Minutes of Fall 2007 Meeting of
Advisory Committee on Appellate Rules
November 1 and 2, 2007
Atlanta, Georgia

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 1, at noon at the Four Seasons Hotel in Atlanta, Georgia. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton,[1] Dean Stephen R. McAllister,[2] Mr. Mark I. Levy, and Ms. Maureen E. Mahoney. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel Coquillette, Reporter to the Standing Committee;[3] Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart and the Committee congratulated the Reporter on her recent wedding. Judge Stewart congratulated Judge Rosenthal on her new role as Chair of the Standing Committee, and expressed appreciation for her presence at the meeting. He noted also that the Committee appreciated the presence of Judge Hartz in his capacity as liaison from the Standing Committee. Judge Stewart noted with regret that Judge Ellis was unable to attend the meeting because he was presiding over a multi-week trial, and likewise that Mr. Bennett was on trial and unable to be present. Judge Stewart also noted with regret that Justice Holland was not present, but he mentioned that congratulations are due to Justice Holland for his recent receipt of the A. Sherman Christensen Award from the American Inns of Court. Judge Stewart noted Justice Holland's long involvement with, and many contributions to, the Inns of Court movement. Judge Stewart congratulated Mr. Letter on his receipt of the Justice Tom C. Clark Award for Outstanding Government Lawyer, which was presented last month by the District of Columbia Chapter of the Federal Bar Association.

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[1] Due to scheduling conflicts, Judge Sutton attended part of the meeting on the afternoon of November 1 and was unable to be present on November 2.

[2] Dean McAllister attended the meeting on November 1 but was unable to be present on November 2.

[3] Professor Coquillette joined the meeting at 12:40 p.m. on November 1 and was present thereafter.

II. Approval of Minutes of April 2007 Meeting

The minutes of the April 2007 meeting were approved.

III. Report on June 2007 Meeting of Standing Committee

The Standing Committee approved for publication six sets of Appellate Rules amendments. Specifically, the Standing Committee gave permission to publish for comment the time-computation template and deadlines package; new Appellate Rule 12.1 concerning indicative rulings; an amendment to Appellate Rule 22(b) concerning certificates of appealability (which corresponds to the Criminal Rules Committee's proposed amendment to Rule 11(a) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255); an amendment to Appellate Rule 4(a)(4)(B)(ii) that is designed to correct a technical difficulty that crept into Rule 4 as a result of the 1998 restyling; amendments to Appellate Rules 4(a)(1)(B) and 40(a)(1) pertaining to the treatment of suits in which a federal officer or employee is sued in his or her individual capacity; and an amendment to Appellate Rule 26(c) designed to parallel Civil Rule 6's treatment of the "three-day rule." Because the Standing Committee decided not to proceed at this time with the Criminal Rules Committee's proposed amendment to Rule 11(b) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255, the corresponding proposal to amend Appellate Rule 4(a)(4)(A) was not approved for publication either. In addition, after discussing late-breaking developments that had occurred subsequent to the Advisory Committee's April meeting, the Standing Committee decided to await the Advisory Committee's further deliberations regarding the proposed amendment to Appellate Rule 29 (concerning amicus brief disclosures), rather than publishing that proposed amendment in August 2007.

At the Standing Committee meeting, Judge Levi appointed Judge Hartz as the chair of a subcommittee that will study issues relating to the sealing of entire cases. Judge Stewart reported that, subsequent to the Standing Committee meeting, he invited Judge Ellis to serve as the Appellate Rules Committee's member on that subcommittee, and Judge Ellis has agreed to serve. Judge Stewart noted that Judge Ellis has had experience with related issues in connection with cases in his district. Judge Hartz stated that the subcommittee's first meeting is scheduled for January, prior to the Standing Committee meeting; he observed that the longevity of the subcommittee will depend in part on how broadly its mandate is interpreted – i.e., whether it studies only the sealing of entire cases, or other issues relating to sealing. Judge Rosenthal noted that the FJC had done a very good study on sealed settlements (in response to congressional pressure to prohibit such practices), and that the Civil Rules Committee had concluded, in the light of the FJC's findings, that sealed settlements do not occur very often and that a rule prohibiting sealed settlements would simply lead litigants not to file their settlements at all. Judge Rosenthal observed that new issues have arisen relating to sealing of items in the court record. For instance, the availability on the internet of information concerning plea agreements has led to issues relating to the website www.whosarat.com, which publicizes the identity of defendants who have entered into cooperation agreements. Judge Rosenthal reported that the

latter topic is now under study by the Court Administration and Case Management Committee ("CACM") and the various Rules Committees.

As a final note, it was mentioned that new Rule 25(a)(5) (addressing privacy concerns relating to court filings) is on track to take effect December 1, 2007.

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

Judge Stewart updated the Committee on the responses to his letter to the Chief Judges of each circuit concerning circuit-specific briefing requirements. Since the April 2007 meeting, Judge Stewart has received written responses from the Third, Sixth and Tenth Circuits. Judge Stewart noted that Chief Judge Tacha's letter on behalf of the Tenth Circuit raises a typical issue, which is that the Tenth Circuit is currently engaged in moving to the case management / electronic case filing system ("CM/ECF") and that the Circuit may take the opportunity to review the issues raised in Judge Stewart's letter in the course of a broader review designed to address the move to electronic filing. Judge Stewart predicted that it will take a while for the Circuits to transition to the electronic filing regime, but he stated that his letter has already served its purpose in making the circuits aware of the issues relating to circuit-specific briefing requirements.

Mr. Fulbruge noted that two circuits have already transitioned to electronic case management, and one circuit has already put in place electronic filing. He predicted that other circuits will likely make the transition to electronic case management during the next six months. Mr. McCabe reported that the bankruptcy courts – which were the first to implement CM/ECF – are at work on a new and improved version of it. A judge member observed that the Sixth Circuit will switch to electronic filing in April 2008, and he predicted that many briefing-related issues will percolate up once the electronic-filing regime takes effect. Another judge member reported that the Eighth Circuit's CM/ECF system has been fully operational since September 2007. He has been surprised to see how accepting the legal community is with respect to the new system; his assessment is that the transition has gone well in the Eighth Circuit. Judge Stewart noted that the Fifth Circuit has looked at the Eighth Circuit as a model for the transition to an electronic system. A member asked how the circuits that are switching to electronic filing are dealing with prisoner filings. Mr. Fulbruge explained that in the Fifth Circuit, prisoner filings will continue to be on paper. He noted, though, that some district courts in Texas scan all the prisoner filings in as electronic documents, which means that – with optical character recognition technology – if the original document was typed then the scanned electronic copy is largely word-searchable.

