

**Minutes of the Fall 1998 Meeting of the  
Advisory Committee on Appellate Rules  
October 15 & 16, 1998  
New Orleans, Louisiana**

**I. Introductions**

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 15, 1998, at 8:30 a.m. at Le Meridien Hotel in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, and Mr. Michael J. Meehan. Mr. Douglas N. Letter, Appellate Staff, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Judge Phyllis A. Kravitch was present as the liaison from the Standing Committee, and Mr. Charles R. "Fritz" Fulbruge, III, was present as the liaison from the appellate clerks. Also present were Mr. Luther T. Munford, whose term as a member of the Advisory Committee expired on October 1, 1998, as well as Mr. John K. Rabiej and Mr. Mark D. Shapiro from the Administrative Office and Ms. Judith McKenna from the Federal Judicial Center.

Judge Garwood announced that Mr. W. Thomas McGough, Jr., had been appointed to the Committee to replace Mr. Munford, but was unable to attend the meeting because he was in trial. Judge Garwood also announced that Judge Anthony J. Scirica, the newly appointed Chair of the Standing Committee, was unable to attend the meeting because of an illness in his family.

**II. Approval of Minutes of April 1998 Meeting**

The minutes of the April 1998 meeting were approved with the following changes:

1. In the third line of the fourth full paragraph on page 4, change "sixth" to "six."

2. In the last line of the third full paragraph on page 26, change "that" to "than."

3. Change all references to "Advisory Committee Note" to "Committee Note."

The last change, suggested by the Reporter, was the subject of substantial discussion. The Reporter said that, at the last meeting of the Standing Committee, Prof. Daniel R. Coquillette (the Standing Committee's reporter) had informed the reporters for the advisory committees that Judge Alicemarie H. Stotler (who then chaired the Standing Committee) had directed that the term "Committee Note" be used instead of "Advisory Committee Note." According to Prof. Coquillette, Judge Stotler believes that use of "Committee Note" better reflects the fact that notes are produced through the joint efforts of the advisory committees and the Standing Committee, and not by the advisory committees alone.

Several members objected and said that they preferred "Advisory Committee Note." Some members pointed out that throughout the profession -- in courts, in law offices, and in law school classrooms -- reference is made to "Advisory Committee Notes," not to "Committee Notes." Other members pointed out that most written resources -- such as judicial opinions, statutory and rule compilations, treatises, and law school casebooks -- also refer to "Advisory Committee Notes."

Mr. Rabiej said that an additional reason for using "Committee Note" is that it permits the Standing Committee to make changes to a note, with the agreement of the chair and reporter of the relevant advisory committee, without requiring the amended note to be approved by the entire advisory committee. A member responded that, in that circumstance, the chair and reporter are acting *on behalf of* the advisory committee, and thus the note can still be considered the advisory committee's. After further discussion, the Committee agreed to accede to the request of the Standing Committee, but directed that its objections be noted on the record.

### **III. Report on June 1998 Meeting of Standing Committee**

Judge Garwood asked the Reporter to report on the Standing Committee's June 1998 meeting.

The Reporter said that Judge Garwood had informed the Standing Committee that this Committee had approved a number of amendments to the Federal Rules of Appellate Procedure ("FRAP") -- and that the amendments and accompanying Committee Notes appeared as an appendix to the draft minutes of this Committee's April 1998 meeting. Judge Garwood once again told the Standing Committee that this Committee will not seek permission to publish proposed amendments until January 2000, so that the bench and bar can become accustomed to the restylized rules before being asked to comment on amendments to those rules.

The Reporter also said that he had described for the Standing Committee the amendment to Rule 47(a) that had been approved by this Committee. Under that amendment, changes to local rules would take effect on December 1, unless there was an immediate need for a change. In addition, no amendment to local rules could be enforced until it had first been received by the Administrative Office ("AO"). The Reporter informed the Standing Committee that this Committee might revisit the issue of whether the ability to enforce a change in a local rule should be contingent upon the *receipt* of that change by the AO, in light of the AO's fears that it might be overwhelmed with inquiries from attorneys.

The Reporter mentioned that Judge Stotler had asked him to distribute the amendment to Rule 47(a) to the other reporters. The Reporter said that he had done so, and that the Advisory Committee on Bankruptcy Rules had already reviewed the amendment and lodged objections to it. The Reporter distributed an October 12, 1998 letter from Prof. Alan N. Resnick describing those objections. The Bankruptcy Committee recommends that the ability to enforce local rules be contingent upon their being *published* in a manner prescribed by the AO (rather than upon their being *received* by the A.O.) and that changes to local rules be permitted to take effect on a date other than December 1 if a majority of the court's judges desire that result (rather than only upon immediate need).

Members expressed disagreement with the Bankruptcy Committee on both points. First, members pointed out that the purpose of blocking enforcement until receipt by the AO was to ensure that there was a single national repository for all local rules currently in force in the federal courts; a "publication" requirement would not accomplish that goal. One member mentioned that, in addition, courts are required *by statute* to provide local rules to the AO, and not merely to publish local rules as the AO directs. *See* 28 U.S.C. § 2071(d). Another member argued that the AO's concerns about being inundated with calls from attorneys wondering whether new local rules had been received could easily be alleviated if the AO would simply post all local rules on its website. Mr. Rabiej agreed, but said that some technical issues would have to be worked out before the AO would be prepared to do that.

As to the Bankruptcy Committee's suggestion that changes in local rules be permitted to take effect on some date other than December 1 upon the mere agreement of a majority of a court's judges, members

argued that the purpose of the amendment was to bring about uniformity and that a strict "immediate need" standard was necessary to accomplish that goal. One member pointed out that the "immediate need" standard was a familiar one, having been borrowed from 28 U.S.C. § 2071(e).

The Committee briefly discussed other possible changes to the amendment to Rule 47(a), but ultimately decided to await the input of the other advisory committees.

The Reporter, finishing his report on the Standing Committee's June 1998 meeting, said that he had informed the Standing Committee that this Committee supported the shortening of the Rules Enabling Act ("REA") process and had no objection to permitting comments on proposed rules to be sent to the AO electronically. The Reporter also told the Standing Committee that, while this Committee would contribute members to an ad hoc committee to draft Federal Rules of Attorney Conduct, this Committee remained skeptical that any changes in Rule 46 were necessary, was troubled about the ad hoc committee's lack of expertise regarding legal ethics, and was concerned that the ad hoc committee take seriously the limits on its authority under the REA. Finally, the Reporter informed the Standing Committee that this Committee had removed from its study agenda the topic of unpublished judicial opinions.

The Committee next turned to the action items on its agenda.

#### **IV. Action Items**

##### **A. Item No. 95-03 (FRAP 15(f) -- premature petitions to review agency action)**

The Reporter introduced the following proposed amendment and Committee Note:

##### **Rule 15. Review or Enforcement of an Agency Order -- How Obtained; Intervention**

**(f) Petition or Application Filed Before Agency Action Becomes Final.** A petition for review or application to enforce filed after an agency announces or enters an order but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final (and thus non-appealable) becomes effective to appeal or seek enforcement of such order upon agency disposition of the last such petition for rehearing, reopening, or reconsideration.

### Committee Note

**Subdivision (f).** Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeals. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g., ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is intended to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *see also Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review with the court after the petition for rehearing is denied by the agency, that party will find itself shut out of court: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

Mr. Letter said that he had talked with Judge Stephen F. Williams, who had initially proposed this change to Rule 15, and to Mark J. Langer, the Clerk of the D.C. Circuit, as well as to the agencies most often involved in litigation in federal court. Mr. Letter said that the consensus of all of those with whom he spoke was that the procedural trap that the amendment seeks to remove does not arise frequently, but that the amendment would cause no harm and might do some good. The only concern that had been expressed was Mr. Langer's concern that the statistics regarding the size and age of the D.C. Circuit's caseload would look worse.

A member said that he opposed the amendment, given that there was no hue and cry for change.

Another member expressed concern about whether the amendment was within the authority of this Committee under the REA. He pointed out that Rule 4(a)(4)(B)(i) was designed to eliminate a procedural trap created by *Rule 4 itself*. By contrast, the procedural trap that the amendment to Rule 15 purports to eliminate was created because the D.C. Circuit, in interpreting the *governing statutes*, had concluded that a premature petition to review agency action was a nullity. If the D.C. Circuit is correct, then the amendment represents an attempt to use FRAP to effectively amend those governing statutes. A couple of members responded that, while that was true, the Supreme Court has authority under the REA to promulgate *procedural* rules that supercede statutes, which is precisely what is being proposed here.

Several members spoke in favor of the proposed amendment, arguing, in essence, that the procedural trap addressed by the amendment undoubtedly exists -- although it doesn't seem to arise frequently -- and that there was no "downside" to eliminating it.

A member moved that Item No. 95-03 be removed from the Committee's study agenda. The motion was seconded. The motion failed (2-5).

A member suggested stylistic changes to the proposed amendment. The Reporter also informed the Committee of other stylistic changes that had been proposed by the Subcommittee on Style. After further discussion and redrafting, it was moved and seconded that the following amendment to Rule 15 be approved:

**(f) Petition or Application Filed Before Agency Action Becomes Final.** If a petition for review or application to enforce is filed after an agency announces or enters its order -- but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable -- the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

The motion carried (5-2).

By consensus, the Committee accepted the following suggestions of the Subcommittee on Style with respect to the Committee Note:

1. In the third line of the first paragraph, change "appeals" to "appeal."
2. In the first line of the second paragraph, change "intended" to "designed."
3. In the ninth line of the second paragraph, delete "with the court."
4. In the tenth line of the second paragraph, change "shut out of court" to "out of time."

