No. 98-02, the subcommittee had agreed that it was not possible to draft a shorter Committee Note in the limited time that was available. The subcommittee will continue to work on the issue and possibly present a shorter Note to the Committee in the future.

Judge Garwood then recognized Mr. Meehan, who introduced Mr. Marty Steinberg, CEO of Pubnetics, and Mr. Dennis Haserot, Pubnetics' Director of Publishing Services. Mr. Steinberg and Mr. Haserot gave the Committee a demonstration of technology developed by Pubnetics that allows parties to file their briefs and the entire record on a single "interactive" CD-ROM. Mr. Meehan distributed copies of Fed. Cir. R. 32, which specifically authorizes the filing of briefs on CD-ROM in the Federal Circuit. Mr. Meehan said that, in the near future, this Committee should consider incorporating a similar provision into FRAP. Judge Garwood thanked Mr. Steinberg and Mr. Haserot for their interesting presentation and Mr. Meehan for bringing this issue to the Committee's attention.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Scheduling of Dates and Location of Spring 2000 Meeting

The Committee agreed that it will meet in Washington, D.C., on April 13 and 14, 2000.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 9:45 a.m.

Respectfully submitted,

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Patrick J. Schiltz

Reporter

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