Mr. McCabe noted that a big issue concerns the logistics of getting the record to the Court of Appeals. For example, the AO has been working with the Social Security Administration to address the handling of the record in Social Security cases. Mr. Fulbruge agreed that paper records are a big issue – in particular, which courts will continue to use a paper

record, and who will bear the costs of printing it. Mr. McCabe noted the possibility that a court might hire a contractor to do the printing. A member inquired whether the Eighth Circuit requires paper copies of filings now that it has switched to electronic filing. A judge member responded that paper copies need not be provided for documents filed electronically in the Eighth Circuit.

Judge Hartz reported that the Tenth Circuit is now receiving petitions and motions electronically, and that sometimes a motion or petition will be disposed of (based on the electronic filing) before the paper copy ever reaches chambers. Judge Stewart recalled that in the Fifth Circuit the courts' electronic-filing capabilities proved particularly useful in the wake of Hurricane Katrina. He noted the existence of debate over who should shoulder the task of printing paper copies: Reading all documents online instead of in print can be hard on the eyes, and judges may not want to tie up personnel in chambers with heavy printing requests.

V. Update on Public Comments Received to Date

Judge Stewart invited the Reporter to review the comments that the Committee has received so far on the proposed amendments that were published in August.

A comment on the time-computation proposals was received from Mr. Luchenitser of Americans United for Separation of Church and State, who suggests that Appellate Rule 26(c) should be amended so that its rendition of the three-day rule parallels that in Civil Rule 6. The Reporter noted that this comment can be taken as support for the proposed amendment to Appellate Rule 26(c) that has been published for comment.

The other comment that has been received so far is from the Committee on Civil Litigation of the Eastern District of New York ("EDNY Committee"), which writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee's proposals to lengthen specific Civil Rules deadlines. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. The EDNY Committee believes that the current time-counting system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules and standing orders. The EDNY Committee observes that some local rules contain periods counted in business days, and notes that any change in the time-counting rules should be tailored so as not to change such periods to calendar days. The EDNY

Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York. The Reporter observed that the EDNY Committee's comment, which was received very recently, will be carefully reviewed by the various participants in the time-counting project.

The Reporter noted that Mr. Letter had consulted with his counterpart on the Criminal Rules Committee concerning the proposed new Appellate Rule 12.1, and she invited Mr. Letter to report on the DOJ's view of the proposed new rule. Mr. Letter predicted that the DOJ will likely ask that Rule 12.1's Note be amended to say that Rule 12.1's indicative-ruling procedure would not generally apply in criminal cases. Prosecutors have indicated they have only seen two types of instances in the criminal context where the indicative-ruling procedure could be relevant. One has to do with motions under Criminal Rule 33(b) concerning newly discovered evidence. The other has to do with motions under Criminal Rule 35(b), concerning correcting or reducing a sentence for assistance to the government. The DOJ is concerned that, without the narrowing language in the Note, the advent of Rule 12.1 could prompt a flood of meritless filings by prisoners seeking to make inappropriate use of the new Rule. Mr. Letter observed that motions under Criminal Rule 35(a) (to correct a clear sentencing error) do not need an indicative-ruling mechanism because Appellate Rule 4(b)(5) makes clear that a trial court retains jurisdiction to rule on Rule 35(a) motions. Mr. Letter noted that one option might thus be to amend Appellate Rule 4(b)(5) to say that a district court retains jurisdiction to rule on all motions under Criminal Rule 35, rather than limiting Appellate Rule 4(b)(5) to motions under Criminal Rule 35(a). The Reporter responded that such an extension of Appellate Rule 4(b)(5) might increase the possibility of friction between the trial and appellate courts, given that the time limits on Rule 35(b) motions are much looser than those on Rule 35(a) motions. Mr. Letter suggested that if the Appellate Rule 4(b)(5) approach is not viable, then perhaps Rule 12.1 could cover Criminal Rule 35(b) motions as well as motions under Criminal Rule 33(b).

Judge Rosenthal noted that the Criminal Rules Committee has been asked to comment formally on proposed Rule 12.1. She observed that the Civil Rules Committee had faced a similar problem concerning the scope of proposed Civil Rule 62.1, and that the Civil Rules Committee had decided to give Rule 62.1 a potentially broad scope in civil cases. Judge Rosenthal noted that it is hard to assess the magnitude of the risk that the new Rule 12.1 will cause a flood of meritless filings; she predicted that, in any event, it was unlikely that prisoner litigants would read the Committee Note to the new Rule.

A judge member asked why Rule 12.1's indicative-ruling procedure would not be useful in the criminal context when dealing with a change in the law, such as the Booker decision. Mr. Letter undertook to raise that question with his colleagues in the DOJ. Another appellate judge noted that he had seen a couple of cases in which the court had remanded, and in which the

indicative-ruling procedure could have been employed; he noted, however, that courts had been getting by without a formal procedure for indicative rulings. An attorney member asked why the indicative-ruling procedure might not be useful with respect to any instance where there is a change in the law. Mr. Letter responded that such instances are less likely to come up in the criminal context because criminal appeals move so quickly. A judge member noted that because many judges are unfamiliar with the indicative-ruling procedure, they find other ways to handle situations when they arise. Judge Rosenthal observed that the need for a rule on indicative rulings may be greater on the civil than on the criminal side.

Mr. Rabiej noted that a consolidated Rules hearing has been scheduled for January 16, 2008 in Pasadena (after the Standing Committee meeting), and that an additional Appellate Rules hearing has been scheduled for February 1, 2008 in New Orleans. He observed that those wishing to testify at one of the hearings must make their interest in testifying known at least 30 days prior to the hearing.

VI. Action Item

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

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

Rule 29. Brief of an Amicus Curiae

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

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

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

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

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

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

(6) if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1; and

(7) unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement that, in the first footnote on the first page:

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

(B) indicates whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) identifies every other person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.

* * * * *

Committee Note

Subdivision (c). Two items are added to the numbered list in subdivision (c). The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear in the first footnote on the first page of text.

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6) for ease of reference.

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

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

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . . .").