By consensus, the Committee rejected the suggestion of the Subcommittee on Style that the word "trap" at the very end of the Note be changed to "problem." The Committee thought that "trap" was clearer, as it more clearly communicated that it was referring to the same "trap" mentioned in the first sentence of the second paragraph.

**B. Item No. 95-07 (FRAP 4(a)(5) -- application of both "good cause" and "excusable neglect" standards to extensions of time to appeal)**

The Reporter introduced the following proposed amendment and Committee Note:

**Rule 4. Appeal as of Right -- When Taken**

**(a) Appeal in a Civil Case.**

**(5) Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

**Committee Note**

**Subdivision (a)(5)(A)(ii).** Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Notwithstanding the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Committee Note to the 1979 amendment to Rule 4(a)(5). What these courts have overlooked is that the Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3950.3, at 148-49 (2d ed. 1996).



The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The Reporter stated that, for the reasons given in his memorandum to the Committee, he thought it unlikely that the courts of appeals would fix the circuit split over Rule 4(a)(5)(A). He recommended that the Committee amend the rule as proposed, unless the Committee concludes that the difference between the "good cause" standard and the "excusable neglect" standard is of too little practical consequence to justify an amendment to FRAP.

A member expressed support for the amendment. He said that the difference between "good cause" and "excusable neglect" is not just theoretical; when interpreting other rules of practice and procedure, the courts have consistently held that the "good cause" standard is substantially less demanding than the "excusable neglect" standard.

Another member also expressed support for the amendment. He pointed out that the "good cause" and "excusable neglect" standards appear elsewhere in the rules of practice and procedure (e.g., FRCP 6(b)), and that it is important that the standards be interpreted consistently.

Mr. Munford, who initially suggested amending Rule 4(a)(5), said that he does not strongly object to the *substance* of the position taken by the majority of the courts of appeals. His concern is that the text of the rule fails to give litigants fair notice of that position. He supports the proposed amendment, but he would also have no objection to amending the rule to adopt the majority position. In fact, adopting the majority position would bring Rule 4(a)(5) in line with FRCP 6(b). His concern is simply that, one way or another, the rule be applied as written.

One member asked why "excusable neglect" is not considered an example of "good cause." Others responded that, while in theory one might think that "excusable neglect" is a form of "good cause," in practice courts had distinguished between the two.

A member moved that the amendment and Committee Note be approved. The motion carried (unanimously).

The Reporter informed the Committee that the Subcommittee on Style had recommended that Rule 4(a)(5) read as follows:

**(5) Motion to Extend Time.** Upon a showing of excusable neglect or good cause, the district court may extend the time to file a notice of appeal for a period not to exceed 30 days from the time otherwise prescribed by this Rule 4(a).

Several members objected, pointing out that this purportedly stylistic suggestion would result in a major substantive change to the rule by eliminating the requirement that a *motion* be filed. The Subcommittee on Style took its suggested language directly from Rule 4(b)(4), apparently without realizing that extensions can be granted in criminal cases without motion, but in civil cases only upon motion. It was moved and seconded that the Subcommittee on Style's suggestion be rejected. The motion carried (unanimously).

The Subcommittee on Style recommended two changes to the Committee Note:

1. In the first line of the second paragraph, change "[n]otwithstanding" to "despite." By consensus, the Committee accepted the suggestion.

2. In the second line of the last paragraph, delete "in this respect." By consensus, the Committee rejected this suggestion. The amendment to Rule 4(a)(5)(A)(ii) brings Rule 4(a)(5) in harmony with Rule 4(b)(4)

only in one specific respect, and not in others, and the Note as drafted more accurately reflects that fact.

**C. Item No. 97-04 (FRAP 15(c)(1) -- notice to parties in proceedings to review informal rulemaking)**

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

**Rule 15. Review or Enforcement of an Agency Order -- How Obtained; Intervention**

**(c) Service of the Petition or Application.** The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except that the petitioner need not serve for the respondents and, in cases involving informal agency rulemaking, the petitioner need not serve any party unless the law requires otherwise;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

**Committee Note**

**Subdivision (c)(1).** Under Rule 15(c), it is the responsibility of the circuit clerk to serve a copy of the

petition for review or application for enforcement on the respondents, and it is the responsibility of the petitioner to serve a copy of the petition for review or application for enforcement on "each party admitted to participate in the agency proceedings." An ambiguity arises when "agency proceedings" involve informal rulemaking, such as informal rulemaking conducted pursuant to 5 U.S.C. § 553. It is common for hundreds or thousands of people to submit comments to the agency in the course of informal rulemaking proceedings. If each commentator is deemed to be a "party admitted to participate in the agency proceedings," then the petitioner will have to serve its petition for review or application for enforcement on hundreds or thousands of people, perhaps making it prohibitively expensive to seek judicial review.

To forestall that result, subdivision (c)(1) has been amended to make clear that, when a petition for review or application for enforcement pertains to informal rulemaking, the petitioner is not required to serve all commentators. Indeed, the petitioner is not required to serve *anyone* (again, the respondents will be served by the circuit clerk), except when a statute requires that service be made on the United States or another entity or person. *See, e.g.*, 28 U.S.C. § 2344. This amendment to subdivision (c)(1) is patterned after D.C. Cir. R. 15(a), which appears to have worked well.

Mr. Letter said that there is a need for this amendment. For example, in one informal rulemaking proceeding regarding the regulation of tobacco, the FDA received comments from over 500,000 people. Each of those commentators might have been considered a "party" entitled to service of a petition to review the FDA's final action. D.C. Cir. R. 15(a) has worked well. The only concern that anyone has expressed about the amendment is that a party who wishes to file a petition for review if and only if another party files such a petition will not get formal notice of the filing of the other party's petition. The party will have to periodically call the clerk's office to inquiry whether a petition for review has been filed by any other party. When there are many parties, and any of those parties might file a petition for review in any of the circuits, the burden on such a party might be substantial. Agencies are supposed to note on their dockets when they are served with petitions for review -- and thus, in theory, such a party could simply check with the agency -- but not all agencies update their dockets promptly. One possible solution to this problem is to require the clerks to publish notice in the Federal Register of all petitions for review of agency action received by the courts. Another is simply to trust that courts will use their discretion to permit late requests to intervene.

A member pointed out that the Ninth Circuit has recently held -- citing D.C. Cir. R. 15(a) -- that those who submit comments in an informal rulemaking proceeding are not "parties" for purposes of Rule 15(c). Mr. Letter said that the D.C. Circuit certainly did not think that its local rule defined commentators in informal rulemaking as non-parties.

A member asked if the proposed amendment to Rule 15(c) would have any impact on *formal* rulemaking. Two members explained that it would not.

A member expressed opposition to the amendment. She said that the D.C. Circuit, which hears the vast majority of petitions to review agency action, has already solved this problem with its local rule. The clerks of the other circuits, in response to Judge Garwood's survey, uniformly reported that this problem has not arisen outside of the D.C. Circuit. Given the potential problems with the amendment described by Mr. Letter, why approve it? Several members agreed.

A member moved that Item No. 97-04 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

#### **D. Item No. 97-18 (FRAP 1(b) -- assertion that rules do not limit jurisdiction)**

The Reporter introduced the following proposed amendment and Committee Note:

##### **Rule 1. Scope of Rules; Title**

~~(b) Rules Do Not Affect Jurisdiction.~~ These rules do not extend or limit the jurisdiction of the courts of appeals. [Abrogated]

#### **Committee Note**

**Subdivision (b).** Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use FRAP to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use FRAP to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not

provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

The Reporter stated that, for the reasons given in his memorandum to the Committee, he did not believe that abrogating Rule 1(b) was required by the case law characterizing the limitations of Rules 3 and 4 as "mandatory and jurisdictional." However, the abrogation of Rule 1(b) was clearly appropriate in light of the amendments to §§ 1292(e) and 2072(c).

The Reporter said that Mr. Rabiej had suggested that the phrase "federal rules of practice and procedure" be substituted for the word "FRAP" in the fourth and sixth lines of the Committee Note. As written, the Note misleadingly suggests that the Supreme Court can define finality or provide for interlocutory appeals only in FRAP, when, in fact, the Court can also do so in any of the other rules of practice and procedure.

Several members briefly expressed support for the amendment. No member expressed opposition.

A member moved that the amendment and Committee Note be approved, with the changes suggested by Mr. Rabiej. The motion was second. The motion carried (unanimously).

**E. 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)**

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

**Rule 4. Appeal as of Right -- When Taken**

**(a) Appeal in a Civil Case.**

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

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later:

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

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

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

(iii) No additional fee is required to file an amended notice.

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**(7) Entry Defined.** 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, except that compliance with Rule 58 is not required when an order denies all relief sought by a motion or motions under Rule 4(a)(4)(A). The failure of any order or judgment that must be entered in compliance with Rule 58 to comply with Rule 58 will not invalidate an otherwise timely appeal from that order or judgment.

### Committee Note

**Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii).** The Committee intends that when a district court, in ruling upon one of the post-judgment motions listed in Rule 4(a)(4)(A), orders that a judgment be altered or amended, the time to appeal that order and the altered or amended judgment runs from the date on which the altered or amended judgment is entered. At present, Rule 4(a)(4)(B)(ii) leaves that matter in some doubt by providing that an appeal from an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) should be brought "within the time prescribed by this Rule measured from the *entry of the order*," rather than from the entry of the altered or amended judgment. Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii) have been amended to eliminate that ambiguity.

