# ADVISORY COMMITTEE
# ON
# APPELLATE RULES

**Miami, FL**
**November 9, 2004**

**Agenda for Fall 2004 Meeting of**
**Advisory Committee on Appellate Rules**
**November 9, 2004**
**Miami, Florida**

I. Introductions

II. Approval of Minutes of April 2004 Meeting

III. Report on June 2004 Meeting of Standing Committee

IV. Action Items

A. Item No. 97-14 (FRAP 46(b)(1)(B) — "conduct unbecoming" standard)

B. Item No. 99-06 (FRAP 33 — impact of settlements on bankruptcy proceedings)

C. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity)

D. Item No. 04-04 (FRAP 25(a) — authorize courts to mandate electronic filing)

V. Discussion Items

A. Item Nos. 02-16 & 02-17 (FRAP 28 & 32 — inconsistent local rules on briefs and covers of briefs)

B. Item No. 03-10 (new FRAP 25.1) — electronic filing/privacy protections)

C. Item No. 04-01 (FRAP 5(c) et al. — replace page limits with word limits)

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1. Item No. 04-02 (FRAP 12(b) — timing of representation statement)

2. Item No. 04-03 (FRAP 4(a)(4)(A)(iii) — tolling effect of Civil Rule 54 motions)

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

VII. Schedule Date and Location of Spring 2005 Meeting

VIII. Adjournment

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November 2004

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October 18, 2004
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# DRAFT

**Minutes of Spring 2004 Meeting of**
**Advisory Committee on Appellate Rules**
**April 13-14, 2004**
**Washington, D.C.**

## I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, April 13, 2004, at 4:00 p.m , at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge David F. Levi, Chair of the Standing Committee; Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Ms. Marie C. Leary from the Federal Judicial Center ("FJC") Prof Patrick J. Schiltz served as Reporter.

The meeting was called to order immediately following a day-long hearing at which over a dozen witnesses testified regarding the proposed amendments to the Appellate Rules that had been published for comment in August 2003. Judge Alito announced that Judge T.S. Ellis III had left the hearing early and would be unable to attend the Advisory Committee meeting because of a family emergency. Judge Alito also announced that the terms of Prof. Mooney and Mr. McGough would expire prior to the Committee's fall meeting, and he expressed hope that Prof. Mooney and Mr. McGough would attend that meeting so that the Committee could express its appreciation for their years of dedicated service. Judge Alito also congratulated Prof. Mooney on her recent appointment as President of St. Mary's College in Notre Dame, Indiana.

## II. Approval of Minutes of November 2003 Meeting

The minutes of the November 2003 meeting were approved.

## III. Report on January 2004 Meeting of Standing Committee

The Reporter said that this Advisory Committee did not seek action on any items at the Standing Committee's January 2004 meeting. However, Judge Levi invited Judge Roberts (who

attended the meeting in place of Judge Alito) and the Reporter to lead a preliminary discussion regarding proposed Rule 32.1 (on unpublished opinions) and the proposed amendment to Rule 35(a) (on en banc voting). Because the agenda of the Standing Committee's June 2004 meeting is likely to be more crowded than the agenda of its January 2004 meeting, and because both proposals are quite controversial, Judge Levi thought it advisable to begin the discussion of the proposals at the January 2004 meeting.

The Reporter said that, in the course of an hour-long discussion, several members of the Standing Committee, as well as several of the advisory committee chairs and reporters, spoke in support of new Rule 32.1 and the proposed amendment to Rule 35(a). No one expressed opposition to either proposal.

Judge Roberts said that, in his comments about Rule 32.1, he stressed that the rule and accompanying Committee Note were drafted to take no position on the issue of whether it is lawful for a court to refuse to give binding precedential effect to one of its opinions. With respect to Rule 35(a), Judge Roberts said that he highlighted the fact that the decision whether there should be a uniform standard has already been made by Congress. The Advisory Committee was merely trying to act consistently with Congressional intent in resolving the sharp circuit split over the interpretation of that standard.

## IV. Action Items

### A. Proposed Amendments Published for Comment in August 2003

#### 1. New Rule 32.1 (citation of unpublished decisions) [Item No. 01-01]

Judge Alito introduced the following proposed rule and Committee Note:

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**Rule 32.1. Citation of Judicial Dispositions**

**(a) Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction

is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) **Copies Required.** A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

**Committee Note**

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Tech, Inc v Lemelson Med, Educ & Research Found*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002), *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from

denial of reh'g en banc); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

**Subdivision (a).** Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of all judicial opinions — "published" and "unpublished." Courts are thus prevented from undermining Rule 32.1(a) by imposing restrictions only upon the citation of

"unpublished" opinions (such as a rule permitting citation of "unpublished" opinions only when no "published" opinion addresses the same issue or a rule requiring attorneys to provide 30-days notice of their intent to cite an "unpublished" opinion). At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to form upon the citation of all judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow The Bluebook in citing judicial opinions).

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and soon every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, §

205(a)(5), 116 Stat. 2899, 2913. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e g , Holmes Group, Inc. v Vornado Air Circulation Sys , Inc* , 535 U.S. 826 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v Sorema N A* , 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as "published" opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no "published" opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no "published" opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they

practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

**Subdivision (b).** Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* of the judicial opinions that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

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Judge Alito said that he was taking up proposed Rule 32.1 out of order because it had been the subject of almost all of the testimony that the Committee had heard earlier in the day, and he hoped it would be helpful to begin the discussion of the rule while the testimony was fresh in Committee members' minds. (The Committee discussed Rule 32.1 until about 5:30 p.m., and the Committee continued the discussion after reconvening at 8:30 a.m. the following day.)

Judge Alito outlined the options for the Committee as follows: (1) It could approve the rule as drafted. (2) It could approve the rule with changes. (3) It could postpone action on the rule in order

to study some of the claims made by the commentators. (4) It could remove the rule from its study agenda.

The Committee discussed the merits of Rule 32.1 at considerable length, touching upon many of the arguments that had been made by the commentators, including the commentators who had testified earlier in the day. Every Committee member, save one, spoke in favor of the proposed rule. The members supporting the rule cited a number of considerations, but two were particularly prominent:

First, Committee members argued that the main problem with no-citation rules — and the main reason to approve Rule 32.1 — is that an Article III court should not be able to forbid parties from citing back to it the public actions that the court itself has taken. It is antithetical to American values and to the common law system for a court to forbid a party or an attorney from calling the court's attention to its own prior decisions, from arguing to the court that its prior decisions were or were not correct, and from arguing that the court should or should not act consistently with those prior decisions in the present case. One member called no-citation rules an "extreme" measure. Another member said that it was "ludicrous" that an attorney cannot cite a court's prior decisions to the court itself, but can cite those decisions to virtually everyone else in the world, including other courts. Yet another member — a judge — said that judges should not be the only government officials who can shield themselves from being confronted with their past actions. The member said that, if a party believes that he has acted inconsistently or unfairly, he *wants* to be told about it. Almost all Committee members agreed that, whatever the problems with unpublished opinions, the way to deal with those problems is not to gag attorneys.

Second, Committee members expressed great skepticism about the "parade of horribles" that commentators predict will result from the approval of Rule 32.1. Members pointed out that there was absolutely no evidence that any of these consequences had been experienced by any of the federal or state courts that have abolished or liberalized no-citation rules. One appellate judge said that he thought the arguments were considerably exaggerated; he said that, although his circuit has a relatively liberal citation rule, parties almost never cite unpublished opinions, and, when they do, he and his colleagues are quite capable of dealing with those citations. Another appellate judge said that he, too, was deeply skeptical of the predictions of doom. The briefs he reads almost never cite unpublished opinions, even though his circuit also has a liberal citation rule. A third appellate judge said that his experience was similar. His circuit, too, has a very liberal citation rule, yet attorneys rarely cite unpublished opinions, and those few citations have not caused any problems for him or his colleagues.

One Committee member argued against approving Rule 32.1. He stated that unpublished opinions are "junk law," and courts should be free to instruct parties not to cite them. He also pointed out that federal rulemaking has traditionally and appropriately been a consensus or near-consensus process. There is obviously not a consensus in favor of Rule 32.1; to the contrary, there was overwhelming opposition to it among commentators. Finally, he was struck by the testimony of Judge

Diane P. Wood and particularly her description of the dramatically different caseloads that the circuits confront and the dramatically different publication rates and other practices that the circuits have adopted to deal with those caseloads. This is an area in which one size does not fit all.

The Committee discussed whether action on Rule 32.1 should be postponed and the FJC invited to study some of the claims made by the commentators. One member argued in favor of such a postponement. He said that conflicting empirical claims are at the heart of the dispute over Rule 32.1. Some of those issues could be studied by the FJC or another neutral party. For example, the FJC could study whether the courts that have liberalized or abolished no-citation rules have been slower to issue opinions or have more frequently resorted to issuing one-line judgments. The member believes that most judges are willing to consider empirical evidence and reassess their positions if appropriate. The member cited himself as an example. He formerly favored no-citation rules, but, after his court liberalized its citation rules, parties did not often cite unpublished opinions, and the judges on his court did not spend more time drafting them. The member is afraid that other judges have not yet had an opportunity to be convinced by empirical evidence, as he was. Unless a better case is made for Rule 32.1, he fears that the proposed rule will not be approved by the Judicial Conference.

A majority of Committee members disagreed. They argued that such a study would be difficult to conduct. Many of the commentators' claims are incapable of being tested at all; others can be tested only with great effort and expense; and still others can be tested only through surveys, which would likely produce unreliable data. Members also thought that little good would come from such a study. Both those who support and those who oppose Rule 32.1 are motivated to a significant extent by philosophical or political beliefs that are not capable of being refuted by empirical evidence. Also, opponents of Rule 32.1 are unlikely to be persuaded by empirical evidence because they will insist that the problems of their circuits are unique. In short, the prospect of anything worthwhile coming out of a study is too remote to justify the considerable time and effort that would have to be invested by the FJC. The issue is "joined" now; it's time to send the rule to the Standing Committee.

A member moved that Rule 32 1 be approved. The motion was seconded. The motion carried. (The vote among members present was 6-1, but a member who was unavoidably absent later informed the Committee that he would have voted against the proposed rule.)

The Committee considered three suggested changes to Rule 32.1:

1. The first was a proposal to amend Rule 32.1 to make it prospective only — that is, to provide that it applies only to unpublished opinions issued after its effective date. The member who proposed the amendment noted that several commentators had argued for this change, and he pointed out that when the D.C. Circuit recently liberalized its citation rule, the court applied the new rule prospectively. He also said that it is not fair for judges who reasonably relied upon no-citation rules in deciding how to draft opinions to now see those opinions cited back to them.

Other Committee members opposed the amendment. They pointed out that a rule that applied only prospectively — that permitted circuits to continue to ban the citation of tens of thousands of their own opinions — would be inconsistent with almost all of the reasons why the Committee had approved Rule 32.1. How can the Committee argue, for example, that Article III courts should not be able to bar citation of their own opinions, or that attorneys should not be forbidden from making the best arguments they can on behalf of their clients, or that uniformity among the circuits is important, and then approve a rule that allows Article III courts to bar such citation, allows attorneys to be forbidden to make such arguments, and leaves disuniformity in place? Moreover, a prospective-only rule would appear to endorse the argument that judges will have to spend much more time drafting unpublished opinions if they are citable, an argument that has been rejected by virtually every Committee member and that is not supported by any empirical evidence. Any "reliance" interest of judges who drafted unpublished opinions under no-citation rules is weak, especially given that judges can continue to treat those opinions as non-binding under Rule 32.1. This weak reliance interest should not overcome the strong public interests that have persuaded the Committee to approve Rule 32.1.

Committee members also expressed concern that a prospective-only rule would create a patchwork of rules and make the disuniformity problem even worse. A single court such as the D.C. Circuit might end up with one rule that governs the citation of one group of unpublished opinions, a second rule that governs the citation of another group, and a third rule (Rule 32.1) that governs the citation of yet another group.

The proposed amendment was withdrawn after it became clear that it did not enjoy the support of more than one or two Committee members. But Committee members also agreed that a prospective-only rule would be better than no rule at all, and thus the Committee would be open to reconsidering the amendment if Rule 32.1 is not approved in its present form.

2. The second proposed change to Rule 32.1 related to what Prof. Stephen Barnett refers to as "discouraging words" — that is, provisions in local circuit rules that bar the citation of unpublished opinions when published opinions address the same point or that instruct attorneys that the citation of unpublished opinions under any circumstance is disfavored. One member suggested that Rule 32.1 be amended either to incorporate discouraging words itself or to permit the circuits to implement local rules that include discouraging words (the approach favored by Prof. Barnett). The member argued that such a rule would overrule the practices of only the four circuits that altogether forbid the citation of unpublished opinions for their persuasive value and would leave in place the practices of the other nine circuits. Thus, such a rule might stand a better chance of being approved than Rule 32.1, which would overrule the practices of all of the circuits to at least some extent.

Several Committee members and the Reporter expressed a number of concerns about such an approach:

First, virtually none of the reasons given by the Committee for approving Rule 32.1 could be given to justify a rule that permitted discouraging words. Under such a rule, an Article III court could still bar an attorney from citing the court's own words. A party could still be forbidden from asking the court to treat it consistently with a prior litigant. Attorneys could still be barred from making arguments that, in their professional judgment, would advance their clients' causes. Attorneys who practice in more than one circuit would still face an array of inconsistent rules.

Second, what would be the point of such a rule? The Committee has not been motivated to act by a desire to force the small minority of circuits who allow no citation of unpublished opinions for their persuasive value to instead allow a little bit. Rather, the Committee has objected to the fact that virtually all of the circuits impose unjustifiable prohibitions or restrictions on such citation.

Third, a rule permitting circuits to use discouraging words would put the Committee in the position of taking the anti-*Anastasoff* side of the debate over the lawfulness of treating unpublished opinions as non-binding. Endorsing the use of discouraging words necessarily endorses the view that the actions of an Article III court can be divided into two categories: binding decisions that are fully citable and non-binding decisions that are not. Prof. Barnett favors the use of discouraging words precisely because he believes *Anastasoff* was wrong. But this Committee has gone out of its way to avoid expressing a view on *Anastasoff*.

Finally, it would be difficult to draft a rule that permitted courts to restrict, but not altogether to prohibit, the citation of unpublished opinions. No circuit completely prohibits such citation; all circuits allow unpublished opinions to be cited for at least some purposes. Thus, a rule that merely provided that a court could not prohibit the citation of unpublished opinions would not require any circuit to change its current practices. To be effective, then, the rule would have to instruct courts that they must permit unpublished opinions to be cited for more than just "case-specific" reasons (such as res judicata), while also making clear that courts are free to restrict such citation as much as they want (short of prohibiting it altogether). That would be a difficult concept to capture in a rule of appellate procedure.

Other Committee members did not disagree with these objections, but suggested that, if the choice is between no rule and a rule that allows discouraging words, the latter would be preferable. It would move courts in the right direction and lay the groundwork for approval of a more sweeping rule in a few years. In addition, such a rule would, as a *practical* matter, have almost the same effect as Rule 32.1. A typical attorney is not going to cite unpublished opinions if there are published opinions on point, and, even if he does, it is highly unlikely that he will be sanctioned. After all, the attorney's opponent will have no incentive to point out to the court that a published opinion supports the same proposition, and the courts are too busy to get involved in disputes over whether a particular published opinion was as closely on point as a particular unpublished opinion.

Members who opposed amending Rule 32.1 to permit discouraging words responded that, for exactly these reasons, a watered-down version of Rule 32.1 was unlikely to win the approval of those who support no-citation rules. They will recognize it for the camel's nose that it is, and oppose it just as vigorously as they have opposed Rule 32.1. If political expediency is the only argument that can be made for the watered-down version, and if the watered-down version is unlikely to be politically expedient, then why support it?

No member of the Committee moved to amend Rule 32.1 to permit courts to implement local rules that restrict or discourage citation of unpublished opinions. It was clear that most members would not support such an amendment at this time. But the Committee agreed that, if either the Standing Committee or the Judicial Conference declines to approve Rule 32.1, the possibility of approving a more limited version of the rule would remain open.

3. The final proposed change to Rule 32.1 was recommended by the Reporter. He suggested that the Committee amend the text of Rule 32.1(a) to delete everything after "or the like," so that Rule 32.1(a) would provide as follows:

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

The published version of Rule 32.1(a) was trying to do two things. On the one hand, the Committee wanted to require courts to permit the citation of unpublished opinions. The Committee did not want a court to be able to permit such citation as a formal matter but then, as a practical matter, make such citation nearly impossible by imposing various restrictions upon it. On the other hand, the Committee did not want to preclude circuits from imposing general requirements of form or style upon the citation of *all* authorities.

The Reporter said that he had been persuaded that the clause "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions" was not necessary. First, Rule 32(e)[1] was intended to put the circuits out of the business of imposing general requirements of form or style. It is hard to identify a requirement of form or style that could be both endangered by Rule 32.1 and enforced under Rule 32(e). Second, Rule 32.1 is most naturally read as precluding only prohibitions and restrictions on the citation of unpublished opinions *as such* — that is, prohibitions and restrictions aimed *exclusively* at the citation of unpublished opinions. A page limit on a brief could be said indirectly to "restrict" the citation of

[1]Rule 32(e) provides: "Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule."

unpublished opinions, but no one is likely to read Rule 32.1 to forbid page limits on briefs, especially if the Committee Note is clear about the scope of the rule.

A member moved that Rule 32.1 be amended as the Reporter had recommended. The motion was seconded. The motion carried (6-0, with one abstention).

The Reporter said that he would revise the Committee Note to reflect the amendment and to strengthen the arguments for the new rule. After Judge Alito has an opportunity to review the revised Note, the Reporter will circulate it to Committee members via e-mail.

**2. Rule 4(a)(6) (clarify whether verbal communication provides "notice") [Item No. 00-08]**

The Reporter introduced the following proposed amendment and Committee Note:

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

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

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or

observes written notice of the entry from any source, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

**Committee Note**

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

**Subdivision (a)(6)(A).** Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or

order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

**Subdivision (a)(6)(B).** Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal that judgment or order. However, all that is required is that a party receive or observe written notice of the entry of the judgment or order, not that a party receive or observe a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir. 2001) (footnotes omitted). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e g., Bass v United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e g , Lowry v McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v First Unum Life Ins. Co* , 174 F.3d 302, 304-05 (2d Cir. 1999)).

New subdivision (a)(6)(B) resolves this circuit split by making clear that only receipt or observation of *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal.

The Reporter reminded the Committee that the proposed amendment is intended to do two things:

First, proposed subdivision (A) is intended to clarify what type of notice precludes a party from taking advantage of Rule 4(a)(6)'s safe harbor. Proposed subdivision (A) makes clear that only Civil Rule 77(d) notice disqualifies a party from later moving to reopen the time to appeal under Rule 4(a)(6). All commentators agreed that proposed subdivision (A) made sense, and the Reporter recommended that it be approved.

Second, proposed subdivision (B) is intended to clarify what type of notice triggers the 7-day period to move to reopen. Proposed subdivision (B) provides that the 7-day deadline begins to run when a party "receives or observes written notice of the entry from any source." The Reporter said that he agreed with commentators — formal and informal — who objected to this proposed formulation. Above all else, the Reporter said, subdivision (B) should be clear and easy to apply; it should neither risk opening another circuit split over its meaning nor create the need for a lot of factfinding by district courts. Subdivision (B) could do better on both counts. The standard — "receives or observes written notice of the entry from any source" — is awkward and, despite the guidance of the Committee Note, seems likely to give courts problems. Even if the standard is sufficiently clear, district courts will be left having to make factual findings about whether a particular attorney or party "received" or "observed" notice that was written or electronic.

The Reporter recommended that the Committee adopt the solution recommended by two committees of the California bar: using Civil Rule 77(d) notice to trigger the 7-day period. The standard is clear; no one doubts what it means to be served with notice of the entry of judgment under Civil Rule 77(d). The standard is also unlikely to give rise to many factual disputes. Civil Rule 77(d) notice must be formally served under Civil Rule 5(b), so establishing the presence or absence of such notice should be relatively easy. And using Civil Rule 77(d) as the trigger would not unduly delay appellate proceedings, mainly because Rule 4(a)(6) applies a "hard cap" of 180 days. The wording of subdivision (B) will only determine when *within* those 180 days the 7-day deadline is triggered.

For these reasons, the Reporter recommended that the Committee amend the text of proposed subdivision (B) to provide as follows:

> (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier;

He also recommended that the Committee Note to proposed subdivision (B) be amended to read as follows:

**Subdivision (a)(6)(B).** Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e g , Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included verbal notice that was not "the functional equivalent of written notice." *See, e g , Lowry v McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split. Under new subdivision (a)(6)(B), only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases — cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, no appeal can be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order.

The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, by later serving notice, the winning party can trigger the 7-day deadline to move to reopen.

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The Committee briefly discussed the Reporter's recommendation. All Committee members concurred that the recommendation should be adopted. Most of the discussion related to the length of the Committee Note, with some members arguing that the Note should just briefly describe the effect of the amendment, and others arguing that the Note should also explain the background to and reasons for the amendment. The Committee compromised by agreeing that the Note would be changed so that the effect of the amendment is briefly described at the beginning of each section of the Note, and then the background and reasons would follow.

A member moved that the amendment to Rule 4(a)(6) be approved, with the changes recommended by the Reporter, and with the understanding that the Reporter would revise the Committee Note as agreed. The motion was seconded The motion carried (unanimously).

### 3. Washington's Birthday Package: Rules 26(a)(4) and 45(a)(2) [Item No. 00-03]

The Reporter introduced the following proposed amendments and Committee Notes:

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**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:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is

located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

**Committee Note**

**Subdivision (a)(4).** Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

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**Rule 45. Clerk's Duties**

**(a) General Provisions.**

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day,

Independence Day, Labor Day, Columbus Day, Veterans' Day,

Thanksgiving Day, and Christmas Day.

* * * * *

**Committee Note**

**Subdivision (a)(2).** Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

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The Reporter said that no commentator objected to the amendments and that he recommended that they be approved.

A member moved that the amendments to Rules 26(a)(4) and 45(a)(2) be approved as published. The motion was seconded. The motion carried (unanimously).

**4. New Rule 27(d)(1)(E) (apply typeface and type-style limitations to motions) [Item No. 02-01]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 27. Motions**

* * * * *

**(d) Form of Papers; Page Limits; and Number of Copies.**

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on

light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

* * * * *

**Committee Note**

**Subdivision (d)(1)(E).** A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

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The Reporter said that only two objections had been made to the proposed amendment:

First, two commentators argued that all of the page limits in the Appellate Rules should be replaced by word limits. The Reporter reminded the Committee that it had recently removed the same suggestion from its study agenda at the request of the appellate clerks. The clerks reported that page limits are much easier for clerks to enforce and that abuses are rarely a problem with respect to papers governed by page limits. If the rules were to apply word limits to all papers (not just briefs), then parties would have to file certificates of compliance with all papers (not just briefs). That would result in tens or hundreds of thousands of additional pieces of paper being served and filed every year — all for no purpose

Second, one commentator objected that, because most circuits now allow motions to be filed in 12- or even 11-point proportional font, the proposed amendment will substantially reduce the content of motion papers in most circuits. The commentator argued that the page limits on motion papers should be increased to compensate for this reduction.

A member said that, while he disagreed with the second suggestion, he would like the Committee to consider replacing all page limits in the Appellate Rules with word limits. He believes that the suggestion is worth considering, and he was not a member of the Committee when it removed the suggestion from its study agenda. That said, he did not want to hold up approval of the amendment to Rule 27(d)(1). The Committee agreed by consensus that it would restore the suggestion to its study agenda.

A member moved that the amendment to Rule 27(d)(1) be approved as published. The motion was seconded. The motion carried (unanimously).

**5. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d) [Item No. 00-12]**

The Reporter introduced the following proposed amendments and Committee Notes:

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**Rule 28. Briefs**

* * * * *

**(c) Reply Brief.** The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

* * * * *

~~**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied~~

~~with appellant's statement need not include a statement of the case or of the facts.~~ [Reserved]

* * * * *

**Committee Note**

**Subdivision (c).** Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

**Subdivision (h).** Subdivision (h) — regarding briefing in cases involving cross-appeals — has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

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**Rule 28.1. Cross-Appeals**

(a) **Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) **Designation of Appellant.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order.

(c) **Briefs.** In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (11). That brief must also be limited to the issues presented by the cross-appeal.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

**(d) Cover.** Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; and the appellee's reply brief, gray. The front cover of a brief must contain the information required by Rule 32(a)(2).

**(e) Length.**

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28(e)(2) must comply with Rule 32(a)(7)(C).

**(f) Time to Serve and File a Brief.** The appellant's principal brief must be served and filed within 40 days after the record is filed. The appellee's principal and response brief must be served and filed within 30 days after the appellant's principal brief is served. The appellant's response and reply brief must be served and filed within 30 days after the appellee's principal and response brief is served. The appellee's reply brief must be served and filed within 14 days after the appellant's response and reply brief is served, but the appellee's reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

**Committee Note**

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such

cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

**Subdivision (a).** Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

**Subdivision (b).** Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary.

**Subdivision (c).** Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

> The first brief is the "appellant's principal brief." That brief — like the appellant's principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).
>
> The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.
>
> The third brief is the "appellant's response and reply brief." Like a response brief in a case that does not involve a cross-appeal — that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal — the appellant's response and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-appeal, on the other, is that the latter must include a corporate disclosure statement.

*See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.

The fourth brief is the "appellee's reply brief." Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the requirements of Rule 28(a)(2)–(3) and (11). (Rather than restating the requirements of Rule 28(a)(2)-(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-reference.) The appellee's reply brief must also be limited to the issues presented by the cross-appeal.

**Subdivision (d).** Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

**Subdivision (e).** Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal.

**Subdivision (f).** Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

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**Rule 32. Form of Briefs, Appendices, and Other Papers**

**(a) Form of a Brief.**

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of Compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

**Committee Note**

**Subdivision (a)(7)(C).** Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

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**Rule 34. Oral Argument**

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**(d) Cross-Appeals and Separate Appeals.** If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

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**Committee Note**

**Subdivision (d).** A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

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The Reporter said that the Style Subcommittee had made three recommendations, which were described in the Reporter's memorandum to the Committee. The Reporter recommended that the Committee accept these suggestions. By consensus, the Committee agreed.

The Reporter also said that the Department of Justice had made three recommendations, and deferred to Mr. Letter for an explanation. Mr. Letter explained that the Department recommended that Rule 28.1 be amended in the following respects: (1) Add a sentence to the Committee Note to Rule 28.1(b) to clarify that the terms "appellant" (and "appellee") as used by rules other than Rules 28.1, 30, and 34, refer to both the appellant in an appeal and the cross-appellant in a cross-appeal (and to both the appellee in an appeal and the cross-appellee in a cross-appeal). (2) Amending Rule 28.1(d) to prescribe cover colors for supplemental briefs and briefs filed by an intervenor or amicus curiae (3) Modify the Committee Note to Rule 28.1(e) to clarify the length of an amicus curiae's brief. The Reporter recommended that the Committee accept these suggestions. By consensus, the Committee agreed.

Finally, the Reporter said that no commentator — save one — objected to any aspect of the proposed amendments except the word limits. For the most part, judges argued that the word limits

should be reduced (to 14,000, 14,000, 7,000, and 7,000), while practitioners argued that the word limits should be increased (to as much as 14,000, 28,000, 21,000, and 7,000). The Reporter said that, while he sympathized with the arguments of the judges, he thought that, no matter what word limit was chosen, the proposed amendments should be approved.

The Committee discussed the word limits. Although some support was expressed for the proposal that the word limits be decreased to 14,000, 14,000, 7,000, and 7,000, the consensus of the Committee was that the rule should be approved as published — that is, with word limits of 14,000, 16,500, 14,000, and 7,000. Committee members recognized that the almost universal circuit practice is to limit the second brief to 14,000 words, but argued that a longer word limit is appropriate in light of the fact that the second brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. At the same time, Committee members did not believe that expanding the size of the second brief beyond 16,500 words was appropriate, in light of the fact that the issues raised on a cross-appeal are usually not as many or as complex as the issues raised on appeal — and the fact that the appellee can always ask for additional words if necessary. Although Committee members thus regarded the published word limits as appropriate, they also concurred that disagreement over the word limits should not be allowed to endanger approval of the package of rules

A member moved that the cross-appeals package of amendments be approved as published, except that the changes suggested by the Style Subcommittee and Department of Justice be made. The motion was seconded. The motion carried (unanimously).

### 6. Rule 35(a) (disqualified judges/en banc rehearing) [Item No. 00-11]

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 35. En Banc Determination**

**(a) When Hearing or Rehearing En Banc May Be Ordered.** A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

**Committee Note**

**Subdivision (a).** Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v Baltimore & Ohio R.R Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the en banc procedure be set in motion in his case." *Id* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id* (quoting *Western Pac R R Corp v Western Pac R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8-9 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7

non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The Third Circuit alone qualifies the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach are reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. Nat'l Cable & Telecomm. Ass'n, Inc. v Gulf Power Co* , 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

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The Reporter recommended that the amendment be approved as published. He said that none of those who opposed the amendment had addressed the fact that Congress (in enacting § 46(c)) and the Supreme Court (in approving Rule 35(a)) have already decided to impose a uniform standard. It is highly unlikely that either Congress or the Court intended that "majority" mean one thing in half of the circuits and another thing in the other half. The Reporter said, however, that he did recommend that three changes be made to the Committee Note:

First, he recommends that the Note put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). One of the strongest arguments in favor of the amendment is that the existence of § 46(c) means that there should be a consistent national practice. In addition, Standing Committee members have argued that, in deciding what approach to adopt, this Committee should choose the approach that represents the best interpretation of § 46(c), whether or not that approach is the one that the Committee would choose as an original matter.

Second, he recommends that the Committee accommodate the request of one commentator that language be added to the Note to clarify that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d)[2] to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service — disqualified or not — are eligible to participate.

Finally, he recommends that a couple of arguments made by commentators who favored the amendment to Rule 35(a) be incorporated into the Note.

The Reporter presented the following revised draft of the Committee Note:

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**Subdivision (a).** Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R Co* , 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The

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[2]Section 46(d) provides: "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id* (quoting *Western Pac. R.R. Corp. v Western Pacific R R Co* , 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, seven of the courts of appeals follow the "absolute majority" approach. *See* Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

Six of the courts of appeals follow the "case majority" approach. *Id* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to vote.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The case majority approach represents the better interpretation of the phrase "the circuit judges . . . in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c) — which defines which judges are eligible to participate in a case being heard or reheard en banc — uses the similar expression "all circuit judges in regular active service." It is clear that "all circuit judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted the same way, the best reading of "the circuit judges . . . in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co* , 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply — and the citizens of the circuit must conform their behavior to — an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of the

number of circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc.

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A Committee member said that, although he had not decided how to vote, he is troubled by two things. First, he is concerned that *Shenker v. Baltimore & Ohio R R Co* could be read to hold that § 46(c) gives courts precisely the discretion that the amendment to Rule 35(a) seeks to take away Second, he views both the absolute majority and case majority approaches as reasonable interpretations of § 46(c). Both present a "worst case" scenario, and neither of the two worst case scenarios is obviously worse than the other. Why not allow each circuit to chose which worst case scenario it wants to risk?

A member responded that, as to the first point, he has read *Shenker* several times, and he does not believe that the Supreme Court held that the word "majority" in § 46(c) should mean different things in different circuits. The Reporter agreed; he said that he reads *Shenker* primarily as a private right of action case, holding that § 46(c) does not confer any rights upon litigants. Although the case contains broad dicta about courts having flexibility in setting up internal processes for considering rehearing requests, the case does not go so far as to hold that the threshold standard that must be met — a "majority" of judges — can be interpreted by circuits as they see fit.

A member agreed. He thinks that the status quo — in which "majority" means one thing in half of the circuits and another thing in the other half — is indefensible. He also pointed out that this is not a case in which the Committee is acting pursuant to its general policy of promoting uniformity in federal appellate practice and thereby reducing the burdens on attorneys who practice in more than one circuit. Rather, here Congress imposed uniformity, and the Committee is implementing Congress's decision.

A member said that he agreed that uniformity was the overriding objective. In fact, he said, he did not care whether Rule 35(a) was amended to adopt the absolute majority approach or the case majority approach; he cared only that parties were treated consistently in all federal appellate circuits. Other members disagreed in part. They expressed opposition to the absolute majority approach on the grounds that it counts each recusal as a vote against rehearing.

A member expressed his strong support for the amendment to Rule 35(a). He said that none of the commentators had suggested any reason why local conditions of the circuits justify inconsistent practices. He also said that Rule 35(a) should be amended through the Rules Enabling Act process before a disgruntled litigant contacts a member of Congress and Congress starts rewriting § 46(c).

A member noted the concern expressed by some of the commentators that adoption of the case majority rule would result in too many en banc proceedings. He said that he doubted that the change from the absolute majority approach to the case majority approach would make much of a real-world difference; at most, it might result in one additional en banc proceeding every few years.

Moreover, if a circuit's judges do not want too many en banc proceedings, they can simply decline to vote to hear cases en banc.

A member moved that the proposed amendment to Rule 35(a) be approved, with the changes to the Committee Note recommended by the Reporter. The motion was seconded. The motion carried (unanimously).

## V. Discussion Items

### A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)

Judge Alito invited Mr. Letter to introduce this item.

Mr. Letter reminded the Committee that this item arose out of a suggestion by Judge Stanwood R. Duval, Jr., that Rule 4 be amended to resolve a circuit split over whether appeals of orders granting or denying applications for attorney's fees under the Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) are governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). In the course of the first Committee discussion of Judge Duval's proposal, several members pointed out that the circuit split over the Hyde Amendment closely resembled the circuit split over whether appeals of orders granting or denying applications for a writ of error *coram nobis* were "civil" or "criminal" — a circuit split that was resolved by the amendment of Rule 4(a)(1) in 2002. The Department of Justice agreed to study the general question of whether Rule 4 should be amended to make it unnecessary or at least easier to distinguish "civil" appeals from "criminal" appeals.

Over the past three years, the Committee had suggested, and the Department had studied, a number of possible approaches. The latest such suggestion was that Rule 4 be amended to provide, in essence, that the time limitations of Rule 4(b) apply to direct appeals of criminal convictions, and the time limitations of Rule 4(a) apply to all other appeals. For example, Rule 4 could be amended to provide something like the following: "As used in this rule, 'appeal in a civil case' means every appeal except a direct appeal from a judgment of conviction entered under Fed. R. Crim. P. 32(k)."

Mr. Letter reported that the Department opposed this latest proposal. The Department identified a number of appeals in criminal proceedings — including appeals brought by defendants, appeals brought by the government, and even appeals brought by uncharged individuals — that must now be filed within a relatively brief period of time (usually 10 days, sometimes more). The proposal would apply a 60-day deadline to these appeals and thus inject considerable delay into criminal proceedings. Such delay could be avoided only if the Committee included a "laundry list" of exceptions to the basic principle, but the Committee has already determined that such a laundry-list approach would not represent much of an improvement over current law.

Mr. Letter also stressed that the circuit split over the Hyde Amendment appears to be the only existing split over whether a particular type of appeal is "civil" or "criminal" for purposes of Rule 4. That single circuit split does not justify a fundamental reworking of Rule 4 — a reworking that could cause unanticipated problems, given Rule 4's importance.

After a brief discussion, members quickly reached consensus that, despite the best efforts of the Committee and the Department, a workable solution to the problem of distinguishing "civil" from "criminal" appeals appears to be out of reach.

A member moved that Item No. 00-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

### B. Item No. 03-06 (FRAP 3 — defining parties)

Judge Alito invited Mr. Letter to introduce this item.

The Department of Justice has proposed an amendment to Rule 3. Under the amendment, all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could "opt out" of the case by filing a notice of withdrawal with the clerk.

The Committee discussed the proposed amendment at both its May 2003 and November 2003 meetings. At the November 2003 meeting, the Committee asked the Department and Ms. Waldron to study the possibility of amending the Appellate Rules to implement an "opt-in" system, such as that used by the Third Circuit. Under such a system, all parties to the district court action are initially presumed to be parties to the appeal. However, those who are interested in *remaining* parties must file a notice of appearance. Those who do not are dropped from the appeal.

Mr. Letter reported that, after giving the matter considerable thought, the Department believed that the opt-out system that it had proposed was preferable to the opt-in system used by the Third Circuit. The Department had a number of concerns about an opt-in system. For example, what would happen if parties were given 10 days to opt in, and a party did not receive notice of the appeal or the notice was delayed? This is a real concern for the Department, as its mail is routinely delayed for several days so that it can be irradiated. The Department believes that its proposal would create less confusion and less work for the clerks.

Ms. Waldron said that the appellate clerks disagree The consensus among appellate clerks is that the status quo works fine. In most circuits, the clerks' offices determine who are parties to the appeal and whether each party is an appellant or appellee by examining the district court docket, the

notice of appeal, the order being appealed, and the rest of the record. The clerks rarely have difficulty figuring out who is a party or whether a party is an appellant or appellee. On the rare occasions when a question arises, it is easily dealt with by the court and the parties. Whatever problems exist are not serious enough to justify the major change in appellate practice — and the major new burdens on clerks and parties — that would be imposed by the adoption of either an opt-in or opt-out system.

The Committee debated the three options: maintaining the status quo, adopting an opt-out system such as that proposed by the Department, or adopting an opt-in system such as that used by the Third Circuit. Committee members identified the potential costs and benefits of each option. In the end, all Committee members, save one, spoke in favor of maintaining the status quo. Members cited the following reasons, among others:

First, the problem addressed by the Department's proposal does not appear to be serious. There is rarely any doubt about whether someone is a party to an appeal or about whether a party is an appellant or appellee. In the rare cases in which there is doubt, the parties can easily ask the court for clarification.

Second, the Department's proposal would burden the clerks and the parties. Few parties are likely to take the trouble to opt out of a case — even a case in which they have little interest. Rather, parties are likely to remain in the appeal so that they can receive the briefs and other papers and keep an eye on the case. As a result, there will be cases in which hundreds of parties in the district court will be deemed parties in the court of appeals — and every one of those hundreds of parties will have to be served with briefs and other papers — even though very few of those parties will have a real stake in the appeal.

Third, the Department's proposal would increase the number of conflicts of interest faced by attorneys and the number of recusals faced by judges. At present, when an appellate attorney decides whether she has a conflict, or an appellate judge decides whether she must disqualify herself, the attorney or the judge takes into account only the "real" parties to the appeal, not all of those who were parties in the district court. By defining all parties to the district court action as parties to the appeal — including those (potentially numbering in the hundreds) who have no plans to actively participate in the appeal but who do not bother to opt out — the Department's proposal would complicate conflict-of-interest and recusal determinations.

Mr. Letter defended the Department's proposal. He argued that the problem is serious enough to merit an amendment to the Appellate Rules; questions regularly arise about who is a party or whether a party is an appellant or appellee. Furthermore, the Department's proposal should actually ease the burden on the clerks. Under the current system, they must examine the district court docket, notice of appeal, order being appealed, and rest of the record and make an educated guess about the configuration of parties on appeal. Under the Department's proposal, all of that work would be done for them by the rule. Finally, the conflict-of-interest and recusal issues raised by Committee members

argue in favor of a rule that leaves no doubt about the parties to the appeal. Perhaps an opt-in system would be preferable to an opt-out system, but either system would provide clearer guidance to attorneys and judges than the status quo.

A member moved that the Department's proposal be approved. The motion failed for lack of a second.

A member moved that Item No. 03-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (6-1).

### C. Item No. 03-08 (FRAP 4(c)(1) — mandate simultaneous affidavit)

Judge Alito invited Mr. Letter to introduce this item.

Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits. Under the prison mailbox rule, a paper is considered timely filed if it is deposited by an inmate in his prison's internal mail system on or before the last day for filing. The rule provides that "[t]imely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding — holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.

The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended.

Mr. Letter reported that the U.S. Attorneys have not found that this issue is a problem. In general, when a question arises about the timeliness of a filing by a prisoner, U.S. Attorneys find it easier to respond to the prisoner's filing on the merits than to engage in litigation over timeliness. The Department does not believe that Rule 4(c)(1) needs to be amended.

A member said that he did not think that the problem identified by Prof. Pucillo was serious enough to warrant amending Rule 4(c)(1). Other members agreed.

A member moved that Item No. 03-08 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

### D. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity)

Judge Alito invited Mr Letter to introduce this item.

Under Rule 4(a)(1)(B), the 30-day deadline to bring an appeal in a civil case is extended to 60 days "[w]hen the United States or its officer or agency is a party." Similarly, under Rule 40(a)(1), the 14-day deadline to petition for panel rehearing is extended to 45 days in a civil case in which "the United States or its officer or agency is a party." (By virtue of Rule 35(c), the extended deadline of Rule 40(a)(1) also applies to petitions for rehearing en banc).

Mr. Letter said that it is unclear whether the extended deadlines provided in Rule 4(a)(1)(B) and Rule 40(a)(1) apply when an officer or employee of the United States is sued in her *individual* capacity. Mr. Letter said that this ambiguity does not exist in the Civil Rules. Civil Rule 12(a)(3)(A) extends the deadline for responding to a summons and complaint from 20 to 60 days for "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity," and Civil Rule 12(a)(3)(B) goes on specifically to provide that:

> An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint . . . within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

At its November 2003 meeting, the Committee considered a proposal by the Department that Appellate Rule 4(a)(1)(B) and Appellate Rule 40(a)(1) be amended so that the Appellate Rules are as clear as the Civil Rules about the deadlines that apply when an officer or employee of the United States is sued in an individual capacity. Although no Committee member objected to the substance of the proposal, Committee members did point out that the proposed amendments drafted by the Department were too broad. Read literally, those amendments would have provided extensions in *any* case in which an officer or employee of the United States was sued, even if the case had nothing to do with the officer's or employee's performance of duties on behalf of the United States. The Department agreed to redraft the proposed amendments.

Mr. Letter said that the Department had redrafted the proposed amendments to Rule 4(a)(1)(B) and Rule 40(a)(1) so that they now provide extensions only when an officer or employee of the United States is sued in an individual capacity "for acts or omissions occurring in connection with the performance of duties on behalf of the United States." (The full text of the amendments, as well as draft Committee Notes, appear in the Committee's agenda book under Tab V-D.) Committee members agreed that the Department's changes met the Committee's concerns.

A member moved that the amendments to Rule 4(a)(1)(B) and Rule 40(a)(1) be approved for publication. The motion was seconded. The motion carried (unanimously).

The Reporter agreed that he would review the draft amendments and Committee Notes and present "cleaned up" versions for the Committee to consider at its fall 2004 meeting.

## E. Items Awaiting Initial Discussion

### 1. Item No. 03-10 (new FRAP 25.1 — privacy protections)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Section 205 of the E-Government Act of 2002 requires every federal court to maintain a website and to make specific information available through that website. The Act specifically provides that "each court shall make any document that is filed electronically publicly available online" (§ 205(c)(1)), and the Act authorizes a court to "convert any document that is filed in paper form to electronic form" (§ 205(c)(1)). Any document that is so converted must "be made available online" (§ 205(c)(1)). The Act thus establishes broad access to documents that are filed in or converted to electronic form.

The Act also recognizes that such broad access raises important privacy concerns. To address those concerns, the Act directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically" (§ 205(c)(3)(A)(i)). This Committee and the other advisory committees have been charged with implementing rules to "provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts" (§ 205(c)(3)(A)(ii)).

To coordinate the response to this directive, the Standing Committee has appointed an E-Government Subcommittee. That Subcommittee met in January 2004 and agreed upon a plan for developing the privacy rules mandated by the E-Government Act. Pursuant to that plan, each reporter has prepared a draft privacy rule for his advisory committee, based upon a common template. Each reporter will collect the comments of his advisory committee, and the chairs and reporters will meet in

June to compare notes and to attempt to agree upon common language that can be presented to all of the advisory committees in the fall.

The Reporter presented the following draft of a new Rule 25.1 for this Committee to consider:

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**Rule 25.1 Privacy in Court Filings**

**(a) Limits on Disclosing Personal Identifiers.** If a party includes any of the following personal identifiers in an electronic or paper filing, the party is limited to disclosing:

(1) only the last four digits of a person's social-security number;

(2) only the initials of a minor child's name;

(3) only the year of a person's date of birth;

(4) only the last four digits of a financial-account number; and

(5) only the city and state of a home address.

**(b) Exception for a Filing Under Seal.** A party may include complete personal identifiers in a filing if it is made under seal. But the court may require the party to file a redacted copy for the public file.

**(c) Social-Security Appeals; Access to Electronic Files.** In an appeal involving the right to benefits under the Social Security Act, access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record; and

(2) a person who is not a party or a party's attorney may have remote electronic access to:

(A) the docket maintained under Rule 45(b)(1); and

(B) an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

**Committee Note**

This rule is adopted in compliance with § 205(c)(3) of the E-Government Act of 2002 (Public Law 107-347). Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." This rule goes further than the E-Government Act in protecting personal identifiers, as this rule applies to paper as well as electronic filings. Paper filings in many districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore they raise the same privacy and security concerns when filed with the court.

This rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/ Policy.htm. The Judicial Conference policy provides that — with the exception of Social Security appeals — documents in civil case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACER, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise

would be included in court filings and by altogether prohibiting electronic access to the files in Social Security cases by members of the general public. (Social Security appeals are unique in their great number, their extensive records, and their focus on medical records and other intensely private information.)

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from § 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

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The Reporter told the Committee that the draft Committee Note was copied from the Committee Note that accompanied the template rule. Because both the Style Subcommittee and the Reporter had made substantial changes to the template rule, the template Committee Note does not match up well with the draft Appellate Rule. The Reporter suggested that the Committee not concern itself with the Note, as the Note will have to be rewritten once the advisory committees agree upon how the privacy rules should be drafted. The Reporter invited the Committee to comment on the proposed rule.

In the discussion that followed, Committee members raised a number of concerns about draft Rule 25.1:

1. The rule is underinclusive in exempting only Social Security appeals from electronic access Many categories of cases — including immigration cases, Black Lung cases, medical malpractice cases, employment cases, and bankruptcy cases — differ little from Social Security cases in the sensitivity of the information contained in their records. Why are Social Security cases exempt from electronic access but not, say, Black Lung cases?

2. The rule imposes an onerous burden on parties — and particularly on the federal government. Subdivision (a) of the rule requires personal identifiers to be redacted from every "filing" whether or not that "filing" is made on paper or electronically. Assuming that "filing" means everything filed in a case — including appendices and administrative records — parties often will have to review

and redact thousands of pages of documents. The government does not have the resources to, for example, redact every personal identifier on every piece of paper filed in every immigration case.

3. The rule will pose difficulty in cases in which a personal identifier is central to the case. For example, in forfeiture cases or cases in which the sufficiency of a warrant is at issue, the parties may need to refer repeatedly to a personal identifier. How will this litigation be conducted under Rule 25.1?

4. The rule may need to be amended to provide both an "opt-in" procedure — that is, a procedure under which a party (e.g., a plaintiff in a medical malpractice case) can ask that her case be treated with a high degree of privacy — and an "opt-out" procedure — that is, a procedure under which a party (e.g., the government in a forfeiture case) can ask that the privacy rules not apply at all to a case.

5. The title of the rule is misleading in referring to "Privacy in Court Filings." It implies that the rule protects the privacy of the paper files at the courthouse. In fact, the rule does nothing to limit access to such files. The rule or Note should make that clear.

6. The rule (or at least the Note) needs to explain more clearly that, even when electronic access to a record is forbidden (such as in Social Security cases), "non-electronic" access to the record is still permitted. In other words, unless the record is sealed, it will still be available to the public and the media at the courthouse, even if electronic access to the record is forbidden.

7. A member warned that the media are likely to raise strong objections to both the provision requiring that personal identifiers be redacted and the provision exempting Social Security files from electronic access.

8. Finally, a member suggested that Rule 25.1(c)(2) would be clearer if the word "only" was inserted after "electronic access," so that the rule would read: "a person who is not a party or a party's attorney may have remote electronic access *only* to."

Judge Alito thanked the Committee members for their comments and said that the Reporter and he would convey them to the other advisory committee chairs and reporters in June

## VI. Additional Old Business and New Business

The Committee addressed one item of old business:

The Reporter reminded the Committee that both the Civil Rules Committee and the Appellate Rules Committee have been working on amendments that would clarify how the 3-day extension provided by Civil Rule 6(e) and Appellate Rule 26(c) should be calculated. The Civil Rules Committee

has been taking the lead; in August 2003, it published for comment a proposed amendment to Rule 6(e). Under that amendment, a party who is required or permitted to act within a prescribed period would first calculate that period, without reference to the 3-day extension provided by Rule 6(e), but with reference to the other time computation provisions of the Civil Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 6(e), the party would add 3 days. The party would have to act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party would have to act by the next day that is not a Saturday, Sunday, or legal holiday.

At its November 2003 meeting, the Appellate Rules Committee approved for publication a proposed amendment to Appellate Rule 26(c) that would follow the approach of the proposed Civil Rule. A complication has arisen, though. Some of the commentators on the proposed amendment to Civil Rule 6(e) complained that it gives parties too much time, and suggested that time be calculated differently. In particular, commentators suggested that a party should have to count the prescribed number of days and then, even if the last of those days falls on a Saturday, Sunday, or legal holiday, immediately count the three extra days. The paper would be due on the third extra day, unless that day fell on a Saturday, Sunday, or legal holiday.

Prof. Edward Cooper, the Reporter to the Civil Rules Committee, drafted an alternative amendment to Rule 6(e) that would implement the approach urged by the commentators. That amendment was distributed via e-mail to members of the Appellate Rules Committee. The Civil Rules Committee has informed Judge Alito that, before it considers the alternative amendment, it would like to get the input of the Appellate Rules Committee. Judge Alito invited reactions to the alternative.

The Committee quickly reached consensus that the alternative draft was inferior to the original draft for three reasons:

First, the alternative draft is not as clear as the original draft. In drafting time-counting rules, clarity is the most important goal. An extra day or two of delay is an acceptable price to pay for clarity. The alternative draft is difficult to understand. Without the Committee Note, it would be almost impossible to understand.

Second, the alternative draft is not as forgiving as the original draft. The original draft adds the three days in the most generous manner; mistakes are likely to result in papers being filed earlier than necessary. The alternative draft does not add three days in the most generous manner; mistakes could result in blown deadlines.

Third, in some circumstances, the alternative draft would render the three-day extension meaningless. Consider the situation in which the last "prescribed day" is a Saturday, and Monday is a legal holiday. Without the extension, the paper would be due on Tuesday. With the extension, the

paper would be due on Tuesday. What's the point of the extension? (And, if Monday is not a legal holiday, the three-day extension provides only one extra day, rendering it almost meaningless.)

Judge Alito asked the Reporter to communicate the Committee's views to the Civil Rules Committee.

Mr. Letter asked to raise one item of new business. He said that the Department of Justice was considering proposing that the Appellate Rules be amended to permit parties to use both sides of the page in submitting briefs and other papers. Such a practice would save paper and file space. The agenda books of the advisory committees are printed on both sides of the page; why couldn't the same practice be followed by the courts of appeals?

One member said that a similar proposal was floated a few years ago, and the circuit judges were violently opposed. Many of them use the blank sides of the pages to make notes, and others use highlighting or other marking that bleeds through the page. She advised the Committee not to stir up this hornet's nest again. Other members of the Committee concurred.

## VII. Dates and Location of Fall 2004 Meeting

Judge Alito asked the Committee to hold November 9 and 10 for the fall meeting. It is likely that the Committee will need to meet only on November 9, but Judge Alito asked the Committee also to hold November 10 for the time being. Judge Alito said that the location of the meeting will be announced after the AO has an opportunity to explore some of the suggestions made by Committee members.

## VIII. Adjournment

The Committee adjourned at 12:30 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 17-18, 2004
Washington, D.C.
**Draft Minutes**

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## ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 17-18, 2004. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Professor Steven Gensler, Supreme Court Fellow with the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice was John S. Davis, Associate Deputy Attorney General.

## INTRODUCTORY REMARKS

Judge Levi reported that no major amendments to the rules were scheduled to take effect on December 1, 2004. He noted that the Supreme Court had recommitted the proposed amendment to FED. R. EVID. 804(b)(3) — governing the hearsay exception for statements against penal interest — in light of its recent decision in *Crawford v. Washington* In *Crawford,* the Court substantially revised its Confrontation Clause jurisprudence, thus making the proposed rule amendment inappropriate. He added that the Advisory Committee on Evidence Rules had decided to defer consideration of any

hearsay exception amendments until adequate case law develops to determine the meaning and implications of the *Crawford* case.

Judge Levi pointed out that the federal courts were facing a severe budget crisis that could result in substantial layoffs and furloughs of court staff. He explained that it was important for the committee to consider its rules decisions in the light of their impact on the resources of the courts. He noted that amendments have been proposed to the bankruptcy rules that could save the courts more than a million dollars in postage and handling costs by facilitating electronic notices and use of the national Bankruptcy Noticing Center. He explained that the committee would be asked to expedite the rulemaking process to achieve the anticipated savings earlier.

Judge Levi said that the project to restyle the civil rules was achieving excellent progress. The Style Subcommittee, he noted, had now reached the landmark of having completed a first draft of all 86 rules.

Judge Levi reported that the E-Government Subcommittee had met the day before the committee meeting to refine the guidance that it would provide the advisory committees in drafting rules amendments to implement the E-Government Act of 2002. The statute requires that rules be promulgated under the Rules Enabling Act to protect privacy and security concerns implicated by posting court case files on the Internet.

Judge Levi noted that the Court Administration and Case Management Committee had been working diligently on privacy and security issues for three years and had offered constructive comments on the latest proposed guidance to the advisory committee. He added that the E-Government Subcommittee had made a great deal of progress at its meeting in addressing a number of difficult policy and practical questions raised when court documents that had been practically obscure in the past are now posted on the Internet. He observed that there will likely have to be some differences in detail among the amendments proposed by the advisory committees. The bankruptcy rules, he noted, will be the most affected by privacy concerns because of the heavy use of social security numbers in bankruptcy cases.

Judge Levi reported that he attends most of the meetings of the advisory committees. Each committee, he observed, has a different personality, reflecting in part the style of its chair and reporter and the role of the Department of Justice He emphasized that the rules process is blessed with great chairs and reporters, and the work product of the committees is truly outstanding.

Judge Levi noted that the Chief Justice had extended Judge Alito's term as chair of the Advisory Committee on Appellate Rules for an additional year. He also reported that Judge Susan Bucklew had been selected to replace Judge Carnes as chair of the Advisory Committee on Criminal Rules and Judge Thomas Zilly had been selected to replace Judge

Small as chair of the Advisory Committee on Bankruptcy Rules. He said that Judge Carnes and Judge Small had been outstanding and successful committee chairs, and they would be sorely missed. He also reported that the Standing Committee would greatly miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — Charles Cooper and Patrick McCartan. Finally, Judge Levi emphasized that one of the highlights of his legal career had been to work closely with Professor Cooper as reporter to the Advisory Committee on Civil Rules.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee voted without objection to approve the minutes of the last meeting, held on January 15-16, 2004.**

## REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring 34 bills introduced in the 108th Congress that would affect the federal rules.

He noted that legislation was still pending, proposed by the bail bond industry, that would directly amend the Federal Rules of Criminal Procedure and limit the authority of a judge to forfeit a bond. He said that the bill had been reported out by the House Judiciary Committee, but was opposed by the Judicial Conference. The legislation, he said, had not reached the House floor, thanks to efforts by the Administrative Office and the Department of Justice He added that: (1) there had been recent communications with representatives of the bail bond industry, but the industry had not changed its essential position; and (2) there has been no action on the bill in the Senate.

Mr. Rabiej noted that legislation sponsored jointly by the Judicial Conference and the Department of Justice should be be enacted shortly to amend the E-Government Act. Under the present law, a party has the right to file an unredacted version of a document under seal with the court. In accordance with the revised E-Government Act, the public file would contain only a redacted version of the document or a reference list identifying redacted information accessible only to the parties and the court. He added that the E-Government Subcommittee and the advisory committees are now implementing the rulemaking requirements of the Act.

Mr Rabiej reported that the Class Action Fairness Act was expected to be brought to the Senate floor for debate sometime in June.

He noted that comprehensive crime victims' rights legislation had passed the Senate in April 2004 on a 96-1 vote. It would give criminal victims a broad array of rights in such areas as protection against the accused, notice of proceedings, being heard at court proceedings, conferring with prosecutors, and receiving restitution. He added that the legislation was expected to pass the House of Representatives, but the chair of the House Judiciary Committee appeared to be holding up the legislation for tactical reasons.

Mr. Rabiej said that the crime victims legislation will have an impact on the criminal rules. He explained that the Advisory Committee on Criminal Rules had a separate proposal ready for final approval that would amend FED R. CRIM. P. 32 to extend the right of allocution to victims of all crimes, not just victims of violence or sexual abuse.

Mr. Rabiej reported that two more bills had been introduced in the preceeding week that appeared to be moving quickly through the legislative process. First, he said, a hearing would be held within a week on H.R. 4547, a bill designed to protect children from drug violence. He noted that it would directly amend FED. R. CRIM. P. 11 to impose additional conditions on a court before it may accept a plea agreement. The second new bill (H.R. 4571), designed to limit "frivolous filings," would directly amend FED. R. CIV P. 11 by mandating that a judge impose sanctions for a violation of the rule.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4)

He reported that the Center was completing work on developing a new weighted caseload formula for the district courts He explained that the study had been completed without requiring judges to keep detailed diaries of their daily activities.

Mr Cecil noted that the Center had also completed a report comparing class actions in the federal and state courts Among other things, the report addresses why attorneys bring cases in one court system rather than the other and finds few differences between federal and state judges and cases. Finally, he pointed to a new Center report on sealed court settlements. One of the findings of the report is that only 1 of every 227 civil cases in the federal courts contains a sealed settlement.

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REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of May 14, 2004. (Agenda Item 6)

*Amendments for Final Approval*

FED. R. APP. P. 4(a)(6)

Judge Alito said that the proposed amendments to Rule 4(a)(6) (reopening the time to file an appeal) provides an avenue of relief for parties who fail to file a timely appeal because they have not received notice of the entry of judgment against them. The amendment allows a court to reopen the time to appeal if certain conditions are met. First, the court must find that the party did not receive notice of the judgment within 21 days after entry. Second, the party must move to reopen the time to appeal within 7 days after receiving notice of the entry of judgment. And third, the party must move to reopen within 180 after entry of the judgment.

Judge Alito pointed out that use of the word "notice," appearing twice in the rule, has been unclear. Most courts have interpreted the existing rule as requiring that the type of notice required to trigger the 7-day period to reopen be written notice. Others, though, have included other types of communications. The proposed amendment, he said, offers a clear solution by specifying that notice must be the formal clerk's office notice required under FED. R. CIV. P. 77(d).

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R. APP. P. 26(a)(4) and 45(a)(2)

Judge Alito stated that the proposed amendments to Rule 26 (computing time) and 45 (when court is open) would replace the incorrect phrase "President' Day" with "Washington Birthday," the official, statutory name of the holiday.

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R. APP. P. 27(d)(1)(E)

Judge Alito explained that Rule 32 (form of briefs) sets out typeface and type-style requirements But Rule 27, which specifies the requirements for motions, does not. The proposed amendment would add a new Subdivision (E) to Rule 27(d)(1) to make it clear

that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motions papers.

Judge Alito said that the proposed amendment had received support during the public comment period, although one comment suggested increasing the number of words allowed in motions. He said that there was also some sentiment to express the length limits in terms of words, rather than pages. But, he explained, clerks of court favor a page limit because it is much easier to verify.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

FED. R. APP. P. 28(c) & (h), 28.1, 32(a)(7)(C), and 34(d)

Judge Alito reported that the current rules say very little about briefing in cases involving cross-appeals. As a result, local rules fill in the gaps with procedural guidance. The advisory committee, he said, recommended moving the few provisions in the current national rules addressing cross-appeals into a new Rule 28.1 and adding several new provisions to fill the gaps in the existing rules. The new Rule 28.1 (cross-appeals) would parallel Rule 28 (briefs). In addition, conforming amendments would be made to Rule 28(c) (briefs), 32(a)(7)(C) (certificate of compliance), and 34(d) (oral argument).

The provisions of the new rule, he said, follow the local rules of every circuit save one. They would authorize four briefs and specify their lengths and colors. (1) The appellant's principal brief would be limited to 14,000 words. (2) The appellee's combined response brief and cross-appeal principal brief would be limited to 16,500 words (3) The appellant's response and reply brief would be limited to 14,000 words. (4) Finally, the appellees's reply brief would be limited to 7,000 words.

Judge Alito said that the lawyers who had commented on the proposal uniformly had recommended higher word limits, while the judges who had commented wanted fewer words. Professor Schiltz added that the local rules of the circuits generally prescribe word limits of 14,000, 14,000, 14,000, and 7,000 for the four briefs. The advisory committee, he said, had decided to increase the second brief to 16,500 words because it serves two functions — responding to the appellant's principal brief and initiating the principal brief in the cross-appeal.