The Reporter briefly reviewed the history of the proposal. In November 2006, the Committee voted to amend the Appellate Rules to require that amicus briefs indicate whether counsel for a party authored the brief and to identify persons (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. The Committee's consensus was that the Rule should be modeled on Supreme Court Rule 37.6. In April 2007, the Committee approved a proposed amendment to Appellate Rule 29, modeled closely on Supreme Court Rule 37.6 as it then stood. Subsequently, the Supreme Court published for comment a proposed amendment to Supreme Court Rule 37.6 that would have required amicus briefs to disclose whether a party or its counsel was a member of the amicus or contributed money to the preparation or submission of the brief. By email circulation, the Committee considered alternative language that would conform the Appellate Rule 29 proposal to the amended language then proposed for Supreme Court Rule 37.6. By email, the Committee decided to present two alternative amendments to the Standing Committee – one for publication if the proposed amendment to Supreme Court Rule 37.6 were adopted, and the other for publication if the Rule 37.6 proposal were not adopted. After that decision, comments were submitted on the proposed Supreme Court Rule amendment that were highly critical; commenters asserted, among other things, that the proposed amendment, if adopted, would deter lawyers from joining groups that might be amici and would deter groups from seeking amicus status. Because the Appellate Rules Committee had not had a chance to consider those comments, and because it was not yet known what action the Supreme Court would take with respect to the Rule 37.6 amendment, the Standing Committee decided to hold off rather than publish the Rule 29 proposal in August 2007. In late July, the Supreme Court adopted a revised version of Rule 37.6, which took effect October 1, 2007. The revised version requires the amicus to disclose whether a party or its counsel contributed money intended to fund the preparation or submission of the brief. The revisions clearly respond to the criticisms voiced during the public comment period, and response to the Supreme Court's Rule amendment seems to be favorable. Accordingly, the Reporter redrafted the Rule 29 proposal to track the language adopted in the Supreme Court's October 2007 amendment to Rule 37.6. The wording of the Rule 29 proposal differs in some respects from that of Rule 37.6, due to style input from Professor Kimble.

An attorney member noted his impression that people who had been concerned about the proposed Supreme Court Rule 37.6 amendment as initially published were satisfied with the revised language. He stated that he supports the proposed amendment to Appellate Rule 29. There was some discussion of the differences between the language of the Rule 29 proposal and the wording of current Supreme Court Rule 37.6; one attorney member stated a preference for the wording of the Rule 29 proposal because it is clearer than the language used in the Supreme Court rule. It was observed that the Committee Note explains that the amendment is modeled on the Supreme Court rule.

A motion to approve the proposed amendment was moved and seconded. Without objection, the Committee by voice vote approved the proposed amendment.

VII. Discussion Items

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

Judge Stewart invited the Reporter to summarize the issues surrounding Item No. 03-02. In 2003, the Committee decided to amend Appellate Rule 7 to make clear that Rule 7 "costs" for which an appeal bond can be required do not include attorney fees. At the time of the Committee's 2003 decision, there was an evenly-divided circuit split on the question. The proposal was held (pursuant to the Committee's practice) to await submission to the Standing Committee along with other proposals. In spring 2007, the Committee decided not to send the Rule 7 proposal forward to the Standing Committee, having noted some issues with the drafting of the proposal. By fall 2007, the original evenly-divided circuit split has grown lopsided, with four circuits holding that Rule 7 "costs" can include at least some types of attorney fees, and two circuits taking the contrary view. This altered landscape makes it worthwhile for the Committee to revisit its earlier decision in order to assure itself that the proposed amendment is still warranted.

The Reporter briefly reviewed the relevant caselaw. First, though the Supreme Court's 1985 decision in *Marek v. Chesny* is not directly on point, it is worth summarizing because its reasoning is germane. In *Marek*, the Court held that Civil Rule 68's reference to "costs" includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute defines "costs" to include attorney fees. In so holding, the Court reasoned that neither Rule 68 nor its Note defined "costs," and that the drafters of the original Rule were aware of extant fee-shifting statutes and presumably drafted against the backdrop of those statutes.

The Reporter next summarized the caselaw on the Rule 7 issue itself. Two circuits – the D.C. Circuit and the Third Circuit – have held that Rule 7 costs cannot include attorney fees. These courts reasoned that Rule 7 costs include only those costs that may be taxed under Rule 39, and that Rule 39 costs do not include attorney fees. By contrast, the Second, Sixth, Ninth and Eleventh Circuits have held that at least some attorney fees can be included among Rule 7 costs. These circuits' views vary in some respects. For example, the Eleventh Circuit will include statutory attorney fees among Rule 7 costs, but only if the statutory language defines attorney fees as part of "costs"; the Sixth Circuit, by contrast, has rejected the view that the statutory language must define the attorney fee as part of the costs. Though the Ninth Circuit has held that Rule 7 costs can include statutory attorney fees, it has also held that Rule 7 costs cannot include attorney fees that might be assessed for a frivolous appeal under Appellate Rule 38; the latter type of attorney fee is hard to gauge prospectively (especially for a district court) and its inclusion could chill valid appeals.

Judge Stewart noted a decision handed down by the Fifth Circuit the day before the meeting, in which the panel reduced a $150,000 Rule 7 bond to $1,000. The case concerned an appeal bond required as a condition of the appeal of an objector to a class action settlement; it did not present the question of a statutorily-authorized attorney's fee. Judge Rosenthal noted that it is interesting that the issue came up in the context of a class action. She observed that there are few tools available to a district judge to prevent a proposed class settlement from being hijacked by objectors. The use of an appeal bond is almost the only way to counter opportunistic objectors. But there is a question what label one puts on the bond. Here, the district judge evidently couched the bond as justified by the judge's view that the appeal was frivolous; perhaps the bond could have been justified instead on another ground, such as the possibility of statutory interest. Judge Rosenthal noted that unlike the possibility of an eventual award of attorney fees for a frivolous appeal under Rule 38, a Rule 7 appeal bond requirement can provide an up-front deterrent to frivolous appeals. She noted that there are "opt out farmers" who have been known to mount campaigns to blow up proposed class settlements.