**Subdivision (a)(7).** The courts of appeals are divided on the question of whether an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) must be entered on a separate document in compliance with Fed. R. Civ. P. 58 before that order can be appealed and before the time to appeal the original judgment begins to run. *See* 16A Charles Alan Wright, et al., Federal Practice & Procedure



§ 3950.2, at 113 (1996) ("The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions."). The First and Second Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed. R. Civ. P. 58 applies to all orders disposing of post-judgment motions. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 234 (1st Cir. 1992) (en banc); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989); *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987). The Fifth and Seventh Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed. R. Civ. P. 58 applies when post-judgment relief is granted, but not when such relief is denied. *See Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231 (9th Cir. 1989). The Eleventh Circuit holds that Fed. R. Civ. P. 58 never applies to orders granting or denying post-judgment relief. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991), *cert. denied*, 502 U.S. 1049 (1992).

Subdivision (a)(7) has been amended to adopt the position of the Fifth and Seventh Circuits. The time to appeal an order *granting* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not begin to run until it is entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order usually alters or amends a judgment, the order should be entered with the same formality as a judgment. The time to appeal an order *denying* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) begins to run immediately upon entry of the order, whether or not the order has been entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order does not disturb the original judgment, compliance with the separate document requirement of Fed. R. Civ. P. 58 seems unnecessary.

Subdivision (a)(7) has been further amended to apply the one-way waiver doctrine when an order or judgment is required to be entered in compliance with Fed. R. Civ. P. 58 but is not. In that situation, the party against whom the order or judgment is entered has two options. First, the party can choose to appeal the order or judgment, and thereby waive its right to have the order or judgment entered in compliance with Fed. R. Civ. P. 58. The appeal will be heard, even if the appellee objects to the lack of a Fed. R. Civ. P. 58 order or judgment. Second, the party can wait until the order or judgment is entered in compliance with Fed. R. Civ. P. 58 and then appeal. In theory, the party could wait forever to appeal, but, in practice, that is highly unlikely to occur. Nevertheless, "[v]ictorious litigants wishing to write *finis* to the case would do well to ensure that the district court adheres to Rule 58." *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc).

The incorporation of the one-way waiver doctrine in subdivision (a)(7) reflects the fact that the separate document requirement is imposed for the benefit of the losing party. If that party wishes to waive that requirement by bringing a premature appeal, it seems pointless to dismiss the appeal, require the district court to enter the order or judgment on a separate document, and force the party to appeal a second time. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978). At the same time, the right of the losing party to have an order or judgment entered in compliance with Rule 58 should not be lost through the party's silence. Cases to the contrary -- in particular, *Fiore v.*

*Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992) (en banc) -- are expressly rejected.

Mr. Munford said that three ambiguities gave rise to this amendment:

1. **The "Applicability" Question:** Does FRCP 58 apply to the "order" referred to in Rule 4(a)(4)(A) -- that is, to "the order disposing of the last such remaining motion"?

2. **The "Prematurity" Question:** If FRCP 58 does apply to the "order" referred to in Rule 4(a)(4)(A) -- and thus the time to bring an appeal in a civil case does not begin to run until an order granting or denying post-judgment relief is entered in compliance with FRCP 58 -- what happens if a party brings an appeal *before* such an order is entered?

3. **The "Timing" Question:** When a post-judgment motion is granted and the judgment is amended, does the time for appealing the amended judgment run from the date on which the district court orders the judgment to be amended or from the date on which the clerk enters the amended judgment?

Mr. Munford said that the Reporter's memorandum accurately described these questions and the need for the amendment.

A member said that it was not clear to him that, under current law, orders that deny post-judgment motions need to be entered in compliance with FRCP 58. Mr. Munford said that he agreed that FRCP 58 *should* not apply, but several courts have held that, under Rule 4, it *does* apply. He said that it was important to amend the rule to clarify the situation.

Another member asked about the purpose of FRCP 58. Members explained that its purpose was to clearly signal when the time to bring an appeal begins to run, so that a potential appellant does not unwittingly lose her right to appeal.

Judge Kravitch asked whether the ambiguity regarding the application of FRCP 58 was limited primarily to orders denying post-judgment motions. Mr. Munford said that, while the question can arise in other settings (such as collateral orders), the disagreement in the courts pertains to orders disposing of post-judgment motions.

A member said that he had some sympathy with the First Circuit approach. He was concerned that, under the amendment, a party who wishes to appeal an order that *grants* a post-judgment motion but is not entered in compliance with FRCP 58 might wait for years before bringing an appeal. But another member responded that such a result, although theoretically possible, was highly unlikely to occur in reality, and that a party whose motion is granted can always protect itself against such a result by asking the judge to enter the order in compliance with FRCP 58.

Mr. Munford expressed concern that the Committee Note to the amendment to Rule 4(a)(7) should more clearly state that the one-way waiver doctrine applies to the appeal of *any* order that must be entered in compliance with FRCP 58, and not just orders granting post-judgment motions. He proposed changes in the language of the Note. In response, the Reporter suggested that, in the second line of the third paragraph of the Note:

1. "an" be changed to "any", and
2. "-- whether or not it disposes of a post-judgment motion --" be inserted after "judgment" and before "is required."

Mr. Munford stated that he preferred the Reporter's formulation and withdrew his suggestion. By consensus, the Committee approved the change to the Committee Note recommended by the Reporter.

The Reporter reviewed with the Committee the changes that had been recommended by the Subcommittee on Style:

1. In the text of Rule 4(a)(4), the Subcommittee recommended substituting "the amended judgment changed in response" for "the judgment altered or amended in response" in the three places that the latter

phrase appeared. By consensus, the Committee rejected the suggestion, on grounds that the original language was clearer and more accurate.

2. In the text of Rule 4(a)(7), the Subcommittee recommended a number of changes, most of which were accepted. By consensus, the Committee redrafted the amendment to Rule 4(a)(7) to read:

**(7) Entry Defined.** 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, but compliance with Rule 58 is not required when an order denies all relief sought by any motion listed in Rule 4(a)(4)(A). The failure to enter an order or judgment under Rule 58 when required does not invalidate an otherwise timely appeal from that order or judgment.

3. In the Committee Note to Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii), the Subcommittee recommended deleting the phrase "[t]he Committee intends that" in the first line of the first paragraph. By consensus, the Committee rejected the recommendation. If the Note were changed as the Subcommittee recommended, the Note would appear to be describing the law as it presently exists -- and therefore would be inaccurate -- rather than the changes that the Committee intends to make to the law.

4. In the Committee Note to Subdivision (a)(7), the Subcommittee recommended two changes to bring the citations into compliance with the Bluebook. Those changes were accepted by consensus. The Subcommittee also recommended changing the word "that" to "this" in the eighth line of the third paragraph, inserting a period after the word "unlikely" in the same line, and deleting "to occur" in the following line. By consensus, the recommendation was approved. The Committee also made a stylistic change of its own in the ninth line of the second paragraph, changing "seems" to "should be."

A member moved that the amendment and Committee Note, as changed, be approved. The motion was seconded. The motion carried (unanimously).

## **V. Discussion Items**

### **Possible Amendments to Rule 26.1**

In April 1998, the Kansas City *Star* published a series of articles describing the alleged failure of federal judges to recuse themselves from cases in which they had a financial interest. These articles have spurred the Committee on Codes of Conduct to consider anew how judges might be assisted in meeting their disclosure and recusal obligations. One option under consideration is incorporating a provision similar to Rule 26.1 into the civil, criminal, and bankruptcy rules. After the agenda book was distributed, the AO circulated a memorandum to the chairs and reporters of the advisory committees asking them to be prepared to share their "preliminary views" on this proposal at the January 1999 meeting of the Standing Committee.

Mr. Rabiej introduced this topic. He mentioned that, in addition to incorporating a provision similar to Rule 26.1 into the other rules of practice and procedure, consideration was being given to amending Rule 26.1 to broaden its scope and to require that corporate disclosure statements be updated during the course of litigation.

Several members said that they would be favorably inclined to consider proposals to broaden Rule 26.1. Among other problems with Rule 26.1, members mentioned in particular the fact that the recusal statute (28 U.S.C. § 455) addresses a much broader array of financial interests than does the rule. Rule 26.1 applies only to publicly traded corporate parties -- not, e.g., to privately held companies or partnerships.

Other members warned that broadening Rule 26.1 would be very difficult. As initially proposed, Rule 26.1 was broader than the version that was eventually adopted. The broader version of Rule 26.1 attracted a great deal of opposition from the chief judges. In addition, the Committee had difficulty drafting workable language that would reach all of the financial interests that should be addressed.

One member said that his court already requires, by local rule, disclosure that is broader than that required by Rule 26.1. For example, parties to a bankruptcy proceeding are required to identify all creditors. Another member said that other circuits similarly require broader disclosure.

A couple of members stressed that the disclosure and recusal process should be as mechanical as possible. Ideally, a computer program should be developed, so that judges would not have to personally review corporate disclosure statements in every case. Some of those statements are so long that it is easy for a judge's mind to wander and for the judge to make a mistake. Mr. Rabiej responded that the Committee on Codes of Conduct is exploring various software alternatives.

The members discussed the practices of various circuits. In some circuits, the judges give the clerk's office a list of individuals and entities whose interest in a case should result in the recusal of the judge, and the clerk's office then screens the corporate disclosure statements for the judges. Judges do not see the corporate disclosure statements until the judges are assigned to a panel and get the briefs -- and, even then, if the system has worked as it should, no judge should have to recuse herself. In other circuits, the judges must review corporate disclosure statements for *every* case -- even cases being heard by panels to which the judge has not been assigned. In other circuits, the judges must review corporate disclosure statements only in the cases being heard by panels to which they've been assigned, as well as in all cases in which petitions for rehearing en banc have been filed.

Some members had specific suggestions for amending Rule 26.1. One member said that it should be amended to require the disclosure of partnerships in which a publicly traded company participates. Another said that it should specifically address limited liability companies.

After further discussion, the committee reached a consensus that it may be worthwhile to examine the question of whether Rule 26.1 should be broadened. The Committee will await further guidance from the Committee on Codes of Conduct and/or the Standing Committee.