Several members said that the advisory committee's proposal to authorize an additional 2,500 words for the second brief was a sound compromise that should accommodate most cases and result in fewer motions by attorneys seeking word extensions.

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R. APP. P. 32.1

Judge Alito reported that the the proposed new Rule 32.1 (citing judicial dispositions) had attracted more than 500 public comments.

He noted that the proposed rule enjoyed the support of the major bar associations. It would equalize the treatment of unpublished opinions with other types of non-precedential materials presented to the courts of appeals. The rule, he emphasized, would merely prevent a court of appeals from prohibiting the citation of unpublished opinions. It would not require a court to give unpublished opinions any weight or precedential value, or even to pay any attention to them. It would just allow the parties to cite them. He said that prohibiting the citation of court opinions undermines confidence in the courts of appeals and the judiciary. It implies that there is something second-class about unpublished opinions. The practice, he said, is very difficult to explain to lay people and most practitioners.

On the other hand, he pointed out, opponents of the rule claim that it will have an adverse impact on judges because they will have to spend more of their limited time on crafting unpublished opinions. This, it is claimed, would both detract from the quality of judges' published opinions and lead to the issuance of more one-sentence orders. He noted, too, that opponents of the rule assert that it will inevitably require lawyers to take the time to read unpublished opinions and increase expenses for their clients.

Judge Alito emphasized that the advisory committee had taken the adverse comments very seriously, but it had concluded that there is simply no empirical support for them. He noted that a number of the federal circuits currently permit citation of unpublished opinions. The committee, he said, had not received any comments from judges on the courts allowing citation that the practice has increased their work. Moreover, he added, the trend at both the federal and state levels is moving away from non-citation rules.

Judge Alito said that, as a result of the public comments, the advisory committee had deleted from the proposed rule a clause that would have prohibited a court of appeals from prohibiting or restricting citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispostions."

Judge Levi observed that the sheer size of the body of comments was daunting, even though many of the comments seemed to copy each other. He congratulated Professor Schiltz for a superb job in summarizing the comments.

One of the members suggested that the key issue was not citation, but the status of unpublished opinions. He pointed out that the committee note refers to unpublished opinions as "official actions" of the court. But, he noted, they are commonly crafted by law clerks and only endorsed by judges. They do not receive the same scrutiny as published opinions and clearly do not represent the views of the full court. The proposed rule, he said, would elevate unpublished opinions into actions of the court and give them a status that they do not presently have. He recommended that the proposal be deferred and the circuits be given time to issue their own rules addressing the contents and effect of unpublished opinions. He added that this approach would promote transparency, for the circuits would articulate what they are doing with regard to unpublished opinions.

One lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court. He added that, regardless of precedential value, an unpublished opinion is in fact an official disposition by a government body.

Two members pointed out that the proposed rule had given rise to concern among state-court leadership as to the use by the federal courts of unpublished state-court opinions. For example, a federal court applying the doctrine in *Erie R.R. Co v Tompkins* might cite an unpublished state-court opinion as establishing binding state law in a way that the opinion was not intended to be used. Judge Alito responded that the advisory committee's deliberations had focused on citing a federal circuit court's own decisions, not on citing state-court opinions. Moreover, he said, the rule does not address what weight is to be given to unpublished opinions. He added, though, that he would not object to amending the rule to limit its application specifically to federal opinions.

One participant pointed out that unpublished opinions are widely available today, and the circuits are free to give them precedence or not, as they see fit. He argued that lawyers should be free to call a court's attention to cases decided by their colleagues that have similar facts and issues. Other panels of the court, he said, should be made aware of what one panel has done with a similar pattern of facts, particularly in sentencing guideline cases. He added that it would be beneficial for courts to look at their unpublished opinions as part of their efforts to achieve consistency and reliability in circuit case law.

One member observed that there are very strong arguments on both sides of the issue, but on balance he favored allowing the courts of appeals to continue their non-

citation policies. He said that the adverse consequences predicted by opponents of the rule might well come to pass. He emphasized the vital need for courts to have a two-tiered opinion system because some cases simply do not deserve the same time and attention as others. He also said that he was not convinced that it is appropriate to compare unpublished opinions of a court of appeals with other types of nonprecedential materials cited to the court. Unpublished opinions, he said, inevitably carry far more weight with the lawyers and the court because they have been signed off on by three judges of the deciding court.

One member noted that he had been struck by how strongly a number of judges feel about the issue. He said that the arguments on both sides appear to be empirical in nature, but they are essentially not provable at this point. He stressed the need for empirical research and suggested that the committee not be put in the position of accepting one side of the argument and rejecting the other without further data. He argued that appropriate research would focus on the practices and results in those circuits that allow citation of unpublished opinions. He conjectured that it should be possible to obtain good empirical data because several circuits now allow citation.

Judge Levi said that he agreed and had spoken with the Federal Judicial Center about what shape an empirical study might take. He emphasized that the proposed rule was very controversial. And in dealing with controversial matters, he said, the rules committees have consistently sought strong empirical support for proposed amendments. In this case, he noted, nine circuits now allow citation of unpublished opinions, and four do not. Researchers, for example, could examine the courts that allow citation to see whether disposition times have lengthened or the number of judgment orders has increased. In addition, judges and lawyers might be surveyed to examine the practical impact of citation policy on their work. Lawyers might be surveyed to examine whether citation policy affects the costs of legal practice. Attention might also be directed to the four circuits that prohibit citation to see whether there are any special conditions in those circuits that make them different.

Judge Levi added that it would be seek to proceed to the Judicial Conference's approval at this time of the proposed new rule without appropriate empirical data. Obtaining the data would better inform the committee and take much of the passion out of the debate. If the data turn out to support the proposed rule, he said, the committee would be in a much better position to secure Conference approval.

Several participants endorsed Judge Levi's approach, citing the great sensitivity of the issue among circuit judges, the need for a period of reflection, and the value of gathering whatever empirical data can be produced. One member added that there were powerful arguments in favor of the proposed amendment, but it would be a mistake institutionally to go forward with a rule that has generated so much opposition. He said

that, as a matter of basic policy, the committee should proceed with a controversial proposal only if: (1) there is a compelling need for the rule; and (2) the committee is convinced that the opposition is clearly wrong. Other participants endorsed this analysis, emphasizing the need for empirical information and institutional restraint. They added that a year's delay for study would not cause any harm and may even lead some opponents to reassess their positions.

Judge Alito agreed that a study would be helpful, especially since opposition to the rule was based largely on empirical observations. Mr. Cecil added that the Research Division of the Federal Judicial Center was prepared to conduct the research. He cautioned, however, that the results of the study may not in fact solve the committee's problems. The key issue, he said, is how judges perform their work in chambers. That, he said, is a matter of utmost sensitivity.

**Judge Kravitz moved to have the committee take no action on the proposed new Rule 32.1 and return it to the advisory committee, with the expectation that the advisory committee will work with the Federal Judicial Center to conduct appropriate empirical studies.** The studies, for example, would explore the practical experience in the circuits that have adopted local rules allowing citation of unpublished opinions. The advisory committee would then have the discretion to make a fresh decision on the matter and return to the standing committee with a proposal, or not.

One member asked that the record reflect that the committee's discussion of the matter and its returning the rule to the advisory committee did not reflect a judgment by the Standing Committee on the merits of the proposal. Rather, he said, the committee's concerns were directed purely to instutional values and the rulemaking process. Judge Kravitz agreed to the clarification.

One member added that the advisory committee should take advantage of the delay to explore the impact of the rule on citing unpublished state-court opinions.

**The committee without objection approved Judge Kravitz's motion by voice vote. Therefore, it decided to take no action on the proposed new Rule 32.1, return it to the advisory committee, and recommend that appropriate empirical study be undertaken.**

FED. R. APP. P. 35(a)

Judge Alito reported that Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) both specify that "a majority of the circuit judges who are in regular active service" may order that an appeal or other proceeding be heard or reheard en banc. Although the standard applies to all the courts of appeals, he said, the circuits are divided in

interpreting the provision when one or more active judges are disqualified in a particular case. Seven circuits follow the "absolute majority" approach, counting disqualified judges in the base to calculate a majority. Six circuits follow the "case majority" approach, requiring a majority only of the active judges who are not recused.

Judge Alito emphasized that the advisory committee believes that whatever the rule means, it should mean the same all across the country. There is no principled basis, he said, for having different interpretations of the same rule. The primary objective of the proposed amendment, thus, was to promote national uniformity. The advisory committee, he said, believed that the better interpretation is the case majority approach because it is most consistent with what Congress must have intended in enacting the statute. He noted that 28 U.S.C. § 46(c) uses the phrase "circuit judges . . . in regular active service" twice. In the second sentence, the phrase clearly does not include disqualified judges, since disqualified judges obviously cannot participate in a case heard en banc. The proposed amendment to Rule 35(a), he added, was not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d).

**The committee without objection approved the proposed amendment for final approval by voice vote.**

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 17, 2004. (Agenda Item 7)

### *Amendments for Final Approval*

### FED. R. BANKR. P. 1007

Judge Small reported that the proposed amendment to Rule 1007 (lists, schedules, and statements) would require a debtor to file a mailing matrix with the court, a practice now required universally by local court rules. The matrix must include the names and addresses of all entities listed on Schedules D-H, including holders of executory contracts and unexpired leases.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

FED. R. BANKR. P. 3004 and 3005

Judge Small explained that the proposed amendments to Rules 3004 (filing of claims by a debtor or trustee) and 3005 (filing of a claim, acceptance, or rejection by codebtor) deal with the situation where an entity other than the creditor files a proof of claim. The amendments to Rule 3004 make it clear that the third party may not file a proof of claim until the exclusive time has expired for the creditor to file its own proof of claim. In addition, FED. R. BANKR. P. 3005 would no longer permit the creditor to file a proof of claim to supersede the claim filed by the debtor or trustee. Instead, the creditor could amend the proof of claim filed by the debtor or trustee. The changes would make the rules consistent with § 501(c) of the Bankruptcy Code.

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R. BANKR. P. 4008

Judge Small reported that Rule 4008 (reaffirmation agreement) would be amended to establish a deadline of 30 days after entry of the order of discharge to file a reaffirmation agreement with the court. He said that some public comments had recommended a shorter period, and the advisory committee had considered a deadline of 10 days following discharge. But, he explained, the shorter time limit would not be practical because it takes several days for the the noticing center to process and distribute discharge notices.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

FED R. BANKR. P. 7004

Judge Small reported that the proposed amendment to Rule 7004 (process and service) would authorize the clerk of court to sign, seal, and issue a summons electronically. He noted that the rule does not address the service requirements for a summons, which are set out elsewhere in Rule 7004.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

FED. R. BANKR. P. 9006

Judge Small stated that Rule 9006 (time) would be amended to remove any doubt that the additional three-day period given a responding party to act when service is made

on the party by specified means — by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served — are added after a rule's prescribed period to act expires.

The committee considered and approved the proposed amendment to Rule 9006 in conjunction with a proposed parallel amendment to FED. R. CIV. P. 6(e).

**The committee without objection approved the proposed amendment for final approval by voice vote.**

OFFICIAL FORMS 6-G, 16-D, and 17

Judge Small reported that the proposed amendments to the forms had not been published because they were technical in nature. The change to Form 6-G is required to conform the form to the proposed amendment to Rule 1007, and the revisions to Forms 16-D and 17 reflect the abrogation of Official Form 16-C in 2003. He asked that: (1) the changes to Form 16-D and 17 take effect on December 1, 2004; and (2) the change to Form 6-G take effect on December 1, 2005, to coincide with the effective date of the proposed amendments to Rule 1007.

**The committee without objection approved the proposed amendments to the forms for final approval by voice vote.**

*Amendments for Publication*

FED. R. BANKR. P. 1009, 4002, and OFFICIAL FORM 6-I

Judge Small pointed out that the proposed amendments to Rule 1009 (amendments to schedules and statements), Rule 4002 (debtor's duties), and Form 6-I (schedule of debtors' current income) had been proposed by the Executive Office for United States Trustees. He noted that the amendment to Rule 4002 was controversial.

The U.S. trustee organization had asked the committee for a rule that would require debtors to bring a substantial number of documents with them to the meeting of creditors under § 341 of the Code. The proposal, he said, had attracted the attention and strong opposition of the debtors' bar. The advisory committee had received more than 80 letters from attorneys opposing the proposal, even though the committee had not approved or published it.

Judge Small noted that the advisory committee's consumer subcommittee had met in Washington to consider the proposal, and it had invited several knowledgeable trustees and attorneys to participate, along with representatives of the U.S. trustee organization. At the meeting, the subcommittee decided that the most of the proposed changes were not needed.

The full committee, however, decided to adopt a compromise amendment to Rule 4002 that would require debtors to bring with them to the § 341 meeting a government-issued picture identification, evidence of their social security number, evidence of their current income (such as a pay stub), their most recent federal income tax return, and statements for each of their depository accounts. That, he said, was the proposal that the advisory committee sought authority to publish.

Judge Small said that the proposed amendment to Rule 1009 specifies that if the debtor files an incorrect social security number, he or she must correct it and notify all those who received notice of the incorrect number

The proposed change to Form 6-I would extend to Chapter 7 cases the requirement that a debtor divulge a non-filing spouse's income The form's mandate to divulge currently applies only to Chapter 12 and 13 cases.

**The committee without objection approved the proposed rule amendments for publication by voice vote. It also approved without objection the proposed amendment to the Official Form by voice vote.**

FED. R. BANKR. P. 7004

Judge Small explained that under the current Rule 7004 (process and service), the debtor's attorney must be served only if the summons and complaint are served on the debtor by mail. The proposed amendment would make it clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor, regardless of the manner of service on the debtor. The rule would also allow the attorney to request that service be made electronically.

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. BANKR. P. 2002(g) and 9001

Judge Small reported that the changes to Rule 2002 (notices) and 9001 (general definitions) were designed in large part to facilitate noticing national creditors. The proposed amendment to Rule 2002(g) would allow creditors to make arrangements with a

"notice provider" to have notices sent to them at a preferred address or addresses. Notices would normally be sent electronically, but the rule also covers the sending of paper notices to central addresses. The amendment to Rule 9001 would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors at a preferred address or addresses under the proposed amendment to Rule 2002(g).

Judge Small explained that the amendments could result in significant financial benefits to the judiciary and taxpayers because more creditors would sign up for electronic service of court notices In light of the potential cost savings, the advisory committee had decided to pursue "fast track" promulgation of these two amendments — as well as the amendment to Rule 9036 approved by the Standing Committee in January 2004, which specifies that notice by electronic means is complete on transmission.

Under the fast track proposal, the rules would become effective on December 1, 2005, rather than December 1, 2006. They would be published for public comment in August 2004. Comments would be due by mid-February 2005. The advisory committee and Standing Committee could approve them by mail ballot and submit them to the Judicial Conference for approval at its March 2005 session They would then be sent immediately to the Supreme Court, which could act on them before May 1, 2005. Mr. Rabiej added that the Court would be given copies of the amendments well in advance of the March 2005 Conference session to give the justices time to review them carefully.

Judge Small said that the advisory committee had carefully considered the rules at three meetings, and he did not anticipate any controversy over them. Professor Morris added that even though the primary thrust of the rules was to facilitate electronic notice, there would also be savings in processing paper notices under the rules because notice providers will be able to bundle notices to creditors and save postage costs.

**The committee without objection approved the proposed amendments for publication by voice vote.**

**The committee also approved expediting approval of the amendments, together with the proposed amendment to Rule 9036 approved by the Standing Committee in January 2004.**

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of May 17, 2004. (Agenda Item 8)

*Amendments for Final Approval*

FED. R. CIV. P. 6(e)

Judge Rosenthal reported that the proposed change to Rule 6(e) (additional time allowed following certain kinds of service) had been referred by the Advisory Committee on Appellate Rules, which was considering parallel changes to FED. R. APP. P. 26(c). Under the existing Rule 6(e), there is some uncertainty in calculating the three additional days given a party to act when service is made on the party by mail, leaving it with the clerk of court, electronic means, or other means consented to by the party served.

The proposed clarifying amendment would specify that the three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and holidays would be included in counting the additional three days, but the last day cannot be a Saturday, Sunday, or holiday. Judge Rosenthal added that the committee note sets forth a number of practical examples calculating the time period.

One member asked why the advisory committee had not used the term "calendar days," as used in the appellate rules. Judge Rosenthal responded that the committee had considered that option, but had decided not to use "calendar days" because it is not found anywhere else in the civil rules.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

FED. R. CIV. P. 27(a)(2)

Judge Rosenthal said that the proposed change in Rule 27 (deposition before action or pending appeal) would merely correct an outdated reference in the rule to former Rule 4(d), which deals with serving a copy of the petition and a notice stating the time and place of a deposition hearing. The corrected reference makes clear that all forms of service under Rule 4 can be used to serve a petition to perpetuate testimony.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

FED. R. CIV. P. 45(a)

Judge Rosenthal reported that the proposed amendment to Rule 45 (subpoena) would close a small gap in the rule by requiring that a deposition subpoena state the method for recording testimony.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

SUPPLEMENTAL RULE B(1)(a)

Judge Rosenthal stated that the proposed amendment to Supplemental Rule B (attachment and garnishment) would bring the rule into conformity with case law. The amendment specifies that the time for determining whether a defendant is "found" in a district is the time the verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

SUPPLEMENTAL RULE C(6)(b)

Judge Rosenthal reported that the proposed amendment to Supplemental Rule C(6) (responsive pleadings and interrogatories) would correct an oversight made during the course of the 2000 amendments to the rule. It would delete the rule's reference to a time 10 days after completed publication under Rule C(4). That rule requires publication of notice only if the property is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

**The committee without objection approved the proposed amendment for final approval by voice vote.**

*Amendments for Publication*

SUPPLEMENTAL RULE G

Professor Cooper explained that civil forfeiture proceedings have long been governed by the Supplementary Rules for Certain Admiralty and Maritime Claims because of tradition, the in rem nature of forfeiture proceedings, and many forfeiture statutes expressly invoking the supplemental rules. But, he said, the relationship had come under considerable strain because of an explosion in the number of civil forfeiture proceedings. In particular, court interpretations of the supplemental rules by the courts in forfeiture cases have been cited by the admiralty bar as creating problems for maritime practice.

Professor Cooper noted that the supplemental rules had been amended in 2000 to draw some distinctions between forfeiture and admiralty practice. At about the same time, Congress enacted the Civil Asset Forfeiture Reform Act, which required a number

of other changes in the rules as they apply to civil forfeiture proceedings. Soon after enactment of the legislation, the Department of Justice approached the Advisory Committee on Civil Rules, suggesting that it was time to consolidate all the civil forfeiture procedures into a single supplemental rule that would be consistent with the new statute.

Professor Cooper said that the advisory committee had appointed a subcommittee that produced a proposed new Rule G after several conference calls, a meeting in December 2003, and substantial input from the Department of Justice and the National Association of Criminal Defense Lawyers. The new rule, he said, was ready for publication, together with conforming amendments to SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E).

Professor Cooper pointed out that the advisory committee had devoted a great deal of attention to a proposal by the Department of Justice to define in the rule what "standing" is needed to assert a claim to property once the government initiates a civil forfeiture action. The Department had proposed that the rule limit standing to a person qualifying as an "owner" within the statutory definition of the innocent-owner defense. The committee, however, concluded that defining standing to file a claim should be left to developing case law, not the rules. Instead, proposed Rule G(8) only sets forth the procedural framework for determining a claimant's standing and deciding a claimant's motion to dismiss.

In the same vein, Professor Cooper reported that the advisory committee had not included a provision in the new rule barring the use FED. R. CRIM. P. 41(g) to accomplish the return of property outside Rule G. This issue, too, would be left to case law development.

Professor Cooper proceeded to describe the provisions of the new rule. He noted that subdivision (1) specifies that Rule G governs in rem forfeiture actions arising from federal statutes. It also states that Supplemental Rules C and E and the Federal Rules of Civil Procedure apply to the extent that Rule G does not address an issue.

Subdivision (2) would replace the particularized pleading in the existing rule with a statement of sufficiently detailed facts to support a reasonable belief that the government will be able to meets its burden of proof at a trial.

Subdivision (3), dealing with arrest warrants, would provide that only the court, on a finding of probable cause, may issue a warrant to arrest property not in the government's possession or not subject to a judicial restraining order. The existing rule allows issuance of a summons and warrant by the clerk without a probable-cause finding In addition, the proposed rule would require the warrant and any supplemental service to

be served as soon as practicable, unless the court orders a different time. Professor Cooper noted that the National Association of Criminal Defense Lawyers had expressed concern that the change would encourage courts to permit more filings under seal. But, he added, the rule does not address when it is appropriate to file under seal. It merely reflects the consequences for execution when sealing or a stay is ordered.

Professor Cooper noted that subdivision (4), the basic notice requirement, reflects the traditional practice of publishing notice of an in rem action. For the first time, the rule would recognize publication on an official government-created Internet forfeiture site to provide a single, easily identified means of notice. He pointed out that there is no such site now, but if the government were to establish one, it would provide more effective notice than newspaper publication.

In addition, proposed paragraph (4)(b) would require the government to send individual notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant, based on the facts known to the government. Although the National Association of Defense Lawyers had asked for formal service of the summons in the manner required by FED. R. CIV. P. 4, the proposed rule does not require that level of service. Rather, due process requirements are satisfied by practical means reasonably calculated to accomplish actual notice.

The proposed rule also specifies that the notice must be sent by means reasonably calculated to reach the potential claimant. Notice may be sent to the attorney if the potential claimant has an attorney, and that this may be the most effective notice in many cases. Notice to an incarcerated person must be sent to the place of incarceration. The rule, however, does not attempt to deal with the due process problems implicated by *Dusenbery v United States,* 534 U.S. 161 (2002), where a particular prison has deficient procedures for delivering notice to prisoners.

The proposed paragraph also sets out deadlines for filing claims and motions. Professor Cooper pointed out that the provision dealing with filing an answer or motion under FED. R. CIV. P. 12 had generated advisory committee discussion. Contrary to an ordinary civil action, where Rule 12 suspends the time to answer, the proposed rule requires that an answer or motion be filed no later than 20 days after a claim is filed.

Professor Cooper pointed out that under subdivision (5), a claim must identify the claimant and state the claimant's interest in the property. If the claim is filed by a person asserting an interest in the property as a bailee, it must identify the bailor.

Subdivision (6) would allow the government to serve special interrogatories under FED. R. CIV. P. 33 limited to the claimant's identity and relationship to the property. The purpose, he said, is to elicit information promptly so the government can move to dismiss

for lack of standing. The government need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered the interrogatories.

Professor Cooper noted that subdivision (7) would allow property to be sold on an interlocutory basis. The court could order the property sold, for example, if it were perishable or at risk of diminution of value. Likewise, it could be ordered sold if the expense of keeping the property is excessive, or if the court finds other good cause.

Professor Cooper pointed out that subdivision (8) govern motions. He noted that paragraph (8)(A) states that a party with standing to contest the lawfulness of the seizure of property may move to suppress use of the property as evidence. He explained that the advisory committee had deleted a reference in the proposed rule to constitutional standing under the Fourth Amendment. Likewise, a party who establishes standing to contest forfeiture may move to dismiss the action under FED. R. CIV. P. 12(b). At any time before trial, the government may also move to dismiss because the claimant lacks standing. Professor Cooper pointed out that the court must decide the government's motion before any motion by the claimant to dismiss the action. The claimant has the burden of establishing standing based on a preponderance of the evidence.

Professor Cooper stated that paragraph (8)(d) deals with a petition to release property under the Civil Asset Forfeiture Reform Act. The venue provision in the rule had been inserted at the request of the Department of Justice. It is derived from the statute and serves as a guide to practitioners It makes clear that the status of a civil forfeiture action is a "civil action" eligible for transfer under 28 U.S.C. § 1404. Finally, Professor Cooper noted that the rule contains a provision allowing a claimant to seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment.

Judge Rosenthal reported that the Style Subcommittee had reviewed the proposed rule and had suggested a few improvements in language. She asked for and received permission to adopt the Style Subcommittee suggestions without having to return to the Standing Committee before publication.

Judge Rosenthal added that the advisory committee anticipated that a significant number of comments would be received during the publication period, but from a narrow section of the bar. Judge Levi and Professor Cooper pointed out that the committee had benefitted greatly as a result of excellent suggestions and input from the Department of Justice and the National Association of Criminal Defense Lawyers.

**The committee without objection approved the proposed new rule for publication by voice vote.**

SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E)

Professor Cooper reported that the proposed changes to Supplemental Rules A, C, and E and FED. R. CIV. P. 26(a)(1)(E) were conforming amendments to account for the consolidation of civil forfeiture provisions into the new Rule G. He noted that the amendment to Rule 26(a)(1)(E) (initial disclosures) would add civil forfeiture actions to the list of cases exempted from the initial disclosure requirements.

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. CIV. P. 50(b)

Judge Rosenthal reported that the proposed amendments to Rule 50(b) would remove a trap that occurs when a party moves for judgment as a matter of law under Rule 50(a) before the close of all the evidence and then fails to renew the motion at the close of all the evidence. The revised rule, she said, would delete the requirement that a renewal motion be made at the close of all the evidence. It responds to court decisions that have begun to move away from a strict interpretation of the current rule requiring a motion for judgment as a matter of law at the literal close of all the evidence. Professor Cooper added that the amendments are fully consistent with the Seventh Amendment.

In addition, the rule would be amended to add a time limit of 10 days after discharge of the jury for a party to make a post-trial motion when a trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict.

**The committee without objection approved the proposed amendments for publication by voice vote.**

ELECTRONIC DISCOVERY
FED. R. CIV. P. 16, 26, 33, 34, 37, and 45 and FORM 35

Judge Rosenthal reported that the package of "electronic discovery" amendments was the product of a lengthy and thorough examination by the advisory committee into whether the current rules are adequate to regulate discovery of electronically stored information She pointed out that the committee had enjoyed invaluable cooperation and input from the bar on the project, and it had conducted three productive conferences with lawyers, judges, and law professors on electronic discovery. She thanked Professor Capra and Fordham Law School for hosting the most recent conference, held in New York in February 2004. She also thanked Kenneth Withers of the Federal Judicial Center for his major assistance and wise counsel.

Judge Rosenthal explained that the advisory committee had initiated the electronic discovery project with a good deal of skepticism regarding the need for rule changes. But as the project progressed and lawyers articulated their experiences, she said, the committee moved to a consensus that the existing discovery rules do not fit current practice as well as they should. The committee, she emphasized, had reached the conclusion that the national rules needed to be amended and the amendments were needed now.

Judge Rosenthal pointed out that the materials in the committee's agenda book demonstrate that there are many real differences between electronic discovery and other types of discovery. For one thing, computer-stored information is dynamic and often changes without active human intervention. Unlike paper information, moreover, computer information may be incomprehensible without the machine and software that created it.

She said that the bar had informed the committee that discovery had become more difficult, burdensome, and costly because the current rules — even though they are very flexible — are simply not specific enough with regard to electronic discovery. She pointed out that some federal district courts now have local rules in place governing electronic discovery, and pertinent case law is beginning to develop. In addition, state court systems have issued or are considering rules to deal with electronic discovery. She concluded that if the advisory committee were to wait too long to propose amendments to the national rules, it would run the risk of having local rules proliferate and wide variations develop in federal practice.

Judge Rosenthal summarized the advisory committee's key proposals, pointing out that they would: (1) require parties and the court early in a case to discuss issues relating to electronicaly stored information and privilege waiver; (2) clarify and modernize the definition of discoverable electronic information; (3) address the form in which electronically stored information must be produced; and (4) provide a procedure for handling inadvertent privilege waivers.

She explained that the committee had heard repeatedly from lawyers that privilege review of discovery materials is very time consuming and expensive. Electronically stored information, moreover, presents special problems because privileged information, though not readily visible, may be embedded in electronic documents or found in metadata. She emphasized that the proposed amendments respect the Rules Enabling Act and avoid dealing with the substance of privilege law. Rather, they only set forth a procedure for retrieving inadvertently produced privileged information.

FED. R. CIV. P. 26(f) and FORM 35

Professor Cooper said that the proposed amendments to FED. R. CIV. P. 26(f) (conference of the parties) were non-controversial. They would require the parties at the 26(f) conference to discuss any issues relating to preserving discoverable information and to include in their discovery plan: (1) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and (2) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information. He noted that the latter item was a response to concerns expressed to the committee by members of the bar regarding the enormous burden imposed by having to screen voluminous documents for privilege.

He said that it was generally accepted that the discovery process moves much more quickly and efficiently when the parties in a case agree on how to deal with privilege issues. He said that the proposed amendment contemplates that the parties will enter an agreement. The court order will enhance the status of the agreement and may well affect future waiver litigation. In addition, Form 35 would be amended to include a new section dealing with disclosure of electronic information and privilege protection.

FED. R. CIV. P. 16(b)

Professor Cooper reported that the proposed amendments to FED. R CIV. P. 16(b) (scheduling and planning) would alert the court to the need, early in the litigation, to address the handling of discovery of electronically stored information and to consider adopting the parties' agreement for protection against privilege waiver.

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that the proposed amendment to FED. R. CIV. P. 26(b)(5) (claims of privilege or protection of trial preparation materials) specifies that when a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party receiving the information that it claims a privilege. The receiving party must then promptly return or destroy the specified information and any copies Professor Cooper added that the committee note specifies that the amendment does not address the controversial question of whether there has in fact been a privilege waiver. It merely provides a procedure for addressing privilege issues.

One member said that the proposed waiver provision would not make a real difference in practice. Parties, he said, will still have to review all documents in order to avoid the danger that a state court may find a waiver of privilege He urged the

committee to publish a much more ambitious proposal that would address the waiver issue itself. He suggested that this would be a great opportunity for the committee to make a major improvement in practice.

Judge Rosenthal responded that the advisory committee was very sympathetic to that approach, but it had opted for a more cautious amendment because of concerns over the limits of the Rules Enabling Act. The statute specifies that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." (28 U.S.C. § 2074) Another participant added that privilege issues implicate fundamental questions of federalism that rules committees should approach with hesitancy.

Other participants countered, though, that a bolder waiver proposal to protect parties against inadvertent waiver of privilege would in fact be consistent with the Rules Enabling Act. They asserted that a federal rules provision could specify that an inadvertent turnover of privileged material through the federal discovery process does not constitute a waiver of privilege. The provision, they said, would be procedural in nature, not substantive. It would not address the scope of the privilege itself. Instead, it would merely address the procedural consequences arising as a result of the mandatory federal discovery process. In other words, if a court requires a party to produce materials through the federal discovery rules, those rules can prescribe the character of the privilege waiver without modifying the content of the privilege itself.

One member pointed out that the advisory committee's proposed amendment may put a court in an awkward position because its order may not effectively bind third parties or prevail in a later proceeding before another court. He noted that there is a split in state law as to whether third parties are bound.

One member pointed out, though, that the proposed amendment would still be a valuable change because — despite uncertainty as to the scope of the privilege protection — parties are in a much better position with a court order than without one. Judge Rosenthal added that the pertinent committee note addresses the issue in general terms by stating that a court order adopting the parties' agreement "advances enforcement of the agreement betweeen the parties and adds protection againt nonparty assertions that privilege has been waived."

Another member noted that the proposed new Rule 26(b)(5)(B) states that a party receiving privileged information must promptly return or destroy it upon being notified by the producing party that it intends to assert a claim of privilege. He suggested that the rule might be amended to require the receiving party to certify that they have in fact destroyed the information in question.

FED. R. CIV. P. 26(b)

Judge Rosenthal reported that the proposed new Rule 26(b)(2)(C) (discovery scope and limits) would establish a two-tiered approach to electronic discovery. A producing party would automatically have to turn over requested information that is "reasonably accessible." Even if it makes a showing that the information sought is not "reasonably accessible," the requesting party may then ask the court to order discovery of the information "for good cause." She pointed out that this approach is similar to the two-tiered approach embodied in the 2000 amendments to Rule 26(b)(1), under which parties may obtain discovery automatically as to matters "relevant to the claim or defense of any party," but they may ask the court for good cause to order discovery of any matter "relevant to the subject matter involved in the action."

One member pointed out that there is no provision in the proposed amendments explicitly addressing the sharing of discovery costs. He noted that judges already have general authority under Rule 26 to shift discovery costs, but recommended that the proposed amendments themselves, or the accompanying committee notes, specify that a judge may assess part or all of the costs of certain discovery requests on the requesting party One member suggested that language covering cost sharing be added to the proposed amendment to Rule 26(b)(2)(C). Judge Rosenthal responded that it might be preferable to include such language in the committee note, rather than the rule.

Professor Cooper pointed out that the committee note in fact quotes the *Manual for Complex Litigation*, instructing that certain forms of production be conditioned upon a showing of need or the sharing of expenses He pointed out, however, that the Standing Committee has been very sensitive to cost sharing or cost bearing, and it is a controversial concept for many members of the bar. Mr. Rabiej added that language regarding cost-shifting had been proposed by the Advisory Committee on Civil Rules in the 2000 amendments to Rule 26, but it had been removed by the Standing Committee.

**Judge Kravitz moved to add language at the end of the proposed amendment to Rule 26(b)(2)(C) to specify that if a responding party shows that requested information is not reasonably accessible, the court may order discovery of the information "on such terms as the court may determine."** He added that no explicit language as to cost sharing should be included in the text of the rule itself, but a reference to costs could be included in the committee note

**The committee without objection approved Judge Kravitz's motion by voice vote.**

FED. R. CIV. P. 33

Judge Rosenthal noted that the proposed amendment to Rule 33(d) (option to produce business records in response to interrogatories) makes it clear that a party may respond to interrogatories by using electronically stored information.

FED. R. CIV. P. 34

Judge Rosenthal explained that the proposed amendments to Rule 34(a) (production of documents and inspection of tangible things) draw a new distinction between "electronically stored information" and "documents." The word "document" in the current rule, she said, is simply not adequate to capture all the types of information stored on computers. The proposed rule, thus, would acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. She also pointed out that under the amendment copying, testing, and sampling would apply explicitly both to electronically stored information and tangible things.

She noted that the proposed amendments to Rule 34(b) permit a party to specify the form in which it wants electronically stored information to be produced. If no request is made as to form, or if there is no agreement by the parties, the producing party may turn over the information in the form in which it is ordinarily maintained or in an electronically searchable form. One member suggested that the term "electronically accessible" might be more appropriate than "electronically searchable."

FED. R. CIV. P. 45

Judge Rosenthal reported that Rule 45 (subpoenas) would be amended to conform it to the various changes proposed in the discovery rules to address electronically stored information.

**The committee without objection approved the proposed amendments to Rules 16, 26, 33, 34, and 45 and Form 35 for publication by voice vote.**

FED. R. CIV. P. 37

Judge Rosenthal reported that the committee had approved a limited "safe harbor" provision in Rule 37 (sanctions for failure to cooperate in discovery) that would give a party protection when information that it is asked to produce has been destroyed or lost through the routine business operation of its computer systems. The loss would occur, for example, when information is destroyed as a result of recycling back-up tapes or automatically overwriting deleted information. She reported that this was the only provision among the proposed amendments in which there had been any disagreement

within the advisory committee. She pointed out, though, that the disagreement had been only as to the actual language of the proposed amendment, and not as to the need for including a limited safe harbor provision in the rules.

As a consequence, she explained, the advisory committee had decided to present the Standing Committee with two alternative versions of a safe harbor provision in FED. R. CIV. P. 37(f). She added that the committee clearly preferred Alternative 1, but several members also wanted to publish Alternative 2 for public comment. Both alternatives, she said, are very narrow. The essential difference between them concerns the standard of culpability applicable to the producing party. Alternative 1 would establish a reasonableness standard, while Alternative 2 would require intentional or reckless conduct. She reported that one member of the advisory committee strongly opposed publishing the second alternative because it would inappropriately limit a court's discretion.

Judge Rosenthal said that whether or not both alternate versions are published, it should be made clear in the publication that the committee is continuing to consider both culpability standards and would like to generate public comment specifically directed to them.

One participant emphasized that Rule 37 deals with sanctions for violation of discovery obligations. But, he said, spoliation issues are generally governed by a separate body of law. He pointed out that what occurs before a case is filed in the district court is not, and cannot be, covered by the rules. Thus, he said, the rules committees should focus on a party's obligation under applicable discovery law, not on spoliation He suggested that the committee note state explicitly that spoliation is governed by a different body of law, even though discovery and spoliation issues often tend to blend in practice.

He added that the culpability standard under discovery law is negligence, including intentional neglect But, he said, the key problem is not so much the applicable standard as the boundary of obligations arising before a case is filed and discovery obligations that attach after a case has been filed. Other members pointed out that lawyers' legal and ethical obligations before filing are clearly established by existing law

One member said that even though the bar had made a compelling case for a safe harbor at the recent Fordham conference, it appeared that any effective protective provision would lie outside the scope of the rules. He suggested that it would take legislation to achieve the sort of protection that the bar seeks. Other members responded, though, that an effective safe harbor provision could indeed be crafted with some additional work.

In light of the difficult competing considerations and the committee discussions, Judge Rosenthal agreed to craft some additional language to address the concerns expressed by the participants. She emphasized the need to include a safe harbor provision together with the rest of the proposed electronic discovery amendments because all the amendments fit together as part of a single, interrelated package.

On the second day of the meeting, Judge Rosenthal presented the committee with revised language for both the text of the proposed Rule 37 amendments and the accompanying committee note. She noted that the proposed revisions would make it clear that the rule does not address the actions of a party before a case is filed.

Judge Rosenthal said that the recommendation of the advisory committee was to publish only one alternative for public comment. But, she said, that version would include appropriate brackets and footnotes to draw the attention of the public to the fact that the committee would continue to study what standard of fault must be met to take a party out of the safe harbor protection.

**Dean Kane moved to approve publication of the proposed amendment, together with appropriate cover language —— to be drafted by the advisory committee — directing the public's attention to the committee's desire to receive public comment on the applicable culpability standard and the other issues identified by the committee. The motion was approved without objection by voice vote.**

*Amendments for Delayed Publication*

1. Pure Style Revisions

FED. R. CIV. P. 38-63, except FED. R. CIV. P. 45

Judge Rosenthal reported that the advisory committee was planning to publish the complete set of restyled civil rules as a single package in February 2005. She noted that the Standing Committee at earlier meetings had approved publication of restyled Rules 1-37. She asked for authority to publish the current batch of proposed amendments — Rules 38-63, except Rule 45 — subject to further refinement before publication. And she reported that the remaining civil rules, Rules 64-86, would be presented to the Standing Committee at its January 2005 meeting.

Judge Rosenthal said that the advisory committee, in partnership with the Style Subcommittee of the Standing Committee and its consultants, would continue to make refinements in the language of the rules. It would also resolve a series of "global" style

issues and present a completed style package of all the civil rules at the January 2005 meeting

**The committee without objection authorized delayed publication of the proposed amendments by voice vote.**

2. "Style-Substance" Amendments

FED. R. CIV. P. 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40

Judge Rosenthal reported that the goal of the restyling project was very narrow — simply to restate the present language of the civil rules as clearly as possible in consistent English without any change in meaning. Nevertheless, she said, as part of the restyling effort, the advisory committee had approved a limited number of minor, non-controversial improvements in language that are arguably more than purely stylistic in nature. She pointed out that the proposed changes, although possibly substantive, reflect sound common sense, universal current practice, or the likely intention of the drafters. Accordingly, she said, the advisory committee would like authority to publish in tandem with the style package a separate track of proposed "style-substance" changes to Rules 4(k), 8(a) & (d), 9(h), 11(a), 14(b), 16(c)(1), 26(g), 30(b), 31(c), 36(b), and 40. She added that a few additional minor "style-substance" changes might be presented to the Standing Committee at the January 2005 meeting.

One member spoke against the proposed deletion of Rule 8(d)(1) as part of the "style-substance" package. Although the proposed committee note suggested that the current rule is redundant and no longer needed, the member said that it might be helpful to retain it. Judge Rosenthal responded that it was important to restrict the "style-substance" package to purely non-controversial items. Thus, in light of the objection expressed, the advisory committee would drop the proposal from the list of proposed amendments.

**The committee without objection approved the proposed "style-substance" amendments for deferred publication by voice vote.**

*Informational Item*

Judge Rosenthal reported that the advisory committee had published a proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) to implement 28 U.S.C § 2403 and replace the final three sentences of FED. R. CIV. P. 24(c). The statute and current rule require a court to certify to the attorney general of the United States or a state when a federal or state statute has been drawn into question. In addition, the rule requires

a party challenging the constitutionality of a statute to call the court's attention to its duty to certify.

Judge Rosenthal pointed out that the reporting obligation is routinely — and unintentionally — violated, perhaps because it is buried in Rule 24. Thus, the advisory committee had proposed moving the reporting requirements from Rule 24 to the proposed new Rule 5.1 in order to attract attention to the reporting obligations by locating them next to the rules that require notice by service and pleading.

In addition, the new rule would have added a requirement that a party drawing into question the constitutionality of a statute serve the pertinent attorney general by mail with a Notice of Constitutional Question and a copy of the underlying court pleading or motion. The advisory committee had thought that the additional requirement would impose only a slight burden on the challenging party.

Judge Rosenthal pointed out that there had been few public comments on the rule. But, she said, concerns emerged in the advisory committee that the new notice and mailing obligation was unwise and should be reexamined. Accordingly, the committee decided to defer the proposed new rule and not present it at this time to the Standing Committee for final approval.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachment of May 18, 2004. (Agenda Item 9)

### *Amendments for Final Approval*

### FED. R. CRIM. P. 12.2(d)

Judge Carnes reported that the proposed amendment to Rule 12.2(d) (failure to comply with the requirement to give notice of an insanity defense or submit to a mental examination) would fill a gap created in the 2002 amendments to the rule. The current rule provides no sanction when the defendant does not comply with the requirement to disclose the results and reports of an expert examination. He pointed out that a comment had been received from the defense bar that the proposed amendment goes too far. But, he noted that the decision to impose a sanction is discretionary with the court.

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R. CRIM. P. 29(c), 33(b), 34(b), and 45(b)

Judge Carnes explained that the proposed amendments to Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), Rule 34 (motion to arrest judgment), and Rule 45 (computing time) would remove the requirement that the court rule on a post-trial motion within seven days after a guilty verdict or after the court discharges the jury.

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R. CRIM. P. 32(i)(4)

Judge Carnes said that the proposed amendment to Rule 32(i)(4) (opportunity to speak at sentencing) would extend the right of allocution — which currently applies only to victims of crimes of violence or sexual abuse — to victims in all felony cases. The rule, he said, allows the victim either to speak at sentencing or submit a written statement to the judge. If a crime involves multiple victims, the rule gives the court discretion to limit the number of victims who will address the court.

Judge Carnes added that Congress was likely to pass comprehensive legislation in the near future dealing with victims' rights. He said that the legislation, among other things, would give a wide array of rights to victims of all offenses, including victims of petty offenses and other misdemeanors. He stated that if the pending legislation were enacted, the committee should ask to withdraw the rule.

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R. CRIM. P. 32.1(b) and (c)

Judge Carnes reported that the proposed amendments to Rule 32.1 (revoking or modifying probation or supervised relief) would address an oversight in the rules by giving the defendant the right to allocution at a revocation or modification hearing.

**The committee without objection approved the proposed amendments for final approval by voice vote.**

FED. R CRIM. P 59

Judge Carnes reported that the proposed new Rule 59 (matters before a magistrate judge) would set forth the procedures for a district judge to review the decision of a

magistrate judge. He explained that the rule is derived in part from FED. R. CIV. P. 72. It distinguishes between "dispositive" and "nondispositive" matters, but does not attempt to define the terms, which are widely used in case law.

Judge Carnes pointed out that on a nondispositive matter, the district judge must consider any timely objections to the magistrate judge's order and set aside any part of the order that is contrary to law or clearly erroneous. But if a party fails to object within 10 days after being served with a copy of the magistrate judge's order, it waives its right to review.

As for dispositive matters, the district judge must decide de novo any recommendation of the magistrate judge to which an objection has been filed. A party's failure to object within 10 days after being served with a copy of the magistrate judge's recommended disposition waives its right to review. There is no need for the district judge to review de novo any matter to which there has not been a timely objection. Nevertheless, despite the waiver provision, the district judge retains authority to review any decision or recommendation of the magistrate judge, whether or not objections are timely filed.

One member said that he supported the rule, but he had a general problem with the way time is computed under this and some other rules. The proposed rule, he pointed out, states that a party must file an objection "within 10 days after being served with a copy" of the magistrate judge's order or recommendation. He pointed out that judges have no way of telling when a party has actually been served with a copy of a particular document. He suggested that consideration be given at a future committee meeting to addressing this uncertainty in computing time.

**The committee without objection approved the proposed new rule for final approval by voice vote.**

*Amendments for Publication*

FED. R. CRIM. P. 5(c)

Judge Carnes reported that two amendments were proposed to Rule 5(c)(3) (initial appearance in a district other than the one where the offense was committed). First, the amendment to Rule 5(c)(3)(C) would remove a reference to Rule 58(b)(2)(G). That rule, in turn, would be amended to eliminate a conflict with Rule 5.1(a) regarding the defendant's right to a preliminary examination. Second, the amendment to Rule 5(c)(3)(D) would take account of advances in technolgy and permit a magistrate judge to accept a warrant by any "reliable electronic means," rather than just by "facsimile."

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. CRIM. P. 32.1(a)(5)

Judge Carnes explained that the proposed change to Rule 32.1 (revoking or modifying probation or supervised release) was similar to that proposed for Rule 5(c). It would authorize a magistrate judge to accept a copy of a judgment, warrant, or warrant application by "reliable electronic means."

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. CRIM. P. 40(a) and (e)

Judge Carnes said that the proposed revision of Rule 40(a) (arrest for failing to appear in another district) would fill a gap in the rules by giving a magistrate judge explicit authority to set conditions of release for a defendant who has been arrested only for violation of conditions of release set in another district. He pointed out that the current rule refers only to a defendant who has been arrested for failure to appear altogether, and not to one who has only violated conditions of release.

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. CRIM. P. 41

Judge Carnes reported that the proposed amendment to Rule 41(e) (issuing a search warrant) would permit a magistrate judge to use "reliable electronic means" to issue warrants. In that respect, it parallels the proposed amendments to Rules 5 and 32.1.

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. CRIM. P. 58(b)

Judge Carnes explained that the proposed amendment to Rule 58(b)(2)(G) (initial appearance in a petty offense or other misdemeanor case) would remove a conflict between that rule and Rule 5.1 (preliminary examination) and clarify the advice that must be given to a defendant during an initial appearance.

**The committee without objection approved the proposed amendments for publication by voice vote.**

*Informational Items*

FED. R. CRIM. P. 29

Associate Attorney General McCallum expressed the concerns of the Department of Justice regarding the May 2004 decision of the Advisory Committee on Criminal Rules to reject the Department's proposed amendments to Rule 29 (motion for a judgment of acquittal). The proposal would have required a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. The current rule gives a judge discretion to rule on an acquittal motion either before or after verdict.

Mr. McCallum pointed out that a district judge's granting of an acquittal motion before a jury verdict is a non-appealable action due to the Double Jeopardy clause of the U. S. Constitution. It is the only area, he said, in which the government has no right to correct an improper action of a trial judge. An appeal does lie, however, when a judge grants a motion for acquittal after a jury verdict.

He emphasized that United States attorneys are deeply troubled by the current rule and certain specific experiences that they have had under it. He noted that the original proposal of the Department had been to amend the rule to require a district judge to defer a ruling on an acquittal motion until after the jury returns a verdict. The aim, he said, was not to limit judicial discretion, but to address the timing of the judge's action, which has important constitutional consequences.

He explained that members had expressed concerns at the October 2003 advisory committee meeting that the Department's proposal might be too broad. They suggested that it is entirely appropriate for a judge to grant a dismissal before judgment in certain circumstances — particularly in the case of a hung jury or a multiple-defendant or multiple-count case. The advisory committee, he said, had asked the Department to consider crafting modifications to its proposal to address these two situations.

Mr. McCallum reported that the Criminal Division had prepared an amendment to deal with hung juries, but it was unable to devise a satisfactory amendment to address the problems of multiple defendants and multiple counts. But, he said, Judge Levi developed a very helpful, alternate proposal that would allow a judge to grant a dismissal before verdict conditioned upon the defendant waiving double-jeopardy rights and permitting an appeal by the government.

He said that because of the importance of this matter, the Department would like to present additional written materials and make a case for amending Rule 29 to the Standing Committee at its next meeting. If the Standing Committee were then to agree with the Department's recommendation — or with Judge Levi's alternate proposal or some other variation — it might propose an amendment itself. But, he noted, a more likely result would be for the Standing Committee to remand the matter back to the advisory committee with a direction to explore every possible alternative to achieve the result of preserving the government's right to appeal. He added that the Department would provide a comprehensive constitutional-law analysis of the Double Jeopardy clause and craft appropriate devices to avoid procedural traps. In short, he emphasized, the Department would like to work cooperatively with the Standing Committee to figure out a way to meet the government's concerns.

Judge Carnes reported that Administrative Office staff had prepared statistics on how often pre-verdict dismissals are granted in the federal courts. In the Fiscal Year 2002, for example, more than 80,000 felony defendants were disposed of in the district courts. Of that total, 3,000 were tried before a jury, and Rule 29 motions were granted in only 37 cases. He warned that the numbers may not be exact because of reporting difficulties in trying to pinpoint pre-verdict acquittals. Neverthless, he said, the number of dismissals under Rule 29 is extremely small. This, he explained, was a primary reason why the majority of the advisory committee were persuaded that there was no compelling case to amend the rule. He pointed out, though, that several members of the advisory committee were very much concerned that when a judge grants a pre-verdict dismissal mistakenly or in questionable circumstances, it reflects badly on the judicial system. In that regard, he noted that the Department had presented the committee with some anecdotes of district judges arguably abusing the process.

Judge Carnes further explained that several members of the advisory committee were concerned that certain prosecutors overcharge. Thus, judges should be able to winnow out groundless charges before a case is submitted to the jury. For that reason, he said, the advisory committee had asked the Department to consider amending its proposal to retain the authority of a trial judge to dismiss specific counts in a multiple-count case or certain defendants in a multi-defendant case. But, he explained, neither the Department nor the advisory committee could fashion a satisfactory proposal addressing those situations.

Judge Carnes said that the issues had been thoroughly explored by the advisory committee, including Judge Levi's alternate solution. If the matter were referred back to the advisory committee, he said, the same result would prevail again. Judge Levi agreed with this assessment, but he added that the Department should have a further opportunity to make a case. He pointed out that the Department has a vital role in the Rules Enabling Act process, and it has been supportive of the process Therefore, he said, if the

Department concludes that a matter is very important to the government and it asks the Standing Committee to take a second look, the committee should accommodate the request.

Judge Levi pointed out that it is very common in rulemaking for empirical data to show that a particular problem is statistically insignificant. But the rejoinder by proponents of an amendment is always that the small number of problem occurrences in fact represents important matters. He recommended that the committee allow the Department to make its case at the January 2005 meeting. He suggested that the Department consider producing additional information, focusing particularly on the character of the actual cases in which it believes a pre-verdict dismissal was improperly granted and the government denied its right to appeal. He added that the Standing Committee might decide to return the proposal to the advisory committee with instructions.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 15, 2004. (Agenda Item 5)

Judge Smith explained that it is the policy of the advisory committee for proposed amendments to evidence rules generally to be limited to resolving case law conflicts in the courts. The committee's presumption, thus, is strongly against amending the rules The four rules amendments recommended for publication, he said, would resolve serious conflicts in the courts.

### *Amendments for Publication*

### FED. R. EVID. 404(a)

Judge Smith reported that the proposed amendments to Rule 404(a) (admissibility of character evidence) would resolve a case law conflict regarding the admissibility in a civil case of character evidence offered as circumstantial proof of conduct. He noted that courts routinely admit such information into evidence in criminal cases. A minority of courts have also permitted its use in civil cases. The proposed amendment would allow the evidence only in criminal cases.

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. EVID. 408

Judge Smith reported that the proposed amendments to Rule 408 (compromise and offers to compromise) would resolve three important conflicts in the case law as to the admissibility of statements and offers made in settlement negotiations. He added that the proposals had been substantially debated and reworked by the advisory committee.

Judge Smith pointed out that the first amendment would resolve the split in the case law regarding the admissibility in later criminal prosecutions of statements and offers made in civil settlement negotiations. He pointed out that the Department of Justice strongly supported allowing the use in criminal cases of admissions made earlier during settlement negotiations, noting that they can be critical evidence to establish guilt in certain cases. After much debate, he said, the advisory committee agreed to present an amendment that would authorize the use of admissions of fault in later criminal prosecutions, but not allow admission of the fact that there has been a civil settlement or negotiations. He emphasized that the committee had worked hard to reach the proper balance between protecting settlement negotiations and allowing critical evidence to be used in criminal cases.

Second, Judge Smith reported that the proposed amendments would resolve a conflict in case law by prohibiting the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. He noted that the proposal reinforces the main purposes of the rule — to promote unfettered settlement discussions.

Third, the proposed amendments would resolve a conflict over whether offers of compromise may be admitted in favor of the party who made the offer. The proposal would bar a party from introducing its own statements and offers when offered to prove the validity, invalidity, or amount of the claim. Judge Smith said that the advisory committee was of the view that a party should not be able to waive unilaterally the protections of the rule because introduction of the evidence would show implicitly that the opposing party had also entered into a settlement agreement. Exclusion of such evidence would not be required, though, when offered for other purposes, such as to prove the bias or prejudice of a witness.

**The committee without objection approved the proposed amendments for publication by voice vote.**

FED. R. EVID. 606(b)

Judge Smith reported that the proposed amendment to Rule 606(b) (juror as a witness) would limit the testimony of a juror regarding the validity of a verdict to whether

there has been a clerical mistake in reporting the verdict He explained that some courts have also allowed juror tetimony on a broader basis, such as to explore whether the jury understood the court's instructions or the impact of their actions. He added that the proposed amendment is very narrowly designed to protect jury deliberations and prevent invasions of the jury process. He pointed out, however, that testimony could still be allowed from a juror as to fraud or outside influence.

**The committee without objection approved the proposed amendment for publication by voice vote.**

FED. R. EVID. 609(a)(2)

Judge Smith reported that Rule 609(a)(2) (impeachment by evidence of conviction of a crime) provides for automatic impeachment of a witness with evidence that the witness has been convicted of a crime that "involved dishonesty or false statement." The problem, he said, is in determining which crimes involve dishonesty or false statement.

Most prior convictions, he noted, occur in other jurisdictions, especially state courts. The issue for the federal court is to determine the extent to which it may look behind the prior conviction to determine whether it involved dishonesty or false statement. Some courts, he said, make the determination by looking only at the actual elements of the crime for which the witness was found guilty. Other courts, though, allow a more detailed inquiry into the facts of the case.

Judge Smith explained that the proposed amendment takes a middle position. It would allow automatic impeachment of a witness if an underlying act of dishonesty or false statement can be "readily determined." Judges, thus, would have discretion to look behind the elements of the crime to the facts of the case. But it is contemplated that their review would be to make a quick determination, such as by reviewing the charging documents, that a crime involved dishonesty or false statement. The court, though, should not conduct a minitrial on the issue. He added that a similar problem exists under the Sentencing Guidelines, where district judges may have to look behind the elements of a crime to determine whether a prior conviction of the defendant had been for a crime of violence. Professor Capra added that the committee note sets forth some examples of key documents that could be used by judges to make the determination of dishonesty or false statement.

**The committee without objection approved the proposed amendment for publication by voice vote.**

*Informational Items*

Professor Capra explained that these four proposals complete a package of amendments that the advisory committee had been considering for several meetings. He said that the advisory committee did not have plans to bring forward to the Standing Committee in the near future other potential amendments that it had under consideration. In addition, he said, the advisory committee would continue to examine the hearsay exceptions, but it will not propose any amendments until the full impact of *Crawford v. Washington* has been determined.

## REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. (Agenda Item 10)

He reported that the E-Government Act of 2002 requires all federal courts to post on the Internet all case documents filed electronically or filed in paper and converted to electronic form. The Act also mandates the promulgation under the Rules Enabling Act of new federal rules addressing security and privacy concerns raised by electronic posting of case documents. The Standing Committee, he noted, had created the E-Government Subcommittee to coordinate the task of drafting appropriate revisions to the rules, and it asked representatives of other Judicial Conference committees to serve on the subcommittee.

He explained that the subcommittee had asked Professor Capra to develop a template that each advisory committee could use to develop appropriate amendments to their own rules. He pointed out that each of the advisory committees had reviewed the template and had raised a number of policy issues. In addition, the Department of Justice and other interested parties had offered practical and helpful comments on the template.

Judge Fitzwater reported that the E-Government Subcommittee met just before the Standing Committee meeting and revised the template in several respects. He emphasized that in making policy choices, the subcommittee had worked from the Judicial Conference's recent privacy policy statements and the assumptions made by the Court Administration and Case Management Committee. The revised template, he said, would now be sent back to the advisory committees for further consideration at their autumn meetings

## NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, January 13-14, 2005.

Respectfully submitted,

Peter G. McCabe
Secretary

**MEMORANDUM**

**DATE:** October 12, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 97-14

I recommend that Item No. 97-14 be removed from the Advisory Committee's study agenda.

Item No. 97-14 was added to the study agenda in 1997 at the request of the Standing Committee. Two developments provided the impetus for the Standing Committee's request. First, the Standing Committee's "Local Rules Project" found that the district courts had implemented as part of their local rules a large number of provisions governing the professional conduct of attorneys — provisions that were, on the whole, vague, confusing, and conflicting. Those provisions not only conflicted with each other, but often conflicted with the rules imposed by the states. Second, the Clinton Justice Department and several state courts were involved in a heated controversy over the interpretation and enforcement of Model Rule 4.2. Some states had interpreted Model Rule 4.2 to prohibit attorneys working for law enforcement agencies from having ex parte contacts with the employees of organizations that were under criminal investigation. The Department sought to use the Rules Enabling Act process to enact rules that would protect federal law enforcement agents from this broad interpretation of Model Rule 4.2 (as well as from broad interpretations of other rules, such as Model Rule 3.8).

A number of proposals have been floated under the umbrella of Item No. 97-14, ranging from, on one extreme, enacting a comprehensive "Federal Rules of Attorney Conduct" to, on the other extreme, tinkering with the "conduct unbecoming" standard of Rule 46(b)(1)(B). From the beginning, this Committee has taken a backseat role. Everyone has conceded that the problem of conflicting standards of attorney conduct in general — and the controversy over Model Rule 4.2 in specific — are primarily problems for the district courts and should be addressed primarily by the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules.

Item No. 97-14 has been dormant for a long time. For a number of reasons — the presidential election of 2000 and change in administrations; the September 11 attacks and resulting reordering of federal law enforcement priorities; changing personnel in the Department of Justice — the Department has not been able to give Item No. 97-14 sustained attention. The subcommittee established by the Standing Committee to coordinate work on this issue has not met since 2000, and this Committee has not even received an update since April 2001. Prof. Daniel Coquillette (Reporter to the Standing Committee) tells me that it is unlikely that the Justice Department will make another push on this issue for at least another year (in light of the upcoming election), and it is not even clear whether the next push — if and when it comes — will be directed at Congress or at the Rules Enabling Act process.

I recommend that Item No. 97-14 be removed from the Committee's study agenda. If Congress should enact legislation requiring Judicial Conference action, or if the Department should again press for new rules, Item No. 97-14 can be restored to the study agenda. But there is no reason to carry on the study agenda a matter than has been dormant for over four years and that likely will remain dormant for the foreseeable future.

**MEMORANDUM**

**DATE:** October 12, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 99-06

The Federal Rules of Bankruptcy Procedure contain provisions designed to protect against the debtor cutting a "sweetheart" deal with one creditor to the detriment of other creditors or the bankruptcy estate. Under FRBP 9019(a), any proposed settlement affecting a bankruptcy estate must be approved by the bankruptcy court after notice of the proposed settlement is given to all of the creditors. And, under FRBP 7041, a complaint objecting to the discharge of a debtor cannot be dismissed at the request of the plaintiff alone; rather, the bankruptcy court must approve the dismissal after notice is given to the trustee.

Rule 33 of the Federal Rules of Appellate Procedure authorizes appellate courts to order the parties to an appeal to engage in one or more settlement conferences. FRAP 33 also provides that an appellate court may, as the result of such a settlement conference, "enter an order . . . implementing any settlement agreement." FRAP 33 does not require that notice of a proposed settlement be provided to anyone, in a bankruptcy case or otherwise.

In 1999, the bankruptcy judges of the Fourth Circuit contacted this Advisory Committee to express concern about the fact that FRAP 33 does not incorporate the notice provisions of FRBP 9019(a) and 7041. The bankruptcy judges feared that, in the course of an appeal involving a debtor

and a favored creditor, the debtor and creditor could reach a "sweetheart" settlement and the appellate court could "enter an order . . . implementing [the] settlement" under FRAP 33, without the other creditors, the trustee, or the bankruptcy court being given notice or a chance to object.