An attorney member suggested that the Committee should not limit its focus to class actions, and asked whether data are available on whether courts are actually awarding attorney fees under Appellate Rule 38. Another attorney member asked how Rule 7 bonds differ from supersedeas bonds. The Reporter stated that whereas a supersedeas bond is required as a condition of staying the judgment pending appeal, a Rule 7 bond is designed to protect the appellee against the possibility that the appellant will inflict costs on the appellee as a result of the appeal itself. Another member queried whether large Rule 7 bonds would ever be required of defendants of limited means. The Reporter responded that in some fee-shifting contexts – such as the Copyright Act – the inclusion of attorney fees in a Rule 7 bond could affect the appeal of a litigant of limited means. Also, though the availability of in forma pauperis status could address the difficulties of some poor litigants, there might be some litigants not poor enough for i.f.p. status but impecunious enough to suffer hardship from a large Rule 7 bond requirement. Also, i.f.p. status is unavailable to corporate litigants.

A member stated that the proposal seems to raise policy issues concerning access to courts. Decisions whether or not to discourage a particular type of appeal are not, he suggested, the types of choices that the rulemakers are supposed to make. He argued that he would want to know what impact the proposed amendment would have.

Another member responded that the general topic of cost bonds is already covered by Rule 7 – showing that it is appropriate for rulemaking – and that it was unlikely that a better solution to the problem could be obtained from Congress or the Supreme Court than from the rulemaking process. This member suggested that Rule 38 attorney fees should not be taken into account in setting Rule 7 bonds (because determining an appeal's frivolity in advance is unmanageable), but that it may be appropriate to take into account the availability of attorney fees that Congress has defined as "costs."

Professor Coquillette noted that commentators have suggested that sometimes the Supreme Court would prefer to abstain from addressing an issue and let the rulemaking process address it instead. He observed that the rulemakers' statutory mandate includes maintaining consistency in the nationwide application of the Rules.

An attorney member agreed that the rulemaking process has comparative advantages over other avenues of change, but – observing that the rulemakers do not yet know enough to assess the relevant issues – he asked whether it might be possible to have hearings on the topic. Judge Rosenthal stated that it has proven very useful in the past to hold a miniconference on the topic of proposed rulemaking, before publishing a proposal for comment. Participants in the miniconference can be selected to represent various practice areas and sectors that could be affected by the rulemaking change under discussion. The Civil Rules Committee, for example, is using this technique to examine issues relating to Civil Rule 56. A member agreed that such a miniconference would not be unprecedented. Another member asked whether the topic is significant enough to warrant a miniconference; Judge Rosenthal responded that a miniconference need not be an involved proceeding – it can take just half a day in Washington, D.C., for example. Professor Coquillette agreed that mini-conferences have frequently been used.

Judge Stewart asked whether the FJC might be able to assist the Committee. For example, if the Committee has a sense of the frequency with which attorney fees are included in Rule 7 bonds, and the types of cases in which this occurs, and the frequency with which parties decide not to appeal when a large Rule 7 bond is required, that might help the Committee to shape the miniconference. Judge Rosenthal volunteered the assistance of her rules clerk to help the Reporter look through the district court decisions that are available online. She also noted that the rules clerk could assist in assessing how Rule 7 bond rulings are docketed in her district, which would then enable the Committee to focus the inquiries that might be pursued by the FJC. Mr. Fulbruge noted that as a prospective matter, the CM/ECF system can assist the Committee: If district clerks can be asked to use certain language when docketing motions and rulings concerning Rule 7 bonds, then those docket entries will be much more readily searchable. The Reporter stated that she would be very grateful for the assistance of Judge Rosenthal's rules clerk, and that she also looked forward to working with Ms. Leary to shape the necessary inquiries.

In summary, the following inquiries will be pursued concerning the inclusion of attorney fees (including both statutory attorney fees and Rule 38 attorney fees) in Rule 7 bonds. The Reporter will work with Judge Rosenthal's rules clerk, Andrea Thomson, and in tandem with guidance from Ms. Leary and the FJC, to assess what information is currently available from docketing statements, focusing first (as a sample) on docket information from Judge Rosenthal's district. The Reporter and Ms. Thomson will also look at electronically available district court rulings. Armed with that information, the group can consider designing a possible study that the FJC might undertake. Then, based on the information gained through these inquiries, the group can confer on the possible design of a mini-conference (which might, if all goes quickly, be held in tandem with the spring meeting).

A member asked whether it would be appropriate to reach out to some congressional committees for their views on the policy issues. It was observed that it would be preferable to get a good deal more information and to engage in a good deal more study before taking such a step.

By consensus, Item No. 03-02 was retained on the study agenda.

B. Item No. 06-06 (proposals to amend FRAP 4 and 40 with respect to cases involving state government litigants)

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

Dean McAllister reported that, subsequent to the Committee's April 2007 meeting, he wrote on the subcommittee's behalf to make Mr. Thro aware of the concerns and questions that had been discussed at the April meeting. Dean McAllister raised the matter in June at the the State Solicitors and Appellate Chiefs Conference sponsored by the National Association of Attorneys General; at the NAAG meeting, Dean McAllister discerned little active support for the proposal among other state attorneys general. Dean McAllister noted that Barbara Underwood, the New York Solicitor General, questioned the usefulness of Virginia's proposal.

A member expressed puzzlement why the momentum behind Virginia's proposal had dissipated. He noted that because many other states had initially signed on to the letter in support of Virginia's proposal, it would be useful to inquire where those states currently stand. Dean McAllister noted that another member (not then in attendance at the meeting) had suggested that the states initially supporting the Virginia proposal had not realized the proposal's full implications.

Dean McAllister suggested that Judge Stewart might write a letter (to be distributed through NAAG) noting that the Committee does not perceive a consensus among state attorneys general in favor of the Virginia proposal, and asking state attorneys general to let the Committee know if they continue to support the proposal.

Judge Stewart agreed to write on the Committee's behalf. He suggested that the letter should note that the Committee has had the proposal on its agenda for three meetings; that the Committee appreciates the states' input on the proposal and has studied it carefully; but that based on the information that the Committee has at this time, the Committee is inclined not to take additional action. Based on this understanding, by consensus, Item No. 06-06 was removed from the study agenda.

C. Item No. 07-AP-C (proposal to amend FRAP 4 in the light of proposed amendments to Rules 11 of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255)

The Reporter noted that the proposed amendment to Rule 11(b) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255 has been remanded to the Criminal Rules Committee for further study. Pending the Criminal Rules Committee's review of the Rule 11(b) proposal, there is no action that needs to be taken by the Appellate Rules Committee on the corresponding proposal to amend Appellate Rule 4(a)(4)(A).