The Committee broke for lunch at 12:30 p.m. and reconvened at 2:00 p.m.

**A. Item Nos. 95-04 & 97-01 (FRAP 26(a) -- making time computation under FRAP consistent with time computation under FRCP and FRCrP)**

The Reporter introduced the following proposed amendment and Committee Note:

**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules

or in any local rule, court order, or applicable statute:

(1) Exclude the day of the act, event, or default that begins the period.

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 11 days; ~~unless stated in calendar days.~~

### Committee Note

**Subdivision (a)(2).** The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure, as are deadlines of 1, 2, 3, 4, 5, and 6 *calendar* days. This creates a trap for unwary litigants.

No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days and will be counted when computing deadlines of 11 days and over. In addition, the rules will no longer state some deadlines in "days" and others in "calendar days." All deadlines will be stated in "days," and all deadlines will be calculated in the same manner.

The Reporter stated that three questions are before the Committee:

1. Does the Committee wish to amend Rule 26(a)(2), so that intermediate Saturdays, Sundays, and legal holidays will not be counted when deadlines are less than 11 days -- instead of less than 7 days?

2. Does the Committee wish to amend FRAP so that the rules no longer distinguish between "calendar days" and "days"?

3. If the Committee wishes to make either or both of these changes, does the Committee wish to change any of the deadlines in FRAP to take into account the new, more generous way of calculating deadlines?

A member said that some deadlines -- such as Rule 4(b)(1)(A)'s 10 day deadline for appealing criminal cases -- are so fixed in the minds of judges and practitioners that they are best left alone, even if amending Rule 26(a)(2) will extend them as a practical matter. However, other deadlines -- particularly some of the 7 day deadlines -- were originally set by the Committee upon the assumption that Saturdays, Sundays, and legal holidays counted, and probably should be shortened if that no longer remains true. With respect to the deadlines stated in calendar days, the member said that only three deadlines in FRAP are stated in calendar days, and those deadlines are *delivery* deadlines rather than deadlines by which parties must act. He favored leaving those three deadlines undisturbed.

Mr. Letter said that the Justice Department favored amending Rule 26(a)(2) to bring it into line with FRCP 6(a) and FRCr P 45(a) and saw no reason to shorten any of the deadlines in FRAP to take into account the new method of calculation. Mr. Letter also said that the Justice Department had no objection to leaving the three calendar day deadlines undisturbed.

A member opposed making any change to Rule 26(a)(2). He said that the rule is clear and that only attorneys who do not bother to read it carefully will get trapped. He also feared that adopting the FRCP/FRCrP counting method may result in unanticipated problems.

Mr. Fulbruge, on behalf of the clerks, also opposed the change. He said that the clerks will have to retrain their staffs on how to calculate deadlines and that many local rules will have to be changed to take into account the new calculation method.

A member supported the change. He argued that most appellate lawyers are primarily trial lawyers and are accustomed to the FRCP/FRCrP calculation method. It is understandable that they get trapped and, given that this trap serves no good purpose, it should be eliminated. One factor that aggravates the trap is the fact that some deadlines -- such as 28 U.S.C. 1292(b)'s 10 day deadline -- are *statutory* and trial



attorneys would naturally assume that those deadlines would be calculated pursuant to the FRCP/FRCrP method. Several other members agreed with these sentiments.

A member pointed out that the proposed change was a *forgiving* one. In other words, any attorney who calculated deadlines under the current Rule 26(a)(2) method rather than the proposed method would merely find that he had *more* time to act than he thought. Another member agreed. She acknowledged that there would be transition problems, but those problems would not *hurt* anyone, except that some lawyers may hurry to file papers earlier than necessary.

A member said that, if the FRCP/FRCrP calculation method is adopted, then she would favor shortening the deadlines for responding to motions. Another member said that she agreed, but that she would otherwise leave the 7 and 10 day deadlines unchanged.

A member said that one way of shortening 7 or 10 day deadlines is to simply state them in calendar days. A couple members objected to that technique, arguing that the use of calendar days should be restricted, as it is now, to delivery deadlines.

A member said that, in considering whether any 7 or 10 day deadlines should be shortened, the Committee should take into account the fact that some deadlines begin running upon *service*, while others begin running upon *filing* or *entry*. In the latter case, the attorney may not learn of the triggering event until several days later.

[Prof. Daniel R. Coquillette, Reporter to the Standing Committee, joined the meeting at this point.]

A member moved that (1) Rule 26(a)(2) be amended so that intermediate Saturdays, Sundays, and legal holidays will not be counted when deadlines are less than 11 days (instead of less than 7 days), and (2) no change be made to Rule 26(a)(2) with respect to "calendar days." The motion was seconded. The motion carried (unanimously). The Reporter was directed to make the necessary changes to the draft amendment and Committee Note that he had prepared.

The Reporter informed the Committee that, even though the only change necessary in Rule 26(a)(2) was

inserting "11" in place of "7," the Subcommittee on Style had nevertheless recommended extensive stylistic changes to the rule. Several members objected that it should not be necessary to restylize a rule that the Subcommittee had already restylized. Other members added that to extensively rewrite the rule would camouflage the simplicity of the substantive change that had been made and confuse judges and practitioners. By consensus, the Committee rejected the Subcommittee's recommendations.

The Subcommittee also recommended that, in the third line of the second paragraph of the Committee Note, the word "and" be changed to "but." By consensus, the recommendation was approved.

The Committee next turned to the question of which deadlines in FRAP, if any, should be shortened to take into account the new method of calculation.

A member argued that the 10 day deadline in Rule 27(a)(3)(A) for filing responses to motions should be shortened to 7 days. Under the new calculation method, all 10 day deadlines in FRAP will, as a practical matter, become at least 14 day deadlines. Fourteen days is too long to wait for a response to a motion. The member was also concerned about Rule 41(b)'s 7 day deadline for the issuance of mandates. He pointed out that, under the "old" calculation method, that 7 day deadline had always meant 7 actual days, and judges and clerks were quite accustomed to the deadline. Mr. Fulbruge agreed.

A member suggested that Rule 41(b)'s 7 day deadline be stated in calendar days. Although this would expand the use of calendar days beyond service-related delivery deadlines, Rule 41(b) sets a deadline for *clerks*, not attorneys, so the change should not sow too much confusion among the bar.

A couple members argued in support of shortening the deadline in Rule 27(a)(3)(A) to 7 days. One member argued that, at the same time, the deadline in Rule 27(a)(4) for *replying* to responses to motions should be shorted from 7 days to 5 days. Under the "new" calculation method, all 7 day deadlines in FRAP will, as a practical matter, become at least 9 day deadlines, and 9 days is too long to wait for a reply to a response to a motion. Although changing the deadline in Rule 27(a)(4) to 5 days may be a bit confusing for the bar, Rule 27(a)(4) is a new rule that will not even take effect until December 1, 1998, and thus the bar will not have long to get used to the 7 day deadline.

A member expressed concern about the 7 day deadline in Rule 29(e) (regarding the filing of amicus briefs), but said that discussion of his concern should be postponed until the Committee considers agenda item V(D)(13) (study agenda Item No. 98-03).

A member asked whether the 10 day deadlines of Rule 10(c) and Rule 30(b)(1) should be shortened. A couple members argued that they should not, as they are not terribly important deadlines and not much is to be gained by changing them.

A member cautioned that the deadline in Rule 27(a)(3)(A) was set at 10 days in the first place in an attempt to cut down on the number of motions filed by attorneys seeking an extension of time within which to file responses to motions. If the 10 day deadline in Rule 27(a)(3)(A) is cut back to 7 days, the courts could see an increase in requests for extensions. Another member responded that when a serious substantive motion is made, parties are going to seek extensions, whether the deadline is 7 days or 10 days. However, for routine procedural motions, it makes sense to cut the deadline back to 7 days.

A member moved:

1. that Rule 27(a)(3)(A) be amended by substituting "7" for "10";
2. that Rule 27(a)(4) be amended by substituting "5" for "7"; and
3. that Rule 41(b) be amended by inserting the word "calendar" after "7" and before "days."

The motion was seconded. The motion carried (unanimously).

The Reporter was directed to prepare the appropriate amendments and Committee Notes and to place them on the agenda for the Committee's spring 1999 meeting.

**B. Item No. 96-02 (FRAP 4(b) -- permit time to appeal criminal case to be extended, even without**

## **good cause or excusable neglect)**

Generally speaking, Rule 4(b) provides that a criminal defendant must file a notice of appeal within 10 days after entry of the judgment or order that he seeks to appeal. The district court is authorized to extend the 10 day deadline up to an additional 30 days. Under the current version of Rule 4(b), the district court may do so only "[u]pon a showing of excusable neglect." Under the restylized version of Rule 4(b) (effective December 1), the district court will be able to grant an extension only "[u]pon a finding of excusable neglect or good cause." Under neither the current nor future version of Rule 4(b) may a district court extend the time to appeal beyond the 40th day following entry of the judgment or order.