This Advisory Committee discussed the concerns of the Fourth Circuit bankruptcy judges at its April 2000 meeting and decided to refer those concerns to the Advisory Committee on Bankruptcy Rules. Shortly after that referral was made, one of the Fourth Circuit bankruptcy judges — Judge A. Thomas Small — was coincidentally appointed chair of the Bankruptcy Rules Committee. Over the past four years, the Bankruptcy Rules Committee has discussed this issue at two of its meetings, and Judge Small and Prof. Jeffrey Morris (the Reporter to the Bankruptcy Rules Committee) have discussed this issue with Judge Will Garwood (former chair of the Appellate Rules Committee) and me.

The Bankruptcy Rules Committee has finally recommended that the Appellate Rules Committee remove this item from its study agenda. Like the Appellate Rules Committee, the Bankruptcy Rules Committee is unaware of any evidence that the problem identified by the Fourth Circuit bankruptcy judges has actually materialized. To the contrary, in the experience of those who serve on the Bankruptcy Rules Committee, when a settlement that might affect the rights of absent creditors is reached on appeal of a bankruptcy case, the court of appeals will remand the case to the district court with instructions to remand the case to the bankruptcy court, so that the bankruptcy court can ensure compliance with FRBP 9019(a) and 7041.

Based on the recommendation of the Bankruptcy Rules Committee, I recommend that Item No. 99-06 be removed from the study agenda of this Committee.

**MEMORANDUM**

**DATE:** October 12, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 03-09

At its April 2004 meeting, the Advisory Committee tentatively approved the Department of Justice's proposal that Rules 4(a)(1)(B) and 40(a)(1) be amended to make clear that the extended time periods apply in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions that occurred in connection with duties that he or she performed on behalf of the United States. The Committee asked me to take a close look at the amendments and Committee Notes proposed by the Department, make appropriate stylistic changes, and present a final version at the November 2004 meeting.

Attached are revised versions of the amendments and Committee Notes. I have rewritten the amendments to comply with the style conventions and to ensure that the text of these amendments will better match up with the text of restyled Civil Rule 12(a)(2) and (3). I have also shortened the Committee Notes, both because the Standing Committee prefers short Notes, and because these amendments do not require a lot of explanation or justification.

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

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

**(1) Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) ~~When the United States or its officer or agency is a party, t~~The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from ~~is entered.~~ if one of the parties is:

(i) the United States;

(ii) a United States agency;

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

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

* * * * *

**Committee Note**

**Subdivision (a)(1)(B).** Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which extended the 60-day period to respond to complaints to such cases. The Committee Note to the 2000 amendment explained: "Time is needed

for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to decide whether to file an appeal.

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**Rule 40. Petition for Panel Rehearing**

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

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

(A) the United States;

(B) a United States agency;

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

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

* * * * *

**Committee Note**

**Subdivision (a)(1).** Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is

sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases ) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

**MEMORANDUM**

**DATE:** October 13, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 04-04

The Committee on Court Administration and Case Management ("CACM") has asked that the rules of appellate, bankruptcy, civil, and criminal procedure be amended on an expedited basis to authorize the federal courts to use their local rules to force parties to file all documents electronically. CACM believes that mandatory electronic filing would achieve significant cost savings for the federal courts. CACM's request is described in the attached letter from Judge John W. Lungstrum, Chair of CACM, to Judge David F. Levi, Chair of the Standing Committee.

Implementing CACM's request would not be difficult. Appellate Rule 25(a)(2)(D) now provides that "[a] court of appeals may by local rule permit [electronic filing]." Adding "or require" after "permit" will give the appellate courts the authority that CACM seeks. The Bankruptcy Rules Committee has already approved a proposed amendment that would add "or require" to Bankruptcy Rule 5005(a)(2)[1], and the Civil Rules Committee is likely to approve a similar amendment to Civil Rule 5(e).[2] (The Civil Rules Committee is meeting on October 28 and 29, after this memorandum is written,

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[1]"A court may by local rule permit or require documents to be filed, signed, or verified by electronic means . . . ."

[2]"A court may by local rule permit or require papers to be filed, signed, or verified by electronic means . . . ."

but before the Appellate Rules Committee meets.) Criminal Rule 49(d) directs that "[a] paper must be filed in a manner provided for in a civil action," so the proposed amendment to Civil Rule 5(e) would apply in both criminal and civil cases, unless the Criminal Rules Committee amends the Criminal Rules to provide differently.

As I mentioned, CACM has requested that its proposal be considered on an expedited basis. The following schedule has been suggested: The amendments will be published for comment on November 15, 2004. The comment period will expire on February 15, 2005. The advisory committees will be asked to consider the comments and give final approval to the amendments at their spring 2005 meetings. The Standing Committee will then consider the rules at its June 2005 meeting, and the Judicial Conference will consider them in September.

I perhaps should note that the swiftness of this schedule and the likely unanimity of the advisory committees at their meetings this fall belies some uneasiness with the proposal among the committee reporters. In e-mail correspondence, some of the reporters have questioned whether it is appropriate to consider CACM's proposal on an expedited basis. In the past, expedited rulemaking has been reserved for uncontroversial technical amendments and for amendments that will effectively address a dire emergency. CACM's proposal is not "technical," and it is at least arguably not "uncontroversial." After all, it was only a couple of years ago that we were assuring judges and practitioners who were wary of permitting electronic filing and service that no one would be forced to file or serve electronically. Moreover, the budgetary problem addressed by CACM, while undoubtedly serious, is also chronic, and will be relieved only partially — and only over the long term — by the amendments. A precedent is being set that rulemakers may come to regret, as members of Congress, Judicial

Conference committees, the Justice Department, and others begin to insist that their favored proposals receive expedited consideration.

Some of the reporters have also raised substantive concerns with CACM's proposal. For example, the reporters have asked about those for whom mandatory electronic filing would pose a hardship, such as pro se litigants, prisoners, and solo practitioners — people who do not have access to computers, scanners, and high-speed Internet connections. CACM's proposal leaves the protection of these individuals to the tender mercies of local rulemakers. Should protection instead be afforded by the national rules? If so, how would that protection be drafted?

Reporters have also expressed concern about the fact that many local rules on electronic filing provide that anyone who *files* a document electronically is deemed to consent to being *served* electronically. The advisory committees made a deliberate decision that electronic service should not be permitted on parties who do not consent. See, e.g., Appellate Rule 25(c)(1)(D) (service is permitted "by electronic means, if the party being served consents in writing"); Civil Rule 5(b)(2)(D) (service may be made by "electronic means, consented to in writing by the person served"). Will local rules that mandate electronic filing effectively mandate electronic service? And, if so, should something be inserted in the national rules to break that connection?

Although I have been among the reporters expressing these concerns, I recommend that the proposed amendment to Appellate Rule 25(a)(2)(D) be approved for publication. The Standing Committee understandably wants to cooperate with a sister Judicial Conference committee that is struggling to find ways to address the severe budgetary constraints under which the federal courts are operating. In addition, it appears that many bankruptcy courts and district courts are already requiring

electronic filing, and that many more are likely to follow suit. It would be best for all if the national rules would authorize what the federal courts apparently are going to do anyway. Finally, at this point, the advisory committees are being asked to approve these amendments for publication. If, after the public comment period, the advisory committees have reservations — either about the substance of the rules or about the advisability of continuing to consider them on the fast track — then the advisory committees can decline to give final approval in the spring.

Attached is a proposed amendment to Rule 25(a)(2)(D). The draft Committee Note combines the major features of the Note that Prof. Jeffrey Morris drafted for the Bankruptcy Rules Committee and the two alternative Notes that Prof. Edward Cooper drafted for the Civil Rules Committee For your information, I have included the text of those three Notes after the draft Note to the proposed amendment to Rule 25(a)(2)(D).

**Rule 25. Filing and Service**

**(a) Filing.**

* * * * *

(2) **Filing: Method and Timeliness.**

* * * * *

(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

* * * * *

**Committee Note**

**Subdivision (a)(2)(D).** Rule 25(a)(2)(D) has been amended to authorize the courts of appeals to use their local rules not merely to permit, but to require, that papers be filed by electronic means. Mandatory electronic filing rules have already been adopted by some district courts and appear to work well. The amendment to Rule 25(a)(2)(D) makes clear that each court of appeals has the authority to move to mandatory electronic filing, when the court decides that both it and those who appear before it are prepared to take that step.

In approving local rules that mandate electronic filing, a court of appeals should be mindful of pro se litigants, prisoners, solo practitioners, and others who might not have access to computers, scanners, high-speed Internet connections, and similar resources. A court might provide categorical exceptions in its local rules, or a court might (in addition or instead) provide a process for litigants to seek to be excused in individual cases.

The amendment to Rule 25(a)(2)(D) authorizes a court of appeals to mandate electronic *filing*; the amendment does not authorize a court to require electronic *service*. Rule 25(c)(1)(D) provides that electronic service is permitted only "if the party being served consents in writing." "Consents" clearly implies a voluntary decision. Thus, a court may not both require mandatory electronic filing and provide that a party who files a paper electronically is deemed to consent to being served electronically.

## Bankruptcy Rules Committee Note

This amendment acknowledges that many courts have local rules that make electronic filing of documents mandatory. The amendment recognizes that advances in technology have led the courts to adopt those local rules. Electronic filing is used in many courts, and the amendment will encourage courts by local rule to proceed at their own pace towards a total electronic filing environment.

In adopting local rules, courts can include provisions to protect access to the courts for those who may not have access to or the resources for electronic filing. Given the variety of circumstances presented to the courts, it is appropriate to allow each court to make these decisions, at least initially, on a local level.

## Civil Rules Committee Note (short version)

Rule 5(e) is amended to authorize local rules that require filing by electronic means. Mandatory electronic-filing rules have already been adopted by some courts. These rules and the model rule will generate experience that will facilitate gradual convergence on uniform exceptions to account for circumstances that warrant paper filing.

## Civil Rules Committee Note (long version)

Rule 5(e) is amended to authorize local rules that require filing by electronic means. Mandatory electronic-filing rules have already been adopted by some courts. These rules and the model rule will generate experience that will facilitate gradual convergence on uniform exceptions to account for circumstances that warrant paper filing.

Adoption of a local rule that requires electronic filing does not authorize provisions that extend beyond filing to require service by electronic means. Rule 5(b)(2)(D) authorizes service by electronic means only if "consented to in writing by the person served." Consent counts only if it is voluntary. A court that wishes to couple electronic filing with electronic service must adopt some provision that enables a party to opt out of electronic service, whether by withdrawing from electronic filing as well or by expressly withholding consent to electronic service. [The choice may be made available as a general matter, or as a matter to be decided on a case-by-case basis.]

04-04

RECEIVED 8/2/04

*COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT*
*of the*
*JUDICIAL CONFERENCE OF THE UNITED STATES*

HONORABLE JOHN W. LUNGSTRUM, CHAIR
HONORABLE W. HAROLD ALBRITTON
HONORABLE WILLIAM G. BASSLER
HONORABLE PAUL D. BORMAN
HONORABLE JERRY A. DAVIS
HONORABLE JAMES B. HAINES, JR.
HONORABLE TERRY J. HATTER, JR.

HONORABLE GLADYS KESSLER
HONORABLE JOHN G. KOELTL
HONORABLE SANDRA L. LYNCH
HONORABLE ILANA DIAMOND ROVNER
HONORABLE JOHN R. TUNHEIM
HONORABLE T. JOHN WARD
HONORABLE SAMUEL GRAYSON WILSON

August 2, 2004

04-AP-D
04-BK-D
04-CV-G
04-CR-C

Honorable David F. Levi
Chief Judge
United States District Court
2504 U.S. Courthouse
501 I Street
Sacramento, CA 95814-7300

Dear Judge Levi:

At our recent Summer meeting, and as part of the Executive Committee's budget initiative, our Committee considered a myriad of cost containment ideas, one of which was that all cases filed in federal court be done exclusively through the CM/ECF system. After discussing this proposal, it was the consensus of the Committee that significant savings can and will be achieved through electronic filing, and therefore mandatory electronic filing should be encouraged to the fullest extent possible. Because this proposal has obvious implications for the federal rules of procedure and therefore your Committee, I wanted to alert you to our Committee's recommendations.

As you are aware, our Committee – at the request of and in coordination with your Committee – has developed model local electronic filing rules (which were subsequently endorsed by the Judicial Conference) that strongly encourage electronic filing. One of the fundamental reasons for developing these model rules was to assist the Rules Committee in its consideration of the development of national rules for electronic filing. These rules have been provided to the courts for over two years, and have been of great assistance in implementing CM/ECF.

At our Summer meeting, the Committee considered a series of proposed amendments to those rules that would create a presumption that all documents would be electronically filed, unless otherwise ordered by the court upon a showing of good cause. The Committee decided, however, that these proposals would probably conflict with the current Fed. R. Civ. P. 5(e) and Fed. R. Bankr. P. 5005, which state that a court may "permit" electronic filing, and therefore declined to endorse them. Instead, our Committee decided to tackle the issue head on, by recommending that the Rules Committee consider expedited amendments to the civil and

bankruptcy rules that would authorize the courts to "require" the use of electronic filing but that would also incorporate appropriate exceptions. Fundamentally, the Committee believes this to be the most appropriate way to formally implement electronic case filing into the culture of the federal courts. And, while the Committee was cognizant of the fact that the Appellate courts will not start implementing CM/ECF until January of 2005, and will not go live until January 2006 at the earliest, we believe now is an appropriate time to begin the rules process to effect these changes, in order that they be implemented as quickly as possible.

In the meantime, the Committee also plans to consider amendments – to the extent they are possible – to the current model local rules that would more strongly encourage the use of electronic filing without violating the current federal rules. The Committee is also requesting the Executive Committee, as part of its cost containment initiative, to strongly urge courts to work with their local bars to ensure that CM/ECF is implemented to the greatest extent possible. The Committee believes this will help eliminate paper filing practices, as well as dual paper and electronic filing practices, in favor of the full incorporation of electronic case filing, thereby achieving cost savings through this technology.

Therefore, based on the Committee's recommendations, I would like to formally request that the Rules Committee propose, on an expedited basis, amendments to Rule 5(e) of the Federal Rules of Procedure and Rule 5005(a)(2) of the Federal Rules of Bankruptcy Procedure that would authorize the courts to "require" the use of electronic filing, but would also incorporate appropriate exceptions. I would also welcome any suggestions your Committee may have regarding our initiative to review the current model local rules with an eye towards amending them to more strongly encourage electronic filing.

Thank you for your consideration of these proposals, and please do not hesitate to contact me if you would like to discuss them further. Our two committees have devoted an enormous amount of time and energy to these issues, and it looks like those efforts will continue for some time. I sincerely believe, however, that our efforts have been a great contribution to the federal judiciary.

Sincerely,

John W. Lungstrum

John W. Lungstrum

cc: Peter McCabe
John Rabiej

## Rule 5(e): Mandatory E-Filing

The Committee on Court Administration and Case Management (CACM) has recommended that the Bankruptcy and Civil Rules be amended to authorize local rules that require electronic filing. Apparently some districts already have adopted mandatory e-filing rules. The amendment itself is simple. Partly because it is simple, and partly because it seems better to address all the sets of rules at once, an informal consensus has emerged that the Appellate and Criminal Rules should be included in the same course of action.

The Court Management/Electronic Case Filing system (CM/ECF) has been implemented in a majority of the district courts. All courts are scheduled to be operating the system within a year. CM/ECF provides courts with the capability to accept electronic case filings. Because it may have significant cost savings for the federal judiciary, CACM has recommended that the rulemaking process be expedited to authorize courts to adopt local rules that require electronic filing. A copy of Judge Lungstrum's letter is attached. If each of the advisory committees finds the amendment noncontroversial as well as simple, it has been proposed that it be published for comment on an accelerated and abbreviated schedule. If the proposal meets with no substantial opposition, the plan would be to have the Standing Committee recommend adoption at its June 2005 meeting. This would require publication of the proposed amendments in November 2004 with a shortened public comment period that expires on February 15, 2005. The Advisory Committee on Bankruptcy Rules met on September 9-10 and agreed to publish the proposed amendments on this expedited schedule. The Advisory Committee on Criminal Rules meets on October 30 and will consider an identical amendment.

Discussion follows the proposed amendment. The proposal is shown in text as it would affect present Rule 5(e); the Style Rule version is shown in the margin. The draft Committee Note first set out is the Note prepared by the Bankruptcy Rules Committee for Bankruptcy Rule 5005(a)(2). As will be seen, the Committee Note presents greater challenges than the proposed rule.

### Rule 5. Service and Filing of Pleadings and Other Papers.

* * * *

**(e) Filing with the Court Defined.** * * * A court may by local rule permit <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. * * *[1]

### [Bankruptcy] Committee Note

This amendment acknowledges that many courts have local rules that make electronic filing of documents mandatory. The amendment recognizes that advances in technology have led the courts to adopt those local rules. Electronic filing is used in many courts, and the amendment will encourage courts by local rule to

[1] In the Style version, Rule 5(d)(3): "(3) *Electronic Filing, Signing, or Verification.* A court may, by local rule, allow <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A paper filed by electronic means in compliance with a local rule is a written paper for purposes of these rules."

proceed at their own pace towards a total electronic filing environment.

In adopting local rules, courts can include provisions to protect access to the courts for those who may not have access to or the resources for electronic filing. Given the variety of circumstances presented to the courts, it is appropriate to allow each court to make these decisions, at least initially, on a local level.

**[Alternative Draft] Committee Note**

Rule 5(e) is amended to authorize local rules that require filing by electronic means. Mandatory electronic-filing rules have already been adopted by some courts. These rules and the model rule will generate experience that will facilitate gradual convergence on uniform exceptions to account for circumstances that warrant paper filing.

**Discussion**

The attached materials show that many initial uncertainties about electronic filing have been resolved by demonstrating that electronic filing works well. Concerns that small law offices might find electronic filing a burden have been dissolved by the experience that they reap comparatively greater advantages than do large law offices. The level of enthusiasm among those who have converted to electronic filing is so uniform and so high that the hold-outs deserve an incentive stronger than "try it, you'll like it." Courts, counsel, and clients alike will benefit from mandatory electronic filing in most circumstances.

Electronic filing also results in substantial cost savings for the courts. These savings generally are accompanied by advantages for the filers as well. A move to mandatory electronic filing is not a case of transferring costs from courts to litigants.

The inevitable caution is that the advantages are general, not universal. If the smallest of law offices can be expected to enter the world of electronic filing, pro se litigants cannot. Extending electronic filing to all "papers" may create problems when the time comes to file the results of massive paper document discovery. Similar problems can arise — and are likely to be more frequent — when a party is required to file official administrative records or the transcripts of prior court or administrative proceedings. One approach would be to draft exceptions into Rule 5(e) itself — the rule could forbid application of mandatory rules to pro se cases, or it could require that mandatory rules provide a procedure to show cause to permit paper filing. (Most local rules that require electronic filing provide an exception for pro se filers.) Yet other qualifications might be adopted. Defining and drafting the qualifications does not seem a task that can be completed in one meeting and accomplished in a form that would justify expedited consideration and adoption. Even on the regular time schedule, the task would be challenging. If anything is to be done about recognizing the need for exceptions, it is likely to be done by comment in the Committee Note. The Bankruptcy Rule Committee Note is an illustration.

Moving beyond the direct terms of electronic filing, further complications may arise from the next step — electronic service of electronically filed papers. Rule 5(b)(2)(D) permits electronic service only if "consented to in writing by the person served." The consent requirement was added out of concern that not all litigants or law offices should be required to assume the burden of acquiring equipment and — commonly the more difficult step — monitoring it constantly. Many local electronic filing rules provide that the option to participate in electronic filing includes consent

to receive service by electronic means.[2] Those provisions constrain the choice to the extent that a party or law office wants to participate in electronic filing, but they leave the option to withhold consent to electronic service by forgoing participation in electronic filing. The option may be held open on a case-by-case basis. Some local rules, however, require electronic filing and also provide that participation in electronic filing includes electronic service. That approach raises two questions: Does the consent requirement in Rule 5(b)(2)(D) invalidate a local rule that establishes mandatory electronic service as part of mandatory electronic filing? And — if we do not propose to amend Rule 5(b)(2)(D) or to complicate the amendment of Rule 5(e) on an expedited track — should we attempt to address this problem in the Committee Note? Is there a risk that if we do not provide guidance in the Committee Note some local rules will fail to provide an option to withdraw from electronic-service provisions, creating an opportunity to challenge the effect of electronic service because there was no Rule 5(b)(2)(D) consent?

It would be possible to add to the Committee Note a paragraph like this:

> Adoption of a local rule that requires electronic filing does not authorize provisions that extend beyond filing to require service by electronic means. Rule 5(b)(2)(D) authorizes service by electronic means only if "consented to in writing by the person served." Consent counts only if it is voluntary. A court that wishes to couple electronic filing with electronic service must adopt some provision that enables a party to opt out of electronic service, whether by withdrawing from electronic filing as well or by expressly withholding consent to electronic service. [The choice may be made available as a general matter, or as a matter to be decided on a case-by-case basis.]

The attached materials include: (1) a brief report on the status of local electronic filing systems in the courts; (2) a study on cost savings realized by CM/ECF/ and (3) the model local rule governing electronic service.

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[2] Model Local Rule 9, attached below, provides that apart from sealed filings, "The 'Notice of Electronic Filing' that is automatically generated by the court's Electronic Filing System * * * constitutes service of the filed document on Filing Users. Parties who are not Filing users must be served with a copy of any pleading or other document filed electronically in accordance with the Federal Rules of Civil Procedure and the local rules. * * * A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User."

## Rule 9– Service of Documents by Electronic Means

The "Notice of Electronic Filing" that is automatically generated by the court's Electronic Filing System, except as provided below, constitutes service of the filed document on Filing Users. Parties who are not Filing Users must be served with a copy of any pleading or other document filed electronically in accordance with the Federal Rules of Civil Procedure and the local rules.

Most sealed filings do not produce a Notice of Electronic Filing, and therefore, service by the filer of any sealed document by an alternate method is required.

A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User.

### Derivation

The first sentence of Model Rule 9 is derived from the rules of the District of Kansas. The second paragraph is derived from the Northern District of Ohio's procedures.

### Commentary

1. The amendments to the Federal Rules (Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 4 service). The Model Rule covers only service of documents after the initial service of the summons and complaint.

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a non-sealed document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under the amendments to the Federal Rules (Civil Rule 5(b)(2)(D)), do so through a local rule. The amendments require a local rule if a court wants to authorize parties to use its "transmission facilities" to make electronic service. The Model Rule includes such a provision by providing that the court's automatically generated notice of electronic filing constitutes service. See note 6, below, for information on when a Notice of Electronic Filing is generated for an electronic filing pertaining to a sealed case or sealed document.

3. Parties who are not Filing Users are not deemed under the Model Rules to have consented to electronic service of the Notice of Electronic Filing. They must be served in some other way authorized by the Federal Rules of Civil Procedure (Fed.R.Civ.P. 5(b)). Under the rules, they can be served in the traditional way with a paper copy of the electronically filed document, or they can consent in writing to service by any other method, including other forms of electronic service such as fax or direct e-mail.

4. An amendment to Fed.R.Civ.P. 6(e) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note states:

> Electronic transmission is not always instantaneous, and may fail for any number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that make electronic service ever more attractive.

5. While some courts accept the Notice of Electronic Filing as a certificate of service, other courts require a separate certificate of service to be included with the filed document indicating that the document was electronically filed using the CM/ECF system and the manner, electronically through the Notice of Electronic Filing or otherwise, in which parties were served.

6. Note that Version 2.0 of District CM/ECF introduces the capability, if a court so chooses, to allow attorneys to electronically file into sealed cases or to electronically file sealed documents into otherwise unsealed cases. For most sealed filings, no Notice of Electronic Filing will be produced. Production of a Notice of Electronic Filing will depend on whether the docket entry and case are sealed from public view. Generally, under the default settings, CM/ECF will issue a Notice of Electronic Filing only when the filed document itself is sealed, but the docket entry for the document and the rest of the case file remain publicly available. Electronic filings in sealed cases do not generate a Notice of Electronic Filing, nor do electronic filings in otherwise unsealed cases in which both the docket entry and the attached document are sealed. Each court will need to decide how to use this functionality to best suit its needs. The model rules picks a uniform approach - requiring service by means other than through the Notice of Electronic Filing in all situations involving a sealed filing. However, if a court wants to allow service though the Notice of Electronic Filing in those instances in which a Notice of Electronic Filing will be generated (i.e., in an otherwise unsealed case where the document is sealed but the docket entry is unsealed), it can choose to do so.

MEMORANDUM

**TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES**

**FROM: JEFF MORRIS, REPORTER**

**RE: REQUIRED USE OF ELECTRONIC FILING UNDER RULE 5005(a)(2)**

**DATE: AUGUST 19, 2004**

The Committee on Court Administration and Case Management (CACM) has requested the Advisory Committees on the Civil Rules and the Bankruptcy Rules to consider amending the rules to encourage mandatory electronic filing. CACM believes that encouraging the mandatory implementation of electronic filing will lead to significant financial savings for the judiciary and has recommended that Bankruptcy Rule 5005(a)(2) be amended to permit local courts to adopt mandatory electronic filing requirements. This would require an amendment to Rule 5005(a)(2) which currently allows the courts to adopt local rules that permit electronic filing. The amendment would switch from a rule authorizing the adoption of local rules "permitting electronic filing" to one that would authorize the courts to adopt local rules that would require electronic filing. Such an amendment follows.

**RULE 5005. Filing and Transmittal of Papers**

(a) FILING

* * * * * *

(2) FILING BY ELECTRONIC MEANS

A court may by local rule ~~permit~~ require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the

United States establishes. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * * *

COMMITTEE NOTE

The rule is amended to authorize the adoption of local rules that would require that documents be filed by electronic means. These local rules also may include appropriate exceptions to the requirement. Electronic filing of documents is the norm in many courts, and the rule as amended will permit the courts that are in differing stages in the adoption of electronic filing of documents to proceed at their own pace towards a total electronic filing environment.

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

# ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief

Rules Committee Support Office

September 29, 2004

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Status of CM/ECF Project and Study of Cost-Savings Associated With It*

I have attached a report on the status of the Court Management/Electronic Case Filing project (CM/ECF) and a study containing information on cost-savings associated with the project.

The three-page report describes the status of the CM/ECF implementation in the federal courts as of June 2004. It is operational in 123 courts, including 75 bankruptcy courts and 48 district courts. "Another 16 bankruptcy courts and 29 district courts are in the process of rolling out the system." Attorney participation is impressive with 88,000 using it to make over 3 million docket entries. In general, the report gives the project a glowing stamp of approval.

In 2003 the Judicial Conference's Committee on Information Technology requested a study "to determine whether electronic public access fees impact specifically attorney's acceptance of the CM/ECF system." The study was conducted by a consulting firm, PEC Solutions, Inc. In determining whether assessing fees reduced attorney participation, the study examined the offsetting cost savings realized by attorneys using the system. A discussion of the attorneys' cost savings can be found on pages 8-9, 12, and 18-24.

The study provides some indirect information on the cost savings for courts. It documents the specific ways attorneys save money using the system, several of which likely will apply to the courts, while others likely will result in less work for the courts. A discussion of revenue enhancements derived from CM/ECF for the courts is also given on pages 36-40.

John K. Rabiej

Attachments

# Status Report: Electronic Filing in the Federal Courts: 2004

by Sharon D. Nelson, Esq. and John W. Simek

*Sharon D. Nelson, Esq. and John W. Simek are the President and Vice President of Sensei Enterprises, Inc., (www.senseient.com) a computer forensics and legal technology firm based in Fairfax, VA. They can be reached by email at sensei@senseient.com or phone at 703-359-0700.* *© 2004 Sensei Enterprises, Inc.*

A well deserved drum roll please! Without any fanfare, the Administrative Office of the U.S. Courts is quietly changing the way federal courts do business, court by court. When the AO first announced that it would have its case management/electronic case filing system (CM/ECF) operational in all federal courts by 2005, the pronouncement was greeted skeptically. After all, state e-filing projects were bogged down, the economy wasn't cooperating, and the whole project seemed extraordinarily massive. This is now the third report the authors have compiled on the status of electronic filing in the federal courts, and it looks as though next year's report will announce the completion of the AO's mission, on time and on budget.

Here are the very impressive statistics: As of June 2004, CM/ECF was fully operational in 123 courts, including 75 bankruptcy courts and 48 district courts. Another 16 bankruptcy courts and 29 district courts are in the process of rolling out the system. CM/ECF is rolled out in waves, with nine courts being rolled out every two months. Remarkably, the timeline adopted at the initiation of this project in 1995 has remained largely in place Also, remarkably, the cost of instituting the system has dropped, to about $50,000 per court, while the speed of the system has more than doubled. This is partly due to reduced equipment cost and the conversion to a Linux operating system.

Gary Bockweg, the AO's Project Director for CM/ECF, reports that the AO has encountered only one significant delay, with respect to electronic filing in the appellate courts. Because the appellate court functionality differs greatly from district court functionality, the appellate courts defined substantially different requirements for their case management system. Rather than merely modifying existing district court software, as had been planned, the developers had to create a wholly new system for the appellate courts. It is also true that the appellate courts have not shown the depth of interest in electronic filing manifested by the bankruptcy and district courts. This may have to do with the fact that appellate courts tend to be more traditional or that due to the differences in their processes, appellate courts may not expect the same benefits that the district and bankruptcy courts are seeing.

The e-filing statistics for May 2004 are really striking. Some fourteen million cases were being handled by the CM/ECF system A total of 88,000 attorneys were using the system, and 127,000 new cases were opened. Some 3,300,000 docket entries were made in May. On a humorous note, in this increasingly complex world, the AO found itself tagged by blacklists as a spammer when it sent out thousands of copies of the same e-mail notification in the Enron case. The AO spent some time trying to unravel the mess. But as is clearly evident from the stats, this is a well-oiled machine in constant use.

As the economy floundered, the federal courts continued to have funding available for their CM/ECF implementation through revenue generated by the judiciary's "PACER" (Public Access to Court Electronic Records) program, which generated approximately $27,000,000 in revenue last year. Where does all the money come from? Many people are surprised to find that court data is invaluable to many industries, including credit card companies, banks, realtors, marketing companies–the list goes on and on. While there are no added fees for those filing electronically or receiving their one free access to any new filing in their own case, the court information is also made available electronically to the public for a fee of

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seven cents per page. Understandably, the AO is pro-PACER and its revenue generation This may well stir a privacy concern for those whose data is being sold, but at the moment, the public seems largely unaware that court data has become electronic gold As Bockweg noted cheerfully, "We are pleased to have access to this money. Congress has authorized the judiciary to assess reasonable user fees for its electronic public access program, and this has enabled us to keep the service going." In fact, much of this data gathering is automated, and has become so intense that it has occasionally threatened to bog the system down. In response, the AO has asked some of the most active data gatherers to adjust their procedures so that the activity is done at night, when normal system access is low. It remains to be seen whether privacy advocates will cry "foul" at this source of revenue.

Some elements of the federal e-filing system remain unchanged The AO's philosophy has been to make e-filing permissive rather than mandatory. While that once seemed worrisome, and skeptics fretted that participation would lag, this train is now moving so fast that everyone seems eager to jump on board.

Just as reported in previous installments, the AO is struggling mightily to stay current with the latest web browsers and doing a credible job, lagging only slightly behind the most up-to-date versions.

As also reported previously, the AO is playing a waiting game with XML and continuing to monitor its progress elsewhere. One element of the CM/ECF system that surprises some observers is that it still uses a user ID and password rather than digital signatures. As Bockweb notes, this simple system has been working just fine and has not thus far presented any security issues. Though he expects digital signatures to be adopted at some point in the future, there are no immediate plans for their adoption.

One major change is that electronic commerce has now been melded with the system, and more and more courts are permitting fees to be paid online.

The universality of the system seems to appeal to all the courts using it, so fairly minimal use has been made of their ability to modify the code. More frequently, courts have supplemented the core code with their own set of local instructions, news, and procedures. If the core code is touched, the court modifying it is also responsible for handling the replication and maintenance of the code in the event of a disaster recovery event.

The "Public Access v. Privacy Rights" debate continues and Bockweb notes wryly that the AO is prepared to "shift with the winds" as dictated by the changing methodologies of balancing both rights. In 2001, the Judicial Conference issued its rules in civil cases, requiring that "personal data identifiers" such as Social Security numbers, dates of birth, financial account numbers, and names of minor children be modified or partially redacted. Social Security cases were excluded from the system entirely. At that time, criminal cases were also generally excluded, but that has now changed.

## Public Access to Electronic Criminal Case Files

In March, 2002, the Judicial Conference approved the establishment of a pilot project that would allow 11 courts, ten district courts, and one court of appeals, to provide remote electronic access to criminal case files. A study of these courts conducted by the Federal Judicial Center did not find any instances of harm due to remote access to criminal documents.

After further study and deliberation, the Judicial Conference adopted new policies with respect to remote access to criminal case files in September of 2003. In general, the policy states that documents that can be accessed at the courthouse should be accessible remotely. There are some restrictions. The policy states in part:

Upon the effective date of any change in policy regarding remote public access to electronic criminal case file documents, it is required that personal data identifiers be redacted by the filer of the document, whether document is filed electronically or in paper, as follows:

1. Social Security numbers to the last four digits;
2. Financial account numbers to the last four digits;
3. Names of minor children to the initials;
4. Dates of birth to the year; and
5. Home addresses to city and state.

The following documents are not to be included in the public case file and are not made available at the courthouse or via remote electronic access:


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1 Unexecuted summonses or warrants of any kind,

2. Pretrial bail or presentence investigation reports,

3. Statements of reasons in the judgment of conviction,

4 Juvenile records;

5. Documents containing identifying information about jurors or potential jurors;

6. Financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;

7 Ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and

8. Sealed documents.

Courts maintain the discretion to seal any document or case file *sua sponte*.

Security remains a constant concern, exacerbated by the injection of terrorist activities as part of the daily culture. The AO works with the Department of Homeland Security and the National Security Agency to secure court records, and thus far, has been very successful. The federal system utilizes a "dirty" server accessible to the public with the court's data residing on a "clean" server protected by a firewall. Thus far, the system has foiled hundreds of thousands of "rattlings at the doorknob" though the AO is anything but complacent. As part of the national infrastructure, court records are potentially a valuable target for terrorists and the AO remains alert to the ever-morphing potential security vulnerabilities. Currently, court databases are replicated in Virginia and Missouri, and further replications are anticipated. It may actually be safer to have data for the Eastern part of the U.S. replicated in the West, and vice versa, a concept that is presently being studied. With current software, only a single replication is possible, but that software will shortly be replaced and multiple replications will then be possible, thereby further reducing security risks.

At one point, the Western District of Kentucky helped test the system by losing their outside server, and then activating the replicated data server. Their system failure resulted in a test of the AO's "failback" procedures, which raised concerns about the methodology used to return to a normal production environment following a failover. The AO continues to work to make such transitions as smooth as possible. The AO has also allowed controlled "white hacking," in which security specialists attempted to hack into the CM/ECF system. While the results mandated some minor fixes, the AO breathed a happy sigh of relief when the experts were unable to effect any major intrusions.

Asked to sum up the general reaction, Bockweb notes happily, "It is rare to hear anything negative. Most courts seem to really enjoy the benefits and those who have already implemented are looking forward to getting more and more 'nice to have' features." Some states, stymied in their own e-filing efforts, have asked the AO for its CM/ECF system, but Bockweb notes that the AO can't afford to devote staff resources to working with the states. Also, because the system hasn't been packaged as an "off the shelf" system, it would be very hard for anyone else to bring it up state by state, or court by court, in accordance with local needs. Still, the AO is looking at the issues to see if it can ultimately assist the states. In the meantime, the "little engine that could" keeps chugging along, and it looks very much as though it will make it to the station on time. ●

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## Executive Summary

### Background

In 2001, the Administrative Office (AO) conducted a study of the electronic public access fee and its impact on the use of CM/ECF. Although data from the Electronic Public Access (EPA) Fee Study performed in 2001 suggested that fees do not impact the use of CM/ECF, these findings were made early in the CM/ECF implementation process, and the survey set was comprised of PACER users (commercial entities, attorneys, and the general public). In 2003, the Committee on Information Technology asked the Electronic Public Access (EPA) Program Office to conduct a follow-up study to determine whether electronic public access fees impact specifically attorney's acceptance of the CM/ECF system.

The EPA Program Office contracted with PEC Solutions, Inc. (PEC), which conducted the 2001 fee study, to also conduct the research for this study, which consisted of a telephone survey, focus group meetings, and an analysis of electronic public access account utilization.

The objectives of the 2003 Fee Study were to assess the impact of fees on users' adoption and use of CM/ECF, and to determine the need to develop an alternate pricing method for electronic public access.

### Methodology

In the telephone survey, PEC randomly selected 135 attorneys who use CM/ECF in either bankruptcy or federal district courts from 13 judicial districts divided into two pools: metropolitan statistical areas, which are populations over 50,000; and micropolitan statistical areas, which are populations under 50,000. The survey consisted of twenty-five questions concerning size and style of law practices, CM/ECF usage patterns, and opinions regarding the current fees and corresponding value of CM/ECF.

PEC personnel, along with AO staff, visited six different courts in four court locations: District of Columbia- District Court; Eastern District of Virginia- Bankruptcy Court; Western District of Missouri- District and Bankruptcy Courts; and Nebraska- District and Bankruptcy Courts. Each participating court contacted a cross-section of attorneys and firms who represented the most experienced users of CM/ECF. The number of participants varied from eight to fifteen persons per group meeting. Participants included attorneys and support staff from sole practitioners' offices, small and large law firms, local and remotely located attorneys, U.S. Attorneys and bankruptcy trustees.

The focus groups proceeded via open discussions, rather than the method of specified questions and answers used in the telephone survey. A facilitator guided the discussion through four topical areas, including: what impact the system has had on attorneys' practices; how fees and other

costs impact attorneys' use of CM/ECF; what benefits attorneys are deriving from the system; and what changes, if any, attorneys would prefer.

Participants discussed any topic or aspect of CM/ECF or PACER that they believed to be important. The openness of the forum allowed potentially contentious issues to surface without derailing the discussion. The unrestrained conversation resulted in less inhibited, more meaningful discussions than the telephone survey permitted. Nonetheless, the focus groups predominantly confirmed the telephone survey results and provided qualitative explanations corresponding to each topic of discussion.

At each focus group meeting, participants completed a time analysis worksheet to identify where and how CM/ECF changed their work processes, filing procedures, storage of data, case management, and other aspects of the work day. The worksheet divided an 8-hour day into time segments into which attorneys attributed their work procedures, both clerical and substantive, before and after the implementation of CM/ECF.

**Results**

The study results show that the current fee structure does not deter attorneys from adopting or using CM/ECF. Accordingly, the survey participants preferred the current fee plan more than a proposed per-document plan or a flat fee.

1. Fee Structure: Participants compared the current fee structure to both a per-document fee plan and a flat fee, and overwhelmingly preferring the current fee system. Most attorneys do not bother to bill clients for the fees, for two reasons: 1) the comparatively minuscule fees do not justify spending the time to track and recover them; and 2) under the current system, attorneys said it is difficult to efficiently attribute a particular fee to a particular client.

An overwhelming majority of attorneys surveyed, 86%, said the fee does not inhibit their use of CM/ECF. A few users, however, complained of paying fees to view case files for their own cases, even after the initial free copy is obtained. Some also complained of the billing mechanism, i.e., they found the billing transaction receipts annoying, but they challenge neither the need for the fee nor the amount of the fee. Other users suggested building the access fee into the filing fee or some other one-time fee associated with each case.

2. Advantages: Survey participants listed several benefits of CM/ECF, including cost savings, productivity and efficiency improvements, and enhancements to products and services. Users realized cost savings in postage, copying, paper usage, courier services, and travel to and from courts for filing and document retrieval. Time advantages include service and delivery efficiencies, document filing, and access to case information, which facilitates improved communications with clients, other case participants, and the courts.

Users also advise that because of the time savings, attorneys and staff alike are able to spend more time on substantive projects. Use of CM/ECF also results in increased workloads, more billable hours, and even product improvement. The attorneys cite the 24 x 7 access as an element of CM/ECF that benefits their professional work as well as their personal lives by providing greater flexibility of when and where attorneys could perform their work.

3. Disadvantages: Attorneys' most vocal complaint was the increase in email volume, especially bankruptcy notices. Some attorneys reportedly diverted resources to manage the barrage of emails. One predominant issue is the inability, under the current system, of the user to identify the source and subject of the emails, which necessitates the time-consuming tasks of opening and reading each individual email.

Attorneys also complained that filing and case management with CM/ECF required more highly skilled support staff. Although filing and noticing have been streamlined, skilled staff are required to operate the system and troubleshoot anomalies. Obtaining skilled staff required new recruitment and hiring efforts and training, and might require laying off other staff with inadequate computer skills.

Those who practiced criminal law disliked the restricted access in criminal cases. However, the Judicial Conference recently changed the policy regarding remote access to criminal cases.

4. Start-Up Costs: Attorneys acknowledged that they incurred considerable initial costs, which they recouped directly, through billing and less money expended on mailing and courier services, and indirectly, through increased operational efficiencies, allowing more time to be spent on substantive issues rather than clerical issues involved in filing of cases. Users also note that by requiring updated computer and word processing equipment, CM/ECF has forced firms to update computer equipment to the overall benefit of the firm. Therefore, users have recouped the start-up costs of CM/ECF while improving client services.

5. Case Management Tool: Almost all attorneys indicate that they have printed documents from CM/ECF, rather than saving them to disc. Users printed hard copies because of habit, practice peculiarities, security concerns, and court rules. Ultimately, both attorneys and support staff reported that they simply were more comfortable with a paper file than with an electronic file. Consequently, because users kept hard copies of CM/ECF documents, they were less likely to refer repeatedly to the system to review case documents. The attorneys have asserted, however, that the EPA fee is not the motivating factor that influences whether they use CM/ECF as their primary file system.

6. Revenue Projections: The number of CM/ECF courts increases dramatically each year, with a corresponding increase in EPA fee revenue. Nearly 50 CM/ECF courts are currently billing for EPA, and by the end of fiscal year 2004 this number should increase to nearly 90 courts, with 60 bankruptcy courts and 27 district courts implementing the system. The bankruptcy implementation is significantly closer to completion than is the district implementation. Consequently, the growth

rate for bankruptcy revenues is relatively flat, whereas the growth rate for district courts projects continued growth through 2005. Additionally, because bankruptcy revenue has historically accounted for most of the EPA revenue, and the bankruptcy statistical model is based on experience, the bankruptcy model supplies the principal dynamic in the projected growth of EPA. Nevertheless, analysis indicates that the current fee structure will provide increased revenues over time, continuing to provide for development, implementation, and operation of CM/ECF.

Due to the differences between bankruptcy and district courts, the researchers created separate forecasting models for each. For fiscal year 2004, expected total revenue is $35.0 million*; for fiscal year 2005, the expected revenue is $43.7 million**; and for fiscal year 2006, the expected revenue is $47.7*** million.

7. Cost-Benefit Analysis: Attorneys report that CM/ECF's benefits substantially outweigh the costs of start-up and operation. Attorneys using CM/ECF take advantage of saved time to improve services and increase billable hours, gaining competitive and thus economic advantage over those who do not use CM/ECF. Firms commonly write-off non-billable hours because they exceed reasonable costs for the period. Upon implementing CM/ECF, however, firms have reduced non-billable hours write-offs and have recovered the revenue corresponding with the regained hours. Users were able to pass savings on to clients, promoting client good will and further enhancing competitive advantage

**Summary**

The 2003 Fee Study results show that the current fee structure does not deter attorneys or support staff from using CM/ECF. Although users do not typically use CM/ECF as their primary internal case management system, this is not related to the access fee. Instead, users choose to print documents for a variety of reasons related to historical practice, court requirements and security. Users have noted that start-up costs were moderate to substantial, but that they have recouped the costs through increased billable hours, expanded competitive advantage and enhanced client goodwill. Ultimately, the users overwhelmingly report that the value of CM/ECF substantially outweighs the burden of the access fee.

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* Between $29.1 million and $38.6 million

** Between $34.2 million and $48.2 million

*** Between $35.8 million and $59.0 million

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# Section 1 – Introduction

## 1.1 Background

The Administrative Office of the U.S. Courts (AO) is at the approximate mid-point of implementing a new case management system for the federal judiciary. The new application is a Government-developed product called Case Management/Electronic Case Files (CM/ECF). The CM/ECF project replaces existing case management systems in the federal courts (e.g., the Integrated Case Management System (ICMS), NIBS) with a new case management system based on current technology, new software, and increased functionality requested by the courts. In addition to providing the courts with updated tools for managing their cases, this new system enables the courts to create electronic case files and implement electronic filing over the Internet.

Current Judicial Conference policy is that public access fees should be commensurate with the costs of providing existing services and for developing enhanced services. The fee for public access to electronic information was initially set at $1.00 per-minute. It was reduced twice, first to $.75, then to $.60 per-minute. As access began to be made available via the Internet, the Judicial Conference, at its September 1998 session, prescribed a $.07 per-page charge for Internet access to court documents. This charge, which was aimed at maintaining current public access revenues, while also introducing new technology to expand public access court information, was calculated to produce comparable charges for Internet and dial-up access for large users (charges are reduced for light users), and applies to all court types.

As a result of the Fee Study conducted by PEC Solutions in 2001, the Judicial Conference approved a per-document cap of $2.10 on case file documents accessed through the Public Access to Court Electronic Records (PACER) system. This cap was set based on user preference combined with the need to preserve revenue at a level sufficient to fund the EPA program, which relies exclusively on revenues derived from PACER. The PACER Service Center, located in San Antonio, TX, manages administration and billing for all electronic public access in the courts. While physical access to public records within the courthouse during regular operating hours is currently available to the general public free of charge, anything beyond this basic level has an associated charge, e.g.: $.50 per-page for copies of court documents; $20 for a search of the court records by the clerk; $4 for a sheet of microfiche; $20 for an audio recording of court proceedings; $7 for certification of a document; and $.10 per-page if printed from a public access terminal.

EPA revenues are used to fund not only the PACER program, but also the Appellate Bulletin Board System (ABBS), the Voice Case Information System (VCIS) and the Appellate Voice Information System (AVIS); the latter two of which are provided to the public without charge. In addition to VCIS, which has been an extremely popular service, the U.S. Party/Case Index, which allows users to perform nationwide searches, logged approximately 3,000,000 transactions last year. These revenues also provide courts with telephone lines and toll-free lines, as well as all of the hardware and software necessary for public access, including PACER-Net and infrastructure costs, and public

scanning stations, including a personal computer for free public access at the court in all offices with ten or more staff.

EPA revenues also fund the development and implementation costs of CM/ECF, whose operation has been integrated with, and indeed expanded the scope of PACER. PACER has been expanded to administer electronic access to documents filed in CM/ECF, in addition to docket sheets. CM/ECF is currently "live" in 60 bankruptcy courts and 27 district courts and is currently being implemented in 52 additional district and bankruptcy courts. Implementation of all federal courts is anticipated to be completed by the end of 2005.

## 1.2 Objectives

The objectives of the EPA Follow-up Fee Study are to assess the impact of fees on the adoption and use of CM/ECF by attorneys and to evaluate alternate pricing models for electronic public access and electronic filing for attorneys. The study reviews the benefits and disadvantages system users have experienced to determine the value that the system provides to attorneys.

## 1.3 Analytical Methods and Document Organization

The focus of this study is on the attorneys practicing in the U.S. Courts. A telephone survey of current, randomly selected, CM/ECF users, coupled with focus groups of attorneys in CM/ECF courts gathered users' opinions regarding the advantages and disadvantages of CM/ECF, and how the system has impacted practice. The survey and focus groups were performed in parallel; however, initial answers from the survey were used to direct questions and discussion during the later focus group sessions to help the PEC facilitators fully understand the issues arising from the implementation and use of CM/ECF by attorneys. EPA revenue forecasts extrapolated revenue trends using statistical regression models. The specific methodology is described in detail in Section 6, "Revenue Projection." These sources also contributed to estimates for Section 4, "Electronic Public Access Benefits and Costs."

The remainder of this document is organized into the following sections:
Section 2 - Data Collection Methodology
Section 3 - CM/ECF Impact on Attorney Practice
Section 4 - Electronic Public Access Benefits and Costs
Section 5 - Attorney Adoption of the CM/ECF System
Section 6 - Revenue Projection
Section 7 - Findings

# Section 2 – Data Collection Methodology

This section describes the three primary data collection methodologies used to develop the information contained in this report. PEC performed a telephone survey of randomly selected attorneys, facilitated focus group meetings with current users of CM/ECF, and analyzed account and revenue data from the previous two years.

## 2.1 Overview

The timing of this study, at the mid-point of CM/ECF implementation, allows analysts to draw on actual experience using the system. The following data collection tools provided complementary insights into the experience of CM/ECF users:

- Telephone Survey - collect data regarding user demographics, usage patterns, and fee-related issues, as well as general information regarding the perceived value and costs of EPA.
- Focus Group Meetings - provide specific information regarding the effects of CM/ECF on attorney practice, the advantages and disadvantages of EPA, including quantifiable and non-quantifiable benefits experienced with the implementation of the system. In addition, issues raised from the telephone survey will be discussed to develop a complete understanding of reasons behind some of the answers.
- CM/ECF and PACER Account and Revenue Data - analyze usage data to develop models to forecast future usage and revenues, as well as development of possible alternative pricing models.

The following paragraphs describe these methodologies in detail.

## 2.2 Telephone Survey

### 2.2.1 Overview

The telephone survey was developed with input from the AO. The survey consists of twenty-five (25) questions developed to elicit responses which identify the user's law practice, CM/ECF usage patterns, and opinions regarding the current fees and value of EPA. Survey participants were randomly selected from lists of CM/ECF users from thirteen (13) judicial districts totaling approximately 15,800 attorneys. A total of 135 attorneys were surveyed, which provides an eight (8) percent error rate with a confidence interval of 90 percent.

### 2.2.2 Methodology

PEC chose a telephone-based survey because of the higher response rate and more in-depth issue exploration anticipated via telephone, as compared to e-mailed or printed questionnaires. To gain the maximum insight into the use of electronic documents from CM/ECF, the population was defined as the courts that have used the system for the longest time. Select additional courts with significant CM/ECF experience were added to provide a balance of "prototype" and later "wave" courts.

The courts represented CM/ECF courts of varying sizes covering different demographic areas in different regions of the country to enable participation and representation in the survey of areas with as many characteristics and court environments as possible. A particular interest in the survey was to ensure adequate representation of the views of attorneys who practice outside of large cities and metropolitan areas. To achieve a balance between metropolitan and non-metropolitan attorneys, the lists provided by the selected courts were divided according to their location into two groups representing larger and smaller population areas. The survey groups were defined as follows:

I. Those attorneys located in Metropolitan Statistical Areas (population >50,000) defined by the U.S. Census Bureau, and
II. Those located in Micropolitan Statistical Areas (population <50,000) and other small towns and sparsely populated areas.

Separation into two groups was necessary because the attorneys in micropolitan areas would represent a statistically insignificant group in a non-differentiated survey.

For each group, the attorneys were sequenced and selected to participate in the survey by matching the sequence number with a list of numbers provided by random number generator. This method supports the guiding principles that all participants have an equal chance of selection. The only records eliminated were those that contained erroneous and incomplete address and telephone contact information that prevented survey contact, or were duplicates.

### 2.2.3 CM/ECF User Pool for Survey

Thirteen (13) courts provided lists of their current CM/ECF attorney users for inclusion in the initial pool from which survey participants would be randomly selected (see Attachment D). The total pool of users provided by the participating courts totaled over 15,800 attorneys. As stated above, the users were then separated into metropolitan and micropolitan sub-groups to ensure representation of both user types.

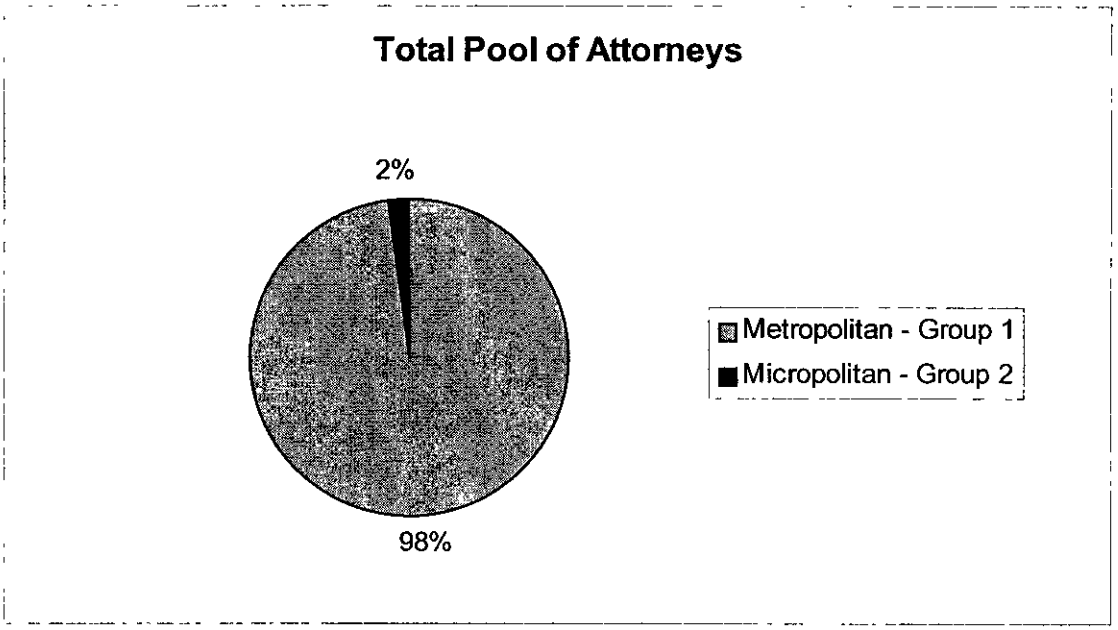



**Exhibit 2.1: Pool of Attorneys by Location**

Exhibit 2.1 shows the enormous disparity between the number of metropolitan and micropolitan users and illustrates the need to create two randomly selected groups. If all users were combined into one pool the odds of randomly selecting a sufficient number of micropolitan users to gather meaningful data would be extremely low.

## 2.3 Focus Group Meetings

### 2.3.1 Overview

The objective of the focus group meetings is to understand how the CM/ECF system is used by attorneys. Several areas are discussed with each focus group:

- What impacts has the system had on their practice?
- How do fees and other costs impact their use of CM/ECF?
- What benefits are attorneys receiving from the system? and
- What would they like to see happen with the system in the future?

The focus groups also allow the PEC team to delve deeper into certain issues that may have been identified during the telephone survey. For the most part, the focus groups confirmed and enhanced the survey results and provided the qualitative explanations underlying the quantitative results of the survey.

### 2.3.2 Methodology

The AO arranged for the PEC team to visit four court locations and a total of six courts which have been using the CM/ECF system for a significant period of time. The focus group courts included:

- District of Columbia - District Court
- Eastern District of Virginia - Bankruptcy Court
- Western District of Missouri - District and Bankruptcy Courts
- Nebraska - District and Bankruptcy Courts

Facilitation of the focus groups insured that:

- All participants had an opportunity to express their thoughts on EPA;
- Potentially contentious issues were surfaced without derailing the main items of discussion; and
- Conduct of the focus groups occurred in an efficient, decorous, and professional manner that reflected on the judiciary's concern for the user community and scrupulously respects the time constraints of busy attorneys.

Each focus group court arranged for the participation of a representative group of attorneys and support staff. The total number of participants in each session varied from eight to fifteen individuals. Sessions were attended by a cross-section of the CM/ECF attorney user community, which included sole practitioners, attorneys from small, medium (10 - 30 attorneys) and large firms (> 30 attorneys), remotely located attorneys, U.S. Attorneys, and bankruptcy trustees. Participants included attorney support staff (paralegal/legal secretary), who identified how the office environment has changed since the implementation of CM/ECF. Many attorneys do not use the system frequently, relying on their support staff to electronically file and receive documents. In addition, many of the anticipated benefits of the system are more clerical in nature and, therefore, the support staff may be significantly affected by the implementation of CM/ECF.

Lastly, a time analysis worksheet (Attachment C) was provided to each of the focus group participants to help identify where and how their work day has changed since the implementation of CM/ECF. Participants were asked to assume an eight hour work day and allocate those hours among the categories provided, both before CM/ECF and after its implementation. The time analysis was not a scientific study; rather, it provided indications of where and how CM/ECF is affecting practicing attorneys.

# Section 3 - CM/ECF Impact on Attorney Practice

## 3.1 Overview

This section explores the impact CM/ECF has had on attorney practice. The impacts CM/ECF has had on the day-to-day practice of attorneys and what advantages/disadvantages attorneys have experienced are reviewed.

## 3.2 CM/ECF Impact on Attorney Practice

CM/ECF impacts practice in many different ways, such as staff requirements, costs, time allotment, productivity, client servicing, and access to information. The telephone survey results and focus group input both identify advantages and disadvantages experienced by attorneys and professional staff using the system. Overall, the input received about the system during the data collection activities is very positive.

The telephone survey asked several questions about how the CM/ECF system affects attorneys' practice. Question #22 asked users if they viewed the system positively or negatively in the following areas: Cost Control, Access, Reliability, Timeliness, Single Source of Data, and Change. For all areas approximately 90% of the survey respondents replied that they view the impacts from CM/ECF in a positive light. All of these aspects of the system were also identified as advantages by the focus groups and are discussed in greater detail in paragraph 3.3.1.

Similarly, Question 20 queried whether there was a positive or negative impact on "Research and/or Document Preparation", Filing/transmittal, Case tracking, and Post Case Follow-up. For the work areas of Research and Post-case follow-up there was an almost even split between those who believed that CM/ECF has had no impact and those who answered that the system has had a positive impact on practice. For the more clerical work areas of Filing/transmittal and Case tracking, close to 90% of the respondents believe there has been a positive impact.

A third question was asked regarding the perceived value that CM/ECF provides or will provide. Question #21 asked:

"In general, do you expect the overall long term impact of electronic documents to be:

a. Labor-saving
b. Burdensome
c. No impact
d. Other

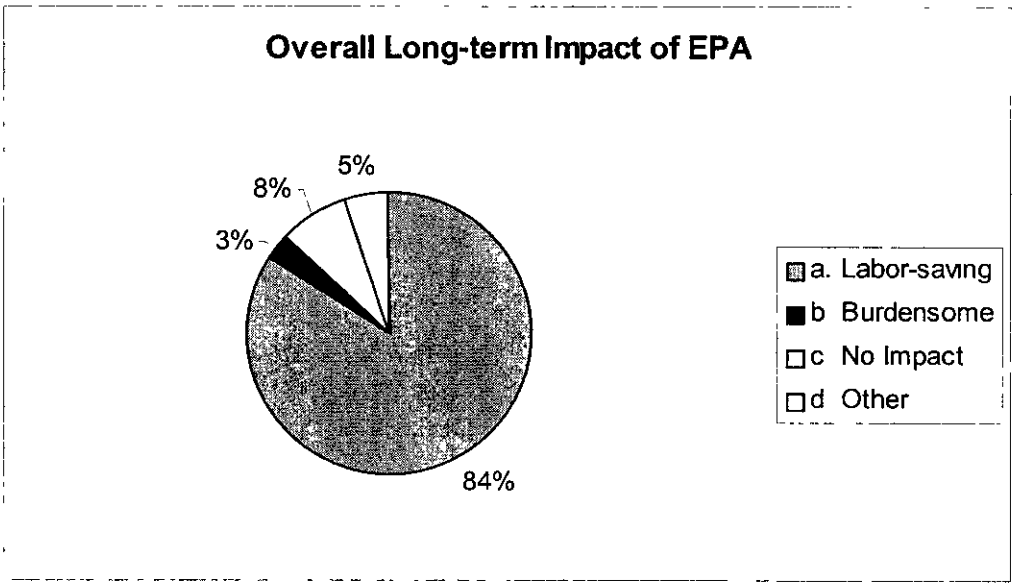



**Exhibit 3.1: Long-term Impact of EPA**

The results are consistent with overall views on the efficiency of using the system. Exhibit 3.1 shows that the overwhelming majority of system users believe that CM/ECF will provide labor-savings over the long term. Both metropolitan and micropolitan attorneys had the exact same percentage of users answer that the system will be labor saving.

### 3.2.1 Advantages

There were numerous advantages cited by the focus group participants; however, several were mentioned consistently throughout the meetings and telephone survey. The benefits can generally be divided into four categories: cost savings, efficiency/time savings, productivity gains, and quality of access improvements.

#### 3.2.1.1 Cost Advantages

Cost advantages provided by the CM/ECF system are usually the first benefits mentioned by system users because they are readily apparent and can be significant. The cost advantages will be discussed in general terms in this section and quantified in greater detail in Section 4, Cost-Benefit Analysis.

Cost savings were identified primarily for clerical and delivery areas having to do with document production and delivery.