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

Judge Stewart invited Mr. Letter to report on the results of his inquiries concerning the views of entities that would be affected by the proposed definition of the term "state" in the Appellate Rules. The proposal would define "state" as follows:

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

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

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

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

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

Committee Note

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

Mr. Letter pursued inquiries through the U.S. Attorney's offices in various places that would be affected by the proposed definition. Those offices themselves have expressed no objections to the proposal. Mr. Letter asked the U.S. Attorney's offices in Puerto Rico, the Virgin Islands, Washington D.C., and Guam to contact their local counterparts to see if there are any objections to the proposal. (He was unable to find a U.S. Attorney's office that covered either American Samoa or the Northern Mariana Islands.) Local justice officials in Puerto Rico and D.C. see no problem with the proposed definition. He does not yet have an answer from officials in the Virgin Islands, but his contacts in the U.S. Attorney's office have been pressing further for an answer. He was unable to obtain a response from officials in Guam.

It was noted that American Samoa had previously expressed reservations about a proposed rule amendment that would affect it. Professor Coquillette recalled that the issue in that instance had to do with extraterritorial warrants. Mr. Letter explained that the Pacific Islands Committee of the Judicial Council of the Ninth Circuit had expressed objections to the inclusion of American Samoa in a proposed amendment to Criminal Rule 41 that would authorize certain overseas search warrants. Ultimately, despite those objections, the Standing Committee voted to include American Samoa in the extraterritorial warrant provision.

A motion to approve the proposed new Rule 1(b) was moved and seconded, and passed by voice vote without opposition.

E. Items awaiting initial discussion

1. Item No. 07-AP-E (consider possible FRAP amendments in response to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to present an overview of the issues raised by the Supreme Court's recent decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In *Bowles*, the Court held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines.

After the district court denied Bowles' habeas petition, Bowles failed to file a notice of appeal within the 30-day limit set by rule and statute. Bowles' counsel subsequently moved for an order reopening the time to file an appeal under Rule 4(a)(6), and the district court granted the motion. Both rule and statute limited the allowable extension to 14 days after the date of entry of the order reopening the time, but the district court erroneously set a date (February 27) which extended the time by 17 days. Bowles' counsel filed the notice of appeal on February 26 – within the time set by the order but outside the limits set by rule and statute. A closely divided Supreme Court held that the 14-day period was mandatory and jurisdictional, and thus that Bowles' appeal must be dismissed. The majority relied heavily on the notion that the time period was jurisdictional because it was set by statute. As the Court reasoned, because Congress decides whether the courts can hear cases at all, it can also determine under what circumstances the courts can hear them. Though Bowles had argued that his reliance on the date set by the judge should have excused his untimely filing under the "unique circumstances" doctrine, the Court overruled that doctrine with respect to deadlines – like Rule 4(a)(6)'s 14-day deadline – that are jurisdictional. The dissenters vigorously contested the majority's view that the deadline was jurisdictional, and would have applied the unique circumstances doctrine to excuse Bowles' late filing.

The Reporter noted that the Court's reliance on the statutory nature of the 14-day deadline is not necessarily persuasive, given that 28 U.S.C. § 2107 has historically been modeled on the relevant Rules rather than vice versa. It remains to be seen how courts will treat other Rule 4 deadlines after *Bowles*. Presumably, the Rule 4 deadlines that have a statutory backing will, like the 14-day limit in *Bowles* itself, be held jurisdictional. But non-statutory Rule 4 deadlines could be viewed as claim-processing rules rather than jurisdictional limits, under the Court's prior decisions in *Eberhart* and *Kontrick*. Prudent litigants, however, would be well advised to comply carefully with all Rule 4 deadlines.

The question before the Committee is whether it might take any action in response to *Bowles*. One option might be to re-define which of the Rule 4 deadlines are jurisdictional. Another option might be to reinstate the unique circumstances doctrine. But as to either of these options, there is a question of rulemaking power. The *Bowles* majority closed by stating, "[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." This language might be read to suggest that the rulemakers do not currently possess that power. Such a conclusion would surprise the rulemakers who adopted the 1966, 1979 and 1991 amendments to Rule 4, each of which forgave untimeliness that would otherwise (under the then-current statute) have doomed an affected appeal. But the conclusion does fit logically with the Court's current view that the statutory appeal deadlines are jurisdictional. The traditional view has been that rules adopted via the rulemaking process are not to affect the courts' subject matter jurisdiction; and though there are limited statutory authorizations for rulemaking that does affect appellate subject matter jurisdiction, those authorizations would not encompass the possible responses to *Bowles*. The Reporter noted that she has had very helpful discussions with Professor Cooper, who has suggested the possibility of exploring ways to respond to *Bowles* through matters that are recognized to be within the scope of the rulemaking power, such as by altering the way in

which the Rules define the entry of judgment or the motions that suspend the running of the time to appeal. But, as Professor Cooper has noted, such approaches may seem circuitous and somewhat artificial when compared with more direct responses such as reinstating the unique circumstances doctrine for all deadlines or redefining which deadlines are jurisdictional.

A member noted that she has always assumed that all the deadlines set by Appellate Rule 4 are jurisdictional. A judge observed that the *Bowles* approach is consistent with the Supreme Court's treatment of the deadlines for seeking Supreme Court review. An attorney member stated that he did not find the Supreme Court's reliance on the statutory nature of the deadline very persuasive. He noted that if one were writing on a clean slate, one could choose among a variety of options – for example, that no appeal deadlines are jurisdictional; or that all are jurisdictional; or that there should be a unique circumstances doctrine. He observed that a key question is who should make those decisions; if the rulemakers were to go forward, he suggested, it would be prudent to obtain ratification from Congress. One would not, he stated, want uncertainty concerning an issue of jurisdiction.

Another attorney member observed that – given the notoriety of the *Bowles* decision – one might assume that if Congress were upset with the approach taken in *Bowles*, Congress would address the matter. A member suggested that only Congress can act to change the approach taken in *Bowles*. Professor Coquillette stressed that the *Bowles* decision has ramifications that will extend throughout all the Rules systems, not just the Appellate Rules; he cautioned that the rulemakers should not be hasty to conclude that there is a lack of rulemaking authority in the area.

Judge Rosenthal noted that the effect of the approach taken in *Bowles* was relatively unlikely to be felt by the attorneys on the Rules Committees, since those attorneys are less likely to miss deadlines. She observed that the effect would likely be felt more acutely in cases litigated by less able lawyers, or by pro se litigants. She pointed out the difficulties that the district courts will face when confronted by uncertainty as to whether a particular deadline is jurisdictional. She predicted that the Bankruptcy Rules Committee and the Civil Rules Committee will also be interested in *Bowles*'s implications. She noted the Rules Committees' historic involvement in questions relating to deadlines.