In *United States v. Marbley*, 81 F.3d 51 (7th Cir. 1996), Chief Judge Richard A. Posner urged that Rule 4(b) be amended so that a district court could extend the 10 day deadline up to an additional 30 days whether or not the defendant makes a showing of excusable neglect or good cause. One way or another, he contends, the court of appeals is going to end up examining the merits of the appeal -- either immediately on direct appeal or later when the defendant collaterally attacks his conviction. In Judge Posner's view, it would be better for all concerned if Rule 4(b) would "permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard" rather than giving that permission only when there is excusable neglect or good cause, thereby forcing "the appeal [to be] heard later through the Sixth Amendment route." *Id.* at 53. This, he says, "introduces real delay into the system of criminal justice." *Id.*

At Judge Garwood's request, the Reporter circulated a memorandum to the Committee outlining several problems with Judge Posner's suggestion, including (1) the fact that the Committee just rewrote Rule 4(b) -- changing the "excusable neglect" standard to "excusable neglect or good cause" -- and may not be inclined to change the standard yet again; (2) the fact that it is questionable whether the Judicial Conference and the Supreme Court would approve a change to Rule 4(b) that would permit district courts to extend the venerable 10 day deadline for any or even no reason; (3) the fact that it simply is not true, as Judge Posner seems to assume, that every defense attorney who cannot show excusable neglect or good cause for failing to file a timely appeal has committed ineffective assistance of counsel; (4) the fact that one could justify waiving many of the requirements of FRAP -- or, for that matter, of the FRCrP or FRE -- in the same way that Judge Posner justifies waiving the requirements of Rule 4(b); and (5) the fact that the scenario that Judge Posner fears seems to occur quite infrequently in practice.

Mr. Letter said that the Justice Department strongly supports removing Judge Posner's suggestion from the study agenda, largely for the reasons stated in the Reporter's memo.

A member asked whether the desire to avoid a § 2255 attack would itself provide the "good cause"

necessary to extend the deadline. Another member said that he was unaware of any case so holding. A third member pointed out that no such case *could* exist, as the "good cause" standard will not be incorporated into Rule 4(b) until December 1.

A member argued that a *defendant* may have good cause for an extension if his attorney failed to file a timely appeal, despite being instructed to do so. Another member responded that, in such a case, the allegation of the defendant -- and, presumably, the denial of the attorney -- *should* be the subject of a § 2255 proceeding, so that the district court can take testimony and evidence on the issue.

A member moved that Item No. 96-02 be removed from the study agenda. The motion was seconded.

A couple members spoke in favor of retaining Item No. 96-02 on the study agenda. They thought Judge Posner's suggestion had merit, and favored giving district courts *carte blanche* to extend the deadline.

Judge Kravitch pointed out that, even if district courts had such discretion, an attorney would be taking a big risk by not filing a timely appeal or timely request for an extension, as the attorney would have no guarantee that the district court would exercise its discretion favorably.

A member argued in favor of removing Item No. 96-02 from the study agenda. He said that, among other problems, he did not know how the appellate courts could possibly review district court decisions to grant or not to grant extensions. If district courts had *carte blanche* to use their discretion to grant extensions, what would constitute an abuse of that discretion?

After further discussion, the motion to remove Item No. 96-02 carried (4-3).

**C. Item No. 97-19 (FRAP 4(b)(1)(B)(ii) -- timing of government's notice of appeal in multi-defendant criminal cases)**

Rule 4(b)(1)(B) provides that, when the government is entitled to bring an appeal in a criminal case, its notice of appeal must be filed "within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." The use of the phrase "any defendant" creates an ambiguity in multi-defendant cases: Does the 30 days begin to run after the *first* notice of appeal is filed by a defendant or not until the *last* notice of appeal is filed by a defendant? Or does the 30 days begin to run after the particular defendant as to whom the government is considering bringing a cross-appeal files his notice of appeal? The Committee attempted to correct this problem at its April 1997 meeting, but the complexity of the problem soon became apparent, and the Committee postponed further discussion.

Mr. Letter argued that this matter should be removed from the study agenda. Mr. Letter said that he had consulted with his colleagues in the Justice Department and learned that this issue rarely arises in practice and does not pose a real problem for federal prosecutors. The Justice Department thought it likely that an attempt to fix this ambiguity would create more problems than it would solve. Moreover, Mr. Letter pointed out that the ambiguous language was inserted into Rule 4(b) directly by Act of Congress. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VIII, § 7111, 102 Stat. 4419 (Nov. 18, 1988).

Several members briefly spoke in favor of removing this item from the study agenda. No member spoke in favor of continuing to study this issue.

A member moved that Item No. 97-19 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

#### **D. Items Awaiting Initial Discussion and Prioritization**

The Committee next turned to a series of proposals that were awaiting initial discussion.

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

Agenda items V(D)(1) through V(D)(9) (study agenda Item Nos. 97-32 through 97-40) all arise out of

suggestions made by the appellate working group of the Methods Analysis Program ("MAP"). Judge Garwood asked Mr. Fulbruge to introduce these items.

Mr. Fulbruge first described the background of the MAP and stated that the appellate working group had drafted 115 recommendations for making appellate practice more efficient. Nine of those 115 recommendations would require amendments to FRAP. However, at an August 1998 meeting of the clerks of the appellate courts, the clerks agreed that six of the nine proposals for amending FRAP should be withdrawn:

**Agenda Item V(D)(3) (Study Agenda Item No. 97-34):** The appellate working group had proposed that Rule 3(d)(1) be amended to specify precisely when district court clerks should forward updated docket entries to appellate court clerks. The appellate clerks decided to withdraw this suggestion because the district court clerks were sure to oppose it, because this has not been a major problem in practice, and because any rule would, as a practical matter, be unenforceable. By consensus, the Committee removed this item from its study agenda.

**Agenda Item V(D)(4) (Study Agenda Item No. 97-35):** The appellate working group had proposed that FRAP be amended to specify how complex cases -- such as class actions, multidistrict litigation, and complex bankruptcy cases -- should be captioned. The appellate clerks decided to withdraw this suggestion because it needs more thought and because it might better be addressed to the Advisory Committee on Civil Rules and Advisory Committee on Bankruptcy Rules. By consensus, the Committee removed this item from its study agenda.

**Agenda Item V(D)(6) (Study Agenda Item No. 97-37):** The appellate working group had proposed that FRAP be amended to require that counsel who represented a criminal defendant at trial must represent that defendant on appeal unless specifically permitted to withdraw by the appellate court. The appellate clerks decided to withdraw this suggestion because most courts already impose this requirement by standing order or local rule and because the suggestion is better addressed to the Advisory Committee on Criminal Rules. By consensus, the Committee removed this item from its study agenda.

**Agenda Item V(D)(7) (Study Agenda Item No. 97-38):** The appellate working group had proposed that FRAP be amended to forbid counsel who represented a criminal defendant at trial to withdraw from that representation before filing a notice of appeal. The appellate clerks decided to withdraw this suggestion for the same reasons that they decided to withdraw the previous suggestion. By consensus, the Committee removed this item from its study agenda.

**Agenda Item V(D)(8) (Study Agenda Item No. 97-39):** The appellate working group had proposed that Rule 15(c) be amended to require that a petitioner seeking review of agency action file with the court of appeals a list of all parties to the agency action and identify for the court the name and address of the respondent agency. The appellate clerks decided to withdraw this suggestion because this problem has arisen only in the D.C. Circuit and can best be addressed by a local rule of that court. By consensus, the Committee removed this item from its study agenda.

**Agenda Item V(D)(9) (Study Agenda Item No. 97-40):** The appellate working group had proposed that FRAP be amended to require advance notice and pre-filings in death penalty cases. The appellate clerks decided to withdraw this suggestion because counsel in death penalty cases are already providing advance notice and pre-filings, so problems are not being experienced in practice. Mr. Letter said that the Justice Department did not object to removing this item from the study agenda, but noted that, as the number of federal capital cases increases, the Department may return to this Committee sometime in the future and propose amendments to FRAP regarding the handling of such cases. By consensus, the Committee removed this item from its study agenda.

Mr. Fulbruge returned to Agenda Item V(D)(1) (Study Agenda Item No. 97-32). At present, Rule 12(a) requires the circuit court to docket an appeal "under the title of the district-court action." District court captions sometimes identify hundreds of parties and run several pages long. It is often a waste of effort for appellate clerks to docket cases under these captions, particularly when only a few of those parties are involved in the appeal. Mr. Fulbruge said that the appellate clerks would like Rule 12(a) redrafted to give them more flexibility in docketing appeals.

A member supported the suggestion. He said that, in complex cases, appellate clerks have a terrible time trying to docket the cases and correctly identify appellants, appellees, cross-appellants, and the like, resulting in frequent motions to recaption.

Another member said that he had reservations about the suggestion. He saw an advantage to using the district court caption. He wondered whether Rule 12(a) might be amended to require use of the district court caption, but, in cases exceeding ten parties or so, require only some of the parties to be identified.

Mr. Fulbruge said that the real problem is cases involving hundreds of parties or complex cases in which it is very difficult for the clerks to ascertain not just who are the appellants and appellees, but who were plaintiffs, defendants, intervenors, and the like in the district court.



After further discussion, the Committee decided by consensus to retain Item No. 97-32 on its study agenda. Judge Garwood asked Mr. Fulbruge to work with the appellate clerks on drafting a specific amendment to Rule 12(a) and then to return to the Committee with that proposed amendment.

**2. Item No. 97-33 (FRAP 3(c) -- require filing of statement identifying all parties and counsel)**

Mr. Fulbruge said that appellate clerks waste a substantial amount of time trying to ascertain which attorneys represent which parties on appeal. Rule 12(b) requires only the attorney who filed the notice of appeal to file a representation statement; no such requirement is imposed upon appellees or intervenors.

One member asked about the possibility of addressing this problem by local rule. Another pointed out that some circuits now require all attorneys to file representation statements. Prof. Coquillette said that the Standing Committee is very hostile to the use of local rules to address a problem that affects all courts of appeals equally, such as the problem under consideration.

A member moved that Item No. 97-33 be retained on the Committee's study agenda and that the appellate clerks be asked to draft a specific amendment to Rule 3 or Rule 12. The motion was seconded. The motion carried (unanimously).