- **Postage** - CM/ECF shifts the burden for document service delivery from the submitting attorney to the Court because the system automatically forwards the documents to parties in the case via e-mail. For large bankruptcy and multiple

defendant civil/criminal cases the number of mailings could run into the hundreds or even thousands of documents over the life of a case. Attorneys are no longer required to send hard copies of court documents (in most cases) and, therefore, save a considerable amount of money.

- **Copying/Paper** - Similar to the postage savings, with electronic delivery of court documents the submitting attorney has shifted the cost of making multiple hard copies of documents, which can be hundreds of pages in length, to send to the parties in a case. Considering that the normal cost attributed to paper and copier usage is estimated at approximately $.05 per-page, for every 100 pages not copied an attorney's office saves $5.00. Although a relatively small amount initially, during the course of litigation thousands of pages per-case can be saved, resulting in significant savings. One focus group member commented that, "Copying costs alone are down 60%."

- **Courier** - Before CM/ECF submission of documents in a timely manner to the court required either a mailing or a courier delivery to the courthouse. Since documents can be filed electronically at any time, day or night, the need for courier delivery and the urgency to meet a 5 o'clock deadline have been eliminated.

- **Travel** - Like courier expenses, travel expenses necessary to deliver or retrieve documents from the court have been significantly reduced or eliminated. Attorneys remotely located from the court particularly benefit from reduced travel costs. The current government reimbursement rate for auto travel is $0.36 a mile. If an office is required to send someone to deliver a document or travel to retrieve a document and they are located 100 miles away, the office can save $72 in auto costs, plus the hourly labor costs for the person making the trip.

- **Storage Space** - Offices have the potential of saving money on storage space for areas currently used for physical files because the files can be stored electronically. However, since attorneys are still printing documents, they are not taking full advantage of this potential benefit.

#### 3.2.1.2 Efficiency/Time Advantages

Efficiency and time advantages consist of changes in how particular tasks are performed, reducing the amount of time required or providing more flexibility for the user.

- **Service/Delivery** - CM/ECF has drastically reduced the amount of time it takes to prepare and deliver documents to case parties for support personnel. Time copying, binding, and mailing documents has been eliminated because the documents are sent to all necessary recipients with immediate delivery. Conversely, notification and

acceptance of delivery on the receiving end is almost immediate. Parties no longer have to wait several days to receive a document via mail.

- **Internal Document Filing/Retrieval** - Time associated with filing or retrieving hard copy documents from file rooms has been reduced or, in some cases, eliminated. Although hard copies are normally made, in many instances copies of documents are also saved electronically on the user's computer system. Users have instant access to the document via CM/ECF or through their own computer files. This is especially important when a client calls and the attorney does not have to waste time finding the file and then calling the client back with the information, he or she can respond almost instantly. Some attorneys noted that the organization of their files is better when they save them electronically.

- **Immediate Access to Information** - CM/ECF provides users with almost immediate access to their own case files, as well as information regarding current cases in the federal judicial system. Attorneys can check the docket at any time to ensure their case files are complete. With immediate delivery and receipt of court documents, it was noted that many simple court actions are completed much quicker. Case history is more readily available, especially for closed/permanent records, along with easier access to exhibits. In addition, client background checks regarding their litigation history can now be done quickly and discretely by attorneys.

- **Improved Communication** - All parties are more aware of what is going on in the case because the access to the docket and case files. This improves efficiency of the entire process and allows practitioners to potentially handle more cases.

#### 3.2.1.3 Productivity Gains

Productivity gains include advantages such as increased case load and reduced "busy" work.

- **More Substantive Work** - CM/ECF has reduced the need for clerical support and has freed up support staff and attorneys to work on more substantive projects. This is especially important for sole practitioners or small offices where clerical support is at a premium. A focus group member commented that it, "liberates support staff of menial and time consuming tasks." By eliminating much of the clerical "busy" work (copying, delivery preparation, etc.), an office can be more productive.

- **Increased case load/billable hours** - Because of the reduced clerical work and increased efficiency, several attorneys commented that CM/ECF allows them to increase their billable hours and/or handle a larger case load.

#### 3.2.1.4 Quality Improvements

Quality improvements include both attorney product quality, but also work/life quality.

- **Product Improvements** - The time savings and efficiency improvements mentioned above allow attorneys to spend more time doing substantive work, such as legal research and quality assurance. One type of research that is now available is the access to pleadings in other cases. Attorneys can now use ideas and arguments from other cases which they may not have had easy access to previously. This results in a better work product and better client support and servicing. The ability to file documents up until midnight the day they are due allows attorneys to do last minute quality checks on documents before they are filed (see also disadvantages).

- **Remote and 24 x 7 Access** - The CM/ECF system allows access via the internet, twenty-four hours a day, seven days a week. The ability to access the system and file documents at any time, from any location with internet access provides considerable flexibility to attorneys. Attorneys can now access case files while they are away from the office.

  Remotely located attorneys, such as those in the micropolitan areas are particularly advantaged by the access CM/ECF provides. Remote attorneys now have the same access to documents as attorneys that are located next to the courthouse. One sole practitioner stated, "The system is a boon for me - it allows me to be more efficient and independent."

  Some quality of life issues are also improved by the 24 x 7 access allowed by CM/ECF. An attorney noted that the ability to file documents at his leisure (up to midnight) allows him flexibility to attend family functions, such as a child's softball game, and still file timely afterwards, often from home.

### 3.2.2 Disadvantages

Participants in the focus groups and the telephone survey were asked to identify disadvantages of using CM/ECF. Respondents named as disadvantages particular facets of using the system that were actually needed system improvements, which are listed as "Attachment A." Several disadvantages were repeatedly identified, such as e-mail volume and naming of docket entries, time increases, and start-up costs, among others. Below are the most common disadvantages cited by the focus groups and survey participants.

- **Volume of e-mails** - The volume of e-mails that some users receive, especially in bankruptcy, can be overwhelming. In contrast to paper copies of documents delivered via U.S. mail, documents served electronically prove more difficult to quickly review for relevance, especially in light of the naming convention issue. Moreover, attorneys are now receiving e-mail notification for every action taken in a particular case, whether or not it is relevant to their client. This is true for

bankruptcy cases where there are multiple creditors and civil cases with multiple defendants. Some attorneys indicated that they spend more time trying to review their e-mails than they used to spend going through their regular mail.

- **Naming convention for docket entries** - The naming convention for e-filing in CM/ECF does not always identify the exact type of document being submitted. CM/ECF users are having difficulty identifying important e-mails because of this, causing them to waste time going through every e-mail received.

- **Higher skilled staff** - Due to the complexities of attorney practice and the growing number of e-mails, staff that is more highly skilled is required to identify important documents, rather than using purely clerical staff. As a result the individual cost per support person has increased. Most indicated, however, that they require less personnel overall, so the costs appear to balance out.

- **Start-up costs** - Start-up costs are an issue for a few of the smaller offices and sole practitioners. The costs of upgrading computers, purchasing scanners and software, and installing a high speed connection could be relatively high.

- **Lack of consistency** - The way CM/ECF is implemented varies from jurisdiction to jurisdiction. Similar rules for using the system would simplify training for multi-jurisdictional practices.

- **Information Access** - A few criminal attorneys commented that they could not access some documents on-line that they were able to access by going to the court. The restrictions reflect current Judicial Conference policy.

- **Staff time has increased in some areas** - Scanning of documents, especially exhibits[1], has increased considerably, along with the formatting of documents to be filed electronically. Getting documents prepared for PDF conversion and delivery has balanced out time savings in other areas for some staff.

- **Accounting** - The credit card bills that the law offices receive for their filing fee via CM/ECF are not detailed which causes increased time for the attorney and/or accounting personnel to figure out the bills for each client.[2]

- **24 x 7 Availability** - Although constant access to the system is advantageous in many respects, it has also extended the day for some attorneys and staff. In many

[1]Not all courts require exhibits to filed electronically.

[2]This is a function of the credit card company billing practices, not CM/ECF or PACER.

instances, the staff person is the only person who knows how to use CM/ECF, so they must stay with the attorney to file the document.

- **Technical Difficulties** - Participants noted sporatic difficulties with electronic service delivery and other aspects of the CM/ECF system and their own internal systems.

- **Less opportunity to catch errors** - A few attorneys found the electronic filing processes provided fewer or briefer reviews before filing the documents. As a result, they were concerned that they occasionally submit the incorrect version of an electronic file.

- **Shift in costs to trustees** - Printing/paper costs have shifted from the debtor to the bankruptcy trustees. This was mentioned in two focus groups, but not specifically identified as a disadvantage to the system.

### 3.2.3 Time Shift Analysis

During the focus group meetings participants were provided a sheet which listed broad work categories likely to be affected by the implementation of CM/ECF. Each broad category had several more specific categories beneath it. Participants were asked to assume an eight-hour day and allocate those eight hours among the categories of work before CM/ECF was implemented and after. The individuals filling out the sheet could fill it out from their own perspective (attorney/paralegal/secretary) or from the perspective of the firm. If attorneys believed that the work areas were more appropriate for support staff, they were asked to fill it out from that perspective. The Time Analysis Template is included as Attachment C.

While the analysis does provide a general indication of how CM/ECF is affecting certain practice areas, the analysis certainly could not be considered a scientific study of how work performance has changed. The four broad work categories are: Delivery, Case Management, Clerical, and Legal Research.

Many attorneys commented that the categories were more applicable to support staff and filled out the sheet from that perspective. A large number of participants also noted that the overall time during their workday has not changed, but what they are doing has shifted somewhat. After tabulating the results from the worksheets, there was a clear indication that time had been reduced in more areas than increased in others since the implementation of CM/ECF. Consistent with advantages cited earlier, the additional time was used to improve work product through additional quality assurance and research, as well as additional client services.

Below are the results of the time shift analysis, broken down by attorney time and staff time.

- **Delivery** - this category included travel/driving, service delivery to multiple recipients, follow-up/service confirmation, and wait time at the courthouse.
    - Across the board, the reduction in time required since the implementation of CM/ECF was by far the greatest.
        - Average attorney time decreased by 1.0 hours
        - Average staff time decreased by 1.49 hours
- **Case Management** - this category included logistics/coordination, internal document retrieval, internal document filing, preparation for submission, and docket checking.
    - The results in this category were mixed. Submission preparation and docket checking increased for many, while document retrieval and filing fell significantly.
        - Average attorney time decreased by 0.78 hours
        - Average staff time increased by 0.5 hours
- **Clerical** - this category included copying, delivery preparation, mail sorting/document processing, and billing.
    - The total time in this category decreased for both attorneys and staff, though scanning was written in by several participants as an increase in time. Copying was significantly reduced. Time spent sorting mail stayed the same or increased for many because of the volume of e-mails and time spent on billing increased for those who bill their clients for CM/ECF charges.
        - Average attorney time decreased by 0.76 hours
        - Average staff time decreased by 0.27 hours
- **Legal Research** - this category includes specific judge rulings, searches of similar cases, key word searches, and travel to courthouse.
    - The total time for each labor category decreased.
        - Average attorney time decreased by 0.37
        - Average staff time decreased by 0.19
- **Other** - this category was filled in if the above list did not include a category which experienced change for a particular participant.

- A few attorneys spent more time with their clients.
  - Average attorney time increased 0.05 hours
  - Average staff time increased 0.29 hours

- **Total Time Change**:
  - Attorney: -3.08 hours
  - Staff: -0.98 hours

# Section 4 – Electronic Public Access Benefits and Costs

The telephone survey and the focus group meetings described above served as the basis for assessing benefits and costs. Attorney users having a wide variety of practices conveyed their perceptions of the system's impacts, which included many benefits, such as decreased costs, increased effectiveness, and improved work product. The general benefits of the system were discussed in Section 3. This section presents a comparison of quantifiable benefits with the estimated costs users incur to use CM/ECF.

## 4.1 Overview

CM/ECF has been implemented in approximately half of the courts in the federal Judiciary and has been in use for several years in some court jurisdictions. The costs and benefits in the jurisdictions that have experience using CM/ECF have been recognized by the users and are beginning to take full effect.

## 4.2 Methodology

The format for collecting information included the focus group meetings and telephone surveys with CM/ECF attorney users. Wherever possible, specific quantifiable costs and benefits were identified and calculated using assumptions regarding use and time periods. Although not a scientific study, the time shift data gathered during the focus groups identified specific changes in time spent on activities by the attorney and staff users, as detailed in the preceding section. Since CM/ECF has been in use in some jurisdictions for several years, this experiential data yields an approximate idea of the savings to be realized from using CM/ECF.

## 4.3 Quantifiable vs. Non-quantifiable Benefits

Quantifiable benefits are those where a direct association can be established between some particular component of CM/ECF and a cost reduction. Other activities that are linked to improvements made by the system, are considered to be non-quantifiable. For example, alleviating the necessity to retrieve a document physically from the courthouse corresponds to a quantifiable cost savings of salary or courier fees. In contrast ensuring that a document has been received timely is a non-quantifiable, though important, benefit. Another example of an important non-quantifiable benefit is the ability to produce better work products due to the efficiencies gained in other areas.

## 4.4 List of Benefits

The benefits/advantages identified by system users are generally explained in Section 3.3. Below is a table listing all EPA benefits identified by the system users during the focus groups and telephone survey. The quantifiable and non-quantifiable benefits are specified.

**Table 4.1: Quantifiable and Non-Quantifiable Benefits**

| Functionality/ Factors | Benefits | |
|---|---|---|
| | Quantifiable | Non-Quantifiable |
| **1. Time Savings** | | |
| **1. Travel time (to Courthouse)** | ✓ | |
| **2. Wait time (in line in Courthouse)** | ✓ | |
| **3. Wait time (for mail or courier)** | ✓ | |
| **4. Document processing time (opening mail, sorting, etc.)** | ✓ | |
| **5. Copy time (to generate copies)** | ✓ | |
| **6. Filing time (internal manual file handling)** | ✓ | |
| **7. Filing time (court document submission)** | ✓ | |
| **8. Legal research time (searching court files)** | ✓ | |
| **9. Legal research time (judges' rulings)** | ✓ | |
| **10. Legal research time (marketing, competitive analysis, client checks)** | ✓ | |
| **11. Search time (document retrieval)** | ✓ | |
| **12. Search time (to find information for clients)** | ✓ | |
| **13. Document production time (reduced data "rekeying")** | ✓ | |
| **2. Increased Availability** | | |
| **1. Case files available 24X7 (not only during Courthouse hours)** | | ✓ |
| **2. Information available immediately (without getting up from computer)** | | ✓ |
| **3. Information is available from anywhere (remote users have same access)** | | ✓ |
| **4. Greater flexibility (adjust schedule)** | | ✓ |

| Functionality/ Factors | Benefits | |
|---|---|---|
| | Quantifiable | Non-Quantifiable |
| **3. Increased Effectiveness** | | |
| **1. Better work product (more time for quality assurance)** | | ✓ |
| **2. Increased billable hours** | ✓ | |
| **3. Increased case load** | ✓ | |
| **4. Better case filings (electronic access to successful filings)** | | ✓ |
| **5. Better communication between parties** | | ✓ |
| **6. Fewer misfiled documents** | | ✓ |
| **7. More effective use of time (time shift)** | ✓ | |
| **4. Increased Efficiency** | | |
| **1. Lower internal copy costs (fewer hard copies)** | ✓ | |
| **2. Lower postage costs (fewer mailings)** | ✓ | |
| **3. Lower court copy costs (fewer hard copies)** | ✓ | |
| **4. Lower travel costs (mileage and time)** | ✓ | |
| **5. Lower storage costs (less hard copy storage)** | ✓ | |
| **6. Lower courier costs (fewer trips to court to file)** | ✓ | |
| **7. Reduced case management time (for manual or automated case management)** | ✓ | |
| **8. Better market analysis (of competition)** | ✓ | |

## 4.5 Estimation of Benefits and Costs

This section quantifies the benefits and costs associated with the CM/ECF system. Benefits derive primarily from the time-saving features and reduced resource usage described previously in this report. The costs are primarily associated with fees for electronic public access. The necessary hardware, software, training, and other costs of becoming proficient in the CM/ECF application delay some users' achievement of the benefits ultimately available from document access in CM/ECF. Many users noted the initial investment required to achieve proficiency, terming it a

"learning curve" or "adjustment period." The vast majority of CM/ECF users expected that the return on the investment from using the system will far outweigh the initial implementation costs.

Projection of the estimated benefits for particular classes of CM/ECF users is produced from the information gained from the telephone survey and focus group meetings. Using the survey breakdown of metropolitan and micropolitan attorneys, a definition of "small" and "large" law offices could be produced. The average number of attorneys in each group was calculated and used to compute associated time benefits. The Time Shift Analysis was used to estimate time savings for various categories of work and provides a break down for staff and attorney time.

**Table 4.2: Time Shift Analysis**

| Work Category | | Attorney | Staff |
|---|---|---|---|
| **Delivery** | | | |
| | Travel/driving | (0.58) | (0 86) |
| | Multiple recipients | (0 11) | (0.23) |
| | Follow-up/service confirmation | (0 14) | (0.12) |
| | Wait time at courthouse | (0 21) | (0 29) |
| | Other - | (0.06) | |
| | Other - | 0.07 | |
| | Other - | 0 04 | |
| | **Total** | **(0.99)** | **(1.49)** |
| | | | |
| **Case Management** | | | |
| | Streamlined logistics/coordination | (0 26) | 0.04 |
| | Internal document retrieval | (0 43) | (0.11) |
| | Internal document filing | (0 11) | 0.01 |
| | Preparation for submission | 0 04 | 0.10 |
| | Docket Checking | (0 04) | 0 21 |
| | Other - | 0 02 | 0.25 |
| | Other - | | |
| | Other - | | |
| | **Total** | **(0.78)** | **0.50** |
| | | | |
| **Clerical** | | | |
| | Copying | (0 57) | (0 48) |
| | Delivery prep | (0.37) | (0.27) |
| | Mail sorting, document processing | (0 28) | 0.51 |
| | Billing | 0.25 | (0 13) |
| | Other - | 0 18 | 0 03 |

| | | | |
|---|---|---|---|
| | Other - | | 0 07 |
| | Other - | | |
| | **Total** | **(0.79)** | **(0.27)** |
| | | | |
| **Legal Research** | | | |
| | Specific Judge rulings | (0 03) | 0.02 |
| | Similar cases currently in the system | 0 09 | (0.10) |
| | Key-word search | (0.11) | 0.01 |
| | Travel to courthouse | (0.52) | (0.11) |
| | Other | | (0 04) |
| | **Total** | **(0.57)** | **(0.23)** |
| | | | |
| **Other** | | | |
| | | **0.05** | **0.29** |
| | | | |
| **Total Time Increase (Reduction)** | | **(3.08)** | **(0.98)** |

**Benefit/Cost Computation for Small Law Office (Micropolitan)**

Assumptions for small law office (3 attorneys and 5 support):

Billing: $150/hour for attorney; $40/hour for support (clerical and paralegal)
Workdays: 250 days/year
Courthouse: 1 visit/week

The following tables detail the Benefits to a Small Law Office using CM/ECF.

| **Annual Savings by Attorneys** | |
|---|---|
| **Delivery** | **.99 hours/day** |
| **Case Management** | **.78 hours/day** |
| **Clerical** | **.79 hours/day** |
| **Legal Research** | **.57 hours/day** |
| **Other (cost)** | **-.05 hours/day** |
| **Total saved per-day (average office)** | **3.08 hours/day** |
| **Adjustment for small office (25% of average office)** | **.77 hours/day** |
| **Total Attorney Dollars Saved/year (.77 x 250 x $150)** | **$28,875.00** |

| **Annual Savings by Support Personnel** | |
|---|---|
| **Delivery** | **1.49 hours/day** |
| **Case Management (cost)** | **-.5 hours/day** |
| **Clerical** | **.27 hours/day** |
| **Legal Research** | **.23 hours/day** |
| **Other (cost)** | **-.29 hours/day** |
| **Total saved per-day (average office)** | **.98 hours/day** |
| **Adjustment for small office (25% of average office)** | **.25 hours/day** |
| **Total Support Dollars Saved/year (.25 x 250 x $40)** | **$2,500.00** |

| **Other annual estimated costs avoided by reliance on CM/ECF information** | |
|---|---|
| **Reproduction costs for 5 documents per-day (assuming 5 pages/document)** ( 25 pages/day x 250 days/year x $.05 /page) | **$312.50** |
| **Postage costs for 1 document per-day and 4 recipients** (1 docs/day x 4 recipients x 250 days x $.37 stamp) | **$370.00** |
| **Vehicle/transportation costs from avoided trips to courthouse** (assuming 10 miles/trip) (10 miles x 52 trips/year x $.36/mile) | **$187.20** |
| **Courier costs for 1 trip per-week** (1 trip x 52 weeks x $15 per trip) | **$780.00** |
| **Reproduction charge for each courthouse visit** (assuming 50 copies @ $.25 per copy 50 copies x 52 weeks x $.25 per copy) | **$650.00** |
| **Annual Total Other Costs** | **$2,299.20** |

**Summary Table**

| **Total Annual Benefits to Small Law Offices** | |
|---|---|
| **Total Attorney Time** | **$28,875.00** |
| **Total Staff Time** | **$2,500.00** |
| **Total Other** | **$2,299.20** |
| **Total Annual Benefits** | **$33,674.20** |

## Costs of CM/ECF to Small Law Offices

Cost of CM/ECF access is estimated based on accessing 10 documents/per day. This basis is larger

than the total hard-copy documents estimated in the savings calculation above due to the fact that additional CM/ECF documents are accessed for reasons of research, quality assurance, and simple convenience. However, as the survey indicated, attorneys only go back to a document once or twice after their first free electronic copy. The propensity expressed by attorneys for using hard-copy documents requires the additional assumption that the electronic documents will be printed for review and filing. Many attorneys indicated that multiple copies are made in some instances for several attorneys.

| **Annual Costs of CM/ECF to Small Law Offices** | |
|---|---|
| **CM/ECF Fee (10 documents x 5 pages/doc x 250 days x .07)** | **$875.00** |
| **Printing Costs [15 documents x 5 pages/document x 250 days x .05 (paper/printer ink)]** | **$937.50** |
| **Total Annual Cost To Small Law Office** | **$1,812.50** |

## Benefit/Cost Computation for a Large Law Office

The following calculation projects the annual benefits derived from access to CM/ECF information for a large law office (78 attorneys and 75 staff personnel):

- Estimated parameters are the same as for the preceding small law office example. Application to large law office case is made on the basis of savings per office with a 25% increase over the medium firm.

| **Annual Benefits to Large Law Firm (detail omitted)** | |
|---|---|
| **Total Attorney Time [(3.08 hours x 1.25) x 250 x $150]** | **$144,375.00** |
| **Total Staff Time [(.98 hours x 1.25) x 250 x $40]** | **$12,250.00** |
| **Total Other** | **$5,748.00** |
| **Total Benefits** | **$162,373.00** |

| **Annual Costs of CM/ECF to Large Law Offices** | |
|---|---|
| **CM/ECF Fee (50 documents x 5 pages/doc x 250 days x .07)** | **$4,375.00** |

| | |
|---|---|
| **Printing Costs [75 documents x 5 pages/document x 250 days x .05 (paper/printer ink)]** | **$4,687.50** |
| **Total Annual Cost To Large Law Office** | **$9,062.50** |
| **Net Annual Benefit(Cost) to Large Law Office** | **$153,310.50** |

## 4.6 Constraints on Achieving Benefits

A number of reasonable, implicit assumptions formed the basis of the preceding estimates, as is typical with "bottom-up" parametric estimates. However, these estimates may overlook factors that can limit the actual benefits received. The time savings were calculated from the Time Analysis Worksheet handed out during the focus group meetings and filled out by attorneys and staff personnel. Participants estimated based upon their actual experience or their opinion of what is being saved or what areas increased. The way the worksheets were filled out was not always consistent and assumptions had to be made in some instances. In many cases, attorneys were estimating changes in time of their support personnel because the work categories were more likely to be in the support area.

## 4.7 Cost-Benefit Estimate

Table 4.2 identifies the Benefit-Cost Ratio for the two example law firms (small and large law offices) . It is important to recognize the issue of how much of presumed benefits actually save attorneys money, since they usually pass these costs on to their clients. The primary consideration is that attorneys risk losing business to more efficient firms if they fail to take advantage of saved time. Hence, savings are real even if they are realized by clients because attorneys who do not use more efficient methods will be negatively impacted. This is most clearly true when attorneys charge fixed fees. This is extremely relevant for federal courts because most of the PACER business is bankruptcy, for which debtors are charged on a fixed fee basis (and very competitively). Whether or not the savings are passed along to the clients in the form of lower fees, the firms who adopt electronic documents have an economic advantage, so CM/ECF provides a benefit. Moreover, it is a common situation to have written-off hours that the firms do not bill because they exceed reasonable costs for that product. Savings that result in fewer hours written off because lawyers work more efficiently are real benefits (in reclaimed revenue). As in the other cases, some benefit may be shared with clients but firms still benefit either from reclaimed revenue, client goodwill, or competitive advantage.

| User Group | Estimated Benefit (saved labor and other cost) | Estimated Cost | Benefit Cost Ratio |
|---|---|---|---|
| **Large Law Office** | **$162,373** | **$9,062.50** | **17.9** |
| **Small Law Office** | **$33,674.20** | **$1,812.50** | **18.6** |

**Exhibit 4.3: Benefit Estimates for CM/ECF**

The benefits listed in Table 4.3 apply specifically to electronic access. Because CM/ECF had been in use for some time in the majority of the courts in the focus groups and the survey pool, the estimates of time savings are thought to be relatively reliable. Almost all respondents indicated that actual work hours had not changed and, in fact, had increased in some instances because of the increased availability. The responses on the Time Shift Worksheet were consistent with the comments made during the focus group meetings. Many attorneys, especially in small offices or sole practitioners indicated that the attorney savings were significant because they no longer had to do clerical work or non-billable "busy" work. The larger offices also commented that attorney benefits were significant and in many instances the support staff day was increased due to the volume of e-mails, file preparation, and extra hours worked to file later at night. Some respondents noted that the start-up (sunk) costs were relatively steep; however, the vast majority believed the benefits of the system far out weighed the initial costs. While the courts may not take into account the short-term costs to attorneys and other users for their changing business processes associated with electronic filing, the long-term benefits and savings greatly outweigh the short-term costs. The access to electronic documents afforded by CM/ECF offers a savings in time and cost to those who embrace the new technology.

# Section 5 - Attorney Adoption of CM/ECF

## 5.1 Overview

This section analyzes possible impediments to fully adopting the CM/ECF system experienced by attorneys practicing in the federal courts. Issues such as the impact of the current electronic public access fee structure, attorney demographics, and the initial costs of implementing the system within the firm are factors which are explored. A primary issue of this study is to identify whether the current EPA fees are affecting whether attorneys are using the system and, more importantly, whether some attorney groups are disadvantaged by the access fees. The telephone survey was essential in gathering data for this section regarding attorney demographics and specific usage, which was enhanced with input from the focus groups. Issues regarding how the system is used and how practice is impacted are addressed in Section 3.

## 5.2 Fee Impact on CM/ECF Adoption

### 5.2.1 Current Environment

The current electronic public access (EPA) fee schedule provides for a $.07 per-page fee with a per-document cap of $2.10 on case file documents accessed through the electronic public access systems. The per-page fee structure was preferred by CM/ECF user groups, including attorneys, and is designed to preserve system revenue at a level sufficient to fund the EPA program, including implementation and development costs of CM/ECF, which relies exclusively on revenues derived from EPA.

Attorneys of record are provided one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. As part of this initial access, users have the opportunity to print or save the document to their own computer system for future use. Attorneys are charged the public access fees for all subsequent access. In addition, users are provided $10 worth of free usage per calendar year.

Many of the judicial districts which have implemented CM/ECF require or strongly encourage use of the system to electronically file to the court docket. Therefore, most attorneys that practice in federal courts which have implemented CM/ECF file electronically, regardless of their location, size of firm, or level of federal practice.

### 5.2.2 Fee Impact on Attorneys

The telephone survey asked participants several questions regarding how the current fee structure impacts their use of the CM/ECF system, as well as how other fee structures might impact their usage or satisfaction with the system. In addition, during the focus group meetings, the question of whether the current fees deterred individuals or organizations from using the system was specifically asked of the participants. ***Approximately 88% of attorneys answered that the current public access fees do not influence their use of CM/ECF.***

A prime example of the responses received from the study groups were the answers to the following question from the telephone survey:

- #11. If you download CM/ECF documents to your computer, why do you do so?
  a. To avoid fees
  b. To maintain your own record
  c. Other, specify

Overwhelmingly, the answer to question #11 was "To maintain your own record." Exhibit 5.1 identifies the breakdown of responses. It should be noted that for the majority of respondents, when referring to "downloading" documents, they are actually printing the documents for hard copies, rather than saving it to their computer. The reasons behind this issue are discussed in greater detail in Section 3.

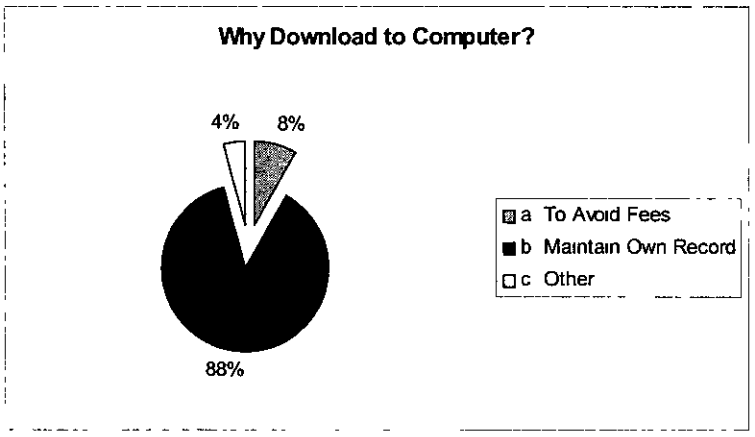



**Exhibit 5.1: Survey Question #11**

The results of question #11 did not vary between micropolitan and metropolitan attorneys. However, when asked if they capture the incurred CM/ECF fees to bill their clients, 77% of micropolitan attorneys answered that they do not bill their clients for CM/ECF charges (see Survey Question #15), while a smaller percentage of metropolitan attorneys, approximately 53% of the offices, do not bill their clients.

The focus groups included attorneys located in remote locations relative to the federal courthouse and they were specifically asked if the fees are an impediment to their use of CM/ECF. Almost unanimously, they answered that the benefits provided by the system far outweigh the minimal fees they incur. The remotely located members of the focus groups and the micropolitan attorneys surveyed by phone stated that CM/ECF has increased their ability to provide services to local clients and has put them on equal footing with attorneys located near the courthouse. The information accessibility, and travel, postage, and time savings for the remote attorneys far exceed the fees that are incurred while using CM/ECF. Further discussion of the impact on attorney practice is contained in Section 4.

### 5.2.2.1 CM/ECF as the Primary Case File

The majority of CM/ECF users do not use CM/ECF as their primary or official case file; however, the fees appear to have almost no influence on this issue. During the telephone survey, PEC asked several questions regarding system usage and what users do with documents after accessing their free copy. The following questions were asked of survey participants:

- Question #10 - We are interested in learning if the system is used to access documents more than once, or if users are using their "one free look" and saving documents to their internal computer system for future access. When you use the system, do you:

    a. Access the document for your one free look and save it to your system for future use?

    b. Go back to the CM/ECF system to look at documents when they are needed again?

    c. A combination of the above? Specify when you save vs. re-retrieve.

Exhibit 5.2 shows that all attorney groups are inclined to use their initial access without charge to save or print the document.[3] A minority of attorneys, however, indicated that they also go back to the CM/ECF system for subsequent retrieval. Most of the attorneys who subsequently retrieve documents gave the reason that they believed the document was not important and they could save space by not "saving". This issue was also raised during the focus group meetings and many attorneys indicated that they subsequently retrieved documents from CM/ECF when clients called and requested information. The convenience of having the document immediately available is highly valued because it provides better client service and saves time not having to search through their files. Almost all attorneys in the focus groups printed the document to hard copy during their initial access, rather than downloading it to their computer system.. The internal hard copy file still appears to be considered the users' primary case file.

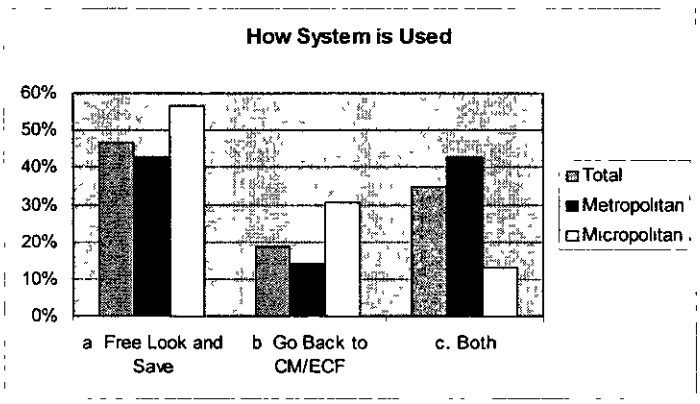



**Exhibit 5.2: Document Retrieval Preference**

- Question #14 - On average, how often do you retrieve documents from your cases on the CM/ECF system after your first free look?

    a. 1 time or less
    b. 1 - 2 times
    c. More than 2 times, but less than 5 times
    d. 5 times or more

[3]Almost all attorneys when asked if they save the document, indicated that they print the document rather than save it to their own computer system for future use. The reasoning behind printing the document is discussed in paragraph 5.2.2.3.

In response, 65% of the respondents answered 1 time or less and an additional 25% indicated that they retrieved documents from CM/ECF only 1 or 2 times. Therefore, 90% of CM/ECF users retrieve documents subsequently 2 times or less from EPA. The next question inquired if the fee influenced this decision.

- Question #13 - Does the current fee structure discourage your use of CM/ECF as your primary file system?
  A. Yes
  B. No

Exhibit 5.3 illustrates that 80% of CM/ECF users stated that the current fee structure does not influence their decision whether or not to use the CM/ECF system as their primary file system. As illustrated in Exhibit 5.1, 88% of the CM/ECF users printed or saved the document to maintain their own record, rather than to avoid fees (8%).

### 5.2.2.2 Focus Group Responses

Focus group answers were entirely consistent with the survey results on this matter and the meeting participants provided several explanations for their hesitancy to rely solely on CM/ECF as their primary file system. These include:

- **Custom/habit**. The most common reason attorneys do not use CM/ECF as their primary filing system is custom or habit. Almost all firms/attorneys are used to working with hard

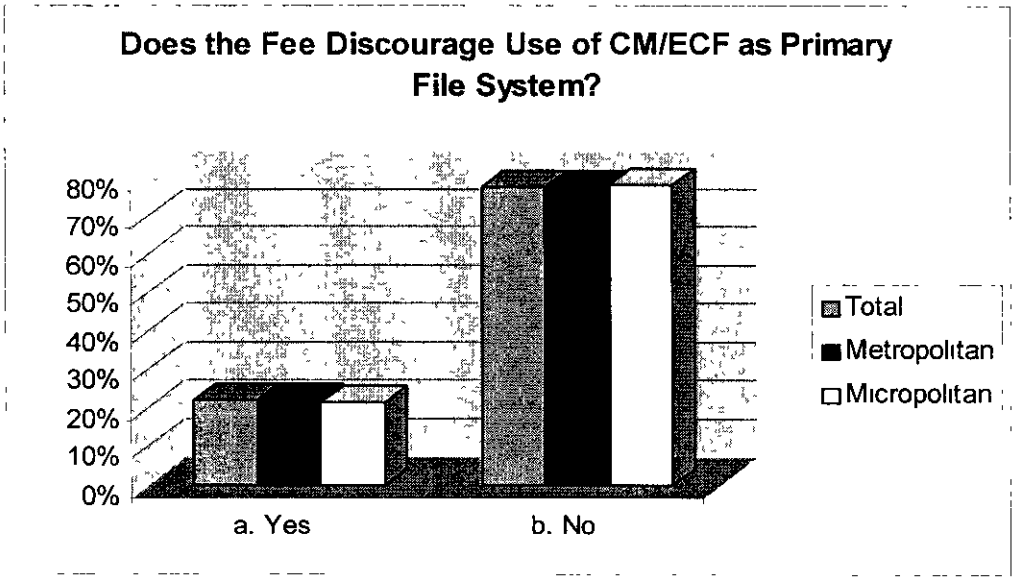



**Exhibit 5.3: Fee Impact on File System**

copy files and have proven filing systems. Some attorneys indicated that they look forward

to having just electronic files; however, until a large portion of senior staff turns over, the current processes are likely to stay in place.

- **General Practice.** Since most attorneys have a portion of their practice outside of the federal courts, the majority of which are not using electronic filing systems, they have to keep hard copy files anyway. So, for consistency they keep all files under the same type of filing system.

- **Security Concerns.** The primary issue with security is in regard to the stability of CM/ECF and their own internal computer systems. If either of the systems were to crash, become infected with a virus, etc., the hard copy file is still available for use. Another consideration is the actual security of the on-line system and the possibility of someone gaining access to information and tainting it in some manner. Malpractice insurance concerns are also an issue because some insurers require attorneys to keep complete files in their office.

- **Court Rules.** Some court documents still require original signatures or initials, especially in bankruptcy practice, and must be kept in hard copy. In addition, some documents are required to be submitted in hard copy, such as evidentiary exhibits. Some bankruptcy creditors do not have internet access and are not required to get access, and must have documents delivered in hard copy. Lastly, most courts are not currently allowing electronic devices in the courtroom during trial, so the attorneys must print hard copies anyway.

- **Court Consistency.** Not all federal jurisdictions have implemented CM/ECF. Attorneys with multi-jurisdictional practices must conform to the rules in each jurisdiction and, therefore, keep all files in hard copy for consistency purposes.

#### 5.2.2.3 Fee Impact on "Paperless" Office

As illustrated above in paragraph 5.2.2.1, attorneys and law offices primarily print court documents for hard copy use, rather than use electronic documents. The survey and focus group results cited above in reference to the use of CM/ECF as a primary file system, also apply to why a "paperless" office has not been realized, except in very few cases. Habit, practice peculiarities, security concerns, and court rules all influence why attorneys print court documents. The EPA fee, however, does not have a significant influence over whether or not users print documents. Although some CM/ECF users may consider the fee and dislike the fee, their decision to download or print a document is independent of the fee because they view the cost as relatively insignificant.

Attorneys and staff personnel in the focus groups provided several additional comments on the reasons for printing documents rather than using the electronic files.

- Hard copies are easier to use, especially when comparing large documents. Users can put notes and tabs on hard copy documents and easily line up documents side-by-side for comparison.

- Support personnel receive the electronic copy and print it out for several attorneys within the office.

- Some attorneys noted that they can check their mail much more quickly in hard copy than trying to click through e-mails to see the documents.

Although there are significant roadblocks to realizing a paperless office, the CM/ECF system has had a positive influence on how some attorneys view other processes around their offices. A comment was made by a focus group member that they have become more selective on what they print and are conscious of other ways to reduce paper around the office environment.

#### 5.2.2.4 Fee Level

***EPA fees are considered de minimus.*** The focus groups provided insight into why some attorneys were not capturing EPA expenses to bill to their clients. The principal reaction was that the costs were so minor, it would take more time and expense to develop a bill for each client for the EPA charges than they would be recouped. As one focus group member commented, "The cost of billing clients would be more than the bills themselves." Focus group participants estimated that average total quarterly fees incurred range between $15 and $150, with one attorney noting that they have incurred $350 in fees in one month. Considering that the average attorney rates are between $100 - $300 per-hour, the EPA user fees are relatively insignificant. In addition, clerical hourly costs generally range between $25 - $60 per-hour, which in many instances would cause the cost of bill preparation to be higher than the amount billed.

Larger firms are more likely to capture EPA fees because they have pre-existing internal infrastructure (e.g. dedicated accounting department) to more effectively identify client charges. In addition, the total incurred fees per billing period in larger firms are greater due to the volume of people using the system and the number of cases handled.

### 5.2.2.5 Fee Structure

***The current fee structure is considered fair, affordable and provides a high level of satisfaction.*** Attorneys were asked during the telephone survey (Question #23) about the current fee structure and two possible alternatives: a per-document plan and flat fee per-user plan. The per-document plan would consist of a specified charge per document, similar to or less than the current $2.10 ceiling, regardless of the page count. The flat fee per-user plan would establish a document or page threshold for a period of time, a month, quarter or year, and the user would pay a set fee, somewhat like current cell phone plans.

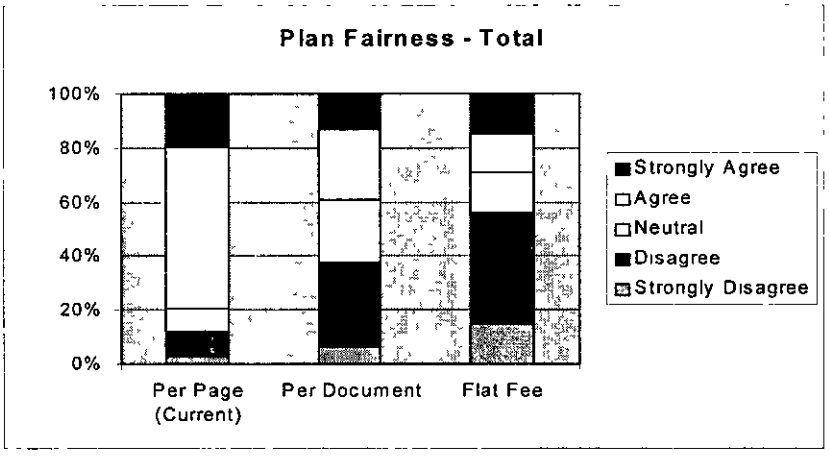



**Exhibit 5.4: Fee Structure Fairness**

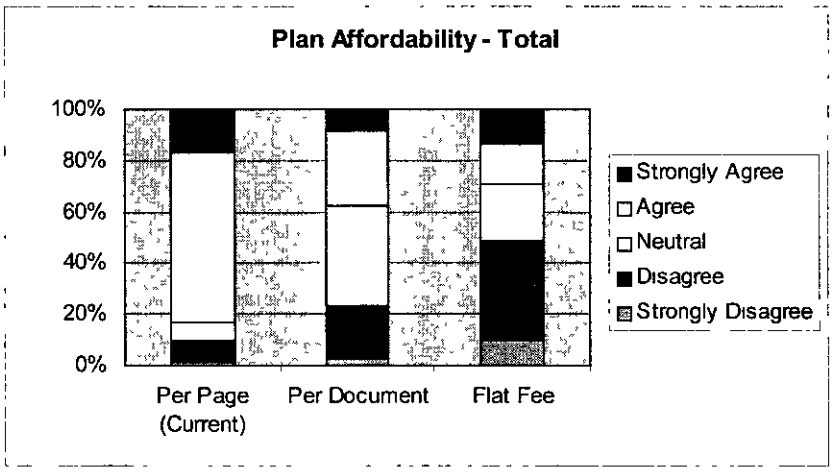



**Exhibit 5.5: Fee Structure Affordability**

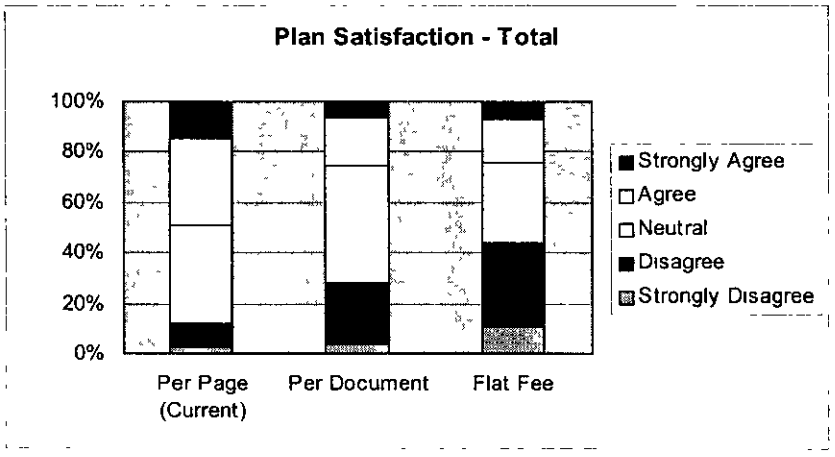



**Exhibit 5.6: Fee Structure Satisfaction**

The responses clearly identified the current fee system as the most desirable. Exhibits 5.4, 5.5, and 5.6 show the responses regarding attorney opinions on the fairness, affordability, and perceived satisfaction. Over 80% of the survey participants agree that the current fee structure is fair and affordable. In regard to plan satisfaction, approximately 50% agree that the current plan increases their satisfaction with CM/ECF, but only 15% disagreed. In contrast, the per-document and flat fee plans had significantly higher ratios of negative responses. It should be noted, however, that the two alternative fee plans received a higher percentage of "neutral" responses. This could be because the participants do not have the experience working with those plans, as they do with the per-page plan.

The results were relatively consistent between the metropolitan and micropolitan survey groups. The micropolitan group found the current fee structure to be slightly more desirable than the metropolitan participants. Although most micropolitan attorneys do not bill for CM/ECF charges, they are conscious of the fees they incur. Therefore, the per-page plan allows them to pay for only what they need. The metropolitan, while preferring the current plan, also liked the concept of the flat fee because it

would allow for greater use, but would make it even more complicated to attribute specific client charges for billing purposes.

### 5.3 Minority Opinion on the Electronic Public Access Fees

As described above, the majority of CM/ECF attorney users believe the current fee level and structure is fair and reasonable, and does not impede their adoption or use of the system. However, some responses from the survey and participants in the focus groups expressed concerns, dislikes, and issues with the PACER fees. Although the total number of negative responses was small, they were fairly consistent within each of the focus groups and the telephone survey. In most instances, the participant making the negative comment also stated that the value provided by the system outweighs the costs or negative aspects.

Below are the issues which were identified during the data collection phase of the study.

- A complaint raised by a few of the participants regarding the PACER fees was in regard to charges parties incur to view documents in their own case. Some questioned why they had to pay for something they could go to the courthouse to look at for free.

- Some attorneys do not like the psychological aspect of seeing the fee each time a document is accessed. They stated that they understood that their overall costs have declined, but it is an issue of finding the transaction receipt "annoying" and "irksome," rather than a deterrent to system use. One suggested alternative fee structure is to include PACER fees as an up front cost, which would remove the psychological affect of the per-page fee and it would be easier to attribute costs to specific clients.

- A few attorneys did state that the fees inhibit their use of CM/ECF. They indicated that their looking at documents was slightly curtailed and in one case a firm had instructed its attorneys not to go back and look unless it was absolutely necessary. The attorneys who made these comments did not come from one specific group (micropolitan vs. metropolitan) or a particular practice area.

- The final comment regarding the fees is a technical issue. There were several comments from survey and focus group participants that they would like the ability to only view a portion of a document, thereby saving money in fees. Attorneys commented that there are some documents that contain a significant number of pages that are not relevant to their client, yet they have to pay to download all of the pages. The current fee cap of $2.10 per-document helps to reduce the total fees incurred; however, attorneys, especially from the micropolitan group, would just like to pay for the pages relevant to their client.

As a confirmation that the fees do not play a significant role in deterring acceptance of the electronic public access is a quote from a participant of one of the focus groups:

*"I don't like the fee, but I'd pay double to use the system."*

### 5.4 User Demographic Impact on CM/ECF Adoption

This section investigates whether demographic issues, such as location, size of firm or area of practice, influence individual attorneys' adoption and use of CM/ECF.

## 5.4.1 Current Environment

As described in Section 2.2.3, the vast majority (98%) of CM/ECF users are located within metropolitan areas, based upon Census Bureau definitions. Although there are practices with a wide range of sizes within both survey groups, data from respondents in both groups show that the size of the firm is highly dependent on location and population centers. The majority of large firms are located in metropolitan areas, whereas firms in the micropolitan group tend to be smaller. This difference in size between the user groups is highlighted in the average number of attorneys (partners and associates) in the firms surveyed. Survey data shows that the average number of attorneys for firms in the metropolitan group is 78 attorneys per firm, while the average number of attorneys for firms in the micropolitan group is slightly less than 3 attorneys per firm.

Attorney location has a minor impact on the proportion of federal work attorneys practice (see Exhibit 5.7). Forty-five (45%) percent of metropolitan firms responding to the survey said that over half of their practice is performed in the federal courts; whereas, only thirty (30%) percent of the micropolitan firms have more than 50% of their practice in the federal arena.

Lastly, the areas of practice vary considerably within both survey groups, but also between the metropolitan and micropolitan survey participants. The most common area of practice for both survey pools is bankruptcy; however, for the micropolitan attorneys bankruptcy is the primary practice area for 58% of the respondents compared to 27% of the metropolitan group. The next most common practice areas identified by the metropolitan attorneys were Contract, Labor/Employment, and Personal Injury, each with 14%. The micropolitan respondents identified Civil Rights (including Habeas cases) as the second most common primary practice area (13%), with no other practice area making up more than 4%.

### 5.4.2 Impact of Firm Size on Individual Usage of CM/ECF

***Firm size has a significant impact on who within the firm actually uses CM/ECF.*** Exhibits 5.8 and 5.9 show that attorneys in the micropolitan group (i.e. smaller firms on average) are much more likely to use CM/ECF themselves. Attorneys with smaller firms and especially sole practitioners, are more likely to perform required clerical functions on a day-to-day basis around the office due to the reduced availability of support resources. A natural progression with the implementation of CM/ECF is for the sole proprietor or small firm attorney to take on the responsibility of using

CM/ECF. Metropolitan attorneys are more inclined to have support personnel, secretaries and/or paralegals, file and retrieve documents using CM/ECF.

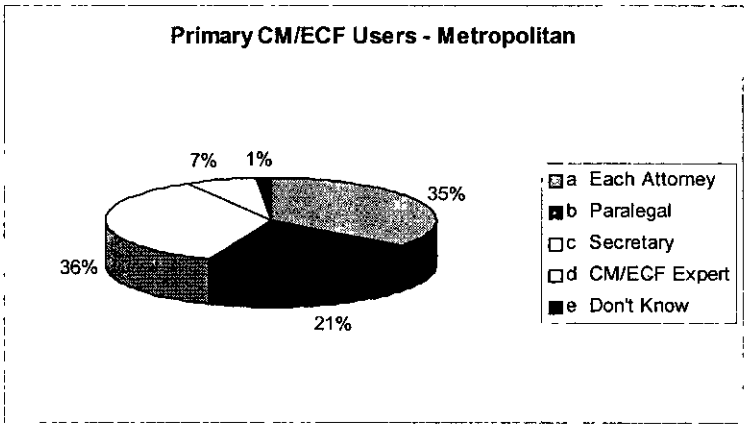



**Exhibit 5.8: Metropolitan Users**

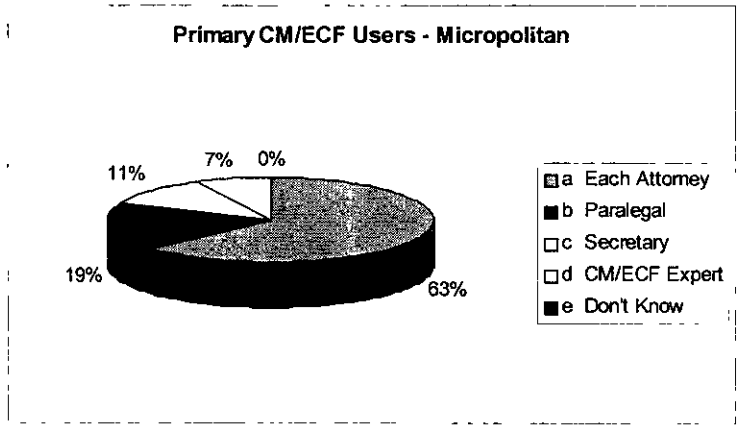



**Exhibit 5.9: Micropolitan Users**

Data gathered from the focus group meetings indicates that sole practitioners are a group that experienced a significant benefit in time savings since the implementation of CM/ECF. EPA has reduced the copying, mailing, and delivery time required for document submission, as well as travel time required to pick up documents from the courthouse. Sole practitioners do much of this work themselves and CM/ECF has provided additional time to do more substantive work (see Section 3).

Results indicate that attorneys in large firms, particularly senior attorneys, are less likely to actively participate in the use of CM/ECF. There are two primary reasons why these attorneys take a less active role in the adoption of the system:

1. Skilled support personnel are more readily available; and

2. Senior attorneys are less likely to be technically proficient and can rely on more junior attorneys in the firm to ensure proper filing and document review.

## 5.5 Impact of Initial Start-up Costs on Adoption of CM/ECF

***Costs to implement CM/ECF in the office environment generally do not hinder adoption of the system.*** Responses during the focus group meetings to questions regarding the initial costs to get started with CM/ECF varied considerably. The primary costs to equip an office for effective use of CM/ECF generally include a relatively recent generation of computer, Adobe Acrobat software, scanning equipment, a high speed internet connection, and system training. How individual offices meet these requirements ranged from the purchase/upgrade of their current equipment costing several thousand dollars to using current equipment in an innovative manner and thereby not spending a significant amount of money to implement the system. For instance, one sole practitioner was able

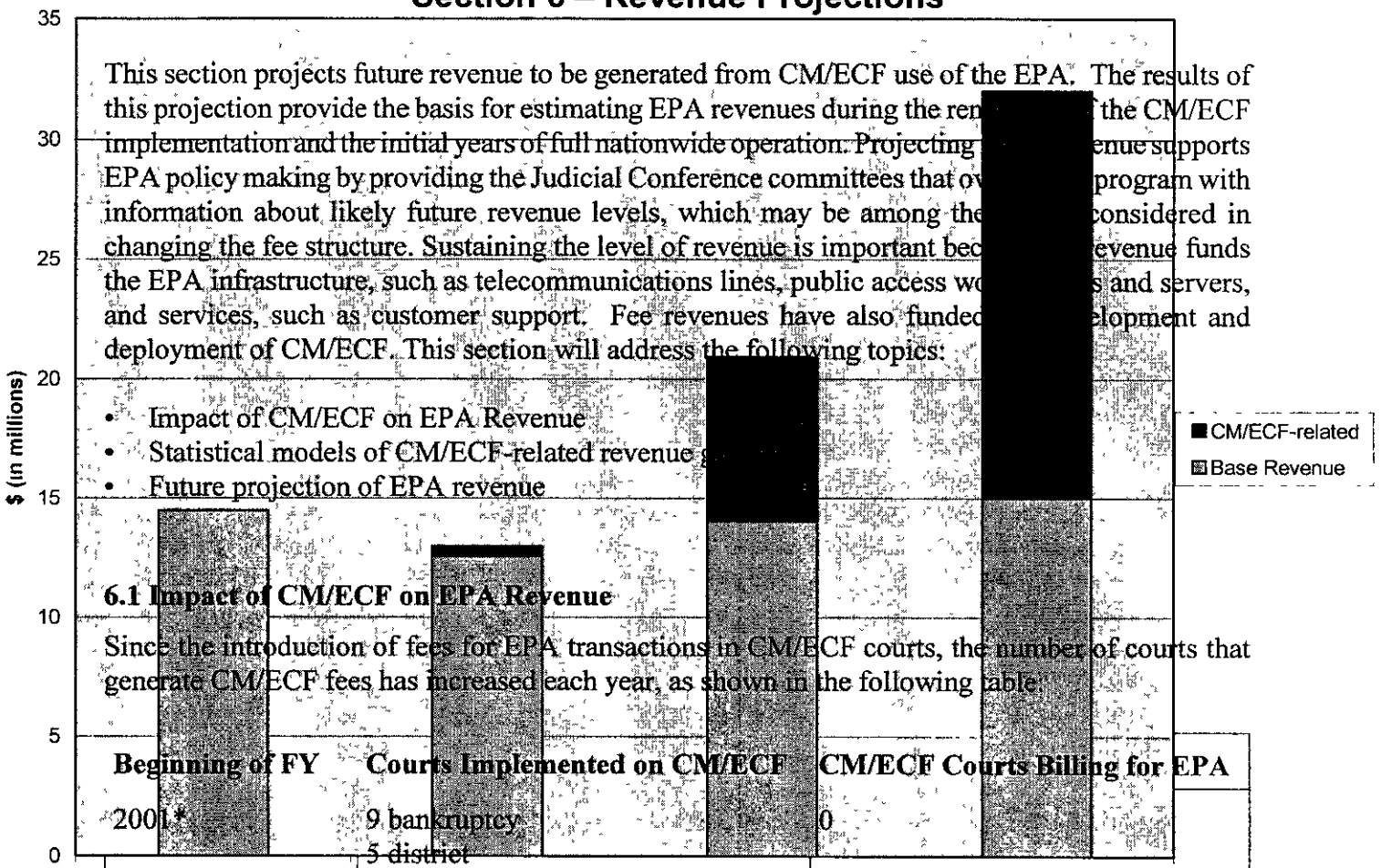
to use his fax machine to fax documents to his computer to create scanned versions of court documents rather than purchasing a separate scanner.
Larger firms tended to have less of a problem with costs associated with CM/ECF implementation because they were already equipped with sufficient resources to handle the new requirements. Sole practitioners and small offices, on the other hand, have incurred relatively greater expenses up front to upgrade their offices. However, virtually all of the attorneys present at the focus groups believed that the return on investment from the system will be positive in a relatively short period of time because of the savings being realized in other areas of their practice. See Section 4, Cost-Benefit Analysis for further discussion of this topic.

One practice area that may be disadvantaged partly by the implementation costs of CM/ECF is the casual bankruptcy practitioner. It was mentioned in two separate focus group meetings that there is a considerable chance that the implementation of CM/ECF would cause the elimination of the casual (i.e. a few cases a year) bankruptcy attorney. The focus group attorneys cited the initial implementation costs as a significant reason, as well as the on-going requirements of electronic filing, because they would not have the volume of cases to receive a positive return on investment.

# Section 6 – Revenue Projections

This section projects future revenue to be generated from CM/ECF use of the EPA. The results of this projection provide the basis for estimating EPA revenues during the ren the CM/ECF implementation and the initial years of full nationwide operation. Projecting enue supports EPA policy making by providing the Judicial Conference committees that ov program with information about likely future revenue levels, which may be among the considered in changing the fee structure. Sustaining the level of revenue is important bec evenue funds the EPA infrastructure, such as telecommunications lines, public access wo s and servers, and services, such as customer support. Fee revenues have also funded elopment and deployment of CM/ECF. This section will address the following topics:

- Impact of CM/ECF on EPA Revenue
- Statistical models of CM/ECF-related revenue g
- Future projection of EPA revenue




## 6.1 Impact of CM/ECF on EPA Revenue

Since the introduction of fees for EPA transactions in CM/ECF courts, the number of courts that generate CM/ECF fees has increased each year, as shown in the following table:

| Beginning of FY | Courts Implemented on CM/ECF | CM/ECF Courts Billing for EPA |
|---|---|---|
| 2001* | 9 bankruptcy<br>5 district | 0 |
| 2002** | 11 bankruptcy<br>6 district | 11 |
| 2003 | 39 bankruptcy<br>10 district | 49 |
| 2004 (estimated) | 60 bankruptcy<br>27 district | 87 |

* CM/ECF bankruptcy courts did not bill for EPA transactions until 7/1/2001.
** CM/ECF district courts did not bill for EPA transactions until 7/1/2002

**Exhibit 6.1: Increase in CM/ECF Courts Generating EPA Fees**

The increased number of CM/ECF courts has resulted in a corresponding increase in EPA revenue, as demonstrated by the graphic depicting the growth of overall revenues and the increasing proportion due to CM/ECF courts.

**Exhibit 6.2: Recent Trend of Base and CM/ECF-Related EPA Billings**

The CM/ECF-related growth in EPA revenue has been driven primarily by bankruptcy courts. In the first ten months of FY2003, for example, district courts accounted for approximately six percent of CM/ECF-related EPA revenue. While this disparity is due in part to the faster implementation of CM/ECF in the bankruptcy courts, fee revenue historically has come disproportionately from the bankruptcy courts.

## 6.2 Statistical Models of CM/ECF-Related Revenue Growth

The model for CM/ECF-related revenue associates the level of EPA fees (excluding dial-up access) in CM/ECF courts to the factors that drive that growth. Separate models for bankruptcy and district courts are required because of the difference in underlying business practices and the different implementation patterns. These distinct patterns are evident in Exhibit 6.1, which shows far more bankruptcy courts receiving CM/ECF during the initial years of the project. Bankruptcy courts also began charging fees earlier, yielding more historic billing information. As a result, bankruptcy courts offer many more data points from which to develop a revenue model. Moreover, as noted above, bankruptcy courts account for a much greater proportion of CM/ECF-related revenue than district courts. For all of these reasons, a specialized model tailored to the particular usage patterns of each case type provides greater capacity to predict future CM/ECF-related revenue than a general model combining all case types.

The statistical models developed in this section are based on regression analysis, which calculates coefficients (multipliers) for explanatory factors–called independent variables. By multiplying the coefficients times the values of the independent variables and adding a constant, an estimate is calculated for the value of the result in question–called the dependent variable. A regression model is presented in the following format:

$$\mathbf{Y = A + B_1X_1 + B_2X_2 + \ldots + B_nX_n + error}$$

In the preceding formula, "Y" is the dependent variable, "A" is the constant, "$X_1, X_2, \ldots X_n$" are the independent (explanatory) variables, and "$B_1, B_2, \ldots B_n$" are the coefficients multiplied times the corresponding independent variables. "Error" is not a calculated component of the formula, but represents the difference between the estimated and actual value of the result (dependent variable) for each occurrence of the data.