A member asked whether other Rules Committees should also be looking into the implications of the *Bowles* decision. Judge Rosenthal stated that it is important to get a sense of what the Supreme Court does next in this area, as well as what the lower courts do. An attorney member stated that it is important to avoid suggesting either that the Advisory Committee lacks authority to respond to issues raised by *Bowles* or that the Advisory Committee does not care about those issues. A judge asked whether it is clear that the jurisdictional-deadlines issue will come back up to the Supreme Court. A member noted that the *John R. Sand & Gravel* case, which is before the Court this Term, presents the question of whether the Tucker Act's statute of limitations limits the subject matter jurisdiction of the Court of Federal Claims.

Judge Stewart noted the difficulty of predicting, after *Bowles*, which deadlines are jurisdictional and which are not. If a deadline is jurisdictional, then the court must investigate the question of compliance with the deadline whether or not counsel raises an objection; this adds another layer to the court's workload. There have been a range of reactions to *Bowles*, from those that are approving to those that are highly critical. The *Bowles* decision will have a range of systemic consequences.

By consensus, Item No. 07-AP-E was retained on the study agenda. Judge Rosenthal predicted that the other Rules Committees would also consider *Bowles*'s implications, and she observed that there would also be discussion of *Bowles* at the January Standing Committee meeting.

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

Judge Stewart invited the Reporter to discuss the proposal concerning amicus briefs with respect to panel rehearing and rehearing en banc. The Reporter thanked Mr. Levy for raising a number of good questions which the Appellate Rules do not currently address: Can such amicus briefs be filed at all? Can they be filed with the consent of the parties, or is permission of the court by motion required? What is the maximum length for such briefs? And when are they due -- at the same time as the petition or 7 days later?

The Reporter noted that Rule 29's text does not explicitly answer any of these questions. The 1998 Committee Note, which dates from the amendment that introduced the 7-day stagger in briefing deadlines, observes that the court may grant permission to file an amicus brief in a context where a party does not file a principal brief – for example, in support of a petition for rehearing. The Note states that in such a situation, the court will set a filing deadline.

The Reporter's research indicates that five circuits – the First, Second, Fourth, Sixth, and Eighth – currently have no local rule or other provision addressing the matter. The Fourth Circuit, however, has indicated in a 2006 decision that it disfavors requests to file an amicus brief in the first instance at the stage of a request for rehearing. The other eight circuits have local rules or provisions that address various aspects of the matter; the local rule recently adopted by the Ninth Circuit provides the most detailed and comprehensive treatment.

On the question of whether amicus briefs can be filed at all, it is interesting as a point of comparison to note that the Supreme Court does not permit amicus briefs with respect to rehearing. The D.C. Circuit permits amicus briefs on rehearing only by invitation of the court. The Fourth Circuit, as noted, disfavors amicus filings on rehearing if the amicus did not seek to participate in earlier briefing. Some circuits may limit amicus filings at the rehearing stage if the filing would result in a judge's disqualification. A number of circuits, though, do have local rules or provisions that – by regulating the submission of amicus briefs on rehearing – display an assumption that such briefs will sometimes be filed.

On the issue of whether a motion is required, or whether party consent suffices, circuits take varying approaches. The Ninth Circuit's rule tracks Appellate Rule 29(a)'s approach. In the Eleventh Circuit, government amici need neither party consent nor court permission, but other amici must obtain court permission. In the Federal Circuit, court permission is always required.

At least three circuits have provisions regulating the length of the briefs. Two circuits specifically address the question of timing for amicus briefs on the question of whether rehearing should be granted, while three circuits have addressed the timing of amicus briefs during briefing that ensues after a grant of rehearing en banc. A variety of other circuit-specific provisions address other aspects of amicus filings with respect to rehearing.

A national rule on the subject could provide practitioners with guidance and reduce circuit-to-circuit variations. But a national rule would alter local practices in some circuits in a way that might conflict with some judges' preferences. The Reporter noted that if the Committee decides to consider a adopting a national rule, it should consider whether the national rule should address all or only some of the questions just mentioned, and should also consider whether the practice concerning rehearing should differ in some respects from Appellate Rule 29's approach to amicus briefs more generally.

Mr. Levy explained that he suggested that this item be placed on the Committee's agenda because he is often asked about the practice for amicus filings with respect to rehearing. Moreover, at the time that he raised the question, two circuits were looking at the possibility of making local rules on the subject, and he wondered whether the Committee might wish to consider a national rule. Mr. Levy noted that he disagrees with the Fourth Circuit's view, in that he believes that an amicus's lack of prior involvement should not disqualify the amicus from participating at the rehearing stage.

Professor Coquillette asked whether it is felt that the current diversity in circuit practice is justified by variations in local conditions. Mr. Levy noted that circuits differ with respect to their willingness to grant rehearing en banc. A judge noted that even if there are no inherent local variations, differences among circuits with respect to amicus filings may grow out of different histories, in particular circuits, with respect to en bancs. The judge asked Mr. Levy whether his concerns would be assuaged if each circuit made clear its approach to amicus filings in relation to rehearing. Mr. Levy responded that such clarity would go a long way toward meeting his concerns; later in the discussion, however, he noted that he would not favor an outcome in which additional circuits decided to bar the amicus filings. On that basis, he stated, he would prefer a national rule permitting such filings to a more gradual circuit-by-circuit approach.

Mr. Fulbruge recounted that the frequency of en bancs varies by circuit. Judge Stewart observed that the Fifth Circuit actually blocks out time in the yearly schedule for en banc arguments. Mr. Fulbruge reported that in the Fifth Circuit, both requests for and grants of rehearing (either panel or en banc) have declined over time. He noted that there have been some

issues in the Fifth Circuit relating to the possibility that some entities seek to file amicus briefs with the object of causing a recusal. Mr. Letter observed that the Fifth Circuit's rule addresses the disqualification issue but does not answer the other questions posed by Mr. Levy. Mr. Letter noted the argument that amicus filings (concerning rehearing) by the DOJ may be authorized by 28 U.S.C. § 516; but he observed that certainty on the question would be useful. A judge member stated that his impression is that younger judges are more likely to vote for en bancs. Seven years ago, he recalled, en bancs were a relatively rare occurrence in his circuit, but that has changed after the recent appointments to the circuit.