**3. Item No. 97-34 (FRAP 3(d)(1) -- specify when district clerk must forward updated docket entries)**

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

**4. Item No. 97-35 (uniform standards for docketing of complex cases)**

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

**5. Item No. 97-36 (FRAP 25(a)(4) -- authorize clerk to refuse to accept non-complying documents for filing)**

Mr. Fulbruge said that, while the appellate clerks had no illusions about their likelihood of success, they once again wanted to ask the Committee to restore their authority to reject documents that do not comply with FRAP or the local rules of a court. At present, Rule 25(a)(4) states: "The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice." Mr. Fulbruge said that, in the view of the clerks, Rule 25(a)(4) makes it impossible for them to deal effectively with improper filings.

According to Mr. Fulbruge, 53% of the cases in the Fifth Circuit are filed pro se. The figure is 48% in the Fourth Circuit. In *every* circuit, at least a third of the filings are pro se. These pro se filings are often in blatant violation of the rules, yet, under Rule 25(a)(4), the clerks must stamp them, enter them on the docket, review them, and then send a letter to the litigant advising him of how his filing violates the rules and requesting a corrected filing. Often, that spurs arguments between the litigant and the clerk's office. If the litigant does comply with the clerk's request, the clerk has to again stamp, docket, and review the corrected pleading; often, the corrected pleading has not solved the original problem or suffers from additional problems. If the litigant does not comply with the clerk's request, the clerk has to get a judge to enter an order. The inability of the clerks to reject deficient filings wastes thousands of hours every year and undermines morale in the clerks' offices.

The problem is not limited to pro se parties, Mr. Fulbruge said. Paid counsel will sometimes file deficient pleadings with the court in order to meet a deadline, knowing that they will have an opportunity to correct the deficiencies after the deadline.

Mr. Fulbruge said that the appellate clerks urge this Committee to amend Rule 25(a)(4) so that clerks are required to *receive* deficient papers, but not to *file* them until and unless corrections are made.

Mr. Letter said that the Justice Department opposes the request. He reminded the Committee that Rule 25(a)(4) resulted from the unreasonable practices of some clerks' offices. With the myriad of local and national rules, it is extremely difficult for even the most conscientious attorney to file a perfect brief every time. Before the rule was changed, the Justice Department was finding that a large percentage of its

briefs were getting bounced back for one hypertechnical violation or another.

Mr. Fulbruge said that the restylized rules should mitigate the problem described by Mr. Letter. The rules are much more specific and understandable, and thus the number of problems should be substantially reduced. Also, clerks have to meet increasingly high caseloads without additional staff, reducing the incentive to pick fights with counsel over hypertechnical violations. Mr. Letter responded that, while the restylized rules will help, a large number of conflicting and confusing local rules remain.

A member agreed with Mr. Letter. He said that the first recommendation of the clerks -- "[r]eturn to the former version of Rule 25" -- was "D.O.A.," not only in this Committee, but in the Standing Committee. The second recommendation of the clerks -- "[a]dopt a local rule which provides that when a document does not comply with the rules, the clerk shall nonetheless file the document but notify the party of the defect [and which permits e]ither a judge, a panel, or the clerk (by delegated authority) [to] strike the document if the defect is not timely cured" -- seems to simply restate existing law, except that clerks cannot be delegated the authority to strike documents.

Another member asked if that was true. Why can't clerks be delegated the authority to strike documents by local rule? Mr. Fulbruge said that it was because clerks are not considered "judicial officers." Prof. Coquillette reminded the Committee that, in addition, such a use of local rules would be highly disfavored by the Standing Committee.

A couple members said that, while they could not support the clerks' suggestion, they sympathized with the problem, and hoped that other means could be found for addressing it. Judges Motz and Kravitch both reported that the PLRA had reduced the number of frivolous pro se filings in their circuits. Mr. Fulbruge said that the Fifth Circuit had not seen a similar decline.

A member moved that Item No. 97-36 be removed from the study agenda. The motion was seconded. The motion carried (6-1).

**6. Item No. 97-37 (require counsel who represents criminal defendant at trial to continue to represent defendant on appeal)**

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

**7. Item No. 97-38 (prohibit district courts from permitting counsel who represents criminal defendant at trial to withdraw before notice of appeal is filed)**

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

**8. Item No. 97-39 (FRAP 15(c) -- require petitioner seeking review of agency order to identify respondents and attach agency order)**

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

**9. Item No. 97-40 (require advance notice and pre-filings in state and federal death penalty cases)**

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

**Report on Federal Rules of Attorney Conduct**

At Judge Garwood's request, Prof. Coquillette updated the Committee on efforts to address the wide variety of local rules governing attorney conduct. Prof. Coquillette said that there had been a substantial amount of misinformation circulated about the issue. Contrary to public reports, the Standing Committee has *not* decided how to address this problem, but only that something has to be done to bring about uniformity. The Conference of Chief Justices favors a "dynamic conformity" approach, under which attorney conduct in federal court would be governed by the professional conduct rules of the state in which the federal court sits. The Justice Department opposes dynamic conformity and instead favors the promulgation of "Federal Rules of Attorney Conduct" that would apply in all federal courts. The

Standing Committee and the advisory committees appear to be closely divided between these two approaches, and even those who favor the federal rules approach disagree about the scope of such rules.

Prof. Coquillette reported that an ad hoc committee has been formed to study this issue and make a proposal to the Standing Committee. Judge Alito and Mr. Thomas will represent this advisory committee on the ad hoc committee. Judge Scirica will chair the ad hoc committee, and Prof. Coquillette will serve as its reporter. Each advisory committee has appointed two representatives. The Standing Committee will be represented by Chief Justice E. Norman Veazy and Prof. Geoffrey C. Hazard, Jr., both of whom have considerable expertise in legal ethics. Also, the Justice Department will have two representatives on the ad hoc committee.

Prof. Coquillette said that Judge Scirica wants the ad hoc committee to proceed slowly and not get too far out ahead of the ABA's Ethics 2000 project. In addition, Judge Scirica wants to give negotiators for the Justice Department and the Conference of Chief Justices time to work out a compromise on the applicability of Model Rule 4.2 to federal investigations. Finally, the Federal Judicial Center is undertaking a study of attorney conduct matters for the Bankruptcy Committee, and Judge Scirica wants to await the results of that study.

After some brief questioning of Prof. Coquillette, Judge Motz raised a related issue. Judge Motz noted that several of her colleagues objected to the fact that, under Rule 46(b)(2), an attorney cannot be suspended or disbarred without a hearing, even if he has already been suspended or disbarred by a state supreme court. In the view of some members of the Fourth Circuit, it is a waste of judicial resources to afford hearings to attorneys who have already been suspended or disbarred for unethical conduct, presumably after notice and hearing.

One member said that he sympathized with the views of Judge Motz's colleagues. Other members and the Reporter disagreed. Some expressed the view that the benefits of affording a hearing to an attorney who had already been suspended or disbarred by a state court outweighed the relatively minor judicial inconvenience. Hearings in such obvious cases are rarely requested and can be conducted quickly. At the same time, such hearings ensure both the appearance and reality of fairness and help to head off constitutional challenges.

**10. Item No. 97-42 (FRAP 3(d) -- permit service of notice of filing of appeal by fax or e-mail)**

Item No. 97-42 arises from a suggestion by several district court clerks that the FRCP, FRCrP, and FRAP be amended to permit clerks to serve notices by fax or e-mail. The Reporter asked the Committee to remove this item from its study agenda. The Reporter said that this proposal is squarely within the jurisdiction of the Subcommittee on Technology and that it would be ill-advised for this or any advisory committee to move forward on its own. The proposal itself recognizes that the amendments it seeks will not be feasible until the Judicial Conference establishes certain technical standards, and that is precisely what the Subcommittee on Technology was created to do.

Several members agreed with the Reporter, and Item No. 97-42 was removed from the study agenda by consensus.

#### **11. Item No. 97-43 (FRAP 22 -- prescribe time period for seeking certificate of appealability)**

Mr. John McCarthy, who is incarcerated in a federal prison, submitted a lengthy handwritten letter to the Committee in which he makes two primary complaints. First, he complains that no time period is prescribed for seeking a certificate of appealability ("COA"). Second, he claims that when a notice of appeal is filed before a COA is sought, it is "ambiguous" under Rule 22(b)(1) whether the district court is supposed to await a formal request for a COA or instead rule sua sponte on whether a COA should issue.

The Reporter recommended that this item be removed from the study agenda. He pointed out that a litigant presumably has to seek a COA within the time for filing a notice of appeal; if the litigant does not, then he will provide a compelling justification for the court to deny the COA (i.e., the COA will be denied because the time to appeal has expired). The Reporter also said that restylized Rule 22 seems to make it clear that a district court should decide sua sponte whether to issue a COA if a notice of appeal is filed without a formal request for a COA.

Several members agreed with the Reporter, and Item No. 97-43 was removed from the study agenda by consensus.

#### **12. Item No. 97-44 (permit appeal of district court's refusal to stay enforcement of judgment pending resolution of post-trial motions)**

Under FRCP 62(a), a judgment in a civil action may not be executed or enforced until 10 days after its entry. A district court may, at its discretion, stay execution or enforcement of the judgment for a longer period of time -- e.g., to give the court time to consider post-judgment motions. However, if the district court chooses not to grant such a stay, the judgment may be executed or enforced on the 11th day after entry, even if post-judgment motions are pending.

Mr. Michael F. Dahlen, an Illinois attorney, was recently involved in a case in which the district court refused to extend the automatic 10-day stay pending its ruling on the defendant's post-judgment motions. Mr. Dahlen, who represented the defendant, feared that the plaintiff would garnish his client's bank accounts and, in effect, put his client out of business before his client's post-judgment motions were even decided. Mr. Dahlen found, to his chagrin, that no means existed for seeking immediate appellate review of the district court's refusal to extend the 10-day stay pending resolution of post-judgment motions.