The regression algorithm computes coefficients that minimize the error of the estimates, as measured by the "least squares" of the differences between actual and estimated value. The success of the model–its "goodness of fit"–is measured by the correlation coefficient, symbolized by $R^2$. This measurement is the variation in the dependent variable successfully estimated by the model as a the proportion of the total variation, so the closer $R^2$ is to 1, the better the model.

### 6.2.1 Statistical Model for Bankruptcy Courts

The most successful model for explaining the revenue growth resulting from bankruptcy courts' adoption of CM/ECF uses caseload and experience with CM/ECF as the explanatory factors that are

most closely associated with the level of revenue. Caseload was modeled both as a combined variable (filings) and as separate measures for business and non-business filings. A model using separate measures performed much better. The formula for this model is presented below:

**revenue = -73170 + 64812 * experience + 1494 * business filings – 24 * non-business filings**

In the preceding formula, *revenue* is defined as the annual revenue (excluding dial-up) for a court adopting CM/ECF, *experience* is defined as the quarters since billing began for CM/ECF transactions in the court, and *business filings* and *non-business filings* are the annual reported filings on the "F-2 Table" in the Annual Report of the Director on the Judicial Business of the U.S. Courts.

The correlation coefficient, or $R^2$, for the model described above has a very high value: **.71**. This result indicates significant predictive power by the model, considering that nearly three-quarters of the variation in court-by-court revenue over time is explained by experience and caseload. The positive association between revenue, experience, and business filings follow intuitive reasoning. It is to be expected that revenue should increase as the EPA user community gains more experience with the information that is available through CM/ECF and greater facility in using the system over time. High volumes of business filings indicate that caseload is composed of highly complex cases with many parties, which should correlate with greater access of EPA information.

The negative association between non-business filings and revenue is counterintuitive, however, it is important to realize that factors do not operate "in a vacuum." A possible explanation for the opposite effects of business and non-business filings is that revenue growth is faster than average for courts with a higher proportion of business filings (examples of such courts are Delaware and the Southern District of New York) and correspondingly slower than average for courts where non-business filings predominate. The quantity of parties and complexity that characterize business filings would explain why this type of caseload accelerates CM/ECF-related revenue, while consumer-intensive caseload retards it. The actual reasons underlying the relationships between the variables cannot be discovered by the regression methodology. Experimentation at a court-by-court level, using control observances, is required to determine cause and effect.

Regardless of the explanation for the discrepancy between business and non-business filings, the impact of experience is the crucial result. Whatever the level of revenue predicted by the particular caseload characteristics of an individual court, the positive effect of experience predicts that revenue will continue to rise over time. Conservatism dictates that this predicted effect not be extended perpetually. Because charging for EPA transactions through CM/ECF is a relatively recent occurrence, the period of time that supports same-quarter (annual) comparisons varies from six months to one year and a half, depending on the court. Projecting the impact of the experience factor into the future based on such abbreviated usage history is problematic. The resulting risk of under- and over-estimation necessitates that the revenue model use different thresholds for the maximum experience period that courts will realize fee increases. The results of these different thresholds are incorporated into the estimates presented in Paragraph 6.3 In no case should projected increases extend further into the future than the duration of the historical trends on which the increases are based, which indicates that the effects of increased CM/ECF experience should be fully realized in

all courts by FY 2006. Accordingly, the revenue projections contained in Paragraph 6.3 extend only through FY 2006 because subsequent revenue increases will be attributable only to caseload changes.

### 6.2.2 Statistical Model for District Courts

The most successful model for explaining EPA revenue in the district courts uses caseload as the explanatory factor most closely associated with the level of revenue. Caseload was modeled using filings, terminations, and pending cases as the candidate measures for caseload. Terminations performed slightly better than filings and much better than pending cases. Only civil case statistics were used because much of the data came from courts that operated only the civil component of CM/ECF during the period of analysis. The formula for this model is presented below:

**revenue = 23785 + 13 * civil terminations**

In the preceding formula, *revenue* is defined as the annual revenue (excluding dial-up) for a court adopting CM/ECF and *terminations* are the annual reported filings on the "C Table" in the Annual Report of the Director on the Judicial Business of the U.S. Courts.

The correlation coefficient, or $R^2$, for the model described above has a significant value: **.56**. This result indicates that the model accounts for slightly more than half of the variation in district court revenue. The short period since the beginning of billing eliminates experience as a factor to be included in the district model. There may be such an effect, as is evident in the bankruptcy courts, but a longer period of time will be required before it appears. In lieu of a statistically generated projection, the best estimate of EPA program managers for the revenue increases due to district court cases–approximately $1 million per year–will be used to represent the estimated growth of revenue attributable to the district courts.

## 6.3 Future Projection of EPA Revenue

The bankruptcy-related revenue supplies the principal dynamic in the projected growth of EPA revenue. The reasons for this are twofold: the revenue from bankruptcy cases has historically accounted for most of the EPA revenue; and the bankruptcy model developed above includes an experience-based multiplier that increases projected revenue as the bankruptcy court user community gains more experience with CM/ECF. There has not been a statistically significant basis for demonstrating the impact of experience in the district court user community, although such a factor may appear in the future.

The projection of revenue is based on two components: the bankruptcy case projection and the base EPA revenue that comprises current district, appellate, and case-party index transactions. The district portion of the EPA revenue is projected to increase by $1 million per year based on program manager estimates rather than using the model based on terminations (described above), which projects flat revenues. The bankruptcy-related revenue projections are based on the experience-based and caseload-based model, and therefore reflect significant increases over the three years that are estimated. The revenue projections are provided in the following table:

| Range of Estimates | FY 2004 | FY 2005 | FY 2006 |
|---|---|---|---|
| [1]Expected revenue | $35.0 million | $43.7 million | $47.7 million |
| [2]Lower bound | $29.1 million | $34.2 million | $35.8 million |
| [3]Upper bound | $38.6 million | $48.2 million | $59.0 million |

[1]Based on 4 quarters' growth in revenue due to CM/ECF experience
[2]Based on 2 quarters' growth in revenue due to CM/ECF experience
[3]Based on 6 quarters' growth in revenue due to CM/ECF experience

**Exhibit 6-3: Projection of EPA Revenue for FY 2004 through FY 2006**

The impact of the experience multiplier is substantial, accounting for a nearly 50 percent increase in revenue over the current level in three years. While dramatic, the magnitude of these increases is plausible given that the previous two years have seen approximately 50 percent increases per year. Given the trend of steadily increasing revenues, the lower bound representing an approximately 10 percent decrease in next year's revenue may seem unrealistic. Given the important role that "mega-cases," such as the WorldCom, Enron, and airline bankruptcies, played in generating large revenue increases during the period of the historical trend analysis, a revenue decrease coinciding with the conclusion of several mega-cases is plausible, although not expected.

A number of assumptions are factored into the projections provided above, of which three are crucial for determining their reliability. The major assumption is that the experience of the courts that have been implemented in the last year and those implemented in the future will be comparable to those implemented within the first 2 years of the project, which served as the basis for the model. This assumption, which is the basis for experienced-based revenue growth, is essential for the revenue levels projected in Exhibit 6-3 to be realized. While significant, this assumption is reasonable based on the common practices–founded in law, rules of procedures, and professional standards–across jurisdictions. The second major assumption is the stability of caseload. As described above, the bankruptcy model is sensitive to significant changes in caseload. The final major assumption is that the revenue increase due to experience will subside within four quarters after implementation. If the experience impact is sustained, then actual results may exceed the expectation. Another possible effect with the ability to increase the actual result beyond the projection is the positive impact of experience, should it materialize in the district courts. The projections above reflect only nominal increases in the revenue from the district courts. The combined effect of these assumptions is to estimate conservatively wherever possible.

# Section 7 - Summary of Findings

The objective of the Electronic Public Access Follow-up Fee Study was to answer three primary questions regarding attorney use of the system.

**1. Does the current fee structure deter CM/ECF users from adopting and using the system?**

No, the current fee structure does not deter adoption of CM/ECF. The current fee structure consists of a $.07 per-page fee with a cap of $2.10 per-document. Although some attorneys do not like the fees, they are considered de minimus. It was estimated by the focus group members that average quarterly costs for CM/ECF use per attorney range between $15 and $150. One participant estimated a high of $350 for one month; however, considering that attorney hourly rates are between $100 and $300 and the support staff costs are between $25 and $60, the CM/ECF costs are minor. In fact, it was identified that a large portion of the attorney users do not bill their clients for the incurred EPA fees because the cost of producing a bill would be higher than the amount of the bill.

The current fee structure was compared to two other alternatives and found to be considered the most fair, affordable, and it provides the greatest level of satisfaction. The two alternatives presented to the telephone survey participants were a Per-Document plan and a Flat Fee for a period time. The survey participants were asked several questions regarding the three plans and in all instances the current fee structure was preferred.

**2. Does the current fee structure inhibit attorney users from using the system as their primary case file system?**

Consistent with the first question, CM/ECF users are not influenced by the fees when deciding how to use the system. Most users do not use CM/ECF as their primary file system; however, the reasons behind their decision have to do with habit, rather than cost. Almost every attorney surveyed or asked during the focus groups indicated that they print a hard-copy of the document during their first free look and keep hard-copy files. The most common explanation is that they are used to working with hard-copy documents and they are easier to use for comparison and note taking. In addition, users noted that court rules do not allow them to go completely paperless, even if they wanted to. Some bankruptcy documents still require an original signature or initials, many exhibits have to be filed in hard copy, some malpractice insurance requires it, and there is no consistency between federal jurisdictions or federal and state courts regarding electronic filing. As a result, most offices have to have hard copy files.

**3. Does CM/ECF provide value to the attorney users?**

Yes. The impacts that CM/ECF has had on attorney practice were discussed during the focus group meetings and the majority of users have found the system to be beneficial in many different ways. Eighty-three percent (83%) of the survey participants stated that the system will provide a long term reduction in labor. In addition, cost reductions for copying, travel, postage and courier expenses have been experienced, as well as time/labor savings for copying of pleadings for submission,

document preparation, and internal file retrieval. The efficiencies cited have provided more time for attorneys to concentrate on their client services and the quality of their work product. Other benefits of the system include the instant access to information and the ability to access the cases remotely.

CM/ECF users noted disadvantages to the system as well. The volume of e-mails that come over the system are overwhelming some offices, especially in the bankruptcy practice. Attorneys are having to hire more skilled staff to work with the system, but they are able to reduce the total number of staff required, so it balances out. The scanning that is required and the formatting of documents for submission have increased staff support time in many instances. Attorneys also have problems identifying documents when they come through the e-mail system because the document categories are too broad or there is no standard naming convention. Lastly, although the 24 x 7 anywhere access to information is an advantage, it is also a disadvantage because it can become intrusive on an attorneys' off hours.

The following is a partial list of positive and negative quotes from the focus groups:

| Positive Quotes | Negative Quotes |
|---|---|
| *"The system has allowed me to be more billable."* | *The fee transaction receipt is "annoying" and "irksome."* |
| *"It liberates my support staff of menial and time consuming tasks."* | *"I now have support personnel rotate checking the e-mails that are coming in all day."* |
| *"I don't like the fee, but I'd pay double to use the system."* | *"Should be able to get documents on-line that we can view at the courthouse (criminal docs)."* |
| *"Copying costs alone are down 60%."* | *"Each court is different on how they want filing, especially exhibits - they need continuity."* |
| *"24 x 7 access provides flexibility to attend family functions and file something later."* | *"Nights and weekends are no longer off limits."* |
| *"The system is a boon for me - it allows me to be more efficient and independent."* | *"The casual bankruptcy attorney is likely to disappear."* |
| *"The cost of billing clients would be more than the bills themselves."* | *"I'm relying on technology that I don't fully understand."* |

**Exhibit 7.1: Focus Group Quotes**

# Analysis of Briefing Requirements in the United States Courts of Appeals

Report to the Judicial Conference
Advisory Committee on Appellate Rules

Marie Leary

Federal Judicial Center
October 2004

This report was undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

## Contents

# I. Introduction

At its November 2003 meeting, the Judicial Conference Advisory Committee on the Federal Rules of Appellate Procedure decided that it needed more information about reported problems with Federal Rule of Appellate Procedure (FRAP) 28 before considering potential amendments to the rule. The committee asked the Federal Judicial Center to assist it by identifying

- every local rule or practice that imposes upon briefs and brief covers requirements that are not found in FRAP 28 and 32;
- the history of the local rules or practices that vary from the national rules; and
- the degree to which those variances are enforced in practice.

## A. The Current Requirements of FRAP 28 and 32

The Federal Rules requirements for the content and cover of appellate briefs are in FRAP 28 and 32.[1] FRAP 28 sets out the items that must be included in appellants' and appellees' briefs, as well as the information that may be included in an addendum to the briefs. FRAP 28(a) requires an appellant's brief to contain (1) a corporate disclosure statement, if required by FRAP 26.1; (2) a table of contents; (3) a table of authorities; (4) a jurisdictional statement; (5) a statement of the issues; (6) a statement of the case; (7) a statement of facts; (8) a summary of the argument; (9) the argument; (10) a short conclusion; and (11) the certificate of compliance, if required by FRAP 32(a)(7). In addition, FRAP 28 imposes requirements regarding such matters as references to parties, references to the record, and appending to a brief copies of statutes or rules on which the party relies.

FRAP 32 prescribes the color of each type of brief and the information that must be provided on the front cover of a brief: (1) the number of the case centered at the top; (2) the name of the court; (3) the title of the case; (4) the nature of the proceeding and the name of the court, agency, or board below; (5) the title of the brief, identifying the party or parties for whom the brief was filed; and (6) the name, office address, and phone number of counsel representing the party for whom the brief is filed.

## B. Local Variations and Complaints About These Variations

All the courts of appeals have adopted local rules or practices that require an appellant's brief to contain additional items not required by FRAP 28 or more detailed information for requirements contained in FRAP 28.

Some courts of appeals also have adopted local rules or practices that are inconsistent with FRAP 32. We would expect that the "local variation" provision of FRAP 32(e)[2] protects attorneys who fail to comply with local rules regarding brief covers. That provision directs every court of appeals to accept briefs that comply with FRAP 32, even though

[1] See Appendix 1 for the text of the relevant provisions of FRAP 28 and FRAP 32.
[2] See Appendix 1 for the text of FRAP 32(e).

the court may choose to accept briefs that do not meet all of the rule's requirements. FRAP 28 has no such "safe harbor" or "local variation" provision.

The Judicial Conference Advisory Committee on the Federal Rules of Appellate Procedure has received complaints from the bar that circuit variations in these local rules and practices impose a hardship on attorneys who practice in more than one circuit and must comply with the different requirements. For example, the American Bar Association Council of Appellate Lawyers and the Department of Justice have both proposed changes to FRAP 28 to establish uniform standards in certain aspects of the brief.[3] The bar has also complained that at least some deputy clerks aggravate this situation by ignoring FRAP 32's safe harbor provision and FRAP 25(a)(4)'s dictate that "[t]he 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 any local rule or practice."

### C. Structure of This Report

This report presents information received from the thirteen courts of appeals. Section II provides an overall examination of additional briefing requirements in the appellate courts. The additional requirements are in two large categories—those not mentioned at all in FRAP 28 and those that ask for different or more detailed information for brief sections already required by FRAP 28. To help the committee identify frequently imposed or favored requirements, the Center further divided the two large categories into subgroups of similar requirements. Section II also describes the few variations regarding brief covers.

Section III analyzes additional briefing requirements in each circuit. It identifies the additional briefing requirements in each court's local rules or other sources, the history behind the adoption of these requirements, and the extent to which courts enforce these additional requirements.

Section IV discusses the questionnaire responses about any appellate court plans to adopt more briefing requirements, problems courts have experienced under the current rules, and whether FRAP 28 should be amended to prohibit further variations or to include additional or different briefing requirements.

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[3] The Department of Justice recommends that FRAP 28 be amended as follows:

(1) A new provision would require briefs to begin with an "introductory statement." The statement would include the identity of the judge or agency whose decision was being appealed, a citation to the decision being appealed if it was included in a federal reporter, a description of related cases, and, at the option of the party submitting the brief, a statement about whether oral argument is appropriate.

(2) The statement of the case—now required by Rule 28(a)(6)—would no longer include a description of "the course of proceedings."

(3) The statement of the facts—now required by Rule 28(a)(7)—would include a description of the "prior proceedings."

(4) Copies of all unpublished decisions cited in the brief would have to be attached to the brief or included in an addendum that accompanies the brief.

Draft Minutes of Fall 2003 Meeting of Advisory Committee on Appellate Rules, Nov 7, 2003, San Diego, Cal.

## D. How Information Was Collected for Study

The Center gathered information by reviewing each court's rules and other documents and from responses to questionnaires that we tailored for each court of appeals.

We sent a tailored questionnaire to each circuit executive, with a copy to the chief judge and clerk of court. Responses are current as of September 1, 2004. Section 1 listed any local rules, requirements, or practices we had identified that required an appellant's brief to contain items not specified in FRAP 28. We asked the respondents whether this listing was accurate and complete and to note any rules or practices not on our list. We then asked about the history of these additional requirements—when they were enacted and why. Finally, we asked about the extent to which the court enforced its additional briefing requirements. Section 2 asked the same questions about brief covers.

Section 3 asked about problems the courts were experiencing with FRAP 28 and whether the rule should be amended to include additional requirements or, in the alternative, whether circuits should be prohibited from adding requirements inconsistent with FRAP 28. To expedite responses, we asked respondents to answer for themselves, not to survey their circuit judges or other court personnel.

We asked the circuit executives to have the questionnaire completed by the person or persons who could best respond about past and current briefing requirement practices. We received completed questionnaires from all thirteen courts, ten from clerks of court and from circuit executives in the First, Seventh, and Eleventh Circuits.

## II. Additional Briefing Requirements in the Courts of Appeals

### A. The Number of Additional Requirements Governing the Contents of Briefs

Table 1 presents the number of appellant brief requirements that each court imposes beyond those imposed by FRAP 28. The additional requirements range from one to ten; six is the average. Over half of the courts have seven or more briefing requirements not contained in FRAP 28.

**Table 1: Number of Additional Requirements Not Listed in FRAP 28**

| Circuit | Number of Additional Requirements Governing Brief Contents |
|---|---|
| DC | 10 |
| 11th | 10 |
| 9th | 9 |
| 10th | 8 |
| 3rd | 7 |
| 5th | 7 |
| 8th | 7 |
| Federal | 4 |
| 1st | 3 |
| 6th | 3 |
| 2nd | 2 |
| 4th | 2 |
| 7th | 1 |

Local rules impose the majority of these additional requirements, but briefing checklists and practitioners' guides on the courts' websites often provide further interpretation of requirements codified in the local rules or list optional items that the appellant could include or leave out. Some courts explained that the "suggestions" in these secondary sources were not formal requirements but merely preferences of the court to aid it when reviewing the briefs. (When we discuss these additional items, we will identify them clearly as "optional" or as suggestions or preferences as opposed to requirements.) Thus, an attorney should not look solely to a circuit's local rules or simply rely on a briefing checklist to fully understand the circuit's requirements or preferences for briefs. In several courts, a complete picture of the court's briefing requirements requires piecing together information from several sources.

## B. The Nature of the Additional Requirements Governing the Contents of Briefs

The additional requirements for brief contents vary widely but fall into one of two categories:

- requirements not mentioned anywhere in FRAP 28[4]; and
- requirements demanding different or more detailed information in the sections already required by FRAP 28.

We have further subdivided these two general categories into subgroups of requirements that address the same subject matter, even though the rules are not identically worded. For example, a number of requirements not found in FRAP 28 direct the appellant to include in the brief certain items from prior court proceedings, such as the district court opinion and any supporting documentation, any magistrate judge's report and recommendation, and the notice of appeal, to name a few. Although these rules differ as to the items required for inclusion, we group them together because they all pertain to prior proceedings.

Creating subgroups of similar requirements helped the Center discern whether there were certain requirements or types of requirements favored by a majority or distinct minority of appellate courts. We identified several subgroups of similar rules within each of the two larger categories.

Below we discuss each of the two main categories of departures from FRAP 28 and present a detailed listing of each of the subgroups of similar requirements.

### 1. Rules that impose content requirements not contained in FRAP 28

Table 2 summarizes the nature of the requirements not mentioned anywhere in FRAP 28.

The largest subgroup of similar requirements (eight courts of appeals[5]) are rules requiring the appellant to include, either in the brief or addendum, certain items from prior court proceedings, such as the order being appealed from and various underlying decisions, rulings, judgments, and supporting documentation. Although the rules vary as to specific content, they all appear to require either the citation to or a copy of the underlying opinion below (district, agency, or bankruptcy court decision or magistrate judge report), including all supporting documentation.

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[4] Local rules in several appellate courts require an appellant's brief to include a certificate or proof of service and/or a signature. *See, e g*, Federal Cir. R. 28(a)(13), Fifth Cir. R. 28.6. Although not mentioned in FRAP 28, these requirements are not included in the listing of additional briefing requirements not imposed by FRAP 28 because they reference items already required by other Federal Rules of Appellate Procedure See Fed. R. App. P. 25(d) (certificate of service requirement) and Fed. R. App. P. 32(d) (signature requirement). Note that even when a certificate of service or signature is not required by local rule, many circuits include these items in "Briefing Checklists" available to practitioners on their websites.

[5] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Federal, First, Second, Third, Eighth, Ninth, and Tenth.

**Table 2: Nature of Additional Requirements Not Mentioned in FRAP 28**

| Nature of the Additional Requirements Regarding the Content of Briefs | Number of Courts |
|---|---|
| Rules requiring appellant to include certain items from prior court proceedings | 8 |
| Rules requiring appellant to state whether or not oral argument should be heard | 5 |
| Rules requiring appellant to include a statement of related cases or proceedings | 5 |
| Rules requiring inclusion of any cited unpublished opinion in the addendum | 4 |
| Rules that are unique to an individual court | 7 |

The next largest subgroup of rules bearing no resemblance to Rule 28 requirements directs appellants to state in the brief whether or not oral argument should be heard in their case. Five courts[6] require such a statement, and three others[7] make it optional.

Five courts[8] require the appellant to include a statement of related cases or proceedings, and three of these five also require a statement indicating that there are no related cases if there are none.

Four courts[9] require the brief's addendum to contain any unpublished opinion cited in the brief.

The final subgroup of rules bearing no resemblance to FRAP 28 requirements are miscellaneous rules that impose briefing requirements unique to an individual court. For example, the Court of Appeals for the District of Columbia Circuit requires the appellant to include a glossary of any uncommon abbreviations used in the brief. The Court of Appeals for the First Circuit requires the addendum to contain any jury instructions that are a subject on appeal. In the Ninth Circuit, the opening brief in a criminal appeal must report on the bail status and projected release date of defendants in custody.

To help the committee understand the nature of the courts' additional briefing rules, below we present each rule, by major subgroup. The descriptions below paraphrase the rules.[10]

[6] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Fifth, Eighth, Tenth, and Eleventh.

[7] See local rules presented *infra* Appendix 2 for the following courts of appeals: First, Fourth, and Sixth.

[8] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Federal, Third, Ninth, and Tenth.

[9] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Fourth, Sixth, and Eighth.

[10] *See* Appendix 2 for the text of these local rules.

**(1) Rules regarding prior proceedings**

- Brief must include a certificate as to "rulings under review" (defined as a list of all appropriate references to each ruling at issue before the court, including the date, the name of the district judge if any, the place in the appendix where the ruling can be found, and any official citation or a statement that no such citation exists). *(District of Columbia Circuit)*
- Addendum must contain the judgment or order in question and any support for it *(Federal and First Circuits),* including any underlying agency, bankruptcy, or state court decision. *(First Circuit)*
- Statement of the case must include the citation of any published decision of the trial court. *(Federal Circuit)*
- Brief must include a preliminary statement with the name of the judge or agency member who rendered the decision appealed from and the citation to the judge's decision or supporting opinion if reported. *(Second Circuit)*
- Brief must include the order being appealed, any trial court or agency opinion, the notice of appeal, and relevant docket entries for applications for writ of habeas corpus and in forma pauperis appeals. *(Third Circuit)*
- Brief must include an addendum, not to exceed 15 pages, with (1) the district court or administrative agency opinion, including supporting memoranda; (2) any magistrate judge's report and recommendation that preceded the district court opinion; (3) "short excerpts from the record" (other than from the transcript of testimony); and (4) other relevant district court rulings. *(Eighth Circuit)*
- Briefs in bankruptcy appeals must contain the name, address, and court of the bankruptcy judge initially ruling on the matter. *(Ninth Circuit)*
- Brief must contain copies of all pertinent written findings, conclusions, and opinions of the district, bankruptcy, or magistrate judge (including any adopted report and recommendation) or copies of their transcript pages if oral. Briefs in social security appeals must include copies of the decisions of the administrative law judge and the appeals council. *(Tenth Circuit)*

**(2) Rules regarding a statement on the need for oral argument**

- Brief must contain a statement referencing any past, scheduled, or concluded oral argument, including dates where applicable. *(District of Columbia Circuit)*
- Preamble to brief must contain a request for oral argument consisting of a "short statement why oral argument would be helpful, or a statement that appellant waives oral argument." *(Fifth Circuit)*
- First item in the brief must be a statement summarizing the case and listing the reasons why oral argument should or should not be heard and the amount of time needed to present the argument. *(Eighth Circuit)*

- The conclusion must include reasons why oral argument is necessary if requested. *(Tenth Circuit)*
- Brief must include a "short statement of whether or not oral argument is desired, and if so, the reasons why oral argument should be heard." *(Eleventh Circuit)*
- Brief may contain an *optional* statement in support of or against oral argument. *(First Circuit)*
- Brief may contain an *optional* statement of reasons why oral argument should be heard. *(Fourth and Sixth Circuits)*

**(3) Rules regarding a statement of related cases**

- Brief must include a statement of related cases and proceedings. *(District of Columbia and Federal Circuits)*
- Brief must indicate if there are no related cases or proceedings in addition to the statement of related cases and proceedings. *(Third and Ninth Circuits)*
- Brief must include a list of all prior or related appeals with appropriate citations or a statement that there are no prior or related appeals. *(Tenth Circuit)*

**(4) Rules regarding attachment of a copy of cited unpublished opinions**

- Any unpublished disposition cited in the brief must be included in an addendum to the brief. *(District of Columbia Circuit, Sixth Circuit, and Eighth Circuit)* A distinctly colored separation page is required if the addendum is bound with the brief. *(District of Columbia Circuit)*
- Any unpublished Fourth Circuit opinion cited in the brief must be included in the addendum; unpublished opinions of other courts cited in the brief must be included in a separately bound attachment accompanied by a motion for leave to file the attachment. *(Fourth Circuit)*

**(5) Miscellaneous rules containing content requirements that are unique to an individual court of appeals**

- Brief must include a glossary of uncommon abbreviations. *(District of Columbia Circuit)*
- In a patent appeal, the patent at issue may be included within the addendum (*optional*). *(Federal Circuit)*
- Addendum must include any jury instructions that are the subject of appeal. *(First Circuit)*
- Brief must include an addendum containing the pertinent portions of any document in the record that is the subject or an issue on appeal or short excerpts from the record if necessary to understand specific issues on appeal. *(First Circuit)*
- Brief must include a certification of bar membership. *(Third Circuit)*

- Brief must include an addendum containing a designation of those parts of the record that are in the joint appendix and a designation of any sealed attachments. *(Sixth Circuit)*
- Opening brief in a criminal appeal must contain a statement as to the bail status of the defendant and the defendant's projected release date if the defendant is in custody. *(Ninth Circuit)*
- Parties may not append or incorporate by reference briefs submitted to the district court or appellate court in a prior appeal or refer the appellate court to such briefs to learn the arguments on the merits of the appeal. *(Ninth Circuit)*
- Pro se litigants may file a form brief supplied by the clerk, and pro se litigants who do so are relieved from the technical requirements of FRAP 28(c) and 32(a). *(Ninth Circuit)*
- Incorporating by reference portions of lower court or agency briefs or pleadings is disapproved and does not satisfy the requirements of FRAP 28(a) and (b). *(Tenth Circuit)*
- A separate addendum must contain copies of all trial exhibits that are referred to in the brief but returned to the parties by the district court. *(Tenth Circuit)*

**2. Rules that impose content requirements different from, but similar to, those imposed by FRAP 28**

The second large category of additional briefing requirements that the Center was able to identify comprises rules that direct the appellant to provide details in the brief that go beyond Rule 28's content requirements. Table 3 summarizes the nature of these requirements.

The largest subgroup of similar rules in this category are those of five courts[11] that specify that the brief contents must be listed in a specific order that is different from the order that FRAP 28(a) requires.[12]

Four courts[13] require a disclosure statement that is broader than that required by FRAP 28(a)(1)'s corporate disclosure statement. These rules frequently reference the court's local rule regarding certificates of interest and require disclosure of all persons known to be interested in any side of the case.

Four courts[14] require the appellant to include, in the jurisdictional statement, details in addition to those required by FRAP 28(a)(4). Local rules in four courts[15] describe additional or different requirements for referring to the record below than those described in

[11] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Fifth, Eighth, Tenth, Eleventh.

[12] *See* Appendix 1 for the text of FRAP 28.

[13] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Federal, Fifth, and Eleventh.

[14] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Fifth, Seventh, and Ninth.

[15] See local rules presented *infra* Appendix 2 for the following courts of appeals: Fifth, Tenth, Eleventh, Ninth.

FRAP 28(e). Four courts[16] expand FRAP 28(a)(5)'s requirement of a "statement of the issues presented for review." These rules require briefs to contain additional information, such as designating where each issue was preserved for appeal. One of these courts[17] also requires a list of four or fewer apposite cases, including constitutional and statutory provisions for each issue. Four courts' rules[18] contain additional details for reproducing statutes, rules, and regulations in an addendum to the brief as permitted by FRAP 28(f). Two courts[19] require the appellant to identify with an asterisk the principal authorities relied upon in the table of authorities required under FRAP 28(a)(3).

**Table 3: Nature of Requirements Mentioned in FRAP 28 and Expanded by the Courts**

| Nature of the Additional Requirements Regarding the Content of Briefs | Number of Courts |
|---|---|
| Rules requiring that brief contents be in a different order than specified by FRAP 28(a) | 5 |
| Rules requiring a broader disclosure statement than FRAP 28(a)'s corporate disclosure statement | 4 |
| Rules requiring appellant to include additional details in the jurisdictional statement required by FRAP 28(a) | 4 |
| Rules stating additional or different requirements for referring to the record than those required by FRAP 28(e) | 4 |
| Rules expanding FRAP 28(a)'s requirements for stating the issues for review | 4 |
| Rules requiring additional details for reproducing statutes, rules, and regulations in an addendum than those required by FRAP 28(f) | 4 |
| Rules requiring appellant to use an asterisk to identify the principal authorities relied on as required by FRAP 28(a) | 2 |
| Rules imposing requirements unique to a single court | 5 |

[16] See local rules presented *infra* Appendix 2 for the following courts of appeals: Third, Eighth, Ninth, Tenth.

[17] See local rules presented *infra* Appendix 2 for the following court of appeals: Eighth.

[18] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Second, Fourth, Ninth.

[19] See local rules presented *infra* Appendix 2 for the following courts of appeals· District of Columbia, Tenth.

Our final subgroup of rules in this category of briefing requirements are those unique to an individual court that expand on a FRAP 28 requirement. For example, the Third Circuit requires citations to any binding authority for each legal proposition supported by citations in the argument section of the brief. In the Fifth Circuit, the brief must contain a separate standard-of-review section, and the summary of the argument must be between two and five pages. The Eighth Circuit requires the certificate of compliance to include the name and version of the word processing software used to prepare the brief. The Eleventh Circuit requires the table of contents to include specific page references to each heading or subheading of each issue argued, and the citations of authority in the brief must comply with Bluebook rules and list the page numbers of cases cited. In addition, the Eleventh Circuit has very specific requirements for the statement of the case.[20]

Below we present the details of the rules that expand on the requirements of FRAP 28. The descriptions below paraphrase the rules.[21]

**(1) Rules requiring that contents of briefs be listed in an order different from the order FRAP 28(a) requires** *(District of Columbia Circuit, Fifth Circuit, Eighth Circuit, Tenth Circuit, and Eleventh Circuit).*

**(2) Rules requiring a disclosure statement broader than that required by FRAP 28(a)(1)'s corporate disclosure statement**

- Brief must include a certificate as to parties and amici. *(District of Columbia Circuit)*
- Brief must include a certificate of interest. *(Federal Circuit)*
- Brief must include a certificate of interested persons. *(Fifth Circuit)*
- Brief must include a certificate of interested persons and corporate disclosure statement. *(Eleventh circuit)*

**(3) Rules requiring the jurisdictional statement include additional details not required under FRAP 28(a)(4)**

- Brief must contain a separate statement indicating that the basis of jurisdiction is in dispute, if so. *(District of Columbia Circuit)*
- Jurisdictional statement must contain citations of authority when needed for clarity. *(Fifth Circuit)*
- Jurisdictional statement must contain extensive details listed in a specific order regarding the district court's jurisdiction and appellate jurisdiction. *(Seventh and Ninth Circuits)*

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[20] See local rules presented *infra* Appendix 2 for the following courts of appeals: Third, Fifth, Eighth, Eleventh.

[21] *See* Appendix 2 for the text of these local rules.

**(4) Rules that contain additional or different requirements for referring to the record than those in FRAP 28(e)**

- Every assertion in the briefs regarding matters in the record must be supported by a reference to the page number of the original record where the matter is found. *(Fifth Circuit)*
- References to the record must be supported by a reference to the location, if any, in the excerpts of record where the matter is to be found. *(Ninth Circuit)*
- Statement of facts must include appropriate references to documents in the record, including the document number, if any, from the district or agency docket sheet, document name, filing date, and page number within the document. Transcript references must be to page number, or if the transcript is not sequentially paginated, to date of proceedings and page number. *(Tenth Circuit)*
- In all sections of the brief, including the statement of the case, every reference to the record must be supported by a reference to the volume number (if available), document number, and page number of the original record. *(Eleventh Circuit)*

**(5) Rules expanding FRAP 28(a)(5)'s requirement of a "statement of the issues presented for review"**

- Statement of the issues must designate where in the proceedings each issue was preserved for appeal. *(Third Circuit)*
- Statement of the issues must include for each issue a list of not more than four of the most apposite cases and the most apposite constitutional and statutory provisions. *(Eighth Circuit)*
- Where a party must record an objection to preserve the right to appeal, the brief must state, for each such issue on appeal, where in the record the issue was raised and ruled on or objected to and ruled on. *(Ninth and Tenth Circuits)*

**(6) Rules containing additional details for reproducing statutes, rules, and regulations in an addendum, as permitted under FRAP 28(f)**

- If pertinent statutes and regulations are set forth in an addendum, the brief must contain a statement referencing the addendum, and a table of contents must precede the statutes and regulations. A distinctly colored separation page is required if an addendum is bound with the brief. *(District of Columbia Circuit)*
- A "Special Appendix" must be included as an addendum to the brief or as a separately bound volume if the application or interpretation of any rule of law, including any constitutional provision, treaty, statute, ordinance, etc., is significant to the resolution of any issue on appeal. *(Second Circuit)*

- Relevant constitutional provisions, treatises, statutes, ordinances, rules, or regulations may be included as an addendum to the brief without leave of court. Any other material may be filed only under separate cover and if accompanied by a motion for leave to file an attachment to the brief. *(Fourth Circuit)*
- If determination of issues requires study of statutes, regulations, or rules, relevant parts must be reproduced in an addendum at the end of the brief separated by a colored page. *(Ninth Circuit)*

**(7) Rules containing additional requirements in the description of the table of authorities required by FRAP 28(a)(3)**

- Principal authorities in the table of authorities must be identified with an asterisk. *(District of Columbia Circuit)*
- Table of citations must contain asterisks in the margin identifying the citation upon which the party primarily relies. *(Eleventh Circuit)*

**(8) Miscellaneous rules containing content requirements that are unique to an individual court of appeals**

- For each legal proposition supported by citations in the argument section, citations to any binding opposing authority must be included. *(Third Circuit)*
- In the argument section of the brief required by FRAP 28(a)(9), citation to authorities must conform to a special citation form. *(Third Circuit)*
- Brief must contain a separate standard of review section (stated as a "preference" of the court, not a requirement). *(Fifth Circuit)*
- The summary of the argument must be between two and five pages. *(Fifth Circuit)*
- In all social security, Title VII, and Section 2254 and 2255 appeals, the brief must include a one-page fact sheet immediately following the table of contents. *(Sixth Circuit)*
- First section of each brief must be a statement providing a one-page summary of the case (and a request for, or waiver of, oral argument and the amount of time necessary to present the argument). *(Eighth Circuit)*
- FRAP 28(a)(11)'s certificate of compliance must include the information required by FRAP 32(a)(7)(C) and the name and version of the word processing software used to prepare the brief. *(Eighth Circuit)*
- Table of contents must include specific page references to each heading or subheading of each issue argued. *(Eleventh Circuit)*
- If a party adopts by reference any part of another party's brief pursuant to FRAP 28(i), the adopting party's brief must include a statement describing in detail which briefs and which portions of those briefs it adopts. *(Eleventh Circuit)*

- The statement of the case must include (i) the course of proceedings and dispositions in the court below, including, in criminal appeals, whether the party counsel represents is incarcerated; (ii) a statement of the facts identifying any inferences as such; and (iii) a statement of the standard or scope of review for each contention. *(Eleventh Circuit)*
- The brief's citations of authority must comply with Bluebook rules and reference the specific page number(s) that relate to the propositions for which the case is cited. Citations to Supreme Court decisions must include both the U.S. Reports and Supreme Court Reporter when available. *(Eleventh Circuit)*

### C. Number and Nature of Additional Requirements Governing the Content of Brief Covers

Only two courts require the appellant to include items on the brief cover beyond what FRAP 32(a)(2) requires.[22] The Court of Appeals for the District of Columbia Circuit requires the appellant to note the date on which the case is scheduled for oral argument if applicable. The Tenth Circuit requires a statement as to whether oral argument is requested, and the name of the court and judge whose judgment is being appealed. The Federal Circuit "encourages" inclusion of the name of the judge whose judgment is being appealed. The local rules of the Second Circuit Court of Appeals direct that the case number (that FRAP 32(a)(2)(A) requires on the cover) be at least one-inch high. The Second Circuit also permits the brief to be filed in pamphlet form.[23]

[22] *See* Appendix 1 for the text of FRAP 32.

[23] See local rules presented *infra* Appendix 2 for the following courts of appeals: District of Columbia, Tenth, Federal, and Second.

## III. Circuit-by-Circuit Analysis of Additional Briefing Requirements

Because the history behind the adoption of the additional briefing requirements and their enforcement is unique to each court of appeals, we present an analysis of each circuit below, including for each court the following information:

- the additional briefing requirements adopted by the court;
- when the requirements were adopted;
- why the requirements were adopted; and
- the extent to which the court enforces the additional requirements.

The text of the courts' rules and other provisions regarding briefs are in Appendix 2. Our information on the history and enforcement of the rules is limited to the questionnaire responses we received. In many instances, respondents indicated that they were unable to uncover comprehensive legislative histories behind the adoption of their rules.

### A. United States Court of Appeals for the Federal Circuit

#### 1. Additional Briefing Requirements

- Certificate of interest (required by Federal Cir. R. 28(a)(1) & 47.4)
- Statement of related cases (required by Federal Cir. R. 28(a)(4) & 47.5)
- Citation of any published decision of the trial tribunal included within the statement of the case (required by Federal Cir. R. 28(a)(7))
- Judgment in question and any opinion, memorandum, or findings and conclusions supporting it should be contained in an addendum (required by Federal Cir R. 28(a)(12))
- In an appeal involving a patent, the patent in suit may be included within the addendum (stated in Federal Cir. R. 28(a)(12)) (*Optional*)
- Front cover should include the name of the judge from whose judgment appeal is taken (stated in the practice notes following Federal Cir. R. 32) (*Preference*)

#### 2. History of Adoption of Additional Briefing Requirements

The clerk of court described the court's process for adopting local rules:

> All Federal Circuit Rules follow the same process, whether proposed by a Federal Circuit judge to the Court's internal rules committee, proposed by the Court's Advisory Council, or by a practitioner— the rules committee proposes the rule to the judges of the circuit. If a majority agrees to propose the rule, it is publicized for comment. The rules committee then reviews the comments. If the rules committee believes the proposed rule should go forward, it is again voted upon by all the judges, with a majority being sufficient to carry the proposed rule.

The certificate of interest required by local Rules 28(a)(1) and 47.4 has been in the court rules since its creation in 1982. The court regards it as an extension of the corporate disclosure statement required by FRAP 26.1. The statement of related cases required by local Rules 28(a)(4) and 47.5 has also been in the court's rules since 1982, and the clerk reported that this additional requirement allows the court to schedule cases in a more orderly manner and to be aware of pending or recently decided relevant matters.

Local Rule 28(a)(7)'s requirement for citation to any published decision in the statement of the case first appeared in the June 1, 1993, edition of the Federal Circuit Rules.

The clerk stressed that the citation requirement is *only* to the published decision in the instant case and is for the convenience of the court. The addendum requirements imposed by local Rule 28(a)(12) first appeared in the June 1, 1990, edition, and were adopted for the convenience of the court. The clerk said the court's convenience was also the reason for local Rule 28(a)(12)'s optional requirement for inclusion of the patent in the addendum. This optional requirement first appeared in the December 1, 1998, edition of the Federal Circuit Rules. The court's preference for placing the name of the judge from whose judgment appeal is taken on the brief's cover conforms with the changes to the FRAP procedure, effective on December 1, 2002. The practice note first appeared in the May 1, 2003, edition of the Federal Circuit Rules.

### 3. Enforcement of the Additional Briefing Requirements

The clerk explained that his office files all briefs, but in some cases the court orders the party to correct the non-conformities. Further, no brief would be rejected, nor would a correction be ordered, if the name of the judge below did not appear on the brief's cover.

## B. United States Court of Appeals for the District of Columbia Circuit

### 1. Additional Briefing Requirements

- Specific order for brief contents (required by Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit)
- Certificate as to Parties and Amici (required by D.C. Cir. R. 28(a)(1)(A))
- Certificate as to Rulings Under Review (required by D.C. Cir. R 28(a)(1)(B))
- Certificate as to Related Cases (required by D.C. Cir. R. 28(a)(1)(C))
- Principal authorities identified with an asterisk in table of authorities (required by D.C. Cir. R. 28(a)(2))
- Glossary of uncommon abbreviations (required by D.C. Cir. R. 28(a)(3))
- Additional statement required if jurisdiction is in dispute (required by Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002))
- Pertinent statutes and regulations included in brief or as an addendum (required by D.C. Cir. R. 28(a)(5))
- References to oral argument (required by D.C. Cir. R. 28(a)(7))
- Copies of any unpublished dispositions included in an addendum (required by D.C. Cir. R. 28(c)(3))
- Date of any scheduled oral argument set forth on the front cover of the brief (required by the Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit (as amended through December 1, 2002))

### 2. History of Adoption of Additional Briefing Requirements

The clerk of court reported that most of the requirements in local Rule 28 appear to have been adopted by 1968. A 1968 version of the local rules contains, with some language variance, nearly all of the current requirements. An annotation in that edition notes that the requirement to use an asterisk to mark authorities principally relied upon (D.C. Cir. R. 28(a)(2)) was adopted in 1960. Some of the requirements appear in versions of the local rules issued in the 1950s, and a version of Rule 28(a)(5), concerning the presentation of statutory or regulatory materials, is in a 1941 edition of the circuit's rules. Two of the current requirements were adopted more recently. The glossary requirement and the instruction to include a summary of argument in all briefs, including the reply brief, were included when the court adopted a major revision of the local rules in 1993. These 1993 changes were discussed at a judges' meeting, were vetted before the D.C. Circuit's lawyers committee on procedures, and were adopted without dissent.

The clerk described the current purpose for these rules (noting that none of the current judges or staff were serving when most of the requirements were adopted). He said the specific order for the content of briefs, as required in the *District of Columbia Circuit Handbook of Practice and Internal Procedures*, guides counsel and ensures that the judges can always find what they are looking for in the same place. Moreover, he said it is a common-sense requirement that is helpful to the bench and bar. He said the certificate as to parties, rulings, and related cases required under local Rule 28(a)(1) serves

three important purposes. First, the listing of parties provides both clerk's office and chambers with an efficient way to check for possible recusals. Second, the listing of rulings identifies for the court exactly what has been appealed. Third, the listing of related cases may allow the court to group cases together for efficient handling and gives the court notice that sister circuits are considering related issues.

The clerk said local Rule 28(a)(2), which requires principal authorities to be identified with an asterisk, is helpful in giving the reader a quick sense of how the party views the case. At least for one judge, the marked authorities indicate which cases to print for a closer review. He said the glossary of uncommon abbreviations, required recently by local Rule 28(a)(3), has proved to be very useful because briefs are replete with acronyms due to the court's heavy federal regulatory and statutory caseload. Readers previously had to search back in the brief for the first reference.

The clerk said the additional statement required if jurisdiction is in dispute, described in the *District of Columbia Circuit Handbook of Practice and Internal Procedures,* focuses the parties and attempts to ensure that the court does not overlook a jurisdictional defect. The requirement to include pertinent statutes and regulations in the brief or as an addendum under local Rule 28(a)(5) has been in place since at least 1941; the clerk said its usefulness is obvious to anyone who must regularly read briefs filed with the court.

The clerk said that local Rule 28(a)(7)'s requirement that litigants put the scheduled oral argument date, if known, at the top of the first page of the brief, and set forth this date on the brief's front cover as described in the court's Practice Handbook, is for administrative convenience and is useful both in chambers and the clerk's office. Local Rule 28(c)(3), which requires copies of unpublished dispositions cited in the brief to be included in an addendum, was essential when unpublished dispositions were not available on line or in volumes such as the Federal Appendix, and it remains a convenience to the reader.

### 3. Enforcement of the Additional Briefing Requirements

The clerk reported that the court strictly enforces all of its briefing requirements, and judges are not reluctant to call enforcement lapses to the clerk's attention. The court enforces the requirements in accordance with FRAP 25, in that the clerk's office accepts defective briefs and contacts the party, usually by phone, to explain the problem and work through a solution.

## C. United States Court of Appeals for the First Circuit

### 1. Additional Briefing Requirements

- Judgment appealed from and any supporting documentation included in an addendum (required by First Circuit Local Rule 28(a)(1)). Include underlying decision if the appeal arises from a decision reviewing an underlying agency, bankruptcy or state court decision the (required by *Requirements for Compliant Briefs and Appendices* and *Ten Pointers for an Appeal)*
- Any jury instructions that are the subject of the appeal included in an addendum (required by First Circuit Local Rule 28(a)(2))
- Portions of any document in the record the subject on appeal and other items from the record necessary for understanding the issues on appeal included in an addendum (required by First Circuit Local Rule 28(a)(3) & (4))
- Optional statement in support of/against oral argument (stated in *Checklist for Briefs*) (*optional*)

### 2. History of Adoption of Additional Briefing Requirements

The circuit executive said the court adopted local Rule 28, which sets forth the addendum requirements, in 1988 and that, although the rule has been renumbered and reformatted over the years, the substance has remained the same. The requirement to include the underlying decision "[i]f the appeal arises from a decision reviewing an underlying agency, bankruptcy or state court decision" is based on an interpretation of the court's rule that requires the brief to include an addendum containing the judgment appealed from and any supporting documentation. As indicated, a statement in support of or against oral argument is not a required part of the brief, but is optional. The circuit executive said that although the court adopted local Rule 28's addendum requirements many years ago and the history behind the rule is not readily available, the rule is valuable in that judges who travel frequently find it convenient to have the most pertinent parts of the record attached to the brief.

### 3. Enforcement of the Additional Briefing Requirements

The circuit executive said that if a brief is nonconforming, the clerk's office issues an order noting the date of filing, identifying the deficiency, and setting a date to cure the deficiency. Any deadlines for filing an opposing brief are automatically extended. The circuit executive explained that although the clerk's office had used language in the deficiency notice indicating that the brief was rejected, in fact the problem has almost always been solved through contact with the litigant. In any event, the circuit executive reported that modifications in the deficiency notice language were in progress but the circuit executive could not predict a date of adoption.

## D. United States Court of Appeals for the Second Circuit

### 1. Additional Briefing Requirements

- Preliminary statement indicating the name of the judge or agency member rendering the decision appealed from, and the citation of the decision if it is reported (required by Second Circuit Local Rule 28)
- Special Appendix included as an addendum to the brief or as a separately bound volume if the application or interpretation of any rule of law, including any constitutional provision, treaty, statute, ordinance, etc., is significant to the resolution of any issue on appeal (required by Second Circuit Local Rule 32(d))
- Case number on cover of brief at least one inch high (required by Second Circuit Local Rule 32(c))
- Brief may be filed in pamphlet form (stated in Second Circuit Local Rule 32(a)) (preference of litigant)

### 2. History of Adoption of Additional Briefing Requirements

Local Rule 28 took effect in 1998, and local Rule 32(d) became permanent in 2002. Both were adopted to provide judges with important information in an easy, straightforward manner. The clerk of court explained that the court's Rules Committee either initiates proposed rules changes or examines recommendations from judges, court units, or members of the bar. The Rules Committee discusses proposed changes, usually drafts the text of the proposed rule, and then presents the proposal to the full court for discussion and a vote.

### 3. Enforcement of the Additional Briefing Requirements

When a defective brief is received, the general practice is to ask the party to cure the defect.

## E. United States Court of Appeals for the Third Circuit

### 1. Additional Briefing Requirements

- Designation of where in the proceedings each issue was preserved for appeal, referring to specific pages of the appendix or place in the proceedings at which each issue on appeal was raised, objected to, and ruled upon included in the statement of the issues (required by Third Circuit LAR 28 1(a)(1))
- Statement of related cases and proceedings (required by Third Circuit LAR 28.1(a)(2))
- Specific citation form required for citation to authorities in the argument (required by Third Circuit LAR 28.3(a))
- Citations to any opposing authority binding on the court for each legal proposition supported by citations in the argument (required by Third Circuit LAR 28.3(b))
- Certification of bar membership included in initial brief filed by each party (required by Third Circuit LAR 28.3(d))
- Order(s) being appealed, opinion(s) of the trial court or agency if any, the notice of appeal, and any order granting a certificate of appealability included in the brief (considered Volume 1 of the Appendix) or in a separate Volume 1 of the Appendix. The court prefers that they be attached to the brief. An additional 25 pages of record material may also be included in Volume 1 (required by *Checklist of Rule Requirements for Preparation of Briefs* and Third Circuit LAR 32.2(c)).
- Relevant docket entries, judgment order or decision being appealed, memorandum or opinion of court or agency subject to review, and notice of appeal or petition for review included when hearing is on the original record under Third Circuit LAR 30.2 (applications for writ of habeas corpus and in forma pauperis appeals) (required by *Checklist of Rule Requirements for Preparation of Briefs*)
- Statement of the standard or scope of review for each issue on appeal placed under a separate heading *before* the discussion of the issue in the argument section (as stated in Third Circuit LAR 28.1(b)) (*preference only*)

### 2. History of Adoption of Additional Briefing Requirements

Although the most recent rules were adopted in 2002, most of the requirements of local Rule 28 existed as early as 1988. The clerk of court said the court adopted each rule because counsel were not providing the information the court needed in the briefs. She said the court adopted local Rule 32.2(c), which requires the addendum to include the order being appealed, trial court opinions, and the notice of appeal (preferably attached to the brief), and the rule requiring additional items when the hearing is on the original record (Checklist of Rule Requirements) so that the judges would have in one document most of what they need to decide a case when they work at home or while traveling. Having the documents attached to the brief or in a separate volume of the appendix makes it easy for judges to identify what they need and to transport it.

### 3. Enforcement of the Additional Briefing Requirements

The circuit executive said the court enforces its briefing rules. The court files a noncomplying brief and calls or sends a noncompliance letter directing counsel to send either a corrected brief or page. Pro se litigants can file an informal brief on a form supplied by

the court. If they are proceeding on the original record and do not attach the required items, the clerk's office sends those items to the court. This is the only briefing requirement the court does not strictly enforce.

## F. United States Court of Appeals for the Fourth Circuit

### 1. Additional Briefing Requirements

- Any unpublished opinion of the Fourth Circuit cited pursuant to Fourth Circuit Local Rule 36(c) included in the addendum; unpublished opinions of other courts included in a separately bound attachment accompanied by a motion for leave to file the attachment (required by Fourth Circuit Loc. R. 28(b) and explained in *Rule Requirements for Preparation of Briefs and Appendices)*
- Verbatim text of any constitutional provision, treaty, statute, ordinance, rule, or regulation cited in the brief and at issue set forth in either body of brief or in addendum. Motion to file required if the attachment is anything other than one of these listed items (required by Fourth Circuit Loc. R. 28(b))
- Optional Request for Oral Argument pursuant to Fourth Circuit Loc. R. 34(a) included if counsel requests argument (stated in *Rule Requirements for Preparation of Briefs and Appendices and Fourth Circuit Checklist for Briefs and Appendices*)

### 2. History of Adoption of Additional Briefing Requirements

Local Rule 28(b), on attachments to briefs, became effective October 7, 1987. It clarifies what documents can be attached to briefs without leave of court (constitutions, treaties, statutes, ordinances, rules, regulations, and unpublished Fourth Circuit opinions) and what documents require leave of court (everything else).

The provision in local Rule 34(a)—that "in furtherance of the disposition of pending cases under this rule, parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard"—became effective April 1, 1984. Inclusion of such a statement is optional, but nevertheless aids the court in determining whether the case merits oral argument or can be decided on the briefs. The clerk said the court may elect to hear argument with or without a request.

### 3. Enforcement of the Additional Briefing Requirements

If the appellant's brief does not include a required component, the clerk asks the appellant to file a corrected brief. For example, the clerk's office enforces local Rule 28(b) on attachments to briefs by advising counsel to file either a motion for leave to file an attachment or a corrected brief if a brief is filed with a nonconforming attachment.

## G. United States Court of Appeals for the Fifth Circuit

### 1. Additional Briefing Requirements

- Certificate of interested persons (required by Fifth Cir. R. 28.2.1)
- Statement regarding oral argument included in a preamble to appellant's brief (required by Fifth Cir. R. 28.2.4)
- Record references throughout the brief supported by page numbers of original record (required by Fifth Cir. R. 28.2.3)
- Citations of authority included in jurisdictional statement (required by Fifth Cir. R. 28.2 5)
- Separate standard of review section (required by Fifth Cir. R. 28.2.6)
- Page limits for summary of the argument (required by Fifth Cir. R. 28.2.2)
- Specific order for brief contents (required by Fifth Cir. R. 28.3)

### 2. History of Adoption of Additional Briefing Requirements

The clerk of court explained that all rule changes are made upon majority vote of the court's active judges. The court adopted some of them more than 25 years ago, and the available records do not always reflect the vote on each rule change. Also, court records do not disclose why a particular rule was advocated, how many judges may have "sponsored" the rule change, or whether the idea came from a judge or the clerk. Minutes from court meetings dating back to the mid-1960s show that there were "Rules Committees" of active judges who considered and proposed rule changes to the entire court. The court no longer has a "Rules Committee" per se. It now has a "rules proctor"—a single judge responsible for rules. The clerk, the rules proctor, any judge, the Lawyer's Advisory Committee, or a member of the public can suggest changes to the rules. All suggested rule changes go through the proctor to a court meeting agenda. If a majority of judges agree, the proposed changes are posted for public comment, and after consideration of any comments, the court votes whether to adopt the rule. Some rule changes are necessary to make local rules conform with amendments to the federal rules; others address specific needs of the court based upon experience or anticipated events, such as electronic filing.

The certificate of interested persons, required by local Rule 28.2.1, was added between 1968 and 1971. It became Rule 28.2.1 in 1983 and has been modified over the years. The most recent modifications were in 1999 and 2002. The court has long used this "certificate" as an aid to determine recusals. The most recent changes require parties to update information that changes during the pendency of the case. The clerk said the Rule is broader than the federal rule's "corporate disclosure statement" because the court's judges believe the federal standards do not provide them with enough information to make reasoned recusal decisions.

The statement regarding oral argument, required by local Rule 28.2.4, was adopted by unanimous vote as Rule 13(j)(2) on June 7, 1976, and was designated as Rule 28.2.4 in July 1983. The court uses the statement during screening. For example, if neither party requests argument, the court most likely will not order it. The court also has an internal policy that if either party has requested oral argument, but the court decides to handle the case on the non-argument calendar, all judges must agree with the opinion, without dis-

sent or a special concurrence. If the panel cannot reach such a decision, the case must be placed on the oral argument calendar.

Local Rule 28.2.3 regarding record references was Rule 13.6.2 and was adopted in October 1978. It became Rule 28.2.3 in July 1983. The clerk said the court is unique in that it uses the original record on appeal in all merits decisions. It requires district courts to paginate the record consecutively, and the court provides the original record to the parties for their use in writing their briefs. The court requests that the parties refer to the page number in the record when citing to authority for their position. References to any transcripts are to "T, page X," and references to the record are to "R, page Y."

The jurisdictional statement, required by local Rule 28.2.5, is former Rule 13.6.5 and was adopted in October 1981. It became Rule 28.2.5 in July 1983. The clerk said the court designed the requirement to ensure that the attorneys and the court agree that there is in fact an articulable jurisdictional basis for the case.

Local Rule 28.2.6's requirement for a separate standard of review section became effective January 1, 1995. The clerk said the court wrote this expanded version because both attorneys and pro se litigants frequently asked the court "what is a standard of review." The court designed rule language primarily for informational purposes. The clerk said that since adoption of the additional language, the number of questions has fallen dramatically, and the number of briefs with a standard of review has increased substantially. Having a separate section for the standard of review is a "preference" of the court, not a requirement. The court at one time checked all briefs for a standard of review. Having it in a separate place rather than incorporated in the argument makes it easier for the court to locate it.

Local Rule 28.2.2, which imposes page limits on the summary of the argument, was adopted by unanimous vote on June 7, 1976, as Rule 13(j)(1) and designated as Rule 28.2.2 in 1983. Several judges said that litigants were spending too much time on the summary of their arguments, so this rule suggests that such summaries should be between 2 and 5 pages.

Local Rule 28.3, which lists the order in which the appellant must present the required content of the brief, was originally part of Rule 13.7, which became effective in October 1978. It became Rule 28.3 in July 1983. The clerk said the court wrote this rule essentially as a checklist to help litigants ensure that their briefs met all the briefing requirements in Federal Rules 25, 28, and 32. To help litigants, the court put them in one rule. The court also wanted consistency in brief preparation so that the court's review would be easier.

Although the clerk pointed out that the court cannot and does not impose a rule or general court policy except by local rule, it does provide a "Checklist for Preparation of Briefs and Record Excerpts" and a *Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit*, both of which are on the court's website at www.ca5.uscourts.gov/clerk/docs/pracguide. The court intends neither the Checklist nor the Practitioner's Guide to add any new requirements. The clerk said the Checklist provides guidance and information to attorneys and pro se litigants in a succinct form and in one source so that they do not have to look in a variety of places to find applicable rule requirements. The Practitioner's Guide was first written in 2001 by the clerk's office. The entire court did not vote on it, but the chief judge and the clerk's rules proctor approved the contents. The Practi-

tioner's Guide provides the practitioner with detailed suggestions for more effective brief writing, particularly regarding the statement of the issues, the statement of facts, and the argument sections of the brief. Judges and the staff attorney's office had complained that counsel did not know how to write effective briefs, and they hoped that some attorneys would read the guide and improve the quality of their briefs, assist their clients, and help the court understand the points in the brief. For example, the clerk said, the guide provides a suggested practice when writing the argument section required by FRAP 28(a)(9): "If the issue is failure to admit or exclude evidence, refusal to give a particular jury instruction, or any other ruling for which a party must record an objection to preserve the right of appeal, your brief should identify where in the record on appeal counsel made proper objection and where it was ruled upon."

### 3. Enforcement of the Additional Briefing Requirements

The clerk explained that FRAP 25(a)(4) prohibits his office from refusing to file a brief or other paper "solely because it is not presented in proper form" as required by federal or local rules or practice. Thus, the clerk's office checks for deficiencies, files the brief, and then expends significant effort writing to counsel and monitoring for follow-up. If counsel do not make the corrections or file a motion to file the brief in its present form, the clerk's office must submit the brief to a judge to determine whether to strike the brief and dismiss the case.

The clerk's office always checks that an appellant's brief contains the certificate of interested persons and the statement regarding oral argument. These requirements are strictly enforced. As a result of personnel reductions, clerk's staff are no longer able to check for compliance with local rules requirements for record references, the jurisdictional statement, and order of brief contents. The clerk's office also does not check for compliance with the court's "preference" for a separate standard of review section and the suggested page limits for the summary of the argument. And the clerk's office never checks for compliance with the suggestions contained in the Practitioner's Guide, since they are court "preferences" and not rules.