Judge Rosenthal suggested that if the main problem is that there are gaps in the circuits' local rules, the Committee might work with CACM to coordinate a request to the circuits to clarify their requirements. A member asked whether the Committee might wish to consider adopting a default rule that would govern in the absence of a circuit-specific requirement. Professor Coquillette noted that one option is to develop a model for a uniform local rule on the subject. Another member stated that, in considering the matter, it would be useful to know whether judges think that amicus briefs concerning rehearing are actually useful. Judge Stewart observed that it would be hard to discern judges' views on that question, and that cultures vary from circuit to circuit; for example, the Seventh Circuit seems less likely than other circuits to welcome amicus filings. He noted that in some instances, amicus briefs have been filed that were more helpful than the parties' briefs; thus, he would not favor a rule that barred amicus filings. An attorney member suggested that the D.C. Circuit might feel that their situation differs from that of other circuits, because the D.C. Circuit does not grant rehearing en banc all that often, and if it permitted amicus filings with respect to rehearing it might receive many more than some other circuits do. (On the other hand, the member noted that if one is drawing a comparison to Supreme Court practice, one should not only look at the practice with respect to rehearing, since a more apt analogy might be the practice with respect to certiorari petitions.) An attorney member agreed that judges' preferences vary with respect to amicus briefs; he also noted, though, that there is a virtue in allowing amici to air their views.

Judge Rosenthal cautioned that the Committee should think carefully about whether the question is one that is appropriate for a national rule. There can be a danger to trying to have it both ways – i.e., to adopt a default rule but to allow local rulemakers to opt out. That approach was tried with respect to Civil Rule 26(a), and what happened was that the district courts opted out in droves – which was particularly problematic in that instance given Civil Rule 26(a)'s potential impact. Professor Coquillette recalled that the local opt-out in Rule 26(a) was forced on the rulemakers by others; he observed that the Civil Rules Committee currently faces similar pressures with respect to local practices on summary judgment.

A member suggested that the question is whether the Committee feels that this matter is more like briefing rules (as to which the Committee has allowed, but discouraged, local requirements) or more like citation of unpublished opinions (as to which the Committee adopted a national rule); he stated that he believes persuasion is the better approach to take in this instance. Professor Coquillette noted, as a precedent, that CACM has in the past developed model local rules, for example, with respect to electronic filing.

An attorney member observed that a national rule permitting amicus filings concerning rehearing would not be as intrusive on circuit preferences as a national rule preempting all circuit-specific briefing requirements: If judges don't want to read the resulting amicus filings, he suggested, they need not do so. Mr. Letter stated that this issue does not seem comparable to the variation in circuit briefing rules; here, it would be better for there to be a rule that governs, even if it is not a national rule. He noted that the government almost never opposes amicus filings in the court of appeals. A judge responded that if judges know that they will not read amicus filings on a particular topic, it would seem wrong to have a local rule that allows those filings. He noted that the circuits' response to Judge Stewart's letter concerning circuit-specific briefing requirements shows that it would be difficult to induce the circuits to address the amicus-brief issue without a nudge; working with CACM, he suggested, could be an effective way to provide such a nudge. Mr. Rabiej noted that a model local rule could be developed either by CACM or by the Advisory Committee; he observed that the track record for adoption of proposed local rules has not been all that good. Professor Coquillette noted that he had offered CACM's experience by way of example, and not to indicate that he thought CACM should necessarily be the entity to perform the drafting. Mr. McCabe noted that the best outcome, in terms of adoption, was the model local rule on electronic filing; but he observed that that result has been the exception. A judge suggested that the key is to present the circuits with a list of the questions that local circuit rules should answer – rather than to tell the circuits how they should answer each of those questions.

Judge Rosenthal commented that even if the circuits take no action on the suggestion, one would be no worse off than before. She suggested that a request to the circuits would be most effective if the Committee makes a persuasive case concerning the need for local rules; thus, for example, if the ABA Section on Litigation voiced support for the proposal, that would be helpful.

Mr. Levy moved that the Committee decide to adopt a national rule on amicus filings with respect to rehearing, with the rule's content to be determined subsequently. Mr. Letter seconded the motion. An attorney member stated that the Committee should consult the D.C. Circuit for its views before publishing a proposed rule. Mr. Letter volunteered to contact the D.C. Circuit's Clerk. A member questioned whether the Committee should vote on Mr. Levy's motion without first deciding the content of the proposed rule. Mr. Letter suggested that the motion should be amended to state that the Committee would retain the matter on its study agenda and consider it further at the next meeting. The member who had raised the question stated that he would be amenable to that approach, but that if the proposal turns out to be one for a national rule he would vote against it. After this discussion, Mr. Levy withdrew the motion.

By consensus, the Committee retained Item 06-08 on its study agenda. The Reporter will work with Mr. Letter and Mr. Levy to develop a proposal for the Committee's consideration at the spring meeting.

3. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing)

Judge Stewart invited the Reporter to describe the issues raised by Item No. 07-AP-F. This Item arises from a suggestion made by Judge Jerry Smith. Judge Smith points out that while Rule 40 assures litigants that ordinarily the court will request a response to a petition for panel rehearing before granting such a petition, Rule 35 provides no such assurance with respect to requests for rehearing en banc. Judge Smith suggests that Rule 35(e) should be amended to state that ordinarily the court will not grant rehearing en banc without first allowing a response to the request.

The Reporter noted that during the Committee's deliberations over the restyling of the Appellate Rules, the Committee discussed but rejected the option of eliminating this difference between Rules 35 and 40. From the minutes, it appears that one or more members relied on the notion that if en banc rehearing is granted, there will be a later opportunity for the party opposing the petition to respond – namely, during the en banc briefing.

The Reporter briefly reviewed the circuit-specific provisions on this question. Currently, seven circuits have no rule or other local provision that would assure the opponent of a petition for rehearing en banc that it will be asked to respond before rehearing en banc is granted. Five circuits have provisions stating that the court will not, or ordinarily will not, grant rehearing en banc without first ordering a response. Another circuit has an internal operating procedure that, in practice, likely assures that in most instances a response will be requested prior to a grant of rehearing en banc. As a point of comparison, the Supreme Court Rules state that the Court ordinarily will not grant rehearing without first requesting a response.