A member said that Mr. Dahlen's suggestion is better directed to the Advisory Committee on Civil Rules. After all, it is FRCP 62(a) that expressly gives the district court discretion to decide whether to extend the 10-day stay pending resolution of post-trial motions. The member said that, in his view, the "default" rule should be the opposite -- that is, enforcement of all civil judgments should be stayed pending resolution of post-trial motions unless the district court orders otherwise. Such an order would be appropriate where it appeared that the judgment debtor was attempting to waste or hide assets.

A member moved that Mr. Dahlen's suggestion be referred to the Advisory Committee on Civil Rules and removed from this Committee's study agenda. The motion was seconded.

A member asked whether changing FRCP 62(a) as suggested would take care of the problem described by Mr. Dahlen. Mr. Dahlen's complaint was that, when a district court permitted enforcement of a judgment prior to disposing of post-judgment motions, there was no way for the judgment debtor to get immediate appellate review of that decision. That problem would remain even if FRCP 62(a) was redrafted as suggested. Another member responded that, especially if FRCP 62(a) was redrafted as suggested, a judgment debtor in the position of Mr. Dahlen's client could use mandamus to seek appellate review.

The motion to refer Mr. Dahlen's suggestion to the Advisory Committee on Civil Rules carried (unanimously).

A member asked that the referral make it clear that this Committee takes no position on the merits of Mr. Dahlen's suggestion. The member thinks that FRCP 62(a) works well as drafted and is concerned that redrafting the rule as suggested would lead to widespread wasting and hiding of assets by judgment debtors. He does not want to imply that this Committee endorses Mr. Dahlen's suggestion.

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

Under the present version of Rule 29(e), an amicus brief is due at the same time as the principal brief of the party whom the amicus is supporting. Under restylized Rule 29(e) (effective December 1), an amicus brief will be due 7 days after the principal brief of the party whom the amicus is supporting. This 7 day period will begin to run with the filing of the principal brief in court -- and not from the time that the brief is served or that the amicus becomes aware of the brief's filing. Mr. Paul Alan Levy of Public Citizen Litigation Group has raised a number of concerns about restylized Rule 29(e):

First, Mr. Levy asks whether Rule 29(e) is intended to supercede local rules (such as those of the D.C. and Fifth Circuits) that give amici a longer period of time to file their briefs. Rule 29(e) states that "[a] court may grant leave for later filing, specifying the time within which an opposing party may answer," but does not make clear whether the court may "grant leave" in *all* cases through a local rule or only in *particular* cases through orders entered in those cases. (By contrast, Rule 31(a)(2) uses the more specific phrase, "either by local rule or by order in a particular case.")

Second, Mr. Levy argues that 7 days is an insufficient period of time to allot to amici in cases in which the party being supported by an amicus does not permit the amicus to see its brief before the brief is filed.

Third, Mr. Levy describes a problem that can develop under restylized Rule 29(e) when an amicus wishes to file a brief supporting an appellee. Suppose that, on June 1, an appellee located in Washington, D.C., mails its briefs to the Ninth Circuit for filing and hand delivers a copy of its brief to the appellant. Suppose further that the Ninth Circuit receives and files the appellee's brief on June 4. Under these circumstances, the brief of the amicus in support of the respondent would be due on June 11 (7 days after *filing*), and the reply brief of the appellant would be due on June 15 (14 days after *service*) -- meaning that the appellant would have only 4 days to review and respond to the arguments raised by the amicus *if it received the amicus brief on the day it was filed*. If the amicus served and filed its brief by mail, the appellant might not see it at all before its reply brief is due. Mr. Levy suggests that this problem could be solved if the time for appellees to file their principal briefs ran from the service of the briefs of amici supporting the appellant (rather than from the service of the briefs of appellants) and if the time for appellants to file reply briefs ran from the service of the briefs of amici supporting the appellee (rather than from the service of the briefs of appellees).



Mr. Letter said that the problems identified by Mr. Levy were real ones that are likely to affect the Justice Department, and that Mr. Levy's suggestions should be retained on the study agenda. The Reporter responded that, although Mr. Levy's concerns are valid, his suggested alternative -- running the deadlines for the filing of principal briefs from the service of amicus briefs -- seems problematic. Mr. Letter agreed and offered to meet with Public Citizen and with other groups who frequently file amicus briefs to try to draft an amendment to Rule 29(e).

A member moved that Item No. 98-03 be retained on the study agenda and that the Justice Department be asked to propose a specific amendment to Rule 29(e), after consultation with others who often file amicus briefs. The motion was seconded. The motion carried (unanimously).

#### **14. Item No. 98-04 (docketing fees/certificates of appealability)**

Under 28 U.S.C. § 2253(c), a prisoner may not appeal the denial of habeas relief unless either the district court or a judge of the circuit court issues a COA. When a prisoner applies to a circuit judge for a COA, must the prisoner pay the docketing fee at that point, or only if and when the COA is issued?

In August, Judge Kenneth F. Ripple of the Seventh Circuit informed the Reporter that the circuits have not been answering this question consistently. Judge Ripple said that he was not certain that FRAP needed to be amended to address the problem; perhaps the fee resolution of the Judicial Conference could be changed to specify when the fee should be collected.

At Judge Garwood's request, Mr. Fulbruge surveyed the circuit clerks. Seven clerks reported that they require the fee to be paid before an application for a COA is even *considered*, while two reported that they require the fee to be paid only if and when a COA is *granted*.

A member said that perhaps FRAP should be amended to specify that the fee must be paid before an application for a COA is even considered. Another member agreed; she said that the decision whether to grant a COA is practically indistinguishable from the decision whether habeas relief will be granted, and the fee should be paid before a court is asked to undertake such a detailed review of the case. She said that it made no sense to collect the fee only if, in essence, the appeal is won.

Mr. Rabiej suggested that this Committee formally refer this matter to the Committee on Court Administration and Case Management ("CACM"), which has authority over the Judicial Conference fee schedule. CACM may be able to resolve this problem either through some gentle persuasion directed at the two "renegade" clerks' offices or by inserting a provision in the fee schedule making it clear that the fee must be collected before an application for a COA is even considered.

A member moved that Item No. 98-04 be referred to CACM and removed from this Committee's study agenda. The motion was seconded. The motion carried (unanimously).

The Committee adjourned for the day at 5:30 p.m.

The Committee reconvened on Friday, October 16, at 8:30 a.m. Chief Justice Pascal F. Calogero, Jr., joined the Committee.

#### **15. Item No. 98-05 (FRAP 15(a)(1) -- joint appeals/Hobbs Act cases)**

Mr. Charles H. Montange, a Seattle attorney, has suggested that FRAP be amended, essentially to supercede the venue provisions of the Hobbs Act. Under the Act, a person aggrieved by an agency action may file a petition for review in (1) the D.C. Circuit, or (2) the circuit in which the petitioner resides, or (3) the circuit in which the petitioner maintains its principal place of business. 28 U.S.C. § 2343. Mr. Montange complains that, under this provision, two petitioners who want to file a joint petition but do not want to file it in the D.C. Circuit are out of luck, unless they reside or maintain their principal places of business in the same circuit. Mr. Montange recommends that FRAP be amended to permit a joint petition for review of agency action to be filed in the D.C. Circuit or in any circuit in which at least one of the joint petitioners resides or maintains its principal place of business.

Several members briefly stated their opposition to the suggestion. The members thought that, even if it could do so under the REA, this Committee should not use FRAP to supercede the venue provisions of the Hobbs Act. No member spoke in favor of retaining Mr. Montange's suggestion on the study agenda.

A member moved that Item No. 98-05 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

FRCrP 35(c) states that a district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Suppose that a defendant is sentenced on June 1. Suppose further that the defendant files a FRCrP 35(c) motion on June 2. Finally, suppose that the district court does not act upon the motion until June 30 -- long after the "7 days" referred to in FRCrP 35(c) have come and gone. This scenario raises at least two questions:

First, did the filing of the FRCrP 35(c) motion toll the time for the defendant to file a notice of appeal under Rule 4(b)(1)? Rule 4(b)(3)(A) lists certain post-judgment motions, the filing of which explicitly tolls the time to appeal under Rule 4(b)(1). FRCrP 35(c) motions are *not* among those listed in Rule 4(b)(3)(A). However, some of the courts of appeals have held that the list of motions in Rule 4(b)(3)(A) is not exclusive, and that under the "*Healy* doctrine" of the common law, any "motion for reconsideration" is sufficient to toll the time to appeal under Rule 4(b)(1). Is a FRCrP 35(c) motion such a "motion for reconsideration"?

In *United States v. Carmouche*, 138 F.3d 1014 (5th Cir. 1998), the Fifth Circuit fractured badly on this question. Judge DeMoss concluded that the particular motion filed by the defendant in *Carmouche*, although *labeled* a FRCrP 35(c) motion, was not, in fact, a FRCrP 35(c) motion, but was instead a "motion for reconsideration," and (apparently for that reason) tolled the time to appeal. Judge Duhé, joined by Judge Garwood, concluded that FRCrP 35(c) motions *do* toll the time to appeal, and that the particular motion filed by the defendant in *Carmouche* was exactly what it purported to be -- a FRCrP 35(c) motion. Thus, all three judges agreed that the motion filed by the defendant tolled the time to appeal for *some* length of time, although they disagreed as to why.