## H. United States Court of Appeals for the Sixth Circuit

### 1. Additional Briefing Requirements

- One-page fact sheet included after the table of contents for all social security appeals, Title VII appeals, habeas corpus Section 2254 appeals and motion to vacate section 2255 appeals (required by Sixth Cir. R. 28(c))
- Designation of appendix contents pursuant to Sixth Cir. R. 30(b) and designation of sealed attachments pursuant to Sixth Cir. R. 30(f)(4) and (5) included in an addendum (required by Sixth Cir. R. 28(d))
- Copy of any unpublished decision cited in the brief included in an addendum (required by Sixth Cir. R. 28(g))
- Optional statement in support of oral argument pursuant to Sixth Cir. R. 34(a) (stated in Sixth Cir. R. 28(e)) (*optional*)

### 2. History of Adoption of Additional Briefing Requirements

The clerk of court reported that various sections of local Rule 28 were adopted at different times, all as a result of action taken by the court as a body. The court adopted local Rule 28(c)'s requirement for a one-page fact sheet in certain types of appeals many years ago, with the goal of facilitating the court's review of these types of cases. The clerk said that the continuing viability of this requirement is open to question. The purpose of local Rule 28(d)'s addendum requirements is to cause counsel to focus attention on exactly which issues are important to the appeal and which parts of the record warrant inclusion in the joint appendix.

The clerk said local Rule 28(g), which requires including any cited unpublished decision in the addendum, assists the court by making readily available to it any unpublished opinions cited by counsel in the briefs. Local Rule 28(e) and 34(a)'s requirements that parties include a statement in the brief explaining why oral argument should be heard represents part of the court's ongoing effort to manage its oral argument docket. The clerk said this requirement is useful in identifying cases in which counsel does not think that oral argument would be especially necessary or useful or where counsel is otherwise willing to dispense with oral argument.

### 3. Enforcement of the Additional Briefing Requirements

The clerk said that the court files noncomplying briefs, but the clerk's office then itemizes the deficiencies and directs counsel to correct them. The clerk's office spends a great deal of time monitoring these corrective steps.

## I. United States Court of Appeals for the Seventh Circuit

### 1. Additional Briefing Requirements

- Extensive jurisdictional statement requirements (required by Seventh Circuit Rule 28(a)

### 2. History of Adoption of Additional Briefing Requirements

The circuit executive said local Rule 28(a) evolved over many years, based on a number of the court of appeals' decisions analyzing trial and appellate court jurisdictional issues and the court's dismissing appeals in which there was no jurisdiction. The judges were concerned about making sure jurisdiction was clearly present.

### 3. Enforcement of the Additional Briefing Requirements

The circuit executive said that the clerk's office accepts deficient briefs and sends counsel a notice to correct the deficiency. If counsel does not correct the deficiency, the office sends counsel a rule to show cause, advising counsel that the brief will not be filed unless the deficiency is corrected. The circuit executive said the court has sanctioned counsel a number of times for filing a factually incorrect statement of jurisdiction.

## J. United States Court of Appeals for the Eighth Circuit

### 1. Additional Briefing Requirements

- Summary of the case statement in one page or less as the first item of the brief (required by Eighth Cir. R. 28A(f)(1))
- Statement in support of/against oral argument and time needed to present argument included in summary of the case (required by Eighth Cir. R. 28A(f)(1))
- List of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions for each issue included in the statement of the issues (required by Eighth Cir. R. 28A(f)(2))
- Copy of the district court or agency opinion, including supporting memoranda; any magistrate's report and recommendation that preceded the district court opinion; short excerpts from the record; and other relevant district court rulings included in an addendum not to exceed 15 pages (required by Eighth Cir. R. 28A(b))
- Name and version of the word processing software used to prepare the brief included in certificate of compliance pursuant to FRAP 28(a)(11) (required by Eighth Cir. R. 28A(c))
- Copy of any unpublished opinion cited pursuant to Eighth Cir R. 28A(i) included in an addendum (required by the *Briefing Checklist*)
- Specific order for brief contents (required by the *Briefing Checklist*)

### 2. History of Adoption of Additional Briefing Requirements

The clerk of court said the court's additional requirements have been part of its local rules for more than 30 years. The court adopted them in the early 1970s as part of wide-ranging procedural changes. The full court approved the rules changes. In the late 1990s the court extensively amended its local rules. The purpose of the amendments was to reduce the number of local rules, rely more heavily on the provisions of the Federal Rules of Appellate Procedure, and reduce the burden on practitioners. The amendments were adopted after extensive discussion by the full court and its Federal Practice Advisory Committee. The court retained the brief requirements because the court thought they provided essential materials needed for review of the case.

The clerk said that local Rule 28A(f)(1), requiring appellants to include, as the first item in the brief, a statement providing a summary of the case and a request for or waiver of oral argument, provides the court with additional information that is useful either in screening the case for oral argument or in conducting the merits review of the case. The clerk said local Rule 28A(f)(2)'s requirement for a list of the four most apposite cases helps the court identify the key cases on which counsel rely. Local Rule 28A(b) directs counsel to include in an addendum the key orders and excerpts from critical record items, such as pleadings, transcripts, and jury instructions. The clerk said the court adopted it because judges often read briefs away from chambers and without immediate access to the full record on appeal. The Briefing Checklist, which directs counsel to list brief contents in a specific order and include a copy of any cited unpublished opinion in the addendum, also assists the court with reviewing the briefs.

A practitioner may need to look in several places for a complete understanding of the court's expectations regarding its briefing requirements. Briefing requirements and court

"preferences" or "suggestions" are discussed in four sources besides the rules: Pointers on Preparing Briefs, Briefing Checklist, Internal Operating Procedures, and the Eighth Circuit Handbook; all are available on the court's website (www.ca8.uscourts.gov). The requirement of local Rule 28A(f)(2), that counsel list the most apposite cases, not to exceed four, for each issue, is also in the Briefing Checklist and the Pointers, but the Pointers contains a requirement not found elsewhere: "If no cases are apposite, include a statement so indicating." Local Rule 28A(b) requires every appellant's brief to have an addendum; this requirement is also in the Briefing Checklist and the Pointers, but once again the Pointers contains additional information not found elsewhere: "Please be sure that your addendum contains the order(s) appealed from, including, in a criminal case, the judgment and commitment order. Do not include the Presentence Investigation Report in the addendum in a criminal case."

Like the Fifth Circuit, the Eighth Circuit has a handbook that provides the practitioner with detailed suggestions for effective brief writing, particularly addressing the statement of the issues, the statement of facts, and the argument sections of the brief. An excerpt from the handbook—expanding on the court's expectations for a Rule 28A(f) statement of the issues accompanied by a list of not more than four of the most apposite cases—reads as follows:

> Effective statement of issues requires careful selection and choice of language. The main issue should be stressed and an effort made to present no more than two or thee questions. The issues selected should be stated clearly, simply, and with specificity. The issues should not be too general or too vague. Examples of ineffective statement of the issues follow:
>
> > Did the district court err in granting (or failing to grant) a directed verdict? Was summary judgment improperly granted because material facts in dispute exist? Was there sufficient evidence to support the jury's verdict?
>
> On occasion, although not usually, the questions may be better understood, or stated more simply, if preceded by an introductory factual paragraph. Sample briefs with statement of the issues are available in the clerk's office.[24]

### 3. Enforcement of the Additional Briefing Requirements

The clerk said that his office inspects every attorney-filed brief for compliance and sends defect letters whenever a brief does not comply. If the defects are relatively minor, the clerk files the brief and directs counsel to submit corrections sheets, which court staff insert into the brief. Briefs that have too many defects to correct by inserts or corrected pages are filed and then stricken; counsel get a short time to file a corrected brief, and if they fail to do so, the clerk issues an order to show cause why the appeal should not be dismissed. The clerk can waive extremely minor defects (e.g., listing five apposite cases or having a 17-page addendum).

[24] United States Court of Appeals for the Eighth Circuit, Handbook § XX.A.6, available at www.ca8.uscourts.gov.

## K. United States Court of Appeals for the Ninth Circuit

### 1. Additional Briefing Requirements

- Specific jurisdictional statement requirements (required by Ninth Cir. R. 28-2.2)
- Statement of bail status of the defendant in a criminal case (required by Ninth Cir. R. 28-2.4)
- Separate standard of review section identifying applicable standard of review as to each issue (required by Ninth Cir. R. 28-2.5)
- Statement of related cases (required by Ninth Cir. R. 28-2 6)
- Relevant statutes, regulations, or rules needed to determine issues included in an addendum at end of brief (required by Ninth Cir. R. 28-2.7)
- Name, address, and court of bankruptcy judge initially ruling on the case if appeal is from bankruptcy court (required by Ninth Cir R. 28-2.9)
- Parties prohibited from incorporating by reference briefs or other pleadings filed in the district court, agency, or this court in a prior appeal (imposed by Ninth Cir. R. 28-1(b))
- Pro se litigants have option of filing a form brief relieving them of the technical requirements of FRAP 28(c) and 32(a) (provided for by Ninth Cir. R. 28-1(c))
- References to the record in briefs supported by a reference to the location in the excerpts of record (required by Ninth Cir. R. 28-2.8)

### 2. History of Adoption of Additional Briefing Requirements

The clerk of court said that local Rule 28-2.2's requirement for a statement of jurisdiction and local Rule 28-2.5, which governs the statement of the applicable standard of review, have been in place for at least 20 years. She said that quite a few judges thought the rules were needed to focus counsel's attention on jurisdictional requirements and identification of the correct standard of review for each issue presented in the brief. The court adopted local Rule 28-2.4's statement of bail status requirement approximately ten years ago to alert the bench to any need to expedite its decision making.

The court adopted Rule 28-2.6, requiring a statement of related cases, approximately 15 years ago. The clerk said that after briefing is completed, staff attorneys review the briefs with the goal of placing cases raising related factual or legal issues before the same panel. The statement of related cases assists them. Additionally, if the same issue is pending before more than one panel, the court's general orders direct other panels to defer decision making pending resolution of the issue by the panel initially presented with the question. The statement of related cases alerts the panel to the possibility that another panel may be considering the same issue.

The court adopted local Rule 28-2.9 about five years ago, at the request of the circuit's bankruptcy judges. Its requirement that counsel include the name, address, and court of the bankruptcy judge allows the clerk to provide the bankruptcy courts with copies of dispositions in cases that originated in the bankruptcy court.

The clerk said the court adopted local Rule 28-1(b) about ten years ago. It prohibits incorporation by reference of briefs or other pleadings filed in the district court, agency, or in a prior appeal. It was a response to litigant efforts to evade the applicable length limits by way of incorporating by reference portions of other documents. The court adopted local Rule 28-1(c), allowing pro se litigants to file a form brief, about twelve

years ago as a means to facilitate pro se litigants' access to the courts and ensure that the court had the information necessary to review the appeal. Local Rule 28-2.8, revised in July 1998, modifies FRAP 28(e)'s requirement and reflects the court's use of excerpts as opposed to an appendix.

### 3. Enforcement of the Additional Briefing Requirements

The clerk said that if counsel submit a brief without a correct statement of bail status or a correct statement of related cases, the brief is filed but the clerk's office sends counsel a notice to correct the omission. No further monitoring of compliance occurs absent a complaint from the bench. The clerk's office also files briefs not complying with the requirement to include the name, address, and court of the bankruptcy judge. The bench identifies violations of the rule prohibiting incorporation by reference of briefs or other pleadings or learns of them through opposing counsel's motion to strike, and the court addresses violations on a case-by-case basis.

## L. United States Court of Appeals for the Tenth Circuit

### 1. Additional Briefing Requirements

- Statement of related cases appended to the table of cases (required by Tenth Cir. R. 28.2(C)(1))
- Statement of the facts with appropriate record references (required by Tenth Cir. R. 28.1 and *Practitioners' Guide to the US Court of Appeals for the Tenth Circuit*)
- Preceding discussion of each issue, cite precise reference in record where issue was raised and ruled upon; if issue requires party to record an objection to preserve right to appeal, identify where in record objection was raised and ruled upon (required by Tenth Cir. R. 28.2(C)(2))
- Copies of the judgment or order under review (or in social security cases, copies of the decisions of the administrative law judge and the appeals council), pertinent written findings, conclusions, etc.; and any relevant statutes, rules, regulations, etc., or magistrate judge's report and recommendation included in an attachment (required by Tenth Cir. R 28.2(A) and *Practitioners' Guide to the US Court of Appeals for the Tenth Circuit*)
- Copies of all trial exhibits which are referred to in the brief that were returned to the parties by the district court included in a separate addendum (required by *Practitioners' Guide to the US Court of Appeals for the Tenth Circuit*)
- statement as to reason oral argument is necessary (required in Tenth Cir. R. 28.2(C)(4))
- Specific order for brief contents (required by *Practitioners' Guide to the US Court of Appeals for the Tenth Circuit*)
- Incorporating by reference lower court or agency briefs or pleadings disapproved (imposed by Tenth Cir. R. 28.4))
- Statement as to whether oral argument is requested included on front cover of brief (required by Tenth Cir. R. 28.2(C)(4))
- Name of the court and the judge whose judgment is being appealed included on front cover of brief (required by Tenth Cir. R. 28.2(C)(5))

### 2. History of Adoption of Additional Briefing Requirements

The clerk of court said the court adopted its briefing rules unanimously in 1989 on recommendation of its Rules Committee, to obtain information the court finds essential to decision of the appeal and for the court's convenience. As an example, the clerk said many judges read briefs away from the court while on travel and find it very helpful having a copy of the district court's order in the brief.

The court also has a Practitioner's Guide, which expounds on the briefing requirements listed in the court's local rules and provides detailed suggestions for more effective brief writing, particularly addressing the statement of the issues, the statement of facts, and the argument sections of the brief. Some requirements in the Practitioner's Guide are not in the local rules. For example, only the Practitioner's Guide requires the brief to contain a separate addendum with copies of all trial exhibits referred to in the brief and returned to the parties by the district court. For several of the requirements, it is necessary to look both to the local rule and the Practitioner's Guide for a complete understanding of the court's expectations.

For example, the following excerpt from the Practitioner's Guide provides details not in the local rules about the brief's argument section: "When possible the emphasis should be on reason, not merely on precedent, unless a particular decision is controlling. A few good cases in point, with sufficient discussion to show that they are relevant, are much preferred over a flurry of string citations. Quotations should be used sparingly." Further,

the guide advises that "[w]hen appropriate, brief writers should argue policy, stressing why the court should adopt the client's view. This is particularly important when there is no controlling precedent—when the court's opinion will fill a gap or resolve an ambiguity in a statute. Legislative history, the intent of the legislature, and sound public policy are very important to argue.[25]

### 3. Enforcement of the Additional Briefing Requirements

The court enforces the briefing rules but does not examine the briefs for content. If only one rule is missed, such as the oral argument statement or statement of related cases, the court permits counsel to correct the brief by submitting labels to be affixed to the brief. Otherwise, the clerk issues a deficiency notice and informs counsel that it will strike the brief if it is not corrected. Because counsel usually make the corrections, the clerk has had to send a deficiency to a judge to strike the brief only once since the amendment to FRAP 25. The clerk's office does not enforce the rules against pro se parties.

[25] Practitioners' Guide to the US Court of Appeals for the Tenth Circuit § VI.C.4 (5th Rev. 1998).

## M. United States Court of Appeals for the Eleventh Circuit

### 1. Additional Briefing Requirements

- Specific order for brief contents (required by Eleventh Cir. R. 28-1)
- Certificate of Interested Persons (required by Eleventh Cir. R. 28-1(b))
- Statement regarding oral argument (required by Eleventh Cir. R. 28-1(c))
- Page references to each section in the brief and each heading or subheading of each issue included in table of contents (required by Eleventh Cir. R. 28-1(d))
- Primary authorities identified with an asterisk in table of citations (required by Eleventh Cir. R. 28-1(e))
- Statement regarding adoption of briefs of other parties if any part of brief of another party is adopted by reference (required by Eleventh Cir. R. 28-1(f))
- Specific reference to original record in statement of the case and all other sections of the brief (required by Eleventh Cir. R. 28-1(i))
- Course of proceedings and dispositions in court below, a statement of the facts, and a statement of the standard of review for each contention included in the statement of the case (required by Eleventh Cir. R. 28-1(i))
- In criminal appeals, counsel's statement as to whether party is incarcerated included in the statement of the case (required by Eleventh Cir. R. 28-1(i)(i))
- Citations of authority in brief in compliance with Bluebook rules (required by Eleventh Cir. R. 28-1(k))

### 2. History of Adoption of Additional Briefing Requirements

The circuit executive said that adoption of rules has always required a majority vote of active judges. The court adopted local rules regarding order of contents (28-1), certificate of interested persons (28-1(b)), statement regarding oral argument (28-1(c)), specific page references in table of contents (28-1(d)), and identification of primary authorities in table of citations (28-1(e)) upon the court's creation on October 1, 1981. Local Rule 28-1(f), regarding adoption of briefs of other parties, took effect April 1, 1991. Local Rule 28-1(i)(i), directing counsel in criminal appeals to state whether the represented party is incarcerated, took effect February 26, 1986.

The circuit executive explained that many of the court's briefing requirements adopted in 1981 are based on the rules in the old Fifth Circuit. The court has no written history or recollection of the reasons behind the adoption of most of these rules. The court adopted local Rule 28-1(f), which requires a party to include a statement describing which briefs and which portions are adopted by reference, to provide more detailed guidance to counsel wishing to "adopt by reference a part of another's brief" as permitted by FRAP 28(i).

### 3. Enforcement of Additional Briefing Requirements

The circuit executive said that the clerk's office enforces local Rule 28-1(a) to the extent that the docket clerks check to ensure that the brief contains every item required by that rule, i.e., a cover page, a certificate of interested persons, a statement regarding oral

argument, and so forth. Clerks check the certificate of interested persons to ensure that the format complies with FRAP 26.1 and the accompanying circuit rules but do not review the specific content within any of the items. In other words, a docket clerk does not check to see if the Table of Contents contains asterisks in the margin or that citations of authority comply with the Bluebook. Enforcement of a specific content requirement within an item rests with the merits panel.

Pursuant to local Rule 32-3, the clerk files a deficient or nonconforming brief conditionally, subject to compliance with the rule that counsel file a complete set of corrected replacement briefs within 14 days. The clerk's notice specifies the matters requiring correction.

The circuit executive commented that not everyone might agree that a clerk's rejection of a brief not in compliance with FRAP 28 is contrary to FRAP 25(a)(4). FRAP 25(a)(4) pertains to papers "not presented in proper form. . . ." He said some might point out that it is at least arguable that failure to include an item required by FRAP 28 is an error of substance and not of form and that such an argument may find some support in the fact that FRAP 32 is the rule governing the "Form of Briefs, Appendices, and Other Papers."

## IV. Current Federal Rules and Future Changes to Rules or Practices

The final section of the Center's questionnaire asked respondents several questions regarding FRAP 28 and 32 and potential changes to these rules. Respondents were told to answer the questions based upon their own personal experiences and not to survey judges in their court. As such, the following summary of the responses we received should not be viewed as representing the current position of the courts of appeals on these subjects.

### A. Planned Changes or Further Additions to Federal Rules by the Appellate Courts

The questionnaire asked whether the court had any immediate plans to change its local rules, requirements, or practices as to the content of appellant briefs and their covers. Only the clerk of court in the Ninth Circuit responded affirmatively, indicating that the court is considering amending its local rule requiring a statement as to the defendant's bail status in all criminal appeals. The amendment would require a statement regarding an immigrant's detention status in cases seeking review of a Board of Immigration Appeals decision.

Several respondents indicated that although their courts had no immediate plans to adopt new rules as to the content or cover of an appellant's brief, they would soon be implementing new rules requiring electronic filing of briefs.[26]

### B. Problems in the Appellate Courts Under Current Federal Rules

Respondents were asked whether their courts are experiencing any problems that the respondents thought could be alleviated with additional requirements for the content of briefs and their covers. Three answered "yes." The clerk of the Ninth Circuit Court of Appeals reported that several judges there had questioned the utility of FRAP 28's "statement of the case" section and suggested the court consider exempting practitioners in the court from that requirement. She added than an e-mail address on the cover would be helpful.

The Federal Circuit's clerk of court said he thought that all circuits would be aided by having each opening brief contain a statement of related cases and by including the district court decision in the addendum to the brief. He said the court routinely grants motions to delete decisions that are overly long.

The clerk of court in the Eighth Circuit said that he believes that local rules should be amended as seldom as possible to avoid confusion for the bar and to avoid burdening clerk's staff with additional requirements to monitor.

### C. Perceived Need in the Appellate Courts for Amending FRAP 28

Respondents were asked whether they think FRAP 28 needs to be amended to prohibit appellate courts from imposing additional content requirements on appellant briefs

[26] Respondents for the Second, Third, and Fifth Circuit Court of Appeals reported that their courts will amend their local rules requiring electronic filing of briefs to require the electronic copy to have a "cover" page as required by FRAP 28.

and their covers. Only one respondent answered affirmatively. The clerk of court in the Fifth Circuit said that he believes, as a court manager, that it would be helpful to simplify the federal briefing rules and to have consistency in briefing rules throughout the appellate courts. He suggested eliminating FRAP 28(a) and (e), and either eliminating FRAP 28(f), limiting exactly what may be included by dropping the "etc.," or adding page limits. He said he believed that many pro se litigants attempt to exceed the brief limits by adding voluminous and irrelevant materials as "addenda."

The other twelve respondents reported that they did not think FRAP 28 should be amended to prohibit courts from imposing additional briefing requirements. The clerk of court in the District of Columbia Circuit said he believes that the Committee on Federal Rules of Appellate Procedure should allow circuits reasonable leeway to use local rules to address unique needs and to experiment with innovative approaches. He said, for example, that his court was the first to adopt word limits, in lieu of page limits, as a local rule. Due, in part, to the success of this local rule, the Appellate Rules Committee abandoned page limits and substituted word limits nationally. In his view, had a rigid national rule precluded the District of Columbia's pioneering of the use of word limits, a national rule change might not have occurred. He said that another example of a local variation that has proved useful in his court is the glossary requirement, but that other courts, with very different caseloads, might find such a requirement of minimal value.

The clerk of court in the Third Circuit said that she believes that attorneys practicing nationally would like uniformity, but the judges are very wedded to the additional requirements they have imposed.

The Eighth Circuit's clerk of court explained why he believes courts should not be precluded from adopting local requirements governing brief contents and format. His court's requirements for a summary of the case, request for oral argument, and addendum elements provide essential information for screening purposes and merits review. The requirements are well understood by the bar, he said, and are not burdensome. Therefore, he said he believes courts should be permitted to retain practices that make their work more efficient or help the judges reviewing the cases. While circuit uniformity is important to those practitioners with national practices, he said, the vast majority of briefs in his court are filed by attorneys who seldom practice in any other circuit. Furthermore, most of the briefs filed by the Justice Department—the main national practitioner in this court—are filed by attorneys who are assigned to the circuit and understand its requirements. He said that since they work from Eighth Circuit samples or brief banks, the court's additional requirements present no problems for them. He said that when the court takes action to correct a defective brief, it is usually against a solo practitioner who rarely files an appeal. In his view, the increase in the court's efficiency and effectiveness as a result of local practices outweighs the minor inconvenience to national practitioners.

### D. Additional Briefing Requirements Mentioned in Comments Received from the Appellate Courts

We asked respondents for their comments regarding what requirements not currently imposed by FRAP 28 and 32 covering the content and covers of appellant briefs should be added if these rules were amended. We received eight comments to this inquiry. The

clerks in the District of Columbia and Tenth Circuits would add all of the additional requirements currently imposed under their local rules, especially if an amended FRAP 28 would preclude any local additional requirements. The clerk in the Third Circuit said she favored adopting all of that court's additional requirements because the additional requirements aid the judges in their review of the case. She said many of the additional rules promote good advocacy, such as identifying where an issue was preserved for appeal or stating the standard of review.

The clerk in the Federal Circuit shared his belief that all circuits would be aided if FRAP 28 required that the addendum contain a copy of the decision and that the opening brief contain a statement of related cases. Furthermore, since a judge can recuse himself or herself for reasons other than stock ownership, he suggested that the corporate disclosure form be renamed as the certificate of interest.

The clerk of court in the Second Circuit suggested that it might be helpful to require parties to include their e-mail address on the cover of a brief.

The Eighth Circuit clerk of court suggested that no more requirements be added to FRAP 28 and 32, as long as local variations are permitted. If local variations are not permitted, he said that he would like to see, at a minimum, amendments that resemble the Eighth Circuit rule on the summary of the case section and that require the addendum to contain the order or orders appealed from.

The Eleventh Circuit's circuit executive said that he believes the court would find it helpful if FRAP 32(a) were amended to require the front cover of a brief to contain the case number of the proceeding before the court, agency, or board below.

Finally, the clerk of court in the Fifth Circuit said that he favored including that court's long-standing requirement that the appellant include the court's certificate of interested parties, which is broader in scope than the corporate disclosure statement required by FRAP 28(a)(1). He also favors inclusion of a request for oral argument identical to that required under Fifth Circuit local Rule 28.2.4. Finally, he thinks that the court's current local Rule 28.7, which prohibits litigants represented by counsel from filing briefs or motions on their own, should be considered for inclusion in the federal rules. He believes this to be a sound rule that helps counsel avoid a long-standing problem the court has faced.

# APPENDIX 1
## Federal Rules of Appellate Procedure 28 and 32

**Fed. R. App. P. 28. Briefs**

**(a) Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26 1;
(2) a table of contents, with page references;
(3) a table of authorities—cases(alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;
(4) a jurisdictional statement, including:
  (A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
  (B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;
  (C) the filing dates establishing the timeliness of the appeal or petition for review; and
  (D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis,
(5) a statement of the issues presented for review;
(6) a statement of the case briefly indicating briefly the nature of the case, the course of proceedings, and the disposition below;
(7) a statement of facts relevant to the issues submitted for review with appropriate references to the record(see Rule 28(e));
(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;
(9) the argument, which must contain.
  (A) appellant's contentions and reasons for them, with citations to authorities and parts of record on which appellant relies; and
  (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of each issue or under separate heading place before the discussion of the issues);
(10) a short conclusion stating the precise relief sought; and
(11) the certificate of compliance, if required by Rule 32(a)(7).

. . . .

**(d) References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

**(e) References to the Record.** References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document.. . . Only clear abbreviation may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

**(f) Reproduction of Statutes, Rules, Regulations, etc.** If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

**Fed. R. App. P. 32. Form of Briefs, Appendices, and Other Papers**

**(a) Form of a Brief.**

. .

**(2) Cover** . . . The front cover of a brief must contain:
(A) the number of the case centered at the top;
(B) the name of the court;
(C) the title of the case(see Rule 12(a));
(D) the nature of the proceeding. . . and the name of the court, agency, or Board below;
(E) the title of the brief, identifying the party or parties for whom the brief is filed; and
(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

. . . .

**(e) Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

# APPENDIX 2
## United States Courts of Appeals' Local Rules and Other Provisions Regarding the Content and Covers of Briefs

## FEDERAL CIRCUIT

**Federal Circuit Rule 28. Briefs**

**(a) Contents of Brief; Organization of Contents; Addendum; Binding.** Briefs . . . must contain the following in the order listed·

(1) the certificate of interest (see Fed. Cir. Rule 47.4);

. . . .

(4) the statement of related cases (see Fed. Cir. Rule 47.5);

. . . .

(7) statement of the case, including the citation of any published decision of the trial tribunal in the proceedings,

. . .

(12) the judgment, order, or decision in question, and any opinion, memorandum, or findings and conclusions supporting it, as an addendum placed last within the initial brief of the appellant or petitioner. This requirement is met when the appendix is bound with the brief. (See Federal Circuit Rule 30(c)(1) and (d) for a duplicative requirement of the appendix.) Additionally, in an appeal involving a patent, the patent in suit may be included within the addendum of the initial brief and, if included, must be reproduced in its entirety. (See Federal Circuit Rule 30(a)(3) for a requirement that the patent in suit be included in its entirety in the appendix )

**Federal Circuit Rule 47.4. Certificate of Interest**

**(a) Purpose; Contents.** To determine whether recusal by a judge is necessary or appropriate, an attorney—except an attorney for the United States—for each party, including a party seeking or permitted to intervene, and for each amicus curiae, must file a certificate of interest. A certificate of interest must be in the form set forth in the appendix to these rules, and must contain the information below in the order listed. Negative responses, if applicable, are required as to each item on the form.

(1) The full name of every party or amicus represented in the case by the attorney.
(2) The name of the real party in interest if the party named in the caption is not the real party in interest.
(3) The corporate disclosure statement prescribed in FRAP 26.1.
(4) The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court.

**(b) Filing.** The certificate must be filed with the entry of appearance The certificate—omitting the caption—must also be filed with each motion, petition, or response thereto, and in each principal brief and brief amicus curiae. . . .

**Federal Circuit Rule 47.5. Statement of Related Cases.** Each principal brief must contain a statement of related cases indicating:

(a) Whether any other appeal in or from the same civil action or proceeding in the lower court or body was previously before this or any other appellate court, stating:

(1) the title and number of that earlier appeal;
(2) the date of decision;
(3) the composition of the panel; and

(4) the citation of the opinion in the Federal Reporter, if published; and

(b) The title and number of any case known to counsel to be pending in this or any other court that will directly affect or be directly affected by this court's decision in the pending appeal If there are many related cases, they may be described generally, but the title and case number must be given for any case known to be pending in the Supreme Court, this court, or any other circuit court of appeals.

**Practice Notes following Federal Circuit Rule 32. Preferred Cover**. In addition to the requirements of FRAP 32(a)(2)(D), the court encourages inclusion on the cover of the name of the judge, when applicable, from whose judgment appeal is taken.

## DISTRICT OF COLUMBIA CIRCUIT

**District of Columbia Circuit Rule 28. Briefs**

**(a) Contents of Briefs: Additional Requirements.** Briefs for an appellant/petitioner and an appellee/respondent, and briefs for an intervener and an amicus curiae, must contain the following in addition to the items required by FRAP 28:

**(1) Certificate.** Immediately inside the cover and preceding the table of contents, a certificate titled "Certificate as to Parties, Rulings, and Related Cases," which contains a separate paragraph or paragraphs, with the appropriate heading, corresponding to, and in the same order as, each of the subparagraphs below.

**(A) Parties and Amici.** The appellant or petitioner must furnish a list of all parties, interveners, and amici who have appeared before the district court, and all persons who are parties, interveners, or amici in this court. An appellee or respondent, intervener, or amicus may omit from its certificate those persons who were listed by the appellant or petitioner, but must state: "[Except for the following,] all parties, interveners, and amici appearing [before the district court and] in this court are listed in the Brief for _____."

Any party or amicus that is a corporation, association, joint venture, partnership, syndicate, or other similar entity must take the disclosure required by DC Circuit Rule 26.1.

**(B) Rulings Under Review.** Appropriate references must be made to each ruling at issue in this court, including the date, the name of the district court judge (if any), the place in the appendix where the ruling can be found, and any official citation in the case of a district court or Tax Court opinion, the Federal Register citation and/or other citation in the case of an agency decision, or a statement that no such citation exists. Such references need not be included if they are contained in a brief previously filed by another person, but the certificate must state: "[Except for the following,] references to the rulings at issue appear in the Brief for _____."

**(C) Related Cases.** A statement indicating whether the case on review was previously before this court or any other court and, if so, the name and number of such prior case. The statement must also contain similar information for any other related cases currently pending in this court or in any other court of which counsel is aware. For purposes of this rule, the phrase "any other court" means any other United States court of appeals or any other court (whether federal or local) in the District of Columbia. The phrase "any other related cases" means any case involving substantially the same parties and the same or similar issues. If there are no related cases the certificate must so state.

**(2) Principal Authorities.** In the left-hand margin of the table of authorities in all briefs, an asterisk must be placed next to those authorities on which the brief principally relies, together with

a notation at the bottom of the first page of the table stating: "Authorities upon which we chiefly rely are marked with asterisks." If there are no such authorities, the notation must so state.

**(3) Glossary.** All briefs containing abbreviations, including acronyms, must provide a "Glossary" defining each such abbreviation on a page immediately following the table of authorities. Abbreviations that are part of common usage need not be defined.

. . . .

**(5) Statutes and Regulations.** Pertinent statutes and regulations must be set forth either in the body of the brief following the statement of the issues presented for review or in an addendum introduced by a table of contents and bound with the brief or separately; in the latter case a statement must appear in the body of the brief referencing the addendum. If the statutes and regulations are included in an addendum bound with the brief, the addendum must be separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the pertinent statutes and regulations are contained in a brief previously submitted by another party, they need not be repeated but, if they are not repeated, a statement must appear under this heading as follows. "[Except for the following,] all applicable states, etc., are contained in the Brief for _____."

. . . .

**(7) References to Oral Argument and Submission Without Oral Argument.** If a case has been scheduled for oral argument, has already been argued, or is being submitted with oral argument, a brief must so state in capital letters at the top of the first page and, where applicable, include the date of the argument.

. . . .

**(c) Citation to Unpublished Dispositions.**

. . . .

**(3) Procedures Governing Citation to Unpublished Dispositions.** Counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited in the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

**Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit** (as amended through December 1, 2002).

Section IX.A.5 provides that the front cover of the brief must set forth "the date on which the case has been scheduled for oral argument."

Section IX.A.7 provides that "[b]riefs must contain the following in the order indicated."

Section IX.A.7 (e) provides that "[i]f the basis of the district court's or agency's subject matter jurisdiction or the appellate court's jurisdiction is in dispute, the parties should include a statement to this effect and reference the pages in the brief that address this issue."

## FIRST CIRCUIT

**First Circuit Local Rule 28. Addendum to Briefs Required**

**(a) Contents.** In addition to the requirements of FRAP 28, for the court's convenience, the brief of the appellant must include an addendum containing the following items:

(1) The judgment, ruling or order appealed from and any supporting opinion, memorandum, or statement of reason;
(2) The portions of any instructions to the jury that are the subject of appeal;
(3) Pertinent portions of any document in the record that is the subject or an issue on appeal, and
(4) Other items or short excerpts from the record, if any, considered necessary for understanding the specific issues on appeal.

**(b) Form**. The addendum must be limited to 20 pages (exclusive of the judgment, order or opinion appealed from) and shall be bound at the rear of the appellant's brief.

(1) The appellee's brief may include such an addendum to incorporate materials omitted from the appellant's addendum, subject to the same limitations on length and content.
(2) Material included in the addendum need not be reproduced in the appendix also.

***Requirements for Compliant Briefs and Appendices and Ten Pointers for an Appeal*** (found on the First Circuit's website, www.ca1.uscourts.gov) provides in addition to First Circuit Local Rule 28 addendum requirements that "[i]f the appeal arises from a decision reviewing an underlying agency, bankruptcy or state court decision, the underlying decision must be included."

***Checklist for Briefs*** (found on the First Circuit's website, www.ca1.uscourts.gov) provides a listing of requirements for the content of an appellant's brief, including a "[s]tatement in support of/against oral argument." However, the listing also clarifies that this is an optional requirement pursuant to First Circuit Local Rule 34(a). Local Rule 34(a) provides that if included, the statement, which is limited to one-half page, must be inserted in the brief immediately after the Table of Contents and Authorities and immediately before the first page of the brief.

## SECOND CIRCUIT

**Second Circuit Local Rule 28. Briefs**

1. Briefs must be compact, logically arranged with proper headings, concise, and free from burdensome, irrelevant, immaterial, and scandalous matter. Briefs not complying with this rule may be disregarded and stricken by the court.
2. Appellant's brief shall include, as a preliminary statement, the name of the judge or agency member who rendered the decision appealed from and, if the judge's decision or supporting opinion is reported, the citation thereof.

**Second Circuit Local Rule 32. Briefs and Appendix**

**(a) Form of Brief.** Briefs must conform to FRAP Rule 32(a), with the proviso that, if a litigant prefers to file a printed brief in pamphlet format, it must conform to the following specifications. . .

. . . .

**(c) Covers.** The docket number of the case must be printed in type at least one inch high on the cover of each brief and appendix.

**(d) Special Appendix**

**1. Contents of the Special Appendix.** If the application or interpretation of any rule of law, including any constitutional provision, treaty, statute, ordinance, regulation, rule, or sentencing guideline, is significant to the resolution of any issue on appeal, or if the Appendix, exclusive of the orders, opinions, and judgments being appealed, would exceed 300 pages, the parties must provide the court with a Special Appendix, including

(A) the verbatim text, with appropriate citation, of any such rule of law, and

(B) such orders, opinions and judgment being appealed.

The inclusion of such materials in a Special Appendix satisfies the obligations established by FRAP Rules 28(f) and 30(a)(1)(C).

**2. Form of the Special Appendix.** The Special Appendix may be presented either as an addendum at the end of a brief, or as a separately bound volume (in which case it must be designated "Special Appendix" on its cover). . . .

## THIRD CIRCUIT

**Third Circuit Local Appellate Rule 28.0. Briefs**

**28.1 Brief of the Appellant**

(a) The brief of appellant/petitioner shall include, in addition to the sections enumerated in FRAP 28, the following:

(1) in the statement of the issues presented for review required by FRAP 28(a)(5), a designation by reference to specific pages of the appendix or place in the proceedings at which each issue on appeal was raised, objected to, and ruled upon;

(2) a statement of related cases and proceedings, stating whether this case or proceeding has been before this court previously, and whether the party is aware of any other case or proceeding that is in any way related, completed, pending or about to be presented before this court or any other court or agency, state or federal. If the party is aware of any previous or pending appeals before this court arising out of the same case or proceeding, the statement should identify each such case; and

(3) See LAR 32.2(c) for other attachments to the brief

(b) The statement of the standard or scope of review for each issue on appeal, *i.e.,* whether the trial court abused its discretion; whether its fact findings are clearly erroneous; whether it erred in formulating or applying a legal precept, in which case review is plenary; whether, on appeal or petition for review of an agency action, there is substantial evidence in the record as a whole to support the order or decision, or whether the agency's action, findings and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. Section 706(2), should appear under a separate heading placed before the discussion of the issue in the argument section.

. . .

**28.3 Citation Form; Certification**

(a) In the argument section of the brief required by FRAP 28(a)(9), citations to federal opinions that have been reported shall be the U.S. Reports, the Federal Reporter, the Federal Supplement or the Federal Rules Decisions, and shall identify the judicial circuit or district, and year of decision. Citations to the United States Supreme Court opinions that have not yet appeared in the official reports may be to the Supreme Court Reporter, the Lawyer's Edition or United States Law Week in that order of preference. Citations to United States Law Week shall include the month, day and year of the decision. Citations to federal decisions that have not been normally reported shall identify the court, docket number and date, and refer to the electronically transmitted decision. Citations to services and topical reports, whether permanent or

loose-leaf, and to electronic citation systems, shall not be used if the text of the case cited has been reported in the United States Reports, the Federal Reporter, and Federal Supplement, or the Federal Rules Decisions. Citations to state court decisions should include the West Reporter system whenever possible, with an identification of the state court.

(b) For each legal proposition supported by citations in the argument, counsel shall cite to any opposing authority if such authority is binding on this court, e.g., U S Supreme Court decisions, published decisions of this court, or, in diversity cases, decisions of the applicable state supreme court.

(c) All assertions of fact in briefs shall be supported by a specific reference to the record. All references to portions of the record contained in the appendix shall be supported by a citation to the appendix, followed by a parenthetical description of the document referred to, unless otherwise apparent from context.

(d) Except as otherwise authorized by law, each party shall include a certification in the initial brief filed by that party with the court that at least one of the attorneys whose names appear on the brief is a member of the bar of this court, or has filed an application for admission. . .

**Third Circuit Local Appellate Rule 32.2. Form of Briefs and Appendices**

. . . .

(c) Volume one of the appendix must consist only of (1) a copy of the notice of appeal, (2) the order or judgment from which the appeal is taken, and any other order or orders of the trial court which pertain to the issues raised on appeal, (3) the relevant opinions of the district court or bankruptcy court, or the opinion or report and recommendation of the magistrate judge, or the decision of the administrative agency, if any and (4) any order granting a certificate of appealability, and (5) no more than 25 additional pages. Volume one of the appendix may be bound in the brief and shall not be counted toward the page or type volume limitations on the brief. All other volumes of the appendix must be separately bound. .

***Checklist of Rule Requirements for Preparation of Briefs*** (found on Court's website at www.ca3.uscourts.gov) lists additional items that must be included in the contents of an appellant's brief:

- order(s) being appealed, and if any, opinion(s) of the trial court or agency, and the notice of appeal, must be included in the brief (considered Volume 1 of the Appendix) or in a separate Volume 1 of the Appendix. The Court prefers they be attached to the brief. An additional 25 pages of record material may also be included (citing to LAR 32.2(c)).
- when hearing is on the original record under Third Circuit LAR 30.2 (applications for writ of habeas corpus and in forma pauperis appeals) the appellant's brief must also include (a) relevant docket entries; (b) judgment order or decision being appealed; (c) memorandum or opinion of court or agency subject to review; and (d) notice of appeal or petition for review.

## FOURTH CIRCUIT

**Fourth Circuit Local Rule 28(b). Attachments to Briefs**

Each party shall include, in the body of the brief or in an addendum thereto, the verbatim text of the relevant portion of any constitutional provision, treaty, statute, ordinance, rule or regulation cited in the brief, if its construction is sought, there is controversy among the parties concerning its proper application to the case, or it is otherwise pertinent to the substantive issues on appeal.

Each party shall also include in the addendum any unpublished opinion cited pursuant to Local Rule 36(c). Should a party wish to supplement the brief with matters other than those enumerated above, the additional material shall be presented to the Court under separate cover, accompanied by a motion for leave to file that specifically identifies the proposed material, indicates whether it is a mat-

ter of record, and sets forth good cause for deviating from the general prohibition of attachments to briefs.

**Fourth Circuit Local Rule 34(a)** states in part, "Because any case may be decided without oral argument, all major arguments should be fully developed in the briefs. In furtherance of the disposition of pending cases under this rule, parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard."

**Fourth Circuit Local Rule 36(c)** provides in part that "[i]f counsel believes, nevertheless, that an unpublished disposition of this Court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b)."

***Rule Requirements for Preparation of Briefs and Appendices*** (found on the court's website at www.ca4.uscourts.gov) provides that "Each party shall also include in the addendum any unpublished opinion of this Court cited pursuant to Local Rule 36(c). Unpublished opinions of other courts may not be included in the addendum; instead, counsel citing an unpublished opinion of another court must include that opinion in a separately bound attachment and file a motion for leave to file attachment pursuant to Local Rule 28(b)."

***Rule Requirements for Preparation of Briefs and Appendices and Fourth Circuit Checklist for Briefs and Appendices*** (found on the court's website at www.ca4.uscourts.gov) provides that in addition to the requirements of FRAP 28(a), an appellant's brief must also contain a Request for Oral Argument, if counsel requests argument, citing Fourth Circuit Local Rule 34(a).

## FIFTH CIRCUIT

**Fifth Circuit Rule 28.2 Briefs—Contents**

**28.2.1 Certificate of Interested Persons.** The certificate of interested persons required by this rule is broader than the corporate disclosure statement contemplated by FRAP 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by FRAP 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes.

(a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:
(1) Number and Style of Case,
(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.
(Here list names of all such persons and entities and identify their connection and interest.)

_____
Attorney of record for _____

**28.2.2 Summary of Argument.** In addition to the requirements of FRAP 28, the summary of argument should seldom exceed 2 and never 5 pages.

**28.2.3 Record References.** Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record where the matter is found.

**28.2.4 Request for Oral Argument.** Counsel for appellant must include in a preamble to appellant's principal brief a short statement why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee's counsel must likewise include in appellee's brief a statement why oral argument is or is not needed. The court will give these statements due, though not controlling, weight in determining whether to hold oral argument. See FRAP 34(a) and Fifth Cir. R. 34.2.

**28.2.5 Statement of Jurisdiction.** The jurisdictional statement required by FRAP 28(a)(4) should contain citations of authority when needed for clarity.

**28.2.6 Standard of Review.** As an aid to understanding FRAP 28(a)(9)(B), the following examples explain the "standard of review." Where the appeal is from an exercise of district court discretion, there should be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be indicated similarly, e.g., that the district court erred in formulating or applying a rule of law; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under Fed. R. Civ. P. 52(a); or that there is a lack of substantial evidence in the record as a whole to support the factual findings of an administrative agency; or that the agency's action, findings, and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. Section 706(2) . . . . The court requests that the standard of review be clearly identified in a separate heading before the discussion of the issues.

## SIXTH CIRCUIT

**Sixth Circuit Rule 28. Briefs**

. . . .

**(c) Fact Sheets.** A one-page fact sheet, in the form prescribed by this Court, shall be prepared by the counsel for the appellant and for the appellee in all social security appeals, Title VII appeals, habeas corpus § 2254 appeals and motion to vacate § 2255 appeals. Such fact sheet shall be of the same page size as the briefs as required by FRAP 32(a), and be incorporated in the briefs of the parties immediately following the table of contents and preceding the statement of issues presented for review which are required by FRAP 28(a).

**(d) Designation of Appendix Contents.** Each principal brief shall contain as an addendum the designation of appendix contents required by 6 Cir. R. 30(b) and of sealed attachments governed by 6 Cir. R. 30(f)(4) and (5).

**(e) Additional Contents.** Each principal brief *shall* also contain the disclosure of corporate affiliations and financial interest required by 6 Cir. R. 26.1 and *may* include a statement of reasons why oral argument should be heard pursuant to 6 Cir. R. 34(a).

. . .

(g) **Citation of Unpublished Decisions.** Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court. Such service shall be accomplished by including a copy of the decision in an addendum to the brief.

**Sixth Circuit Rule 30(b). Designation of Contents** provides in relevant part that "[t]he appellant shall file and serve as an addendum to the appellant's brief a designation of those parts of the record to be included in the joint appendix."

**Sixth Circuit Rule 34(a). Requesting Oral Argument** provides that "[a] party desiring oral argument must include a statement in the brief, not to exceed one page in length, setting forth the reason(s) why oral argument should be heard. A party's failure to include such a statement may be deemed by this Court a waiver of oral argument."

## SEVENTH CIRCUIT

**Seventh Circuit Rule 28. Briefs.** The following requirements supplement those in the corresponding provisions of FRAP 28:

*(a) **Appellant's Jurisdictional Statement.*** The jurisdictional statement in appellant's brief (see FRAP 28(a)(4)) must contain the following details:

(1) The statement concerning the district court's jurisdiction shall identify the provision of the constitution or federal statute involved if jurisdiction is based on the existence of a federal question. If jurisdiction depends on diversity of citizenship, the statement shall identify the jurisdictional amount and the citizenship of each party to the litigation. If any party is a corporation, the statement shall identify both the state of incorporation and the state in which the corporation has its principal place of business If any party is an unincorporated association or partnership the statement shall identify the citizenship of all members. The statement shall supply similar details concerning the invocation of supplemental jurisdiction or other sources of jurisdiction.

(2) The statement concerning appellate jurisdiction shall identify the statutory provision believed to confer jurisdiction on this court and the following particulars:

(i) The date of entry of the judgment or decree sought to be reviewed.

(ii) The filing date of any motion for a new trial or alteration of the judgment or any other motion claimed to toll the time within which to appeal.

(iii) The disposition of such a motion and the date of its entry.

(iv) The filing date of the notice of appeal (together with information about an extension of time if one was granted).

(v) If the case is a direct appeal from the decision of a magistrate judge, the dates on which each party consented in writing to the entry of final judgment by the magistrate judge.

(3) If the appeal is from an order other than a final judgment that adjudicates all of the claims with respect to all parties, counsel shall provide the information necessary to enable the court to determine whether the order is immediately appealable. Elaboration will be necessary in the following cases although the list is illustrative rather than exhaustive:

(i) If any claims or parties remain for disposition in the district court, identify the nature of these claims and the ground on which an appeal may be taken in advance of the final judgment. If there has been a certificate under Fed. R. Civ. P. 54(b) or if this is

an appeal by permission under 28 U.S.C. Section 1292(b), give the particulars and describe the relation between the claims or parties subject to the appeal and the claims or parties remaining in the district court.

(ii) If the ground of jurisdiction is the "collateral order doctrine," describe how the order meets each of the criteria of that doctrine: finality, separability from the merits of the underlying action, and practical unreviewability on appeal from a final judgment. Cite pertinent cases establishing the appealability of orders of the character involved.

(iii) If the order sought to be reviewed remands a case to a bankruptcy judge or administrative agency, explain what needs to be done on remand and why the order is nonetheless "final."

(iv) Whenever some issues or parties remain before the district court, give enough information to enable the court to determine whether the order is appealable. Appeals from orders granting or staying arbitration or abstaining from decision as well as appeals from the grant or denial of injunctions require careful exposition of jurisdictional factors.

## EIGHTH CIRCUIT

**Eighth Circuit Rule 28A. Briefs**

. . . .

**(b) Addendum.**

(1) CONTENTS. Appellant must prepare an addendum and file it with the opening brief. The addendum must include:

(i) a copy of the district court or administrative agency opinion or order including supporting memoranda or findings;

(ii) any magistrate's report and recommendation that preceded the district court opinion and order;

(iii) short excerpts from the record, other than from the transcript of testimony, that would be helpful in reading the brief without immediate reference to the appendix; and

(iv) other relevant rulings of the district court.

(2) LENGTH. The addendum must not exceed 15 pages excluding the district court or agency opinion and the magistrate's report and recommendation. The addendum will normally be incorporated into the back of the brief, but may be bound separately if it includes a long district court opinion or report and recommendation. If bound separately, the appellant must file the same number of addenda as briefs.

**(c) Certification of Word Processing Program.** In addition to the information required by FRAP 32(a)(7)(C), the certificate of compliance must also include the name and version of the word processing software used to prepare the brief.

. . . .

**(f) Contents.**

(1) SUMMARY OF THE CASE. Each appellant must file a statement not to exceed one page providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument. The summary must be placed as the first item in the brief. If appellee deems appellant's statement incorrect or incomplete, appellee may include a responsive statement in appellee's brief.

(2) STATEMENT OF ISSUES. In addition to the requirement of FRAP 28(a)(5), the statement of issues shall include for each issue a list of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions.

. . . .

(i) **Citation of Unpublished Opinion.** Unpublished opinions are decisions, which a court designates for unpublished status. They are not precedent and parties generally should not cite them. When relevant to establishing the doctrine of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

**United States Court of Appeals for the Eighth Circuit,** ***Briefing Checklist*** (available at www ca8.uscourts.gov) provides that unpublished opinions are to be cited pursuant to 8th Cir. R. 28A(i) and a copy of the opinion should be included in the addendum. The *Checklist* also specifies the order in which items must be included in appellant's brief.

## NINTH CIRCUIT

**Ninth Circuit Rule 28-1. Briefs, Applicable Rules**

. . . .

(b) Parties must not append or incorporate by reference briefs submitted to the district court or agency or this Court in a prior appeal, or refer this Court to such briefs for the arguments on the merits of the appeal. (New Rule 7/1/2000)

(c) Appellants proceeding without assistance of counsel may file the form brief provided by the Clerk in lieu of the brief described in the preceding paragraph. If the appellant uses the informal brief form, the optional reply brief need not comply with the technical requirements of FRAP 28(c) or 32(a). (Rev. 1/96)

**Ninth Circuit Rule 28-2. Contents of Briefs.** In addition to the requirements of FRAP 28, briefs shall comply with the following rules:

. . . .

**Rule 28-2.2.** ***Statement of Jurisdiction.*** In a statement preceding the statement of the case in its initial brief, each party shall demonstrate the jurisdiction of the district court or agency and of this Court by stating, in the following order:

(a) The statutory basis of subject matter jurisdiction of the district court or agency;

(b) The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court;

(c) The date of entry of the judgment or order appealed from; the date off filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely.

If the appellee agrees with appellant's statement of one or more of the foregoing matters, it will be sufficient for the appellee to state such agreement under an appropriate heading.

. . . .

**Rule 28-2.4.** ***Bail Status***

The opening brief in a criminal appeal shall contain a statement as to the bail status of the defendant. If the defendant is in custody, the projected release date should be included.

**Rule 28-2.5.** ***Reviewability and Standard of Review***

As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review.

In addition, if a ruling complained of on appeal is one to which a party must have objected at trial to preserve a right of review, e.g., a failure to admit or exclude evidence or the giving or refusal to give jury instruction, the party shall state where in the record on appeal the objection and ruling are set forth.

**Rule 28-2.6.** ***Statement of Related Cases***

Each party shall identify in a statement on the last page of its initial brief any known related case pending in this court. As to each such case, the statement shall include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed Cases are deemed related if they:

(a) arise out of the same or consolidated cases in the district court or agency;
(b) are cases previously heard in this Court that concern the case being briefed;
(c) raise the same or closely related issues; or
(d) involve the same transaction or event.

If no other cases in this Court are deemed related, a statement shall be made to that effect. The appellee need not include any case identified as related in the appellant's brief.

**Rule 28-2.7.** ***Addendum to Briefs***

If determination of the issues presented requires the study of statutes, regulations or rules, relevant parts thereof shall be reproduced in an addendum at the end of a party's brief. The addendum shall be separated from the brief by a distinctively colored page

**Rule 28-2.8** ***Record References.***

Every assertion in briefs regarding matters in the record shall be supported by a reference to the location, if any, in the excerpts of record where the matter is to be found (Rev. 7/1/98)

**Rule 28-2.9** ***Bankruptcy Appeals***

If the appeal arises out of the bankruptcy court, the appellant with the opening brief shall furnish the name, address and court of the bankruptcy judge initially ruling on the matter to the clerk of this court.

## TENTH CIRCUIT

**Tenth Circuit Rule 28.1. References to Appendix or Record**

**(A) Appendix.** References to the appendix should be by page number (e g., Aplt. App. at 27, or Aplee. Supp. App. at 14)

**(B) Record.** In cases without an appendix, references to the record should be by document number from the district court's docket sheet and page number within the document (e.g., Doc. 4 at 6). References to the transcript should be by page number.

**Tenth Circuit Rule 28.2. Additional Requirements**

**(A) Appellant's brief.** In addition to all other requirements of FRAP and these rules, the appellant's brief must include the following (even though they are also included in the appendix):

(1) copies of all pertinent written findings, conclusions, opinions, or orders of a district judge, bankruptcy judge, or magistrate judge (if the district court adopts a magistrate's report and recommendation, that report must also be included);
(2) if any judicial pronouncement listed in (1) is oral, a copy of the transcript pages; and
(3) in social security cases, copies of the decisions of the administrative law judge and the appeals council.

. . . .

**(C) All principal briefs.**

(1) **Statement of related cases.** At the end of the table of cases, the first brief filed by each party must list all prior or related appeals, with appropriate citations, or statement that there are no prior or related appeals.

(2) **Record references.** For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on.

(3) **Particular record references.** Briefs must cite the precise reference in the record where a required objection was made and ruled on, if the appeal is based on:
   (a) a failure to admit or exclude evidence;
   (b) the giving of or refusal to give a particular jury instruction; or
   (c) any other act or ruling for which a party must record an objection to preserve the right to appeal.

(4) **Oral argument statement.** The front cover of each party's first brief must state whether oral argument is requested. If argument is requested, a statement of the reasons why argument is necessary must follow the brief's conclusion.

(5) **Name of court and judge.** The front cover of each brief must contain the name of the court and the judge whose judgment is being appealed.

**Practitioners' Guide to the US Court of Appeals for the Tenth Circuit (5th Rev. 1998)**

**VI. Writing a Brief**

**A. Formal Requirements as to Content**

**1. Principal Briefs.** Federal Rule of Appellate Procedure 28 and Tenth Circuit Rule 28 set out the requirements for briefs filed in appeals. The opening and answer briefs must contain the following, under appropriate headings and in the order indicated. .

**Section VI.A.1(e)** provides that the opening brief must contain a statement of the facts relevant to the issues presented for review, with appropriate references to the record. The Guide goes on to provide details on compliance with this general directive: "References to documents in the record must include the document number, if any, from the district or agency docket sheet, document name, filing date, and page number within the document (e.g , Doc. No. 48, Motion for Summary Judgment filed 1/15/88 at 3). Transcript references must be to page number, or if not sequentially paginated, by date of proceeding and page number (e.g., Trans. of 8/15/88 Suppression Hearing at 37). If transcripts are not sequentially paginated, references must be to volume or date of proceedings and page number (e.g , Tr. Vol. VII at 37 or Tr. 8/31/88 at 37)."

**Section VI.A.1(j)** provides that "[i]n appellant's brief only, an attachment containing a copy of the judgment or order to be reviewed, any pertinent written findings, conclusions, opinions or orders, or, if oral, transcripts of them. If consideration of the appeal requires study of statutes, rules, regulations, contracts (or relevant parts of them), copies of those documents must also be placed in the attachment to the brief. If the district court's ruling was premised on adoption of a magistrate judge's report and recommendation, both must be included."

**Section VI.B.4** provides: "Copies of trial exhibits referred to in a brief must be included in an addendum separate from, but filed with, the brief. The addendum must have a cover page in the same form as the cover page on the briefs and must have a table of contents. The addendum must be paginated, and copies of trial exhibits included in the addendum must be referred to by name and page number Only one copy of the addendum must be filed. A party may include trial exhibits in all copies of the appendix, instead "

## ELEVENTH CIRCUIT

**Eleventh Circuit Rule 28-1.** ***Briefs—Contents*** Each principal brief shall consist, in the order listed, of the following:

(a) **Cover Page**: elements identical to those in FRAP 32(a)(2)

(b) **Certificate of Interested Persons and Corporate Disclosure Statement.** A Certificate of Interested Persons and Corporate Disclosure Statement is required of all parties, including governmental parties. The Certificate shall comply with FRAP 26.1 and accompanying circuit rules, and shall be included within each brief (except for the reply brief of an appellant or cross-appellant) immediately following the cover page.

(c) **Statement Regarding Oral Argument.** Appellant's brief shall include a short statement of whether or not oral argument is desired, and if so, the reasons why oral argument should be heard. Appellee's brief shall include a similar statement. The court will accord these statements due, though not controlling, weight in determining whether oral argument will be heard.

(d) **Table of Contents.** The table of contents shall include page references to each section required by this rule to be included within the brief. The table shall also include specific page references to each heading or subheading of each issue argued.

(e) **Table of Citations.** The Table of Citations shall show the locations in the brief of citations, and shall contain asterisks in the margin identifying the citation upon which the party primarily relies.

(f) **Statement Regarding Adoption of Briefs of Other Parties.** A party who adopts by reference any part of the brief of another party pursuant to FRAP 28(i) shall include a statement describing in detail which briefs and which portions of those briefs are adopted.

(g) **Statement of Jurisdiction.**

(h) **Statement of the Issues.**

(i) **Statement of the Case.** In the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found. The statement of the case shall briefly recite the nature of the case and shall then include:

  (i) the course of proceedings and dispositions in the court below. IN CRIMINAL APPEALS, COUNSEL MUST STATE WHETHER THE PARTY THEY REPRESENT IS INCARCERATED;

  (ii) a statement of the facts. A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified s such;

  (iii) a statement of the standard or scope of review for each contention. For example, were the appeal is from an exercise of district court discretion, there shall be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be similarly indicated, e.g., . . . .

(j) **Summary of the Argument.** The opening briefs of the parties shall also contain a summary of argument, suitably paraphrased, which should be a clear, accurate and succinct condensation of the arguments actually made in the body of the brief. It should not be a mere repetition of the headings under which the argument is arranged. It should seldom exceed two and never five pages

(k) **Argument and Citations of Authority.** Citations of authority in the brief shall comply with Bluebook rules. Citations shall reference the specific page number(s) that relate to the propositions for which the case is cited. Citations to decisions of the Supreme Court shall include both US Reports and Supreme Court Reporter where such citation exists.

(l) **Conclusion.**

(m) **Certificate of Compliance.**

(n) Certificate of Service.

**MEMORANDUM**

**DATE:** October 14, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 03-10

Section 205 of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires every federal court to maintain a website (§ 205(a)) and to make specific information available through that website, including "docket information for each case" (§ 205(a)(4)), "the substance of all written opinions issued by the court" (§ 205(a)(5)), and "documents filed with the courthouse in electronic form" (§ 205(a)(6)). The Act also provides that "each court shall make any document that is filed electronically publicly available online" (§ 205(c)(1)), and the Act authorizes a court to "convert any document that is filed in paper form to electronic form" (§ 205(c)(1)). Any document that is so converted must "be made available online" (§ 205(c)(1)).

The Act thus establishes broad access to documents that are filed in or converted to electronic form, but the Act recognizes that access cannot be unlimited. The Act provides that documents that "are not otherwise available to the public, such as documents filed under seal, shall not be made available online" (§ 205(c)(2)). Moreover, the Act directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . of documents filed electronically" (§ 205(c)(3)(A)(i)). These privacy

rules are to "provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts" (§ 205(c)(3)(A)(ii)).