Mr. Fulbruge noted that although the Fifth Circuit does not have a local rule on point, in practice the court requests a response before granting rehearing en banc. Judge Stewart agreed that, in practice, the court would not grant rehearing en banc without requesting a response. He noted, as well, that a response to the request for rehearing en banc can assist the court in reaching a resolution that stops short of rehearing en banc; for example, the panel might change some aspects of the language in the panel opinion.

Judge Hartz noted that though the Tenth Circuit does not have a local rule on point, in practice the court calls for a response prior to granting a request for rehearing en banc. On the other hand, Judge Hartz noted, the court does order en bancs *sua sponte* without first requesting a response. Judge Stewart noted that a fair number of rehearings en banc are initiated by a circuit judge rather than by the parties.

Mr. Letter cautioned that it is not always the case that the party opposing rehearing en banc will get an opportunity to submit new briefing during the en banc procedure itself. For example, in the Ninth Circuit, the court does not always call for new briefs when it grants

rehearing en banc. He suggested that it is good to call for a response before granting rehearing en banc, because giving the party a chance to submit its views in opposition to rehearing contributes to the perception that the process is fair. This is true, Mr. Letter suggested, not just when a party requests rehearing en banc but also when the court grants rehearing en banc sua sponte.

An attorney member stated that he believes the proposal makes sense, although he has not considered the question of whether the court should provide an opportunity for a response before it grants rehearing en banc sua sponte. He noted a general trend in the Appellate Rules toward treating panel rehearing and rehearing en banc the same way. Another attorney member stated that seemed to be no grounds for objection to the proposed rule change, but, on the other hand, that it is not clear whether there is a need for it: As a practical matter, the courts seem to ask for a response before granting rehearing en banc. A judge noted that if Rule 35 is amended, there is the question of whether to cover sua sponte grants of rehearing en banc. It was noted that one could draft the response provision so it does not apply to sua sponte en bancs; and it was also observed that the Rule 40 provision contains the qualifier "ordinarily."

By consensus, Item No. 07-AP-F was retained on the study agenda.

4. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)

Judge Stewart invited Mr. McCabe to present Item No. 07-AP-G, which concerns the implications of the new privacy requirements for Appellate Form 4.

Mr. McCabe explained that the Administrative Office produces a number of forms, and has a working group that provides advice on them and on other forms. Among the forms appended to the Appellate Rules is Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. Form 4 is referred to in Rule 24, which states that motions for leave to proceed in forma pauperis status must attach an affidavit that shows in the detail prescribed by Form 4 the party's inability to pay.

In the wake of the E-Government Act, the courts have adopted new privacy rules that require redaction of certain personal identifiers. An effort has been made to review the AO's many forms for consistency with the new privacy requirements. The AO's committee has identified a number of forms for court filings that ask the litigant to include a social security number.

There is thus a need to consider amending Form 4. There is also the question of what form should be used in the district courts. Perhaps Form 4 can be adapted for use in the district courts. But some district judges argue that they do not need all the detail required by Form 4, especially in prisoner cases. One option might be to use something like Form 4 for use in non-prisoner cases, and to have a shorter, simpler form for use in prisoner cases. In the meantime, it

is necessary to bring the current forms into compliance with the new privacy requirements. Mr. McCabe also noted that an effort is underway to restyle all of the forms. Mr. Rabiej noted that the district courts' shorter form is used in habeas cases, where the fee is $ 5.00; questions concerning a $ 5.00 fee would not seem to justify a lengthy affidavit form.

Professor Coquillette pointed out that, while the Committee is considering revisions to Form 4, it may wish to consider Question 10, which requests the name of any attorney whom the litigant has paid for services in connection with the case, as well as the amount the litigant has paid. Professor Coquillette stated that the National Association of Criminal Defense Lawyers has argued that these questions seek information that is protected by the attorney-client privilege; he noted that some other commentators dispute that view.

Mr. Fulbruge noted that it is important to require some sort of personal identifying information, especially since many litigants may have common surnames. Mr. Rabiej asked whether including the last four digits of the person's social security number would suffice. Judge Rosenthal stated that in addition, it is important to require the person's full name. She stated support for the notion of having one form that can be used in both the district courts and the courts of appeals. She observed that current Form 4 includes what seems like excessive detail for in forma pauperis requests; why does the judge need to know about the person's laundry and dry cleaning? Mr. Rabiej recounted that the Supreme Court Clerk had specifically requested that detailed questions be included in Form 4.

Judge Rosenthal stressed the need to act quickly to eliminate the request for the full social security number. Judge Rosenthal observed that the issue of home addresses should also be looked at, and that Form 4's Question 7 – relating to dependents – raises privacy issues concerning minor children. The Committee will work with CACM and other Committees and with Mr. Rabiej and Mr. McCabe to get the word out to the district courts and courts of appeals. Mr. Fulbruge suggested that it will also be important to get word to prison libraries. Mr. Fulbruge volunteered to reach out to his colleagues among the circuit clerks to alert them to these issues.

VII. Additional Old Business and New Business

A. Information item relating to Item No. 06-05 (statement of issues to be raised on appeal)

The Reporter drew the Committee's attention to the correspondence from Judge Jan DuBois, who wrote to the Reporter to express support for Judge Baylson's proposal for a FRAP rule modeled on Pennsylvania Rule of Appellate Procedure 1925(b). The Reporter noted that she had had a very helpful telephone discussion with Judge DuBois concerning his support for the proposal, and that she had assured Judge DuBois that she would make the Committee aware of his thoughts on the matter.

B. New Business

Judge Stewart noted that, pursuant to the Chief Justice's new policy, the Chairs of the Rules Committees will be attending the Judicial Conference's discussions concerning long-range planning. Thus, if members have suggestions concerning long-range planning issues, Judge Stewart would be happy to discuss them.

A judge member noted that the Tenth Circuit's recent opinion in *Warren v. American Bankers Insurance of Florida*, 2007 WL 3151884, raises significant issues concerning the operation of the separate document rule. Mr. Letter agreed that the questions raised in *Warren* are important. The Reporter suggested that she should investigate the matter and report on it at the Committee's spring meeting.

VIII. Date and Location of Spring 2008 Meeting

The Committee tentatively discussed April 10 and 11 as possible dates for the Committee's Spring 2008 meeting. The date and location will be announced.

IX. Adjournment

The Committee adjourned at 9:45 a.m. on November 2, 2007.

Respectfully submitted,

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Catherine T. Struve
Reporter