The second question is this: Given that a district court has authority to correct a sentence under FRCrP 35(c) only when "acting within 7 days after the imposition of sentence," what happens when a timely FRCrP 35(c) motion is filed but the district court does not rule upon the motion until, say, 30 days after imposition of sentence? Again, the judges in *Carmouche* disagreed. Judge DeMoss argued that the authority of a district court to grant a motion should not necessarily be deemed coextensive with the tolling effect of that motion. Thus, even though a district court cannot grant a FRCrP 35(c) motion after the 7 day period expires, the time to appeal should continue to be tolled until the district court actually

denies the motion. Judges Duhé and Garwood disagreed. They argued that, after the 7 day period of FRCrP 35(c) expires, any FRCrP 35(c) motion should be deemed denied -- since the district court has lost any authority to grant that motion -- and the time to appeal under Rule 4(b)(1) should begin to run. Thus, in the view of Judges Duhé and Garwood, if a defendant is sentenced on June 1 and files a FRCrP 35(c) motion on June 2, but the district court does not rule on the motion until June 30, the time to appeal begins to run on June 8. This is the law of the First Circuit, *see United States v. Morillo*, 8 F.3d 864, 867-70 (1st Cir. 1993), and, in the opinion of Judges Duhé and Garwood, it should be the law of the Fifth Circuit. However, an unpublished opinion of the Fifth Circuit is to the contrary, *see United States v. Moya*, No. 94-10907 (5th Cir. July 25, 1995), and, under Fifth Circuit rules, that precedent binds the circuit until overturned by the en banc court.

Judge Garwood, who placed Item No. 98-06 on the Committee's study agenda, introduced this matter and reiterated his views. Judge Garwood also pointed out, in support of his position, that Rule 4(b)(5) specifically states that a FRCrP 35(c) motion does not "affect the validity of a notice of appeal filed before entry of the order disposing of the motion." In other words, Rule 4(b)(5) specifically provides that FRCrP 35(c) motions do not render the underlying judgments non-final.

Mr. Letter stated that the Justice Department strongly agrees with the First Circuit view advocated by Judges Duhé and Garwood in *Carmouche*. He urged that the issue be retained on the agenda and offered to make a specific proposal for amending Rule 4(b) at the next meeting of the Committee. Judge Garwood stated that he would welcome such a proposal from the Justice Department.

A member moved that Item No. 98-06 be retained on the study agenda. The motion was seconded. The motion carried (unanimously).

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

Rule 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 Rule 22(a) be amended to permit circuit judges to deny habeas petitions. He argues that it is a waste of time for a circuit judge to review a frivolous habeas petition and then, instead of denying it, transfer it to a district judge, who will have to take the time to review it before denying it.

A member said that this issue is worthy of further study. This issue arises frequently under the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which has been interpreted by some courts to bar aliens from filing petitions for judicial review of deportation orders, but to permit aliens to effectively seek judicial review by filing habeas petitions. Another member agreed; she stressed that she did not necessarily agree with Judge Ripple -- in fact, she was sympathetic to retaining the requirement in Rule 22(a) that all habeas petitions be ruled upon in the first instance by district courts -- but she wanted to give Judge Ripple's argument more thought.

Mr. Letter stated that the government was now involved in litigation over the IIRIRA provisions on this issue and offered to make a formal presentation -- and perhaps to present a proposal for amending Rule 22(a) -- at the Committee's next meeting. Judge Garwood said that such a presentation would be most welcome.

A member moved to retain Item No. 98-07 on the study agenda. The motion was seconded. The motion carried (unanimously).

#### **18. Item No. 98-08 (permit "54(b)" appeals from Tax Court)**

It is not clear whether the courts of appeals have jurisdiction to review orders of the Tax Court that finally resolve some but not all of the disputes between the Internal Revenue Service and a taxpayer. The rules of the Tax Court do not contain the equivalent of FRCP 54(b). Chief Judge Richard A. Posner has suggested that either the rules of the Tax Court or FRAP be amended to permit "54(b)-type" appeals from the Tax Court. *See Shepherd v. Commissioner of Internal Revenue*, 147 F.3d 633 (7th Cir. 1998).

The Reporter introduced this issue and said that, in his opinion, it would be appropriate for such a "54(b)-type" provision to appear in the rules of the Tax Court rather than in FRAP. He suggested referring this issue to the committee responsible for drafting amendments to the Tax Court's procedural rules.

Mr. Letter asked that this matter be retained on the study agenda of this Committee. According to Mr. Letter, there is no final judgment rule for the Tax Court, and thus in theory *every* Tax Court order is immediately appealable. However, in practice, the circuits are split on whether and in what circumstances "partial" decisions of the Tax Court may be appealed. The normal practice of the Tax Court is not to issue a decision until all of the issues in dispute between the IRS and the taxpayer have been resolved. On occasion, though, the Tax Court varies from its normal practice and issues "partial" decisions, and the circuit courts have been inconsistent in their treatment of the appealability of such "partial" decisions.

Mr. Letter's impression is that this issue needs to be addressed, but that FRAP is probably not the place to address it. Before this issue is removed from the Committee's study agenda, though, Mr. Letter would like to consult with the IRS and the Chief Judge of the Tax Court.

Several members expressed agreement with the Reporter that this issue is one that should be addressed in the rules of the Tax Court, and that FRAP should not be amended to incorporate a special "54(b)-type" provision applicable only to Tax Court decisions. Mr. Letter reiterated that he did not necessarily disagree, but wanted a chance to consult with the IRS and the Tax Court before this item was removed from the Committee's study agenda. Mr. Letter said that he would report back to the Committee at its next meeting.

A member moved that Item No. 98-08 be retained on the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

#### **19. Item No. 98-09 (FRAP 32(a)(7)(B) -- define "word")**

Restylized Rule 32(a)(7) (set to take effect on December 1) provides that a party's principal brief may not exceed 30 pages, unless it contains no more than 14,000 words or, if it uses a monospaced typeface, it contains no more than 1,300 lines of text. Rule 32(a)(7) also provides that a party's reply brief may not exceed 15 pages, unless it contains no more than 7,000 words or, if it uses a monospaced typeface, it contains no more than 650 lines of text. Rule 32(a)(7)(B)(iii) instructs that, in calculating whether a brief meets the word or line limitations, headings, footnotes, and quotations count, but the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, addendum, and certificates of counsel do not count. However, no where in Rule 32 is the word "word" defined.

Mr. Fulbruge said that the Fifth Circuit has for some time been enforcing limitations on briefs similar to those that will be implemented by restylized Rule 32, and that it has recently become clear that the failure of those limitations to define the word "word" has given counsel a loophole. Although Rule 32(a)(7)(C) states that an attorney who prepares her brief on computer *may* rely on the word count of the word processing software used to prepare the brief, it does not *require* use of the word count program. This permits attorneys to choose to count the words manually, and to define for themselves whether, e.g., numbers, symbols, and abbreviations count as words. For example, one attorney may count "*Smith v. Jones*, 150 F.3d 300 (5th Cir. 1998)" as two words, while another might count it as nine. Mr. Fulbruge described a recent Fifth Circuit case involving extraordinarily "creative" word counting by an attorney. Mr. Fulbruge suggests that Rule 32 may have to be rewritten to more specifically define "word."

A member asked whether *requiring* use of the computer's word count program would solve the problem. Mr. Fulbruge said that it would not. First, different word processing programs count words differently. Second, many pro se briefs are handwritten, often using tiny letters and lines cramped closely together. The only effective way of limiting the length of pro se briefs is by limiting the number of words. However, the clerks do not have time to manually count the words in these briefs -- and, even if they did, they could not do so until "word" was first defined.

Judge Garwood said that, in his opinion, trying to define "word" in Rule 32 would be an exercise in futility. He said that the Fifth Circuit case described by Mr. Fulbruge was unusual; for the most part, the Fifth Circuit rule has worked well. Moreover, the lengthy handwritten pro se briefs described by Mr. Fulbruge are just an unfortunate reality of appellate judging. The "cheating" done by the pro se litigant -- that is, the tiny handwriting and cramped lines -- is far more likely to prejudice the litigant than the litigant's opponent.

A member said that the D.C. Circuit has imposed a word limit on briefs for almost 5 years and, to his knowledge, it has not been a problem. He noted, though, that the D.C. Circuit rule differs from restylized Rule 32 in an important respect: Under the D.C. Circuit rule, a party who prepares his brief on a computer must comply with a word count limit, while a party who does not prepare his brief on a computer must comply with a page count limit.

A member asked why the D.C. Circuit approach would not work for FRAP. For example, all principal briefs could be limited to 30 pages *unless* they were prepared on computer, in which case they would be limited to 14,000 words. However, other members expressed reluctance to begin rewriting restylized Rule 32 before it even takes effect.

A member said that trying to define "word" in Rule 32 would be a nightmare. She also pointed out that, even if "word" could be defined successfully, the very act of defining "word" would make it impossible for parties to rely on word count programs, as none of those programs would count words exactly like Rule 32.

Prof. Coquillette asked whether it was possible to draft limitations that would apply only to pro se briefs or prisoner briefs. A couple members responded that, while it might be possible, they would be reluctant to single out specific categories of litigants in this manner. Prof. Coquillette said that he shared those sentiments and suggested that a better means for getting prisoners to comply with limitations on briefs is to create "plain English" forms and instructions. That step would at least help to eliminate abuses that are

the result of ignorance of the rules.

A member moved that Item No. 98-09 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

Ms. McKenna drew the Committee's attention to the recently released report of the Commission on Structural Alternatives for the Federal Courts of Appeals and said that comments on the report from members of this Committee would be welcomed. She said that none of the Commission's proposals would immediately impact upon FRAP. The Committee briefly discussed some of the Commission's recommendations.

Judge Garwood thanked Mr. Munford for his outstanding service to this Committee and presented him with a certificate of appreciation.

## **VII. Scheduling of Dates and Location of Spring 1999 Meeting**

The Committee agreed that it will meet in Washington, D.C., on April 15 and 16, 1999.

## **VIII. Adjournment**

By unanimous consent, the Advisory Committee adjourned at 9:35 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.*