Except as I have already described, the Act contains little in the way of specific directives about privacy rules. An exception is Section 205(c)(3)(A), which states:

> (iv) Except as provided in clause (v), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which . . . shall be either in lieu of, or in addition to, a redacted copy in the public file.
>
> (v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in clause (iv) in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response —
>
> > (I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that —
> >
> > > (aa) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case; and
> > >
> > > (bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and
> >
> > (II) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

Section 205(c)(3)(A)(iv) was included in the original Act at the insistence of the Department of Justice, and over the objection of the Judicial Conference. The Department and the Conference

subsequently negotiated a compromise agreement. Based on that agreement, Congress amended the Act in August to add § 205(c)(3)(A)(v).

In response to the Act's directive that the Rules Enabling Act process be used to implement privacy rules, Judge David F. Levi, the Chair of the Standing Committee, appointed an E-Government Subcommittee chaired by Judge Sidney A. Fitzwater. The Subcommittee includes liaisons from each of the five Advisory Committees (Judge John G. Roberts, Jr., represents this Committee), as well as liaisons from other Judicial Conference committees. The reporters to the advisory committees serve as consultants to the Subcommittee.

The Subcommittee met on January 14, 2004, in Scottsdale, Arizona Following that meeting, Prof. Daniel J. Capra, Reporter to the Evidence Rules Committee, and Lead Reporter to the E-Government Subcommittee, drafted a template privacy rule patterned after model rules that had been drafted by the Committee on Court Administration and Case Management ("CACM"). That template was provided to the other reporters, and each of the reporters then used the template to draft privacy amendments to his respective set of rules. The advisory committees considered those draft amendments at their spring 2004 meetings.

As you may recall, I used the template to draft a new Appellate Rule 25.1. The text of that proposed rule, as well as a summary of the Committee's discussion of the rule, can be found at pages 45-49 of the minutes of the Committee's April 2004 meeting.

On June 16, 2004, the E-Government Subcommittee reconvened in Washington, D.C. At that meeting, the reporters shared the input that they had received from their respective committees about the template privacy rule. Based on that input, the Subcommittee painstakingly drafted a revised

template. The Standing Committee now asks that the advisory committees review the revised template and provide any input that they deem appropriate.

At one point, the Standing Committee hoped that the advisory committees would approve privacy rules at their fall 2004 meetings, so that the Standing Committee would be able to consider those rules at its January 2005 meeting. It is now clear, though, that the advisory committees will not be able to meet this schedule. The Bankruptcy Rules Committee has already met and determined that it will not be able to approve privacy amendments to the Bankruptcy Rules until its spring 2005 meeting. I expect that, in connection with the January 2005 meeting of the Standing Committee, either the E-Government Subcommittee will meet again or the advisory committee chairs and reporters will get together and produce another revised template. The advisory committees will then be asked to approve privacy rules based on that template at their spring 2005 meetings, the Standing Committee will take up those rules at its June 2005 meeting, and the rules will be published for comment in August 2005. That, at least, is my guess.

I have prepared for you a revised draft of new Appellate Rule 25.1 and an accompanying Committee Note. As the Standing Committee instructed, I have tracked the revised template word-for-word to the extent possible.

Attached to this memorandum are copies of the revised template and the minutes of the June 16, 2004, meeting of the E-Government Subcommittee. It is important that you read the attachments. You will note, for example, that Prof. Capra has included in the revised template a number of footnotes describing some of the choices made by the Subcommittee and specifically requesting the input of the advisory committees on particular questions.

**Rule 25.1 Privacy in Court Filings**

**(a) Limits on Disclosing Identifiers.** If an electronic or paper filing made with the court includes any of the following identifiers, only these elements may be disclosed, unless the court orders otherwise:

(1) the last four digits of a person's social security number and tax identification number;

(2) the initials of a minor's name;

(3) the year of a person's date of birth; and

(4) the last four digits of a financial account number.

**(b) Unredacted Filing Under Seal.** A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record.

**(c) Reference List.** A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information.

**(d) Exemptions.** The redaction requirement of subdivision (a) does not apply to the following:

(1) in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture;

(2) records of an administrative agency proceeding;

(3) official records of a state court proceeding in an action removed to federal court; and

(4) the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed.

**(e) Social Security Appeals; Access to Electronic Files.** In an action for benefits under the Social Security Act, access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have electronic access to any part of the case file, including the administrative record;

(2) all other persons may have remote electronic access only to:

(A) the docket maintained under Rule 45(b)(1); and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

**(f) Court Orders.** In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a).

(g) **Waiver of Protection of Identifiers.** A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction.

**Committee Note**

The rule is adopted in compliance with § 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in most districts are scanned by the clerk and made part of the electronic case file. As such, they are as available to the public over the Internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the Internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from § 205(c)(3)(iv) of the E-Government Act. Subdivision (c) allows parties to file a list of redacted information. This provision is derived from § 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, the rule refers to "redacted identifiers." The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (e) provides for limited public access in Social Security cases. Under Judicial Conference policy, Social Security cases are *sui generis* in the pervasiveness of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the

written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the Social Security case file at the courthouse.

Subdivision (g) allows a party to waive the protections of the rule as to its own personal identifier by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits of privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

# REVISED TEMPLATE DRAFTED BY PROF. CAPRA

**Rule [ ] Privacy in Court Filings**

**(a) Limits on Disclosing Identifiers.** If an electronic or paper filing made with the court includes any of the following identifiers,[1] only these elements may be disclosed, unless the court orders otherwise,[2]

**(1)** the last four digits of a person's social security number and tax identification number[3];

**(2)** the initials of a minor's name[4];

**(3)** the year of a person's date of birth; and

**(4)** the last four digits of a financial account[5] number.[6]

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[1] The subcommittee rejected an option that would apply the redaction requirement only to filings made by parties: "If a party includes any of the following identifiers in an electronic or paper filing with the court, the party is limited to disclosing:"]

[2] The subcommittee determined that flexibility should be added to the rule by allowing the court to excuse the redaction requirements in a particular case.

[3] The subcommittee determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.

[4] The subcommittee rejected an exception to the redaction requirement for actions in which the minor is a party; it also resolved to inquire of CACM as to how it determined that a child's name should be a protected identifier.

[5] The subcommittee rejected language that would limit the protection of financial accounts to those accounts that were personal; to active accounts; and to asset accounts. The subcommittee concluded that the risk of identity theft was significant with respect to *any* financial account number available over the internet.

**(b) Unredacted Filing Under Seal.** A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record.[7]

**( c) Reference List.** A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information.[8]

**(d) Exemptions.** The redaction requirement of subdivision (a) does not apply to the following: [9]

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[6] The subcommittee deleted home address as a protected identifier. It determined that a full home address was often necessary, especially in bankruptcy cases. The subcommittee requests the Criminal Rules Committee to consider whether home address should be a protected identifier in criminal cases. CACM supports the protection of home addresses in criminal cases. The subcommittee also requests the Criminal Rules Committee to consider whether it is necessary to protect home addresses in habeas cases.

[7] The subcommittee rejected the following language that was proposed by the Justice Department:

> Where a document is filed under seal solely to comply with this rule, the seal does not prohibit the disclosure of the document to the parties, their counsel, their agents, law enforcement officers, and triers of fact, nor the disclosure by those persons when appropriate to the performance of their official duties.

[8] This language is intended to track proposed legislation that would amend the E-Government Act to permit the filing of a registry list as an alternative to an unredacted document under seal. The subcommittee directed the Lead Reporter to monitor the legislation and to make any changes to the revised template to accord with the legislation as adopted.

[9] The subcommittee requests the Criminal Rules Committee to consider the following possible exemptions to the redaction requirement, as proposed by the Justice Department for criminal cases:

**(1)** in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture;

**(2)** records of an administrative agency proceeding;

**(3)** official records of a state court proceeding in an action removed to federal court; and [10]

**(4)** the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed.[11]

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**(1)** filings in any court in relation to a criminal matter or investigation that are prepared before the filing of a criminal charge or that are not filed as part of any docketed criminal case;

**(2)** arrest warrants;

**(3)** charging documents—including indictments, informations, and criminal complaints—and affidavits filed in support of those documents;

**(4)** criminal case cover sheets.

The subcommittee also requests the Criminal Rules Committee to consider whether similar exemptions are necessary for civil cases.

[10] The subcommittee rejected an exception for "a certified copy of a document filed with the court." The subcommittee determined that a redaction could be indicated on a certified copy where necessary to protect an identifier.

[11] Some subcommittee members suggested that the exemption apply to "the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally ***created.***"

**(e) Social Security Appeals; Access to Electronic Files.** In an action for benefits under the Social Security Act,[12] access to an electronic file is authorized as follows, unless the court orders otherwise:

**(1)** the parties and their attorneys may have electronic access to any part of the case file, including the administrative record;

**(2)** all other persons may have remote[13] electronic access only to:

**(A)** the docket maintained under Rule [relevant civil or appellate rule]; and

**(B)** an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.[14]

**(f) Court Orders.** In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against

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[12] The subcommittee considered whether limited public access, as provided for Social Security cases, should be extended to other sets of cases, such as immigration, Black Lung, ADA cases, etc. The subcommittee deferred to the determination of CACM, made after extensive study, that Social Security cases are sui generis because of the sensitive information presented and the voluminous filings made. The Subcommittee concluded that in light of CACM's considered determination, the burden would be on those seeking exclusion of other sets of cases to show that public access must be limited in order to protect privacy interests. It is possible that such a showing will be made before or during the comment period.

[13] The revised template contemplates that members of the public may obtain electronic access at the courthouse.

[14] The subcommittee rejected a sentence at the end of the subdivision that would have provided: "The parties are not required to redact personal identifiers from a transcript filed in an action for benefits under the Social Security Act." The subcommittee found this language to be unnecessary.

widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a).[15]

**(g) Waiver of Protection of Identifiers.** A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction.

## Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. [Subdivision (c) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(iv) of the E-Government Act, as amended in 2004.]

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[15] This subdivision is referred to the Advisory Committees to determine whether it is useful to clarify that the court may by order provide protection for information not covered by the redaction requirement, on the ground that it is sensitive information that should not be accessible to non-parties over the internet. CACM's position is that courts already have this power, and to include it in this rule would provide an open invitation to parties to seek court orders.

In accordance with the E-Government Act, the rule refers to "redacted identifiers". The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (f) provides for limited public access in Social Security cases. Under Judicial Conference policy, Social Security cases are *sui generis* in the pervasiveness of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the Social Security case file at the courthouse.

Subdivision (g) allows a party to waive the protections of the rule as to its own personal identifier by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.[16]

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[16] The subcommittee rejected language in the Committee Note that would have provided: "This rule does not apply to trial exhibits as they are not filed within the meaning of the rule." It was determined that exhibits are indeed filed in some courts, and that if exhibits are filed, they should be treated the same as any other court filing.

## E-GOVERNMENT ACT RULE

*The Direction to Prescribe A Civil Rule*

Section 205 (a) of the E-Government Act of 2002, Pub.L. 107-347, 116 Stat. 2899, 2913, 44 U.S.C. 101 note, requires each district court to establish a website. Section 205(c)(1) provides that the court "shall make any document that is filed electronically publicly available online." The court "may convert any document that is filed in paper form to electronic form"; if converted to electronic form, the document must be made available online. Section 205(c)(2) provides an exception — a document "shall not be made available online" if it is "not otherwise available to the public, such as documents filed under seal."

Section 205(c)(3) directs adoption of implementing rules:

> (A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28 * * * to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.
>
> (ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.
>
> (iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.
>
> (iv) Except as provided in clause (v), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.
>
> (v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in Clause (iv) in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response—
>
> > (I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that—
> >
> > > (aa) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case; and
> > >
> > > (bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and
> >
> > (II) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

*Standing Committee E-Government Subcommittee*

The Standing Committee has appointed an E-Government Act Subcommittee, chaired by Judge Sidney A. Fitzwater, to coordinate study of E-Government Act rules by the several advisory committees. Professor Daniel J. Capra, Reporter of the Evidence Rules Committee, has been designated Lead Reporter for the Subcommittee. Professor Capra prepared a "template" rule and Committee Note for consideration by the advisory committees. The template rule was extensively revised after a Subcommittee meeting last June; minutes of the June meeting are attached.

Each advisory committee has been asked to study the revised template rule at its Autumn 2004 meeting and to suggest any desirable changes or variations. The Subcommittee, in consultation with the advisory committee reporters, will consider the advisory committee reactions in January. The effort is designed to generate a uniform rule that may be adopted in uniform — or nearly uniform — terms for each of the Appellate, Bankruptcy, Civil, and Criminal Rules. Some variations may prove suitable for the different circumstances faced by the different procedure systems.

# Revised Privacy Template

Date: June 16, 2004.

**Rule [ ] Privacy in Court Filings**

**(a) Limits on Disclosing Identifiers.** If an electronic or paper filing made with the court includes any of the following identifiers,[1] only these elements may be disclosed, unless the court orders otherwise,[2]

**(1)** the last four digits of a person's social security number and tax identification number[3];

**(2)** the initials of a minor's name[4];

**(3)** the year of a person's date of birth; and

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[1] The subcommittee rejected an option that would apply the redaction requirement only to filings made by parties: "If a party includes any of the following identifiers in an electronic or paper filing with the court, the party is limited to disclosing:"]

[2] The subcommittee determined that flexibility should be added to the rule by allowing the court to excuse the redaction requirements in a particular case.

[3] The subcommittee determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.

[4] The subcommittee rejected an exception to the redaction requirement for actions in which the minor is a party; it also resolved to inquire of CACM as to how it determined that a child's name should be a protected identifier.

(4) the last four digits of a financial account[5] number.[6]

**(b) Unredacted Filing Under Seal.** A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record.[7]

**( c) Reference List.** A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information.[8]

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[7] The subcommittee rejected the following language that was proposed by the Justice Department:

> Where a document is filed under seal solely to comply with this rule, the seal does not prohibit the disclosure of the document to the parties, their counsel, their agents, law enforcement officers, and triers of fact, nor the disclosure by those persons when appropriate to the performance of their official duties.

[8] This language is intended to track proposed legislation that would amend the E-Government Act to permit the filing of a registry list as an alternative to an unredacted document under seal. The subcommittee directed the Lead Reporter to monitor the legislation and to make any changes to the revised template to accord with the legislation as adopted.

following: [9]

> **(1)** in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture;
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> **(2)** arrest warrants;
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The subcommittee also requests the Criminal Rules Committee to consider whether similar exemptions are necessary for civil cases.

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**(A)** the docket maintained under Rule [relevant civil or appellate rule]; and

**(B)** an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.[14]

**(f) Court Orders.** In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a).[15]

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[12] The subcommittee considered whether limited public access, as provided for Social Security cases, should be extended to other sets of cases, such as immigration, Black Lung, ADA cases, etc. The subcommittee deferred to the determination of CACM, made after extensive study, that Social Security cases are sui generis because of the sensitive information presented and the voluminous filings made. The Subcommittee concluded that in light of CACM's considered determination, the burden would be on those seeking exclusion of other sets of cases to show that public access must be limited in order to protect privacy interests. It is possible that such a showing will be made before or during the comment period.

[13] The revised template contemplates that members of the public may obtain electronic access at the courthouse.

[14] The subcommittee rejected a sentence at the end of the subdivision that would have provided: "The parties are not required to redact personal identifiers from a transcript filed in an action for benefits under the Social Security Act." The subcommittee found this language to be unnecessary.

[15] This subdivision is referred to the Advisory Committees to determine whether it is useful to clarify that the court may by order provide protection for information not covered by the redaction requirement, on the ground that it is sensitive information that should not be accessible to non-parties over the internet. CACM's position is that courts already have this power, and to

**(g) Waiver of Protection of Identifiers.** A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction.

## Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

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Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. [Subdivision (c ) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(iv) of the E-Government Act, as amended in 2004.]

In accordance with the E-Government Act, the rule refers to "redacted identifiers". The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

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include it in this rule would provide an open invitation to parties to seek court orders.

Subdivision (f) provides for limited public access in Social Security cases. Under Judicial Conference policy, Social Security cases are *sui generis* in the pervasiveness of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the Social Security case file at the courthouse.

Subdivision (g) allows a party to waive the protections of the rule as to its own personal identifier by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.[16]

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[16] The subcommittee rejected language in the Committee Note that would have provided: "This rule does not apply to trial exhibits as they are not filed within the meaning of the rule." It was determined that exhibits are indeed filed in some courts, and that if exhibits are filed, they should be treated the same as any other court filing.

# ALTERNATIVE SUBDIVISION (a)

**(a) Limits on Information Disclosed~~ing Identifiers~~.** ~~If~~ Unless the court orders otherwise, an electronic or paper filing ~~made with the court~~ that refers to a social security or tax identification number, a minor's name, a person's birth date, or a financial account may includes ~~any of the following identifiers~~ only ~~these elements may be disclosed, unless the court orders otherwise~~:

**(1)** the last four digits of ~~a person's~~ the social security, ~~number and~~ tax identification, or financial account number;

**(2)** the minor's initials ~~of a minor's name~~; and

**(3)** the year of ~~a person's date of~~ birth~~; and~~

~~**(4)** the last four digits of a financial account number~~.

*Parallel Civil Rules Changes*

Each Advisory Committee is to determine whether existing rules should be changed to reflect the new circumstances created by electronic access to materials filed with the court. Several Civil Rules may be candidates for future amendment; some of the more obvious possibilities are described briefly below. It may be premature, however, to consider amendments before gaining any experience with electronic access. Anticipated problems may not arise, and unanticipated difficulties are almost inevitable.

Rule 5(d). The statute requires that any document filed electronically be made available online. Paper documents converted to electronic form also must be made available online. Rule 5(d) now requires filing of "[a]ll papers after the complaint required to be served upon a party." Rule 5(d) was recently amended to forbid filing of discovery papers until they are used in the proceeding or the court orders filing. Rule 5(d) might be amended further to except other papers from filing.

Rule 5, whether in subdivision (d) or otherwise, also might be the place to add provisions on sealing filed papers. Rule 26(c)(6) already authorizes a protective order sealing a deposition. Section 205(c)(2) of the E-Government Act provides that a filed document shall not be made available online if it is "not otherwise available to the public, such as documents filed under seal."

Rule 5(d) also may be used to anticipate a pervasive problem. Filing discovery materials, when that happens, invokes all the limits of the proposed E-Government Act rule. Apparently depositions, responses to interrogatories, documents (including computer-generated information), requests for admission, and perhaps even reports of Rule 35 examinations, must be redacted. Rule 5(d) might be amended to provide a reminder of the duties imposed by Rule "5.2."

Amendments designed to limit filing requirements or to expand sealing practices must be approached with great care. It does not seem likely that these topics should be made part of the initial E-Government Act rules process, unless it seems appropriate to amend Rule 5(d) to refer to the Rule 5.2 duty to redact discovery materials when filed.

Rule 10. Rule 10(a) provides that "the title of the action shall include the names of all the parties." This provision is at odds with subdivision (a)(2) of the proposed rule, which permits only the initials of a "minor child." It might be desirable to add a cross-reference to Rule "5.2." (The E-Government Act might provide an occasion for reconsidering the question of pseudonymous pleading. There has not been any enthusiasm in recent years for considering an amendment that would attempt to guide this practice. But electronic access may suggest further consideration, particularly if it is easily possible to search court filings along with all other online materials that refer to a named person.)

Special problems arise from Rule 10(c), which indirectly reflects the practice of attaching exhibits to a complaint. The exhibit must be redacted to conform to Rule "5.2." It is difficult to guess whether this requirement will impose significant burdens in effecting the redaction, or whether there may be practical difficulties. If Rule "5.2(b)" survives, permitting filing of the complete complaint and exhibits under seal, these difficulties may be substantially reduced.

Again, it is difficult to frame amendments beyond a possible reference to Rule 5.2 in Rule 10(a).

Rule 11. The Minutes of the E-Government Subcommittee meeting reflect discussion of the question whether Rule 11 should be "amended to contemplate violations of the privacy/access rules. Judge [Jerry A. Davis] noted that CACM had reviewed this issue and determined that Rule 11 already covers any arguable violation of these policies and that it is better to leave it to the discretion of the courts as to how to deal with violations or abuse of any new rule regarding electronic filing. The Subcommittee agreed with this assessment."

Rule 11(b)(1) states that an attorney or party presenting a paper to the court certifies that it is not presented for any improper purpose. If it is desirable to use Rule 11 or any other rule of procedure to reach liability for such acts as purposefully filing a defamatory pleading, the present language seems adequate. The determination whether to bend Rule 11 to this purpose at all will be difficult — it at least approaches substantive questions of defamation liability, the right to petition courts, and privilege. It would not be wise to take on these issues by amending Rule 11, unless it be to disclaim any attempt to answer them.

Rule 12(f). The agenda includes a pending question addressed to the effect of a Rule 12(f) order to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Is the stricken material physically or electronically expunged? Or is it preserved to maintain a complete record, for purposes of appeal or otherwise, but sealed? Electronic access to court files may make this question more urgent, but there is no apparent change in the principles that will guide the answer.

Rule 12(f) could be amended to refer directly to an order to strike information that violates Rule "5.2." Authority to strike seems sufficiently supported, however, both by present Rule 12(f) and by the implications of Rule "5.2."

Rule 16. Rule 16(b) or (c) might be amended to include scheduling-order directions or pretrial-conference discussion of electronic-filing issues. The most apparent subjects would be limiting filing requirements or permitting filing under seal. Care would need to be taken to avoid interference with the purposes of the E-Government Act. But there may be an advantage, particularly in early years, from assuring that parties and court think of the privacy and security issues that may arise from electronic access.

Rule 26 or Other Discovery. Rule 5(d) limits on filing discovery materials are noted above. It is conceivable that a reminder of E-Government Act access — and the need to redact filed documents to comply with Rule "5.2" — should be added somewhere in the discovery rules as well.

The protective-order provisions of Rule 26(c) do not seem to need amendment. They provide ample authority to respond on a case-specific basis "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense * * *."

Rule 56. Summary-judgment affidavits are among the papers covered by Rule "5.2." It would be possible to add a cross-reference to Rule 56.

Rule 80(c). Rule 80(c) — inevitably part of the future project to reconcile the Civil Rules with the Evidence Rules — states that whenever stenographically reported testimony is admissible in evidence at a later trial, it may be proved by the transcript. Although the proof might include filing, and a corresponding need to redact under Rule "5.2," there is no apparent need to amend Rule 80(c) to refer back to Rule "5.2."

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
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CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

September 20, 2004

Honorable David F. Levi
Committee on Rules of Practice and Procedure
Chief Judge, United States District Court
501 I Street, 14th Floor
Sacramento, CA 95814-2322

Re: Privacy Template Rule

Dear Judge Levi:

As you know, the Advisory Committee on Bankruptcy Rules considered the proposed Privacy Template Rule at our meeting last week. Since we are the first of the Advisory Committees to consider the proposal, we are reporting the Committee's action to you and the Reporters of the other Advisory Committees so that they are aware of our actions prior to their meetings.

The primary substantive concern expressed by members of our Committee relates to the treatment of a minor's name. In a bankruptcy case, it is essential to have the full name of the debtor set out in the petition as well as in notices to the creditors. Consequently, the Bankruptcy Rule version of the privacy rule will have to accommodate that need. Furthermore, the Committee believes that the need to limit the identification of a minor to his or her initials does not exist when the minor is not being identified as a minor. For example, a creditor listed on the debtor's schedules would not normally be identified as a minor. In fact, the debtor may not even know that the creditor is a minor. Nonetheless, the Template would seem to require the limited identification of the minor/creditor.

A second matter that may require special treatment in the Bankruptcy Rules is the limit on the use of the social security number. Sections 110(h) and 342(c) of the Bankruptcy Code mandate the use of social security numbers by bankruptcy petition preparers and by debtors who are giving notice to a creditor, respectively. These provisions may survive the enactment of the E-Government Act and would continue to require the full social security number of petition preparers and debtors. The Committee will be studying the issue and considering it at its March meeting.

As a result of these issues, the Advisory Committee decided to reconsider the matter at its March meeting. This will also permit the Bankruptcy Rules Committee to have the benefit of comments from the other Advisory Committees. We anticipate that we will then recommend to the Standing Committee for publication a rules amendment to implement the Privacy Template Rule for bankruptcy cases. Most likely, the Bankruptcy Rule amendment will be an incorporation of the Civil Rules version of the Privacy Template Rule. If necessary, the incorporation will be limited to meet particular needs of the Bankruptcy Code and practice.

The Committee discussion also led to a suggested revision of some of the language of subdivisions (a) and (d) of the Template. That revision is attached to this letter. It is offered to the other Advisory Committees for their consideration.

We look forward to hearing about the deliberations of the other Committees on this matter. We understand the need to make the rules as consistent as practicable, and we will continue to work with the other Committees as we prepare for our March 2005 meeting.

Please do not hesitate to give me a call if you have any questions about this matter.

Sincerely yours.

A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

Enclosure

cc: Hon. Thomas S. Zilly
Prof. Patrick J. Schiltz
Prof. Edward H. Cooper
Prof. David A. Schlueter
Prof. Daniel J. Capra
Prof. Jeffrey W. Morris

**MEMORANDUM**

**TO:** **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

**FROM:** **JEFF MORRIS, REPORTER**

**RE:** **PRIVACY RULE TEMPLATE**

**DATE:** **AUGUST 16, 2004**

The E-Government Act of 2002 requires the promulgation of rules to protect the privacy of persons identified in court filings and to govern the availability of those documents when they are filed electronically. The Act applies to all government agencies, but the rules promulgation requirement obviously applies only to the courts. The E-Government Committee, chaired by the Hon. Sidney Fitzwater (N.D. Tex.) met on two occasions to consider drafts of a template of a privacy rule that could be adopted by the Advisory Committees. Prof. Dan Capra, the Reporter to the Advisory Committee on the Rules of Evidence, served as the Reporter for the E-Government Committee.

The E-Government Committee met most recently in June 2004, and the result of that meeting is the Revised Privacy Template attached to this memorandum as Exhibit A (the "template Rule"). Subdivision (a) of the Template Rule sets out the limitations on the disclosure of certain information in the materials filed with the court. Disclosure of a person's social security number and date of birth are limited as are references to a minor's name and any financial account numbers that might be included in the filings. The rule permits a party to file an unredacted copy of the document under seal at the same time that they file a copy of the document properly redacted as required by the rule. Consistent with recently-enacted legislation to amend the E-Government Act, the rule provides in subdivision (c) that a party may file a

reference list for use in identifying the otherwise redacted items in a particular document. Attached to this memo is a report on the amendment. The proposed rule also includes actions that are exempt from the redaction requirements (see subdivision (d)) and includes a significant restriction on electronic access to files in actions for benefits under the Social Security Act. The Template Rule also provides that a party can waive the privacy protection of subdivision (a) of the Rule by using his or her own personal identifier without redacting the relevant information.

The Template Rule also includes a provision in subdivision (f) that authorizes the court to order a greater limit or restriction on "remote electronic access" by non-parties to the electronically filed documents. The rule states that the court must be satisfied that the protection of the information provided by subdivision (a) of the rule is insufficient before it orders additional protection of the information under subdivision (f). The E-Government Committee is especially interested in receiving the comments of the Advisory Committees as to the propriety of this subdivision of the rule. The subdivision arguably may be unnecessary because the courts already have the power to seal records, and including this in the rule would simply create a cottage industry in applications for such orders.

The Advisory Committee on Civil Rules is considering the Template Rule (as are the Criminal and Appellate Rules Committees), and the expectation is that the rule as adopted by the Advisory Committees will be as uniform as possible. In fact, the E-Government Act of 2002 includes such a directive, with the proviso that the uniformity be as great as is reasonably practicable. To that end, Judges Small and Swain and I have been active participants in the work of the E-Government Committee and have considered how to best incorporate the rule into the Bankruptcy Rules. In keeping with the spirit of the E-Government Act and the directives of

Judge Fitzwater's Committee, we suggest that the Bankruptcy Rules incorporate the Civil Rule version of the Privacy Template Rule into the rules governing adversary proceedings and that the rule be added to the list of rules that apply in contested matters under Rule 9014. There is a need for one distinction between the Civil Rule and the Bankruptcy Rule. That is, the Civil Rule (we assume) will include a limitation that only the initials of a minor's name be included in the document. This will create a problem if the minor is the debtor in the case. Since the rule would apply only in adversary proceedings and contested matters, the limitation would not apply either to a voluntary or involuntary petition. (Our recent amendment to Rule 1005, for example, calls for the partial redaction of a debtor's social security number but does not require the use of only a minor's initials on the petition. Official Forms 1 and 4, the voluntary and involuntary petitions, likewise include the limit on the publication of the full social security number.) After consideration, we believe that a minor debtor's full name should be required on the petitions to ensure that creditors are receiving appropriate notice in the case. Since the full name will be on the petition, that name will appear again in the caption of the adversary proceedings and contested matters in the case. We are therefore proposing a modification of that provision of the Template Rule, to exempt the name of a minor who is the debtor from the redaction requirement in adversary proceedings and contested matters.

**RULE 70XX[1] Privacy in Court Filings.**

Except as provided in this rule, Rule XX F. R. Civ. P. applies in adversary proceedings. Subdivision (a)(2) of Rule XX F. R.

[1] The number will correspond to the number of the Civil Rule in the same manner as other rules in Part VII of the Bankruptcy Rules.

Civ. P. does not apply if the minor being identified is the debtor in the case.

COMMITTEE NOTE

This rule makes Civil Rule XX applicable in adversary proceedings with the exception of the limitation in that rule on the publication of a minor's name. Under the Civil Rule, only a minor's initials may be included in the filed document, and this rule carries that limitation forward if the minor is not the debtor in the case. If the debtor is a minor, the debtor's full name will be included on the petition (whether it be a voluntary or involuntary petition) as well as on all of the filings in adversary proceedings and contested matters. See Bankruptcy Rules 7010 and 9004(b).

**RULE 9014 Contested Matters.**

* * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, 70XX and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same

manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

COMMITTEE NOTE

The rule is amended to include Rule 70XX in the list of Part VII rules that automatically apply in contested matters. That rule largely incorporates Rule XX F. R. Civ. P. with the exception that Rule XX's limitation on the use of a minor's full name is made inapplicable where the minor is the debtor in the case.

**U. S. Department of Justice**

Civil Division

*Assistant Attorney General* *Washington, D C 20530*

October 15, 2004

The Honorable Sidney A Fitzwater
United States District Court
for the Northern District of Texas
1100 Commerce Street, Room 1520
Dallas, Texas 75242-1003

Re: E-Government Act and Immigration Cases

Dear Judge Fitzwater:

In my last letter to you regarding the Privacy Rule template, I suggested that immigration cases should be exempted from electronic access for the same reasons that prompted the Judicial Conference to treat Social Security cases differently from other civil cases. Like Social Security cases, immigration cases are filed in substantial numbers and are infused with multiple kinds of personal information. In the June 10, 2004 memorandum responding to this and other comments on the template, the Committee on Court Administration and Case Management (CACM) indicated a disinclination to expand the category of exempt cases, because it was not convinced "that any other type of cases presented the same type, quality and quantity of information in every case filed." CACM noted, however, that it "would be open to a discussion of special treatment of immigration cases if it can be demonstrated that the volume of these cases is substantial and the information routinely filed should be protected." At the June 16 meeting of the E-Government Subcommittee, the Subcommittee members agreed that because the policy underlying the E-Government Act favors public access, the burden should be on the proponent of an exemption to establish the need for it. The Department at that time proposed to provide the Subcommittee with specific information to support an exemption for immigration cases. This information is provided below.

The immigration caseload in the federal courts has increased at a substantial rate in recent years and these increases are expected to continue for the foreseeable future: [1]

[1] The Administrative Office of the United States Courts reports, for example, that appeals from Board of Immigration Appeals in the Second Circuit climbed 290% in 2003, from 553 to

| | Total Case Receipts in the Federal Courts[2] |
|---|---|
| Calendar Year 2003 | 12,320 |
| Calendar Year 2004 (projected) | 15,030, an increase of 22%[3] |

This federal court caseload is based primarily on decisions of the Board of Immigration Appeals, the highest administrative court for immigration cases.[4] In fiscal year 2002, the Board received 34,815 cases and completed 47,327 cases. In fiscal year 2003, the Board received 41,907 cases and completed 48,060 cases. It expects to complete 55,000 cases in fiscal year 2005, which will result in an increase in the federal court caseload. Immigration cases generally commence in the immigration courts, which in fiscal year 2002 received 290,628 cases and completed 273,926 cases. In fiscal year 2003, the immigration courts received 299,733 cases and completed 296,424 cases.[5]

Immigration case records are filed in the federal courts when an alien seeks review of a removal order or a detention decision, two categories which constitute the majority of immigration filings. Since the court is charged with a record review, the entire case file is submitted. To a lesser extent, there are filings to seek review of a denial of naturalization, denial of legalization or Special Agricultural Worker status, or a challenge to a benefit denial.

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2081. The Ninth Circuit reports that, as of August 31, 2004, immigration cases constituted 48% of all the 2004 cases inventoried.

[2] The figures for total case receipts in the federal courts are derived from an internal Department of Justice database that tracks incoming cases according to case type. The numbers represent cases filed in both the circuit and district courts.

[3] By way of comparison, according to the Administrative Office of the U.S. Courts, the total number of social security cases filed in the circuit and district courts during the twelve-month period ending June 30, 2004 was 15,935.

[4] For civil cases, Board of Immigration Appeals decisions are reviewed directly by the federal courts of appeals. Federal immigration cases can also originate in the federal district court, primarily by way of petitions for writs of habeas corpus or mandamus.

[5] The statistics for immigration cases filed at the administrative level come from the Executive Office for Immigration Review (EOIR)'s statistical yearbook, located at http://www.usdoj.gov/eoir/statspub/syb2000main.htm.

All immigration cases records contain a significant amount of personal information about the alien and others. The typical immigration record starts with the charging document, which notifies the alien of the initiation of proceedings. The Notice to Appear contains the alien's name and address, as well as factual information to support the legal charges of removal (such as when the alien was admitted to the United States or when he was convicted of a crime). Throughout the proceeding, there are various notices of hearing, legal briefs, motions, and notices of appearance of attorneys which also contain the alien's name and address and other personal information. Most cases contain an application for relief from removal and supporting documentation. These filings include detailed personal information about an alien, such as:

- current and former addresses,
- employers,
- bank account records,
- tax returns,
- marriage and birth certificates,
- business-related documents,
- real estate or mortgage documents,
- leases,
- driver's licenses,
- Social Security cards,
- Selective Service cards,
- insurance policies,
- criminal conviction documents and records.

These applications also contain significant information about other individuals related to the alien or who are witnesses providing information relevant to the alien's application for relief (including names, addresses, employers of the witnesses). This type of information is critical to an alien's case because most forms of relief are discretionary. In many cases, the alien is a lawful permanent resident and the witnesses are lawful permanent residents or United States citizens whose personal information is protected from authorized disclosure by the Privacy Act.

Applications for asylum, restriction on removal, and protection under the Convention Against Torture present other privacy considerations because they contain a detailed basis for the alien's fear of persecution or torture, including statements from the alien and other witnesses and names and locations of persons the alien fears.

As you can imagine, the resources required to redact the amount of personal information contained in these records would be substantial, and would add delay to the submission – and hence resolution – of these factually intensive record review cases.

We would urge, therefore, that the Committee treat immigration cases like social security cases, and exempt them from electronic access. They deserve this treatment due to (1) the increasing numbers of immigration cases in the federal courts (comparable to the number of social security cases), (2) the amount and nature of the detailed, personal information contained in their administrative records, and (3) the enormous burden of manually redacting them. At a minimum, it may be possible to exempt immigration cases for an initial period of several years, or until a system is perfected at the administrative level to redact the records as they are compiled and submitted.

We thank you for the opportunity to submit this additional information for your consideration, and look forward to seeing you at the Civil Rules Committee meeting in Santa Fe. If you have any questions in the interim, please feel free to contact me directly, or to contact Elizabeth Shapiro, at (202) 514-5302.

Sincerely,

Peter D. Keisler

# E-Government Subcommittee

Minutes of the meeting of June 16, 2004
Washington D.C.

The E-Government Subcommittee (the "Subcommittee") met on June 16, 2004, at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

*The following members of the Subcommittee were present:*

Hon. Sidney A. Fitzwater, Chair
Hon. Robert L. Hinkle, Liaison from the Evidence Rules Committee
Hon. Laura Taylor Swain, Liaison from the Bankruptcy Rules Committee
Deborah Rhodes for Hon. Reta M. Strubhar, Liaison from the Criminal Rules Committee
Hon. David F. Levi, Chair, Standing Committee *(ex officio)*
Professor Daniel R. Coquillette, Reporter to the Standing Committee *(ex officio)*
Professor Daniel J. Capra, Lead Reporter and Reporter to the Evidence Rules Committee *(consultant)*
Professor Edward H. Cooper, Reporter to the Civil Rules Committee *(consultant)*
Professor Jeffrey W. Morris, Reporter to Bankruptcy Rules Committee *(consultant)*
Professor Patrick J. Schiltz, Reporter to the Appellate Rules Committee *(consultant)*

*The following individuals participated via teleconference:*

Hon. Shira A. Scheindlin, Liaison from the Civil Rules Committee
Hon. Donetta W. Ambrose, Liaison from the Committee on Court Administration and Case Management

*Also present were:*

Hon. Francis M. Allegra, U.S. Court of Federal Claims
Hon. Lee H. Rosenthal, Chair of the Civil Rules Committee
Hon. A. Thomas Small, Chair of the Bankruptcy Rules Committee
Bruce Curtis, Committee on Court Administration and Case Management
Robert Deyling, Esq., Attorney Advisor, Administrative Office of the Courts
Daniel Hawtof, Esq., Attorney Advisor, Administrative Office of the Courts
James Ishida, Esq., Attorney Advisor, Administrative Office of the Courts
Patricia Ketchum, Administrative Office of the Courts
Barbara Kimble, Committee on Court Administration and Case Management
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
Paul Miller, Administrative Office of the Courts
John K. Rabiej, Esq., Chief, Rules Committee Support Office
Elizabeth Shapiro, Esq., Attorney, Department of Justice
James Wannamaker, Esq., Administrative Office of the Courts
Brooke D. Coleman, Esq.

## Welcome and Introduction

Judge Fitzwater extended a welcome to the Subcommittee and thanked all in attendance for coming. Those attending the meeting introduced themselves.

## Business of the Subcommittee Meeting

Judge Fitzwater briefly reviewed the activities of the Subcommittee since its previous meeting in January 2004. Judge Fitzwater explained that Professor Capra provided a draft template rule to each of the appropriate Advisory Committees. The Advisory Committees raised questions and comments regarding the template rule, as have outside groups such as the Department of Justice ("DOJ"). Judge Fitzwater explained that the goal of the meeting is to revise the template rule in light of these questions and comments and to distribute the revised template rule to the Advisory Committees. He further noted that members of the Committee on Court Administration and Case Management ("CACM") were unable to attend today's meeting. However, CACM supplied a letter with comments and concerns regarding the revised template that would be referred to and addressed during the meeting. In addition, the Subcommittee intends for CACM to review the revised template adopted at this meeting in order to identify any additional concerns.

Professor Capra explained that some changes had been made to the template by common consent. However, he planned to review these changes to confirm the Subcommittee's approval. The changes include: (i) deletion of the Judicial Conference standards from the Committee Note; (ii) deletion of home address from the template list of identifiers (the Criminal Committee should still consider this identifier for its E-Government Rule); (iii) addition of social security cases as a category of cases exempt from electronic filing; and (iv) general shortening of the Committee Note.

Professor Cooper asked how home addresses in habeas cases should be treated. The Subcommittee discussed this issue and decided to refer the question to the Criminal Rules Committee for further review. Finally, the members of the Subcommittee unanimously approved the changes proposed by Professor Capra.

## Review of Drafting Options

Limits on Disclosing Identifiers. Professor Capra discussed whether the proposed rule should be limited in application to parties or expanded to cover all electronic filings. CACM prefers the latter approach. The Subcommittee unanimously agreed that the rule should cover electronic filings by both parties and non-parties.

The Subcommittee further discussed this section of the template rule. Judge Swain explained that in bankruptcy cases, certain statutes require the inclusion of some of the information listed for redaction in the template rule. She requested that the proposed rule be "subject to existing statute(s), as directed by the court." The Subcommittee discussed whether the E-Government Act of 2002 ("E-Government Act") preempts those

statutes. Judge Hinkle suggested that adding language such as "unless the court orders otherwise" to section (a) may be appropriate since Judge Swain's comment is not necessarily solely a bankruptcy issue. He explained that the rule is currently written in a definitive way, and the Subcommittee may want to provide the court with discretion to suspend redaction in certain cases. The Subcommittee discussed and debated the merits of this proposal. The following language was proposed and unanimously approved:

> "(a) Limits on Disclosing Identifiers. If an electronic or paper filing made with the court includes any of the following identifiers, only these elements may be disclosed, unless the court orders otherwise"

Delineated Identifiers. Professor Capra explained that some of the Advisory Committees have questioned whether to redact the name of a minor in every case, using only the minor's initials as an identifier. Professor Cooper questioned how parties will know who is suing them when an action is brought on behalf of a child, creating a practical notice problem. Judge Small explained that the abbreviations might create a problem in the bankruptcy setting as well. Professor Capra pointed out that as the revised rule stands, the court would have discretion to permit the filing of the full minor's name if appropriate. Judge Fitzwater asked why CACM takes the position that minor's names should be abbreviated in every case. CACM's reasoning was not clear on this issue from its correspondence. Judge Fitzwater suggested leaving the identifier in the rule, subject to CACM's response regarding their reasoning for including it. Further, Judge Fitzwater suggested that the Subcommittee could make clear that it neither supported nor opposed the inclusion of this particular identifier such that the Advisory Committees could make their own determination on the issue. Judge Fitzwater's proposal was unanimously approved.

Professor Capra reviewed the question of whether financial account numbers should be listed in section (a) of the rule. Specifically, since there is a requirement to truncate social security numbers, should tax identification numbers be subject to the same requirement. Ms. Shapiro explained that she believed the rule was aimed at protecting personal privacy, and not necessarily at the privacy of corporations or other entities. The DOJ requested that this point be clarified since it is concerned about how the rule will affect its ability to prosecute fraud (and other) cases involving corporate entities. The Subcommittee requested specific examples of how truncating tax identification numbers would negatively affect the DOJ's ability to prosecute cases. Ms. Shapiro agreed to follow up on that question. Professor Capra proposed approving the addition of tax identification numbers to the list of identifiers. The proposal was unanimously approved.

Unredacted Filing Under Seal. Professor Capra explained that the E-Government Act allows for unredacted documents to be filed under seal. Further, under the E-Government Act, courts can still require that a redacted copy be filed publicly. Professor Cooper opined that the tone of the rule as currently drafted suggests that filing a sealed copy can be done as a matter of course, and does not clearly communicate that a redacted filing may also be required. He suggested drafting the rule to state that a party that does file a redacted copy may also file an unredacted copy under seal. The Subcommittee

discussed this proposal, including a discussion of how to practically seal the documents (e.g., by court order). The Subcommittee also discussed the current legislative proposal under consideration by Congress that allows for a redacted document to be filed publicly along with a sealed list of the redacted personal identifies. Professor Capra explained that he believed this legislation would create a third option under the proposed rule. Following this discussion, Professor Capra proposed the following language for section (b):

> "(b) Unredacted Filing Under Seal. A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record."

The proposal was unanimously approved. The Subcommittee asked for the DOJ to provide further information regarding its proposal that the rule specifically allow for copies of the sealed documents to be served on parties and their lawyers without violating this provision. Also, the Subcommittee agreed to advise the Advisory Committees to consider addressing sealing mechanics in their respective rules.

Reference List for Redacted Filings. Professor Capra explained that the proposed language for this provision reflects the amendment that is currently being considered by Congress. The provision basically provides that a reference list of the redacted information in a filing can be filed under seal. Ms. Shapiro questioned whether the reference list would cause authenticity problems at later stages of a case. Professor Capra pointed out that the Subcommittee has to follow the statutory language, which does not address Ms. Shapiro's concerns as of now. Judge Levi inquired about the language providing for amendment of the reference list "as of right" and questioned whether the opposing party could challenge that amendment. Judge Sheindlin thought the language was intended to cover the filing of additional information as a matter of course, and not as a way to add additional claims. Judge Fitzwater suggested that the Civil Rules Committee consider clarifying that point in the Committee Note to its rule. After discussion, the following language was proposed, subject to any additional changes in the legislation:

> "(c) Reference List. A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information."

The Subcommittee approved this language unanimously and requested that Professor Capra make any changes necessary once the final legislation passes. Any revision will be circulated to the Subcommittee for a vote via e-mail or conference call.

Exemption Options. Professor Capra explained that there might be certain categories or types of documents that should be exempted from the redaction requirements of the rule. For example, some have argued that arrest warrants should not be redacted since they may be created before the case file even exists and redacting them later could prove burdensome. The Subcommittee discussed the proposed options.

The first proposal included four related documents that arise in a criminal context (criminal documents prepared before filing a criminal charge, arrest warrants, charging documents, and criminal case cover sheets). The Subcommittee discussed this category of documents at length and decided to eliminate them from the template rule. However, the Subcommittee advised the Criminal Rules Committee that it should consider including these documents in the list of exemptions for its specific E-Government Rule. The Subcommittee also agreed to ask CACM for its opinion on this category of documents. Finally, Professor Cooper requested that the Criminal Rules Committee also consider whether the Civil Rules Committee should worry about this category of documents in the civil context. The Subcommittee unanimously agreed to refer these issues to the Criminal Rules Committee for its consideration.

Next, the Subcommittee considered whether to exempt financial account numbers from redaction when those numbers are the subject of a civil or criminal forfeiture. The Subcommittee agreed that this category should be exempted from redaction and the following language was proposed and unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (1) in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture."

The next proposal would exempt administrative records. CACM asked that this exemption not be expanded beyond social security cases, which it had specifically recommended for exemption. CACM did not wish the exemption to apply to other administrative records because they were concerned such an exemption would invite abuse. However, the Subcommittee expressed concern regarding the size of these types of records and the cost associated with redacting information for filing. The Subcommittee further discussed how to define administrative records in a way that would capture all areas of concern (for example, ERISA cases will often include a record from an administrative agency, but no direct appeal of an administrative agency decision). Judge Fitzwater proposed that the Subcommittee start with a narrow definition and let CACM and the DOJ comment as appropriate. He proposed the following language, which was unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (2) records of an administrative agency proceeding."

Next, Professor Capra discussed exempting state court records in an action removed to federal court. Judge Hinkle asked what would happen if a minor's name was included in state court documents filed in a removed abuse case. Judge Fitzwater explained that a party could still move to seal those records in that situation. The Subcommittee discussed this option. Judge Fitzwater proposed the following language, which was approved by all members of the Subcommittee with the exception of Judge Hinkle:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (3) official records of a state court proceeding in an action removed to federal court."

Professor Capra then asked the Subcommittee whether certified copies of documents should also be exempt. Judge Rosenthal suggested that this could be problematic since, for example, one may file a certified copy of his or her social security card. Judge Swain stated that she thought this category was too broad. Ms. Shapiro expressed concern that if a certified document, which by its nature has a certain legal status, is redacted, the legal status of that document once filed would be questioned. Judge Hinkle explained that the document could still be filed under seal without redaction. A proposal was made to delete any exemption for certified copies of documents filed with the court. This proposal was unanimously approved.

Next, Professor Capra discussed exemption of pre-existing court records from the redaction requirement. He explained that CACM's position was that this exception should only apply to bankruptcy. Judge Swain asked what the term pre-existing was meant to encompass -- documents filed before the E-Government Rule is effective or any document where the party did not comply with the E-Government Rule. Judge Fitzwater asked why this category had been proposed. Ms. Shapiro provided an example of records on appeal that the parties would not want to go back and redact (such as INS cases). The Subcommittee discussed whether this would be a category triggered by the timing or by the type of case and case history. The Subcommittee further discussed whether the other categories listed already covered the examples being discussed. After extensive discussion, Judge Fitzwater suggested that this category be included conceptually so that the Advisory Committees can flush it out with the assistance of CACM and the DOJ. The Subcommittee agreed and the following proposal was unanimously approved:

> "(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the following: (4) the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed [created]."

Social Security Appeals; Access to Electronic Files. This section limits remote electronic access to social security cases to the parties only. Professor Capra inquired as to whether the limitation for access to social security cases should be expanded to other categories of cases (such as medical malpractice cases). The limitation of access to social security files had been developed by CACM and approved by the Judicial Conference.

Ms. Shapiro explained that immigration or black lung cases present many of the same privacy concerns as social security cases. However, the point was made that any number of specific cases are analogous to social security cases such that the exception itself could become much too broad. Mr. Deyling explained that his understanding of CACM's position what that it understood that other categories similar to social security cases exist, but that it drew the line at social security cases because of the volume of the cases and amount of personal information contained in those cases. The Subcommittee members questioned what sensitive documents typically filed in social security cases would also be found in other types of cases. In other words, the members of the Subcommittee wondered what primarily motivated the inclusion of social security cases in this section. Judge Fitzwater asked whether the DOJ could conduct a study to determine empirically what other categories of cases might be included with social security cases. The DOJ agreed to submit its views and results of its research by mid-September. In the meantime, Judge Fitzwater suggested that only social security cases be included in this section. The Subcommittee unanimously agreed to this approach.

Professor Capra explained that this section also provided that remote electronic access to social security cases would be limited to the parties, but that at the actual courthouse, any member of the public could access the physical or electronic file. The motivation for this proposal is that the E-Government Act should not limit access at the courthouse. Judge Scheindlin expressed concern that electronic access, even if at the courthouse, would give database companies even more access and that items may still get posted on the internet because of this access. Professor Morris explained that these companies were actually less likely use electronic access at the courthouse because they could not transfer the electronic files easily. In other words, they would still have to print out the documents (at $0.50/page) and scan them. However, Judge Fitzwater pointed out that PACER and the associated fees may not always be in place, making all of the files much more accessible than they are today. Following discussion, Professor Capra proposed the following language, which was approved by all members of the Subcommittee with the exception of Judge Scheindlin:

> "(2) all other persons may have remote electronic access only to: (A) the docket maintained under Rule [relevant civil or appellate rule]; and (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record."

Professor Schiltz also requested that Professor Capra draft Committee Note language to clarify the distinction between remote electronic access and courthouse electronic access.

Waiver of Identifier Protection. Professor Capra explained that CACM was opposed to allowing parties to forfeit the protection of their identifiers as provided by the proposed rule. Professor Capra inquired whether the Subcommittee believed that such a waiver should still be included. Professor Schiltz stated that if a party does not want to pay its attorneys to redact, that party should not be forced to do so. Further, if a party makes that choice, other parties should not be required to redact those same identifiers. The Subcommittee agreed with Professor Schiltz and discussed how the waiver should be

drafted. Proposals included serving a notice of waiver on other parties to the action or providing for a de facto waiver if identifiers are disclosed in a filing. Ms. Shapiro expressed concern about the latter proposal because pro se parties could mistakenly file personal identifiers without intending to forfeit the protection. Judge Hinkle stated that he understood Ms. Shapiro's concern, but the reality is that once the identifier is filed, it is public so other parties should not be forced to redact the information in their filings. The Subcommittee agreed that this was a policy decision. After additional discussion, Professor Capra suggested the following language, which was unanimously approved:

> "(g) Waiver of Protection of Identifiers. A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction."

Judge Rosenthal requested that the Committee Note clarify that a party may seek relief for improvident disclosure.

Committee Note. Professor Capra explained that the DOJ requested that a sentence warning parties against filing "other sensitive information" be deleted because it was too vague. The Subcommittee unanimously agreed to delete this sentence.

Miscellaneous Issues. The Subcommittee next discussed whether trial exhibits should be explicitly excluded from the proposed rule. Some argue that trial exhibits are not "filed" with the court and, therefore, not subject to the rule. The members of the Subcommittee discussed whether exhibits were considered part of a case file or not. Professor Capra proposed that the rule not reference trial exhibits at all -- if the exhibits are filed with the court, then they should be redacted and if they are not filed, then they are not public and not subject to the rule. The Subcommittee agreed. Judge Levi suggested that the Civil Rules Committee may still want to revisit this issue.

Professor Capra asked whether employer identification numbers ("EIN") should be included as identifiers to be redacted. The Subcommittee discussed whether an EIN raised the same privacy risks as social security or tax identification numbers. Professor Morris explained that the EIN was solely used to file taxes and did not present the same privacy concerns. The Subcommittee agreed and decided not to include EIN's in the list of redacted identifiers.

Next, Professor Capra asked whether a section clarifying the application of judge discretion outside of the new rule should be included. He explained that CACM opposed including any such language. CACM believed that judges maintain the discretion articulated, but to state it in the rule would only invite abuse by parties seeking court order under that section. The Subcommittee discussed the proposed language. A proposal was made to keep the current language in the rule and invite the Advisory Committees to consider the proposal without any Subcommittee recommendation on whether the language should be included. The Subcommittee unanimously agreed and the following language was retained in the rule for Advisory Committee consideration:

"(f) Court Orders. In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected under subdivision (a)."

**Conclusion of Meeting**

Judge Fitzwater thanked the members of the Subcommittee for their input and thought on these matters. He gave special thanks to the members of CACM, attorneys in attendance from the DOJ, and other attendees for their input. He reviewed the plan of action for the Subcommittee and adjourned the meeting at 6:15 p.m.

Respectfully submitted,

Brooke D. Coleman, Esq.

# E-GOVERNMENT ACT OF 2002

# PUBLIC LAW 107-347

# SECTION 205

# Public Law 107–347
# 107th Congress

## An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Dec. 17, 2002
[H.R. 2458]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

E-Government Act of 2002.

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

44 USC 101 note.

(a) SHORT TITLE.—This Act may be cited as the "E-Government Act of 2002".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the General Services Administration, to ensure the development and operation of a Federal bridge certification authority for digital signature compatibility, and for other activities consistent with this section, $8,000,000 or such sums as are necessary in fiscal year 2003, and such sums as are necessary for each fiscal year thereafter.

**SEC. 204. FEDERAL INTERNET PORTAL.**

44 USC 3501 note.

(a) IN GENERAL.—

(1) PUBLIC ACCESS.—The Director shall work with the Administrator of the General Services Administration and other agencies to maintain and promote an integrated Internet-based system of providing the public with access to Government information and services.

(2) CRITERIA.—To the extent practicable, the integrated system shall be designed and operated according to the following criteria:

(A) The provision of Internet-based Government information and services directed to key groups, including citizens, business, and other governments, and integrated according to function or topic rather than separated according to the boundaries of agency jurisdiction.

(B) An ongoing effort to ensure that Internet-based Government services relevant to a given citizen activity are available from a single point.

(C) Access to Federal Government information and services consolidated, as appropriate, with Internet-based information and services provided by State, local, and tribal governments.

(D) Access to Federal Government information held by 1 or more agencies shall be made available in a manner that protects privacy, consistent with law.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the General Services Administration $15,000,000 for the maintenance, improvement, and promotion of the integrated Internet-based system for fiscal year 2003, and such sums as are necessary for fiscal years 2004 through 2007.

**SEC. 205. FEDERAL COURTS.**

44 USC 3501 note

(a) INDIVIDUAL COURT WEBSITES.—The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information·

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE.—

(1) UPDATE OF INFORMATION.—The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES.—Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS.—

Public information.

(1) IN GENERAL.—Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(2) EXCEPTIONS.—Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

Regulations.

(3) PRIVACY AND SECURITY CONCERNS.—(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file.

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns

arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security. Deadlines. Reports.

(d) DOCKETS WITH LINKS TO DOCUMENTS.—The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION.—Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking "shall hereafter" and inserting "may, only to the extent necessary,".

(f) TIME REQUIREMENTS.—Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date. Deadlines

(g) DEFERRAL.—

(1) IN GENERAL.—

(A) ELECTION.—

(i) NOTIFICATION.—The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS.—A notification submitted under this subparagraph shall state—

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION.—To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1)

(2) REPORT.—Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that— Deadline.

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.

**SEC. 206. REGULATORY AGENCIES.** 44 USC 3501 note.

(a) PURPOSES.—The purposes of this section are to—

(1) improve performance in the development and issuance of agency regulations by using information technology to increase access, accountability, and transparency; and

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PL 108-281, August 2, 2004, 118 Stat 889

UNITED STATES PUBLIC LAWS
108th Congress - Second Session
Convening January 7, 2004
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PL 108-281 (HR 1303)
August 2, 2004
RULEMAKING AUTHORITY OF JUDICIAL CONFERENCE

An Act To amend the **E-Government** Act of 2002 with respect to rulemaking authority of the Judicial Conference.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<< 44 USCA § 3501 NOTE >>

SECTION 1. RULEMAKING AUTHORITY OF JUDICIAL CONFERENCE.

Section 205(c) of the **E-Government** Act of 2002 (Public Law 107-347; 44 U.S.C. 3501 note) is amended by striking paragraph (3) and inserting the following:
"(3) PRIVACY AND SECURITY CONCERNS.--
"(A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form.
"(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.
"(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.
"(iv) Except as provided in clause (v), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.
"(v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in clause (iv) in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response--
"(I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that--
***890** "(aa) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case; and
"(bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and
"(II) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

"(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).
"(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing or electronic conversion shall comply with, and be construed in conformity with, subparagraph (A)(iv).
"(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.".

Approved August 2, 2004.

PL 108-281, 2004 HR 1303
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**MEMORANDUM**

**DATE:** October 14, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 04-01

At the Committee's last meeting, a member asked to add to the Committee's study agenda the proposal that all of the page limitations in the Federal Rules of Appellate Procedure ("FRAP") be replaced with word limitations.

All of the limitations on the length of papers in FRAP are expressed in pages, with one "full" exception and one "partial" exception. The page limitations include:

> **Rule 5(c).** A petition for permission to appeal and an answer in opposition to a petition for permission to appeal are limited to 20 pages.
>
> **Rule 21(d).** A petition for a writ of mandamus or other extraordinary relief and an answer to such a petition are limited to 30 pages.
>
> **Rule 27(d)(2).** A motion and a response to a motion are limited to 20 pages. A reply to a response to a motion is limited to 10 pages
>
> **Rule 35(b)(2).** A petition for a hearing or rehearing en banc is limited to 15 pages.
>
> **Rule 40(b).** A petition for panel rehearing is limited to 15 pages.

In two instances, FRAP uses word limitations. The first is as a backup limitation on briefs. The limitations on briefs are initially stated in pages — 30 pages for principal briefs and 15 pages for reply briefs (see Rule 32(a)(7)(A)) — but then the rules provide an alternative "type-volume limitation."

Under that type-volume limitation, a principal brief that exceeds 30 pages is nevertheless acceptable if it contains no more than 14,000 words (or 1,300 lines of monospaced typeface). The type-volume limitation for reply briefs is half of that provided for principal briefs.[1]

The other instance in which FRAP uses word limitations is in Rule 28(j). The body of a Rule 28(j) letter is limited to 350 words — a limitation that was added by the 2002 amendment to Rule 28(j). The Advisory Committee Note to the 2002 amendment defined the "body" of a Rule 28(j) letter as "the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close" and made clear that "[a]ll words found in footnotes will count toward the 350-word limit."

This is the third time in the seven years that I have served as Reporter that the notion of replacing all page limitations with word limitations has been formally added to the Committee's study agenda. The notion has been informally discussed on at least a couple of additional occasions. Every time the idea has been floated, the Committee has unanimously decided not to proceed with it.[2] The reasons that Committee members have given for not proceeding with word limitations can be summarized as follows:

1. The decision to amend FRAP should not be taken lightly. Amending FRAP not only requires the time and effort of those involved in the Rules Enabling Act process, but it requires

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[1]New Rule 28.1 on briefing in cross-appeals will mirror the limitations on briefing in cases that do not involve cross-appeals.

[2]The Committee most recently added this proposal to its study agenda in April 2001 and voted to remove it from the study agenda at its next meeting in April 2002. (The Committee did not meet in the fall of 2001.)

thousands of judges, clerks, and practitioners to learn new rules. The Committee should not amend FRAP unless there is a compelling reason to do so.

2. There is no compelling reason to replace page limitations with word limitations. The clerks have not complained about the page limitations; to the contrary, the clerks have consistently told us that the page limitations work fine and should not be disturbed. Attorneys have also not complained about the page limitations. The closest we have had to a "complaint" is an inquiry or two about whether, say, a 20-page limitation is violated when a signature block strays onto the 21st page. The clerks have always assured us that page limitations are not enforced in a draconian manner and that straying signature blocks are routinely overlooked. In short, there is simply no problem here that needs to be solved.

3. The clerks strongly prefer page limitations because they are easy to enforce. A clerk can tell at a glance whether a paper exceeds 20 pages. By contrast, word limitations are difficult to enforce. A clerk cannot tell at a glance whether a paper exceeds 7,500 words; such a limitation can be enforced only by counting words,[3] and no clerk has time to count words. In the Fifth Circuit, for example, about half of all petitions and motions are handwritten and filed by pro se litigants (usually prisoners). Word limitations cannot effectively be enforced against such papers; page limitations provide at least some restraint.

4. Clerks are able to enforce the type-volume limitation on briefs only because parties are required to file a certificate of compliance. See Rule 32(a)(7)(C)(i). For word limitations to work,

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[3]An exception is the 350-word limitation on Rule 28(j) letters. That limitation translates into roughly a one and one-half page letter and therefore is easily monitored by clerks.

then, FRAP would have to be amended not just to replace every page limitation with a word limitation, but to require that a certificate of compliance be filed with every document subject to a word limitation, such as every petition for rehearing. That would add hundreds of thousands of pages to the files of attorneys and courts, and it would add substantially to the workload of clerks, who would often have to contact attorneys and ask them to supply missing certificates.

5. If the Committee replaced page limitations with word limitations, and the Committee required that compliance with the new word limitations be certified, then the Committee would also have to decide whether to amend the appendix of forms to include certificates of compliance similar to Form 6. If the Committee did so, the Committee would further have to decide whether to amend various rules to provide that the use of the new forms "must be regarded as sufficient to meet the requirements" of the various word limitations, as Rule 32(a)(7)(C)(ii) provides with respect to the type-volume limitation.

6. Word limitations and other restrictions (such as restrictions regarding typeface and type styles) were imposed on briefs because abuses were a real problem. The clerks have consistently told us that abuses are not a problem with regard to motions, rehearing petitions, and other documents. And, as noted above, clerks have also consistently told us that the abuses that do exist are better controlled through page limitations than through word limitations.

For all of these reasons, the Committee has several times in the past seven years declined to proceed with suggestions that the page limitations in FRAP be replaced with word limitations. The Committee has simply concluded that there isn't a problem here that needs solving — much less a

problem that needs solving through an extensive set of amendments that is strongly opposed by the very people who would be charged with enforcing the word limitations that would be imposed.

04-AP-B

RECEIVED 4/13/04

DENNIS R. COOKISH
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SECRETARY
COMMITTEE OF RULES OF
PRACTICE & PROCEDURE
ADMINISTRATIVE OFFICE OF
THE U.S. COURTS
WASHINGTON, D.C 20544

APRIL 4, 2004

DEAR MR. SECRETARY:

PURSUANT TO PART I, PARAGRAPH 2 OF THE "PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE JUDICIAL CONFERENCE COMMITTEES ON RULES OF PRACTICE AND PROCEDURE", I'D LIKE TO MAKE A SUBGESTION/RECOMMENDATION REGARDING THE FEDERAL RULES OF APPELLATE PROCEDURE.

RULE 12 (b), F.R. App. P., REQUIRES "THE ATTORNEY WHO FILED THE NOTICE OF APPEAL MUST, WITHIN 10 DAYS AFTER FILING THE NOTICE, FILE A STATEMENT WITH THE CIRCUIT CLERK NAMING THE PARTIES THAT THE ATTORNEY REPRESENTS ON APPEAL."

THE RULE SHOULD BE CLARIFIED.

I FILED A NOTICE OF APPEAL TODAY - APRIL 4, 2004 - WITH THE U.S. DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE. UNDER THE RULE, I HAVE UNTIL APRIL 14, 2004 TO FILE THE REPRESENTATION STATEMENT. I WILL NOW SEND THE FIRST CIRCUIT THEIR "DOCKETING STATEMENT" FORM WHICH THEY REQUIRE TO COMPLY WITH RULE 12(b).

OBVIOUSLY, THE FIRST CIRCUIT CLERK WILL NOT HAVE A CASE PENDING AS THE DISTRICT COURT WILL NOT HAVE FORWARDED ANYTHING AT THAT TIME, SO THEY WON'T BE ABLE TO FILE IT.

THE RULE SHOULD BE CLARIFIED SOMEHOW IN CONJUNCTION WITH RULE 3(d), F.R. App. P. WHICH REQUIRES THE DISTRICT COURT CLERK TO "PROMPTLY SEND A COPY OF THE NOTICE OF APPEAL ... TO THE CLERK OF THE COURT OF APPEALS ...". AN INDIVIDUAL SHOULD EITHER BE NOTIFIED UNDER RULE 3(d) THAT THE NOA HAS BEEN SENT TO THE COURT OF APPEALS AND THEN HAVE 10 DAYS FROM THAT SERVICE TO SEND THE 12(b) STATEMENT. OR, UPON RECEIPT OF THE NOA, THE CIRCUIT CLERK SHOULD DOCKET THE APPEAL AND SO NOTIFY THE INDIVIDUAL PARTIES OF SUCH; 10 DAYS AFTER SERVICE OF THE NOTICE OF DOCKETING THE 12(b) STATEMENT SHOULD BE DUE.

AS IT STANDS NOW, I'M FILING A STATEMENT WITH THE CIRCUIT CLERK, FOR A CASE THAT DOES NOT EXIST IN THAT COURT WHEN RECEIVED.

THE COMMITTEE SHOULD CONSIDER A CLARIFICATION OF THE RULE.

SINCERELY,

DENNIS R. COOKISH

**MEMORANDUM**

**DATE:** October 15, 2004

**TO:** Advisory Committee on Appellate Rules

**FROM:** Patrick J. Schiltz, Reporter

**RE:** Item No. 04-03

Some of you may recall that the Appellate Rules Committee, later joined by the Civil Rules Committee, spent almost five years working on the 2002 amendments to Appellate Rule 4(a)(7) and Civil Rules 54(d)(2)(C) and 58. Those amendments addressed incredibly complicated questions — questions that spawned at least four circuit splits — about how Appellate Rule 4(a)(7)'s definition of when a judgment or order is "entered" was intended to interact with the requirement in Civil Rule 58 that, to be "effective," a "judgment" (defined by an obscure provision of Rule 54(a) to include all appealable orders) must be set forth on a separate document. For those of you who regret that you were unable to participate in that effort, welcome to *Wikol ex rel Wikol v Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). The opinion is attached, but the following summary (which I wrote for the 2005 Supplement to Volume 16A of *Federal Practice and Procedure*) may suffice:

> The parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure

4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit, in a careful opinion by Judge Ronald Gilman, held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective "

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered

> on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).
>
> Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committee consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A). The suggestion is worth considering. It does seem silly that the Wikols would have preserved their appeal if they had filed their notice of appeal on July 12, but forfeited their appeal by filing on June 14. There is something odd about a June appeal being too late but a July appeal being timely.[1]

Taking off my treatise author's hat, and putting on my Reporter's hat, I want to agree with me: I believe that this Committee and the Civil Rules Committee should consider addressing the problem that Judge Gilman brought to our attention. That said, I am not certain what a solution to the problem should look like.

Back in June, Prof. Edward Cooper (the Reporter to the Civil Rules Committee) and I engaged in an extensive e-mail conversation about the *Wikol* problem. (Several others, including Judge Alito, were included in that conversation.) Prof. Cooper and I tentatively identified several possible approaches to *Wikol*. For those who have interest, I have attached copies of our correspondence.[2] In addition, the *Wikol* problem was brought to the attention of the Committee by Prof. Philip A. Pucillo in a letter that I did not receive until after discussing the problem with Prof. Cooper. Prof. Pucillo's letter

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[1]16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE (3d ed. Supp. forthcoming 2005) (footnotes omitted).

[2]Prof. Cooper has graciously given me permission to share his messages. This is our raw e-mail correspondence, so please excuse the informal tone, brief excursions down blind alleys, typos, and other errors.

is also attached. As you will see, Prof. Pucillo has a somewhat different "take" on the problem than either Prof. Cooper or I.

Because I do not know whether this Committee will decide that the *Wilcol* problem is worthy of further attention, I do not want to discuss all of the potential solutions and their complications at this point. Perhaps it will suffice to say the following:

In *Budinich v Becton Dickinson & Co* , 486 U.S. 196 (1988), the Supreme Court held that a judgment is final and appealable even if a motion for attorney's fees is pending. After *Budinich*, then, the advisory committees basically had three choices (I'm oversimplifying somewhat):

First, the advisory committees could have decided that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The advisory committees could have accomplished this by amending the rules so that timely Rule 54 motions for attorney's fees were *always* treated like timely Rule 59 motions for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the advisory committees could have decided that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The advisory committees could have accomplished this by amending the rules so that timely Rule 54 motions were *never* treated like timely Rule 59 motions. Under this approach, a Rule 54 motion would not toll the time to appeal and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Third, the advisory committees could have decided to take a "hybrid" approach. Under this approach, a default rule would be established — a timely Rule 54 motion either would or would not be treated like a timely Rule 59 motion — but the court could, either on motion of a party or on its own motion, decide that a particular Rule 54 motion would be treated differently than the default rule provided.

The hybrid approach is, of course, the approach that the advisory committees took. Under Rule 4(a)(4)(A), a motion for attorney's fees under Rule 54 is not treated like a Rule 59 motion unless the court orders otherwise. Civil Rule 58(c)(2) gives district courts that authority; it provides that a district court may "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59."

The advantage of the hybrid approach is that it allows the district court to determine how an appeal should be packaged. The advisory committees concluded that sometimes it would be wise to allow an appeal of the underlying merits to go forward before the fee question was resolved, and other times it would be wise to defer the appeal of the underlying merits until the fee question was first resolved. The hybrid approach allows district judges to decide which cases are which.

The disadvantage of the hybrid approach is that it is complicated. It is not just inherently more complicated in the sense that, rather than setting forth a uniform rule, it instead sets forth a presumption that a court can reverse in particular cases. It is also complicated because it does not contain a deadline by which a party must ask for the presumption to be reversed, nor does it contain a deadline by which a court must make a decision on the party's request. The result is *Wikol* — and the potential

*Wikol*-related problems that Prof. Cooper and I discussed in our correspondence. (See especially "Message 5 ")

There are several possible solutions to the *Wikol* problem. Prof. Pucillo, for example, argues that the rules should be amended to reverse the default rule — i.e., that Rule 54 motions should presumptively be treated like Rule 59 motions unless the district court orders otherwise. Another possible solution would be to maintain the current approach, but to impose a deadline by which the district court must decide whether a Rule 54 motion will be treated like a Rule 59 motion. Perhaps the easiest, clearest, and most effective solution, though, would be to reject the hybrid approach and instead choose one of the absolute approaches. The rules could be amended so that Rule 54 motions are *always* treated like Rule 59 motions, or the rules could be amended so that Rule 54 motions are *never* treated like Rule 59 motions

Before the advisory committees can decide on the wisdom of these approaches, they will have to assess the value of the ability to package appeals — discretion that only the hybrid approach provides. If most parties now ask that their Rule 54 motions be treated like Rule 59 motions, and if courts routinely grant those requests, then it may be wise to amend the rules so that *all* Rule 54 motions are treated like Rule 59 motions. Conversely, if few parties ask that their Rule 54 motions be treated like Rule 59 motions, and if the few requests that are made are rarely granted, then it may be wise to amend the rules so that *no* Rule 54 motion is treated like a Rule 59 motion. But if parties and judges are making careful and judicious use of Rule 58(c)(2) — sometimes packaging the merits with the fee question, and sometimes not — then the cost of adopting one of the absolute approaches may be too high. If this Committee decides that the *Wikol* problem deserves further study, the Committee may

want to seek the assistance of the Administrative Office or the Federal Judicial Center with gathering empirical evidence on these questions.

## Addendum: Cooper-Schiltz Correspondence Regarding *Wikol* Issues

**Message 1 (from Schiltz)**

The recent opinion of the Sixth Circuit in *Wikol ex rel Wikol v. Birmingham Pub. Sch. Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004), complains about the complexity of the interaction of the Civil Rules and Appellate Rules on the question of when a motion for attorney's fees under Civil Rule 54 tolls the time to appeal under Appellate Rule 4(a)(4)(A). The Sixth Circuit explicitly invites the attention of the Advisory Committee on Appellate Rules to the issue.

The facts are complicated, and I won't try to summarize them here. The Sixth Circuit's opinion is clear and concise. Essentially, the Sixth Circuit appears to be proposing that a timely motion for attorney's fees under Civil Rule 54 should *automatically* toll the time to appeal (as does, for example, a timely motion for a new trial under Civil Rule 59), rather than toll the time to appeal only if the court so decides under Civil Rule 58. Specifically, the Sixth Circuit wrote:

"As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) automatically extend the time to file an appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure."

Because the problem cited by the Sixth Circuit implicates both the Civil Rules and Appellate Rules, I am copying this message to Judge Rosenthal and Prof. Cooper. Prof. Cooper has forgotten more about Civil Rule 54 than I will ever know, so I will be particularly interested in getting his reaction to the Sixth Circuit's suggestion. . . .

**Message 2 (from Cooper)**

Professor Schiltz is right at least as to this — I regularly suppress anything I learn about Rules 54 or 58 Out, out faint glimmer!

John can verify this much from the minutes, if I have it right. Rules 54(d)(2) and 58 were amended together, effective December 1, 1993. The impetus no doubt was the ruling in Budinich v. Becton Dickinson & Co., 1988, 486 U.S. 196, establishing a bright line rule that a decision on the merits is a final judgment whether or not a claim for attorney fees remains to be decided. The rule has all the

advantages of a bright line and some of the disadvantages. In some circumstances it is more convenient for all concerned to have a single appeal that presents both the merits and the fee award.

My recollection is that the system we now have was primarily the invention of Sam Pointer. Rule 54(d)(2)(B) deliberately set the time to move for attorney fees at 14 days after judgment, a period that does not exclude intervening Saturdays, Sundays, and Legal Holidays (no comment) and thus is no longer — and may be shorter — than the 10-day periods for all of the other motions that suspend appeal time under Appellate Rule 4(a)(4)(A). Then the part of Rule 58, now 58(c)(2) that still causes some consternation. The trial court may order that a timely motion for attorney fees has the same effect under Rule (4)(a)(4) as a timely Rule 59 motion if the court acts "before a notice of appeal has been filed and has become effective." That means that the trial court can act before a notice of appeal has been filed, or after a premature notice of appeal has been filed, or after a notice of appeal is filed but then suspended by a timely motion. (Or something like that.) It is, in its own way, a rather neat scheme. The district court is given discretion to determine what makes most sense as an appeal package; compare Rule 54(b).

I assume, without really remembering, that what now is Appellate Rule 4(a)(4)(A)(iii) was added at the same time. It may be that this is one of those ideas that is good, but too good to be administered effectively. That is to say, it may fit within a long chain of Appellate Rule 4 amendments designed to simplify perfectly workable rules to a point where the bar can actually understand and use them. But I offer no advice on whether the hint should be taken up, apart from the observation that if it is taken up the Civil Rules Advisory Committee will once again have the pleasure of addressing something in tandem with the Appellate Rules Committee. No matter who takes the lead, it will be an exhilarating experience. . . .

**Message 3 (from Schiltz)**

I'm of two minds on the issue.

The system is somewhat complicated, but it is not unclear. Every one of the rules parsed by the Sixth Circuit was clear. Ten minutes of careful reading by either the plaintiffs' attorney or the district court would have taken care of the problem. I'm generally not inclined to amend rules that are clear and that are not inherently unfair because they require a few minutes' work to understand. (If I was otherwise inclined, I'd be looking for ways to undo the work that we did on Civil Rule 58 and Appellate Rule 4(a)(7) in 2002 — work that is complicated but clear.)

That said, the plaintiffs' attorney and district court are probably not atypical. (I say that with particular confidence about the attorney. I know that the "special ed" bar takes most IDEA cases for free or at a heavy discount ) Everyone hates to see an appeal forfeited on a technicality, and it does seem silly that the plaintiffs would have preserved their appeal if they'd filed their notice of appeal on July 12, but

forfeited their appeal by filing on June 14. There is something odd about a June appeal being too late but a July appeal being timely.

Might not there be merit in the Sixth Circuit's suggestion that timely Rule 54 motions automatically toll the time to appeal? Not only would fewer appeals be forfeited, but, in general, a single appeal would bring to the court both the decision on the merits and the decision on attorney's fees. In the typical civil case, would that not be preferable — or at least not less preferable?

**Message 4 (from Cooper)**

It is easier to react quickly, hoping to prod Pat into thinking things through, than to try to untangle the Rule 54(d)(2)/Rule 58(c)(2)/Rule 4(a)(4)(A)(iii) muddle on my own.

My first reaction at odd moments last evening was surely — well, come to look at it, no There is nothing in these rules that actually belies the superficially "plain meaning": if there is no other complication, there is no stated limit on the time when the trial court must act under Rule 58 to give the attorney-fee motion the same effect as a timely Rule 59 motion. So in the *Wikol* case, it would be proper to make a timely attorney-fee motion, then do nothing more until the court has ruled on the motion. After that — perhaps months after judgment was entered — the intending appellant can still ask for, and the court can still grant, an extension. Perhaps the 4(a)(4)(A) provision that appeal time starts to run from the order disposing of the motion imposes an implicit limit that the court must act within appeal time as measured from that order. Perhaps not? So one obvious question is whether we need to put a time limit somewhere, with cross-references (further complicating the system).

Then I skimmed through *Wikol* and became even more thoroughly confused. The event that really confounds thinking is this: Order denying attorney-fee motion: May 15. Motion to give motion the effect of a timely Rule 59 motion: May 24. Protective notice of appeal filed: June 14 Order giving the effect of a timely Rule 59 motion: July 11. As in the paragraph above, it seems to be assumed that the May 24 motion was timely; had the plaintiffs not filed the protective notice of appeal on June 14, but instead waited to file a notice on or after July 11, the appeal would have been effective. But, in an astonishing bit of double-talk, the court concludes that it must dismiss the appeal based on the June 14 notice because the notice "became effective" on June 14. Say what?

Although I was involved only tangentially and lackadaisically as a new committee member, I can come close to warranting that no one gave any thought to this possible application, much less interpretation, of the "become effective" term in Rule 58. If anything is done, we have to do something to correct the bizarre result. Penalties should not be imposed for filing a protective notice of appeal. Compare the 4(a)(4)(B) provisions for premature notices.

That sense of the bizarre does not automatically translate into a vote to do anything about it. We have a long history of not reacting to a single decision that either is wrong or is right because of an unanticipated but probably exotic failure in drafting a present rule. Much depends on whether we can come up with a clear and right fix that at least does not add to the complication-trap aspects of these rules.

Because 4(a)(4)(A)(iii) relies on cross-reference to Rule 58, Rule 58 might be a place to begin thinking. One possibility would be to amend (c)(2) to permit an extension of appeal time only if a party moves or the court acts within the appeal period measured from the judgment, and before a notice of appeal has been filed and has become effective. That would mean that a notice of appeal must be filed if there is no timely motion to extend time or action sua sponte I'm not at all sure that is a good idea. But at least it could be drafted, and avoids the risks of loosely guided discretion that arise if the request to extend appeal time can be deferred until the court has ruled on the fee motion.

Already this is longer than I had intended. Pat?

**Message 5 (from Schiltz)**

I, too, thought about this last evening. (It says something about our respective wives that they stay married to men who think about Rule 58 in the evenings.) I'm far from confident that I've got this figured out, but, at this point, I guess I lean toward believing that there is a problem here that needs to be fixed.

My first reaction was the same as Ed's: We have an unusual case here; it's important not to overreact, especially when the cure is likely to result in more complications than the disease. (I am not as critical of Judge Gilman as Ed is, though. I think he just applied the rules as they were written. I don't know what other choice he had.) My second reaction, though, is that although *Wikol* is an unusual case, and although the attorney screwed up, there is a rather serious problem that is at the root of all this, and that is the lack of any time limitations on Rule 58(c)(2). Rule 58(c)(2) puts no time limitation on when a motion must be *made* and no time limitation on when a motion must be *decided.* Think about this in reverse order:

1 First, as to the lack of a limitation on when a motion must be *decided*: Let us say that a judgment is entered against me. Under Rule 54(d)(2)(B), I have to move for attorney's fees within 14 days. Let us say that I do so. And let us say that, along with moving for attorney's fees under Rule 54(d)(2)(B), I move for a Rule 58(c)(2) order.

If I do not hear anything from the court, I will have a difficult decision to make when my judgment becomes 29 days old. At that point, I can either file a notice of appeal or not file a notice of appeal. If I file a notice of appeal, then I forfeit any chance of having my Rule 58(c)(2) motion granted, as my

notice of appeal will have been "filed" and become "effective." But if I do not file a notice of appeal, then I am taking a big gamble. It could be that, months from now, my Rule 58(c)(2) motion will be granted. If it is, I can bring my appeal. But it could be that, months from now, my Rule 58(c)(2) motion will be denied. If it is, I'm out of luck.

This is a rather unsettling situation to put attorneys in. More importantly, note that Rule 58(c)(2), by putting no time limitation on when the court must decide the motion, essentially permits a court to extend to forever the time to bring an appeal. Nothing would keep the judge from sitting on my Rule 58(c)(2) motion for two or three years — and, if the judge eventually granted my motion, I'd be free to bring my appeal. In the meantime, my opponent is in limbo, and there is absolutely nothing that it can do to speed things along.

2. Second, as to the lack of a limitation on when a motion must be *brought*: Suppose that, like the attorney in *Wikol*, I do not move for a Rule 58(c)(2) order when I move for attorney's fees. My opponent and I wait for months — years — for my motion for attorney's fees to be decided.

It seems to me that, as long as I don't file a notice of appeal, I can bring a Rule 58(c)(2) motion any time during this waiting period. I could bring it a month from now — a year from now — two years from now — as long as the motion for attorney's fees is still pending. And, if my Rule 58(c)(2) motion is eventually granted, I can appeal the underlying judgment months or years after it was entered. (Indeed, I could file my Rule 58(c)(2) motion even *after* the motion for attorney's fees is decided, although, after 30 days pass, it will be too late for Rule 58(c)(2) to do me any good.)

If I've thought this all through correctly, then it seems to me that the lack of any time limitation on when Rule 58(c)(2) motions must be brought or decided has the potential for creating a lot of mischief and uncertainty. That makes me ask again a question that I do not know enough about Civil Procedure to answer: Would it not be better if we simply provided that a timely Rule 54(d)(2) motion will always be treated like a timely Rule 59 motion: It will automatically suspend the time to appeal until the motion is decided?

**Message 6 (from Cooper)**

I agree with Pat on each of the two points he makes: (1) As the rules now stand, even a party who moves at the same time for a fee award and to have a fee motion treated as a Rule 59 motion must file a protective notice of appeal within the original appeal period if Rule 59 treatment has not been granted before the period expires. Otherwise the right to appeal may be lost. (2) There is nothing in the rules that prohibits making a motion to treat the fee motion as a Rule 59 motion while the fee motion remains pending (and, accepting *Wikol*, so long as no notice of appeal has been filed by any party). Apparently the motion can be filed even after disposition of the fee motion. That seems a bit extreme.

One fix might be as suggested — any fee motion made within 54(d)(2) time has the same effect as a timely Rule 59 motion. That would lead us to ask again why we should not set the 54(d)(2) period at 10 days. More importantly, it would reverse or confuse the Budinich clear line: judgment on the merits is not final and nothing can be appealed, or else judgment on the merits still is final and can be appealed or not at the option of the parties, or else judgment on the merits is final but any notice of appeal filed before disposition of the fee motion takes effect only on disposition of the motion. If I have not got confused again, we would have to make a choice. Present Rule 58(c)(2) created a discretionary system in the belief that often it is desirable to have an appeal on the merits before fee questions are resolved. Was that a wrong idea?

Separately, Pat has pointed out that not all questions would be answered by the alternative of requiring that the Rule 58(c)(2) question be raised during the initial appeal period. What happens if the judge acts on the fee motion but delays acting on the appeal period until the appeal period runs out as measured from the order deciding the fee motion? We could draft an answer, but we would have to figure out what we want.

Our spouses stay with us because we're obviously having fun with Rule 58. Glee is contagious. So keep the messages coming.

**Message 7 (from Schiltz)**

I think we now understand the problem. As an aside, and following up on one of Judge Rosenthal's comments: When two reporters to federal rules committees — one of whom is a legendary procederalist — have to work this hard to figure out what the rules mean and what problems they pose, it suggests that the rules are too complex for the typical lawyer and even the typical judge.

At this point, I suggest that, if Judge Alito and Judge Rosenthal agree, we ask our committees to react to the following suggestion: (1) Civil Rule 54(d)(2) be amended so that motions for attorney's fees must be brought within 10 days. (This first suggestion is easily "severable" from the next two.) (2) Civil Rule 58(c)(2) be amended — actually, deleted — so that district courts will no longer have discretion to certify which Rule 54(d)(2) motions toll the time to appeal and which do not. And (3) Appellate Rule 4(a)(4)(A) be amended so that all timely motions for attorney's fees under Rule 54(d)(2) toll the time to appeal, just as all timely Rule 59 motions do.

I think it would be worthwhile to get input from the two committees on this possibility. It might also be worthwhile to ask someone in the A.O. to do a little digging into the "legislative history" so that we can know exactly why such a scheme was rejected by the rulemakers in 1993 in favor of the current discretionary approach.

Ed, I do not think that this approach would undermine *Budinich*. We are not talking about the finality or appealability of judgments here; we are talking about tolling the deadline for filing a notice of appeal seeking review of final and appealable judgments. When a Rule 59 motion is timely filed — or a Rule 60(b) motion is filed within 10 days — they do not render the underlying judgment non-final. That judgment is still final and appealable; parties can still file notices of appeal, and those notices are "good." Rule 59 or 60 motions merely toll the time to file a notice of appeal from that final judgment. Likewise, under this approach, a Rule 54(d)(2) motion would not render the underlying judgment non-final, and thus would not "overrule" *Budinich*.

I suppose that other "fixes" are possible — such as putting time limits on bringing or deciding Rule 54(d)(2) motions — but, frankly, every other "fix" that I've been able to identify would make an already overly complicated set of rules even more complicated. Maybe Ed can do better.

**Message 8 (from Cooper)**

I'm still confused. I thought the point of Rule 4(a)(4)(B) is that although there is a final judgment, the notice of appeal does not become effective until disposition of the last remaining timely motion described in 4(a)(4)(A). So under the present system, a fee motion made after final judgment is entered does not postpone the effect of a timely appeal notice, nor suspend the time for filing the notice, unless the district court acts under Rule 58(c)(2). The purpose of 58(c)(2), as I had thought, is to carry forward the basic proposition that sometimes it is better to take and resolve the appeal on the merits before deciding the fee questions. If we routinely suspend appeal time until disposition of the fee questions, we are making a real change.

That may be OK if the only purpose of *Budinich* is to establish a bright line; any old bright line will do. It may be OK if *Budinich* chose the wrong bright line — appeal on the merits before resolution of fee issues is so seldom useful that we are better off defeating the opportunity (absent possible entry of a Rule 54(b) judgment on everything but the fee issue — that depends on whether the fee demand is a "claim" separate from the "claim" on the merits). But don't we need to make those decisions in order to justify always treating a Rule 54(d)(2) motion in the same way as a Rule 59 motion?

**Message 9 (from Schiltz)**

It has been a couple of years since I read *Budinich* (and I'm heading out the door), but I recall it as a finality case — a case that held, in essence, that a motion for attorney's fees does not render the underlying judgment non-final. I could be wrong. . . But all I meant to say is that *Budinich*'s holding regarding finality would not be affected by the proposed change. Whether we keep the discretionary system or go to an automatic system, the underlying judgments would still be final and appealable whether or not motions for attorney's fees were filed.

**Message 10 (from Cooper)**

You are right that *Budinich* is only a finality ruling. But the finality ruling explicitly entails the proposition that unless the Civil and Appellate Rules get in the way, the appeal on the merits must be taken within appeal time measured by the rules that apply to a final judgment that resolves the entire dispute. A Rule 59 motion addressed to the merits defers appeal time, and so on. A separate appeal must be taken after disposition of the fee motion. My concern is that the present structure rests on the view that sometimes it is good to have an appeal on the merits before the fee question is resolved, while at other times it is good to defer the appeal on the merits until the fee question is resolved. There are lots of ways that can be accomplished. But my understanding is that if we simply make a timely fee motion equal to a timely Rule 59 motion, the appeal on the merits will always be deferred until the fee motion is decided. Unless, perhaps, Rule 54(b) can be pressed into duty to recreate the discretionary authority to sever the appeals.

So still: do I miss something?

**Message 11 (from Schiltz)**

I don't think you've missed anything. My assessment is the same as yours.

If we made the change that I propose — propose in the sense of, "we should think about this," not in the sense of, "we should do this" — then it is likely that, in almost all cases, the appeal of the underlying judgment would wait until the motion for attorney's fees was decided, and then a single appeal would bring both decisions up to the court of appeals. And you are right that someone at sometime decided that there is a benefit to going forward with the appeal of the underlying judgment without awaiting disposition of the attorney's fees motion. The question with which I'm struggling — because I don't know enough to answer it — is exactly what this benefit is and in how many cases is it realized.

Suppose, for example, that we learned that Rule 54 motions for fees are almost always accompanied by Rule 58(c)(2) motions, and those Rule 58(c)(2) motions are almost always granted. That would argue in favor of moving forward with the proposal. Suppose, on the other hand, that we learned that the appeals of the underlying judgments almost always go ahead first, and decisions on attorney's fees are usually not made until months later, and either the courts or the parties reap substantial benefits by being able to move the appeal several months along before the attorney's fees motion is decided. That would argue against moving forward with the proposal. The point is that it is impossible to know whether the proposal is advisable without first getting a sense of the day-to-day realities of practice under Rules 54 and 58. One way to get a sense of these day-to-day realities is to talk to the members of our committees who are in court every day. There may be others; perhaps the FJC could help with this. . .

**Message 12 (from Cooper)**

So we are in exactly the same place after all. Sorry to have been obtuse about understanding your position.

The empirical questions you suggest are the ones easiest to answer, at least in the sense that someone like the FJC could find the answers. The more uncertain questions may not deserve our concern. Suppose, for example, we found that district courts almost invariably act under Rule 58(c)(2), so all issues await a single appeal: how do we figure out whether that is a good thing? By looking at the affirmance rate as compared to remands that require further fee determinations and potential second appeals? Or suppose we found out that district judges almost never act under Rule 58(c)(2): does that tell us that the experienced judgment of district courts is that dual appeals are better (whatever appeals courts may thing about it), or only that lawyers and courts have not yet learned about all this? And so on.

There well may be a point at which we need not worry over-much about all of that. Getting a rule that is clear and easily remembered by courts and lawyers may be more important than abstract dithering. On the other hand, it would be interesting to know whether there are any signs of distress other than this one case. If we do go into all of this, perhaps we may be pardoned if we decide to do nothing about the parallel finality rule with respect to sanctions. At least some courts have adopted the *Budinich* rule for sanctions — pending sanctions proceedings do not suspend the finality of an otherwise final judgment on the merits. We do not now cover this in 58(c)(2) or 4(a)(4)(A). So why go into it?

**Message 13 (from Schiltz)**

These are all good questions. I'm inclined to think that, to use your words, "[g]etting a rule that is clear and easily remembered by courts and lawyers may be more important than abstract dithering," but I'm anxious to hear from lawyers and trial judges, who have a lot more relevant experience.

the marijuana was seen "near" to the residence does not necessarily imply a connection between the two, particularly when Lawson knew that the plants were in fact approximately 900 feet from the Carpenter residence Unlike *Malin*, when the marijuana grew in a fenced-in yard directly adjacent to the house, the marijuana "near" the Carpenters' trailer was far enough away that no officer could draw a firm connection between the two, or between the marijuana and any other residence in the neighborhood for that matter If the marijuana had been growing next to the trailer or in the patch of corn behind the trailer, the officers' belief in the warrant's validity might have been more reasonable Furthermore, the road "connecting" the residence to the marijuana plants was in reality a dirt path leading from the Carpenters' trailer to a separate tractor path that may have served as the connection between the city road and a homestead behind the Carpenters' trailer that had burned down several years before The good-faith exception cannot apply here because Lawson's affidavit was based on two extremely inconclusive connections between the marijuana and the house, and therefore Lawson could not have reasonably believed that probable cause existed.

Because there was no probable cause to justify the search and because I do not believe that a law enforcement officer could form the objectively reasonable belief that the warrant was valid when so little linked the Carpenter residence to the marijuana plants growing "near" the residence, I would reverse the district court and exclude the evidence gathered from the illegal search

BOYCE F. MARTIN, JR., Circuit Judge, dissenting.

I join Judge Moore's very persuasive dissent and add only the following Given the sophisticated technologies that the police now have at their disposal, as well as the wide discretion that they currently enjoy, it is especially important that we are careful not to expand their powers beyond what is authorized by the Constitution. In this case, the Constitution has been set aside in the name of expediency. Regrettably, we have descended further down that slippery slope of post-hoc rationalization, where everything that the police do becomes acceptable when viewed in retrospect.

For the reasons set forth by Judge Moore and for these reasons, I respectfully dissent


**Anika WIKOL, by and through her next friends, Murray and Nanette WIKOL, Plaintiff–Appellant/Cross–Appellee,**

**v.**

**BIRMINGHAM PUBLIC SCHOOLS BOARD OF EDUCATION, Defendant–Appellee/Cross–Appellant.**

**Nos. 02–1798, 02–2047.**

United States Court of Appeals, Sixth Circuit.

Argued Feb. 5, 2004.

Decided and Filed March 10, 2004.

**Background:** Parents of autistic child brought Individuals with Disabilities Act (IDEA) action against school district, seeking reimbursement for child's home-based educational program. The United States District Court for the Eastern District of Michigan, Marianne O. Battani, J., entered judgment on jury verdict awarding parents

portion of costs being sought. Cross appeals were taken.

**Holdings:** The Court of Appeals, Gilman, Circuit Judge, held that.

(1) appeal from underlying judgment was untimely, and

(2) denial of attorney fees was abuse of discretion.

Dismissed in part; vacated and remanded in part.

**1. Federal Courts ⇐668**

Thirty-day time limit for filing notice of appeal in civil case is mandatory and jurisdictional. F.R.A.P.Rule 4(a)(1)(A), 28 U S.C.A.

**2. Federal Courts ⇐669**

When timely post-judgment motion for attorney fees is filed, and district court exercises its discretion to extend time for filing notice of appeal, motion for attorney fees is given same effect as motion to amend or alter judgment, i.e., time to file notice of appeal is reset until attorney fee motion is disposed of. Fed.Rules Civ. Proc.Rules 54, 58, 59, 28 U.S.C.A.; F.R.A.P.Rule 4(a)(4)(A), 28 U.S.C.A

**3. Federal Courts ⇐669**

Notice of appeal, filed after district court's post-judgment ruling on attorney fee motion but before filing of motion to extend time for filing notice of appeal, was effective when filed, and thus deprived district court of authority to rule on extension motion; thus, appeal was timely only as to issues decided within thirty days of filing of notice of appeal. Fed Rules Civ.Proc. Rules 54, 58, 28 U S.C.A.; F.R.A.P.Rule 4(a)(1, 4), 28 U.S.C.A.

**4. Schools ⇐155.5(5)**

District court abuses its discretion with regard to attorney fee award in IDEA suit when it relies upon clearly erroneous factual findings, applies law improperly, or uses an erroneous legal standard. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S C A. § 1415(i)(3)(B).

**5. Schools ⇐155.5(5)**

IDEA's fee-shifting provision is to be interpreted consistent with attorney-fees provision for civil rights actions Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S.C.A. § 1415(i)(3)(B); 42 U.S.C.A. § 1988.

**6. Schools ⇐155.5(5)**

Parent of disabled child, who prevails in IDEA suit, is entitled to award of attorney fees unless there are special circumstances militating against such award. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U S C A. § 1415(i)(3)(B).

**7. Schools ⇐155.5(5)**

Parents' submission of allegedly false or misleading billings to school district did not constitute special circumstance that would justify denial of attorney fees after parents prevailed in their IDEA suit. Individuals with Disabilities Education Act, § 615(i)(3)(B), as amended, 20 U.S C.A. § 1415(i)(3)(B).

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Richard J Landau (argued and briefed), Dykema Gossett, Ann Arbor, MI, for Plaintiff–Appellant in 02–1798, 02–2047.

Richard E Kroopnick (argued and briefed), Pollard, Albertson, Nyovich & Higdon, Bloomfield Hills, MI, for Defendant–Appellee in 02–1798, 02–2047.

Before. DAVID A. NELSON, GILMAN, and ROGERS, Circuit Judges

## OPINION

GILMAN, Circuit Judge.

Anika Wikol is a child with autism who is eligible for special education and related services under the Individuals with Disabilities Act (IDEA), 20 U S C §§ 1400–1487. She resides within the Birmingham Public School District in Birmingham, Michigan. At issue in this case are her parents' attempts to secure reimbursement from Birmingham for Anika's educational program for the 1998–99 and 1999–2000 academic years

The Wikols have appealed what they regard as an inadequate award by the jury They also seek to recover attorney fees, costs, and prejudgment interest, all of which the district court denied In its cross-appeal, Birmingham challenges the timeliness of the Wikols' appeal with respect to all but their claim for attorney fees and costs. For the reasons set forth below, we agree that the Wikols' appeal was untimely except for these latter items. We accordingly dismiss the bulk of the Wikols' claims for lack of appellate jurisdiction. With regard to their claim for attorney fees and costs, we vacate the decision of the district court denying such relief and remand for reconsideration

## I. BACKGROUND

When Anika was approximately two-and-a-half years old, her parents enrolled her in the preprimary impaired program in the Birmingham public schools The Wikols soon became dissatisfied with the program They consequently removed Anika from the public school system and established a full-time home-based alternative program recommended by the Lovaas Institute, a non-profit organization that specializes in educating children with autism. After approximately three years in the Lovaas home-based program, the Wikols decided to partially transition Anika back into the Birmingham public schools.

An "individualized education program team" comprised of the Wikols and members of Anika's school thus convened, pursuant to the IDEA, to develop an individualized education program (IEP) for Anika At the meeting, Birmingham and the Wikols could not agree upon Anika's educational program because, according to the Wikols, Birmingham refused to (1) provide Anika with an IEP that would support her home-based education, and (2) reimburse the Wikols for their past expenses in providing Anika with the Lovaas program.

This impasse led the Wikols to request a due process hearing pursuant to 20 U.S.C. § 1415(f). The due process hearing did not occur, however, because the parties reached a settlement. Under the settlement agreement, dated April 8, 1998, Birmingham agreed to pay the Wikols $115,000 "as reimbursement for necessary educational services actually incurred or reasonably anticipated to be incurred during the 1994–95 through 1997–98 school years." The agreement further provided that Birmingham and the Wikols would meet to determine Anika's IEP for the following school years, and that if a Lovaas or Lovaas-style program were implemented, Birmingham would pay "one-half of the costs of any such program" Despite the settlement for these prior years, disputes continued between the Wikols and Birmingham regarding reimbursement for the Lovaas program in the 1998–99 and 1999–2000 school years.

In December of 1999, the Wikols again requested a due process hearing to resolve the outstanding reimbursement issues A local hearing officer was appointed in early 2000, but Birmingham objected to the hearing officer's jurisdiction and requested that the matter be dismissed Birmingham and the Wikols ultimately stipulated

to the dismissal of the Wikols' request for a due process hearing regarding the two school years in question, opting instead to "seek judicial resolution of the issues."

The Wikols brought suit in May of 2000 against Birmingham in the United States District Court for the Eastern District of Michigan. Eight months later, the Wikols moved for summary judgment, arguing that they were entitled to reimbursement from Birmingham for Anika's home-based Lovaas program The district court granted the Wikols' motion in part with regard to the 1998–99 school year. It concluded that, pursuant to the settlement agreement, Birmingham owed the Wikols fifty percent of the "costs" of the Lovaas program, but that a genuine issue of material fact existed as to what constituted those costs. With regard to the 1999–2000 school year, the district court denied the Wikols' motion for summary judgment in its entirety.

The case then proceeded to trial, at the end of which the jury awarded the Wikols approximately $5,000 for costs incurred in providing Anika's home-based program for the 1998–99 school year. As for the 1999–2000 academic year, the jury determined that Birmingham's school-based educational program had provided Anika with a "free appropriate public education," and therefore declined to award the Wikols any reimbursement for that year

Following the district court's entry of judgment on March 27, 2002, the Wikols timely moved for the recovery of attorney fees and costs pursuant to 20 U S C. § 1415, which the district court denied. The Wikols appeal from the district court's partial denial of their motion for summary judgment, the jury's verdict concerning the 1999–2000 school year, the district court's denial of their motion for attorney fees and costs, and the district court's denial of prejudgment interest Birmingham cross-appeals, challenging the timeliness of the Wikols' appeal as to all issues other than their claim for attorney fees and costs.

## II. ANALYSIS

### A. Timeliness of the Wikols' appeal

We must determine, as a threshold issue, whether we have jurisdiction to hear the bulk of the issues raised in this appeal. On cross-appeal, Birmingham argues that we do not have such jurisdiction because the Wikols filed their notice of appeal late, outside of the time limits imposed by Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

[1] Determining the timeliness of the Wikol's notice of appeal requires an analysis of the interplay between Rule 4 of the Federal Rules of Appellate Procedure and Rules 54, 58, and 59 of the Federal Rules of Civil Procedure. Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure provides the generally applicable limitation that a notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered." A litigant's compliance with this "mandatory and jurisdictional" requirement is of critical importance. 16A Wright et al., Federal Practice and Procedure § 3950.1 (3d ed.1999).

Exceptions to the 30–day rule exist, however. If a party timely files any one of the six post-judgment motions enumerated in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, other than the one for attorney fees, the time to file an appeal automatically runs for all parties from the entry of the order disposing of the last such remaining motion The post-decisional motion relevant to this case is of course the one for attorney fees, which was filed pursuant to Rule 54 of the Federal Rules of Civil Procedure When a liti-

gant files a Rule 54 motion for attorney fees, the time to file a notice of appeal will run from the disposition of that motion "*if* the district court extends the time to appeal under Rule 58." Fed R.App. P 4(a)(4)(A)(iii) (emphasis added). The plain language of Rule 4 thus stipulates that in order for the time to file an appeal to be tolled when a party moves for attorney fees under Rule 54, the district court must affirmatively act pursuant to Rule 58 of the Federal Rules of Civil Procedure. Rule 58, in turn, provides that

> [w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act *before* a notice of appeal has been filed and has *become effective* to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Fed.R.Civ.P. 58(c)(2) (emphasis added).

Rule 58's reference to "a timely motion under Rule 59" is initially puzzling, given that Rule 59 neither mentions the filing of a notice of appeal nor refers back to Rule 58. A number of cross-references are necessary to divine Rule 59's place in the Rule 4, 54, 58, 59 quagmire. The only part of Rule 59 that appears relevant to the timeliness of a notice of appeal is 59(e), which provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment." If we then look back to Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, we see that a Rule 59 motion to alter or amend the judgment is one of the five enumerated motions that automatically resets the time to file a notice of appeal "from the entry of the order disposing of the motion."

[2, 3] We therefore conclude that when a timely motion for attorney fees is filed under Rule 54, and the district court exercises its discretion under Rule 4(a)(4)(A) to extend the time for filing a notice of appeal, the motion for attorney fees is given the same effect as a Rule 59 motion to amend or alter the judgment, which, pursuant to Rule 4(a)(4)(A), automatically resets the time to file a notice of appeal until the newly characterized Rule 59 motion, formerly a Rule 54 motion for attorney fees, is disposed of. *See Mendes Junior Int'l Co. v Banco do Brasil*, 215 F.3d 306, 312 (2d Cir.2000) ("Rule 58 expressly describes some of the temporal limitations on the district court's authority to order that a timely Rule 54 fee motion have the same effect as a timely motion under, for example, Rule 59 (which we will sometimes refer to as a 'Rule 58/54/59 order')."). Rule 58 imposes no time limit on when the district court must rule on the Rule 54 motion, except that it must act *before* "a notice of appeal has been filed and has become effective " This is the nub of the problem, because here the district court acted on the Wikols' Rule 54 motion *after* they had filed their notice of appeal.

On March 22, 2002, the Wikols moved for attorney fees and costs, which the district court denied on May 15, 2002. The Wikols then attempted to take advantage of the tolling provision of Rule 4(a)(4) in a May 24, 2002 motion to extend the time for filing a notice of appeal Their motion provided in pertinent part as follows:

> 4. Plaintiffs hereby request that pursuant to Fed.R.Civ.P 58, the Court order that the parties' motions for costs and attorneys' fees have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.
>
> 5. In the alternative, Plaintiffs request that pursuant to Fed R.Civ.P. 58 and 59(e), the Court amend its May 15, 2002 Order to include a provision stating that the parties' March 22, 2002 motions to assess fees and costs shall be given the

> same effect under Rule 4(a)(4) of the Federal Rules of [Appellate] Procedure as a timely motion under Rule 59.

While this motion was pending in the district court, the Wikols filed their notice of appeal on June 14, 2002. On July 11, 2002, the district court granted the Wikols' motion for an extension of time in which to file a notice of appeal, ruling in pertinent part that

> the court grants the plaintiff's request and pursuant to Fed R Civ.P [ ] 58, the March 22nd motion for costs and attorney fees shall have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Therefore, the time for filing a notice of appeal shall run from the date of the entry of the Court's order on the motion for attorney fees, May 15, 2002

Birmingham argues that the district court's July 11, 2002 grant of an extension of time to file the notice of appeal was ineffective because it was entered *after* the Wikols filed their June 14, 2002 notice, contrary to the language contained in Rule 58 of the Federal Rules of Civil Procedure that limits the district court's power to act to the time "*before* a notice of appeal has been filed and has become effective " (Emphasis added.) It contends that when the Wikols filed their notice of appeal on June 14, 2002, the notice became effective immediately; therefore, "[b]y the express terms of Rule 58, the District Court had no authority, on July 11, 2002, to enter its Order Extending the Time for Filing the Notice of Appeal "

In response, the Wikols argue that although they had *filed* their notice of appeal before the district court entered its Rule 58/54/59 order, "it is indisputable that the notice of appeal as to the underlying judgment had not yet become effective." They reason that because the notice of appeal was filed outside of Rule 4(a)(1)'s prescribed time period, it could only become effective upon some action of the district court triggering one of the exceptions to the 30–day limit The Wikols conclude that their notice of appeal "became effective upon the district court's entry of its July 11, 2002 Memorandum and Order " For the reasons that follow, we respectfully disagree.

The key issue is whether the notice of appeal became effective prior to the time the district court issued its July 11, 2002 order We look to Rule 4(a)(4)(B)(i) of the Federal Rules of Appellate Procedure for guidance as to the meaning of the word "effective." This portion of Rule 4 provides as follows

> 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.

Rule 4(a)(4)(B)(i) does not apply here because the Wikols' notice of appeal was filed *after* the entry of the order disposing of their Rule 54 motion, not before The rule suggests, however, that the concept of "effectiveness" is limited to delaying the transfer of jurisdiction to the appellate court from an otherwise timely filed notice of appeal until the relevant post-judgment motion is decided. Supporting this interpretation are the advisory notes to Rule 4, which explain that

> [a] notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals [A] notice of appeal will ripen

into an effective appeal upon disposition of a posttrial motion

Fed. R.App. P. 4(a)(4) advisory committee's notes

Based upon this understanding of the word "effective," we hold that the Wikols' notice of appeal was effective on the day that it was filed, given that the judgment had been entered and that no motions that automatically toll the time to file a notice of appeal were pending We therefore agree with Birmingham that the district court's July 11, 2002 order did not comply with the time requirements of Rule 58

As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. *See generally,* Kenneth J. Servay, *The 1993 Amendments to Rules 3 and 4 of the Federal Rules of Appellate Procedure—A Bridge Over Troubled Water—Or Just Another Trap?,* 157 F.R.D. 587, 605 (1994) (noting that the amended Rule 4 "concerning the effect of post-judgment motions for attorney's fees" on the timeliness of a notice of appeal creates a "jurisdictional trap"). The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) *automatically* extend the time to file an appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure.

In any event, we have no choice but to dismiss the Wikols' appeal as untimely with respect to all but their claim for attorney fees and costs. "[E]ven where the attorney's fee motion is filed before the notice of appeal, under the wording of [Rule 58], that motion would not extend the appeal time unless the district court also extended the appeal time before the notice of appeal was filed" Servay at 606 This leaves us with the remaining issue regarding the Wikols' request for attorney fees and costs, as to which the appeal was indisputably timely We now turn our attention to this issue.

### B. The district court's denial of attorney fees and costs to the Wikols

Following the district court's entry of judgment, the Wikols filed a motion for the recovery of attorney fees and costs pursuant to 20 U S C. § 1415. The district court denied the Wikols' motion, reasoning that although they were technically the prevailing parties, they did not prevail on the bulk of their case and they were therefore not entitled to attorney fees or costs. On appeal, the Wikols argue that the district court erred because they were undeniably the prevailing party and because there were no "special circumstances" justifying a denial of fees.

The IDEA provides that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. 1415(i)(3)(B). To be considered a "prevailing party" for the purpose of attorney fees, a plaintiff must "succeed on any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit" *Berger v Medina City Sch Dist,* 348 F 3d 513, 526 (6th Cir 2003) (quoting *Hensley v Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)) The district court found that the Wikols were a prevailing party because they had obtained a favorable judgment regarding reimbursement for Anika's schooling during the 1998–99

academic year. Birmingham does not contest the Wikols' prevailing-party status

[4] We review a district court's decision of whether to award attorney fees under the "abuse of discretion" standard. *Phelan v. Bell*, 8 F.3d 369, 373 (6th Cir. 1993) A district court abuses its discretion when it relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard *Id.*

[5, 6] The IDEA's fee-shifting provision is to be interpreted consistent with 42 U.S C. § 1988, the attorney-fees provision for civil rights actions. *Id.* Sixth Circuit case law requires that a district court award attorney fees to a prevailing party where no special circumstances militate against such an award *Berger v City of Mayfield Heights*, 265 F.3d 399, 406 (6th Cir.2001) ("[W]e have previously observed that although the Supreme Court has held [that] it is within the district court's discretion to award attorney's fees under section 1988, in the absence of special circumstances a district court not merely may but must award fees to the prevailing plaintiff") (quotation marks and citation omitted)

The Ninth Circuit has adopted a two-prong test to determine whether special circumstances exist, presumably in an effort to define "special circumstances" more precisely. Under this test, a court must consider "(1) whether awarding fees would further the congressional purpose in enacting [the IDEA], and (2) the balance of the equities." *Barlow–Gresham Union High School v Mitchell*, 940 F.2d 1280, 1285 (9th Cir.1991). Although the use of such a test gives the appearance of a systematic approach to defining "special circumstances," we question whether the Ninth Circuit's factors, due to their vagueness, render the test any more useful than the customary case-by-case analysis.

The Fourth Circuit has rejected the *Mitchell* test, reasoning that it "contains no real standards and provides no legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes" *Doe v. Bd. of Educ of Baltimore County*, 165 F.3d 260, 264 n. 2 (4th Cir. 1998) (holding that an attorney-parent's representation of his own daughter in an IDEA proceeding constituted special circumstances that justified the denial of an award of attorney fees). *But see Borengasser v Arkansas State Bd of Educ*, 996 F.2d 196, 199 (8th Cir.1993) (holding that the district court abused its discretion in not awarding attorney fees to the parents of a disabled child in an IDEA action where the school district had argued a lack of effort to resolve the dispute on the part of the parents' attorney). We agree with the Fourth Circuit's approach that attorney-fees awards should be analyzed on a case-by-case basis, without attempting to apply any predetermined formula.

[7] Birmingham argues that the Wikols' allegedly "false and misleading" billings to Birmingham constitute special circumstances that justify denying their request for attorney fees But this court has rejected the argument that a plaintiff's bad acts are special circumstances warranting the denial of attorney fees. *Price v Pelka*, 690 F.2d 98, 101 (6th Cir 1982) (holding that the plaintiff's perjury was not a special circumstance that warranted a denial of attorney fees in a housing discrimination case). Given this precedent, the record does not support a finding of special circumstances warranting the denial of attorney fees to the Wikols, even if we assume that some billings were false or misleading. We therefore remand the issue of attorney fees and costs to the district court

On remand, the district court should take into consideration the extent to which the Wikols succeeded on their claims. *See Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("[W]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained") The Wikols may well receive reimbursement for only a fraction of their total legal fees under the *Eckerhart* standard but, under this court's precedents, their "limited success" should not have acted as a total bar to recovery.

Birmingham also argues that the Wikols are barred from attorney fees under 20 U.S.C. § 1415(i)(3)(D), which provides that a plaintiff will not be awarded attorney fees where he or she rejects a written settlement offer and the court finds that the relief obtained by the plaintiff is not more favorable than the offer of settlement. The settlement-offer exception to an award of attorney fees might indeed bar the Wikols from recovery, but the district court did not make the requisite finding that the relief obtained by the Wikols was less favorable than whatever offer Birmingham may have made On remand, the district court should therefore consider 20 U.S C. § 1415(i)(3)(D)'s potential applicability to this case.

## III. CONCLUSION

For all of the reasons set forth above, we conclude that the Wikols' notice of appeal was untimely as to the bulk of their claims. We therefore have jurisdiction only over the district court's denial of attorney fees and costs, which decision we vacate and remand with instructions to reconsider.

**Raymond ZIMMERMAN, Individually and on behalf of a Class of Similarly Situated Soybean Farmers, et al., Plaintiffs–Appellants, Cross–Appellees,**

v.

**CHICAGO BOARD OF TRADE, Patrick H. Arbor, Thomas R. Donovan, et al., Defendants–Appellees, Cross–Appellants.**

**Nos. 02–3844, 02–3997.**

United States Court of Appeals, Seventh Circuit.

Argued Sept. 25, 2003.

Decided Feb 9, 2004.

**Background:** Soybean farmers brought class action against board of trade, alleging that board violated Commodity Exchange Act in adopting Emergency Resolution requiring holders of futures contracts in soybeans to reduce their positions At trial, following close of evidence, the United States District Court for the Northern District of Illinois, Wayne R. Andersen, J., granted judgment as matter of law to board. Farmers appealed.

**Holdings:** The Court of Appeals, Cudahy, Circuit Judge, held that.

(1) board did not act in bad faith in adopting Emergency Resolution, and

(2) there was no evidence that board adopted Emergency Resolution to advance directors' own private interests

Affirmed

**1. Federal Courts ⇐698.1**

Motion to strike matter from appellate record on ground that it is not proper-


RECEIVED
6/7/04

04-AP-C

AVE MARIA
SCHOOL OF LAW

May 24, 2004

Peter G. McCabe
Secretary
Standing Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Please refer this proposal for amendment to Rule 4(a)(4)(A)(iii) of the Federal Rules of Appellate Procedure to the Advisory Committee on Appellate Rules.

In *Wikol v. Birmingham Public Schools Bd. of Educ.*, 360 F.3d 604 (6th Cir. 2004), the U.S. Court of Appeals for the Sixth Circuit addressed an interesting issue of federal appellate procedure, expressly inviting consideration by the Advisory Committee on Appellate Rules. *See id.* at 610. I write at this time to elaborate on the issue and to offer proposals.

Ordinarily, a party to a civil action must file a notice of appeal within 30 days of entry of the order or judgment to be challenged on appeal. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1). However, if a party timely files one of the six post-judgment motions listed in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Fed. R. App. P. 4(a)(4)(A). The motions in question are: (1) a Rule 50(b) motion for judgment as a matter of law; (2) a Rule 52(b) motion to amend the judgment or to make additional factual findings; (3) a Rule 54 motion for attorney fees; (4) a Rule 59 motion to alter or amend the judgment; (5) a Rule 59 motion for a new trial; and (6) a Rule 60 motion for relief from the judgment. *See* Fed. R. App. P. 4(a)(4)(A)(i)-(vi).

At issue in *Wikol* was the effect that a timely post-judgment motion for attorney fees had on the time to appeal from the underlying judgment. Under Rule 4(a)(4)(A)(iii), the time to appeal such a judgment does not begin to run until after the district court disposes of a timely motion "for attorney fees under Rule 54 *if the district court extends the time for appeal under*

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*Rule 58*." Fed. R. App. P. 4(a)(4)(A)(iii) (emphasis added). Because of the presence of the emphasized language, a timely motion for attorney fees, unlike the other five motions listed in Rule 4(a)(4)(A), does not automatically prolong the time for appeal from the judgment. Rather, the motion will prolong the time for appeal if, and only if, the district court affirmatively acts. The basis for affording such discretion to a district court is that the attorney-fees determination might be best left until after the appeal concludes, especially when the decision on appeal could obviate the need to address the attorney-fees issue in the first place. *See* Fed. R. Civ. P. 58, 1993 Advisory Committee Note.

When a district court confronted with a motion for attorney fees acts to extend the time for appeal from the underlying judgment, a court of appeals must work through a number of interrelated provisions to determine whether the action had the desired effect. The process begins, of course, with Rule 4(a)(4)(A)(iii). Read in conjunction with Rule 4(a)(4)(A), the provision states that a timely motion for attorney fees will delay the time for appeal "if the district court extends the time for appeal under Rule 58." Fed. R. App. P. 4(a)(4)(A)(iii). First and foremost, therefore, the court must determine whether the motion was timely, which involves a review of Rule 54(d)(2)(B) (requiring that such a motion for attorney fees be brought within 14 days after entry of judgment). If the motion was indeed timely, the court must then consult Rule 58 to understand the manner in which a district court is expected to effect an extension of the time for appeal. In particular, Rule 58(c)(2) provides that "[w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under [Rule 4(a)(4)(A)] as a timely motion under Rule 59." Fed. R. Civ. P. 58(c)(2). Given Rule 58(c)(2)'s reference to Rule 59, the court must return to Rule 4(a)(4)(A) to ascertain the effect of a timely Rule 59 motion. *See* Fed. R. App. P. 4(a)(4)(A)(v).

Only after examining the various provisions can a court of appeals derive the governing principle: a timely motion for attorney fees will prolong the time to appeal from the underlying judgment only if the district court renders an order to that effect before a notice of appeal has been filed and becomes effective. The question for the Committee is whether the current framework imposes unnecessary difficulty upon the courts of appeals, as well as the litigants. The Sixth Circuit in *Wikol* made its view on the matter abundantly clear:

> As a final comment on this issue, we cannot help but express dismay over the complexity of the rules regarding the timeliness of an appeal under the present circumstances. There should be no need to have to parse the language of four different rules of procedure in order to find an answer to whether an appeal is timely filed. The basic problem is that five of the six post-judgment motions enumerated in Rule 4(a)(4)(A) *automatically* extend the time to appeal, but the remaining one (a motion for attorney fees pursuant to Rule 54) does not. Perhaps this is a topic that should be considered by the Advisory Committee to the Federal Rules of Appellate Procedure.

360 F.3d at 610 (internal citation omitted) (emphasis in original).

If the Committee finds merit in the *Wikol* court's sentiment, there are various alternatives for reform. Of course, motions for attorney fees could be easily synchronized with the other Rule 4(a)(4)(A) motions were the "if the district court extends the time to appeal under Rule 58" language of Rule 4(a)(4)(A)(iii) simply abrogated. But such an approach would fly in the face of sound policy by depriving the district court of the flexibility to take a wait-and-see approach in connection with an attorney-fees determination. *See* Fed. R. Civ. P. 58, 1993 Advisory Committee Note.

A preferable solution would bring motions for attorney fees into line with other Rule 4(a)(4)(A) motions, while permitting district courts to continue determining the ultimate effect of a timely motion for attorney fees. Under this approach, Rule 4(a)(4)(A)(iii) would be amended to shift the current default rule—that a timely motion for attorney fees has no effect on the time to appeal—to one under which a timely motion for attorney fees *automatically* extends the time for appeal. If, however, the district court would prefer to consider the motion for attorney fees only after the appeal of the underlying judgment concludes, it would retain discretion to do so. Below is proposed language reflecting this suggested amendment:

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

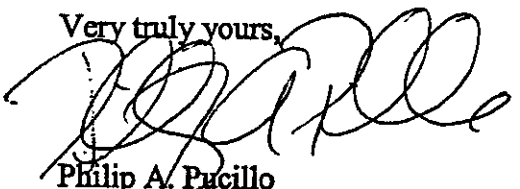
> **(A)** If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> * * *
>
> **(iii)** for attorney's fees under Rule 54 ~~if the district court, extends the time to appeal under Rule 58~~ unless the district court orders that the motion shall not affect the time to appeal, in which event the time to appeal shall run from the later of the date of such order or the order disposing of the last remaining motion under this Rule 4(a)(4)(A);

The revised provision must set forth some point at which the time for appeal will begin to run in the event that the district court defers adjudication of a timely motion for attorney fees until after conclusion of the appeal from the judgment. It follows that the district court's order to that effect would trigger the time for appeal. At the same time, the revised provision must account for the possibility that other Rule 4(a)(4)(A) motions will be pending when the district court enters its order. If such motions are indeed pending, the time to appeal cannot run until the district court has entered its order disposing of the last such remaining motion. *See* Fed. R. App. P. 4(a)(4)(A).

I note in closing that the proposed amendment to Rule 4(a)(4)(A)(iii) would require coordination with the Advisory Committee on Civil Rules. Specifically, Rule 58(c)(2) (providing that "[w]hen a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under [Rule 4(a)(4)(A)] as a timely motion under Rule 59.") would be irreconcilable with the revised framework.

I hope that the Committee finds this analysis to be helpful.

Very truly yours,



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Enclosure