Minutes of the Fall 1997 Meeting of the

Advisory Committee on Appellate Rules

September 29, 1997

Santa Fe, New Mexico

I. Introductions

Judge Will L. Garwood called the meeting of the Advisory Committee to order on Monday, September 29, 1997, at 8:35 a.m. at the Homewood Suites Hotel in Santa Fe, New Mexico. The following Advisory Committee members were present: Judge James K. Logan, Chief Justice Pascal F. Calogero, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. Michael J. Meehan, and Mr. Luther T. Munford. Mr. Douglas N. Letter, Appellate Staff, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Judge Alicemarie H. Stotler, who chairs the Standing Committee, was present, as was Judge Frank H. Easterbrook, the liaison from the Standing Committee. Mr. Patrick J. Fisher, Jr., the liaison from the appellate clerks, and Mr. Charles R. "Fritz" Fulbruge, III, who will replace Mr. Fisher as liaison on October 1, were both present. Also present were Ms. Judy McKenna from the Federal Judicial Center and Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office.

Judge Garwood made a series of announcements: Prof. Mooney, longtime Reporter to the Committee, has been appointed a member of the Committee, and Prof. Patrick J. Schiltz of Notre Dame Law School has been appointed to replace her as Reporter. Mr. Letter has replaced Mr. Robert E. Kopp as the representative of the Acting Solicitor General. Judge Alex Kozinski has resigned from the Committee; his replacement has not yet been appointed. Judge Stanwood R. Duval, Jr., of the Eastern District of Louisiana has been appointed to the Committee, but was unable to attend today's meeting. Judge Phyllis A. Kravitch will replace Judge Easterbrook as the liaison from the Standing Committee, and Mr. Fulbruge will replace Mr. Fisher as the liaison from the appellate clerks.

Judge Logan explained that he technically remains Chair of the Advisory Committee until October 1, when Judge Garwood's appointment as Chair becomes effective. However, Judge Logan asked Judge Garwood to preside at today's meeting because the focus of the meeting will be to set priorities for Judge Garwood's tenure.

II. Approval of Minutes of April 1997 Meeting

The minutes of the April 1997 meeting were approved, with one correction: The first sentence of the last

full paragraph on page 3 was in err in stating that, "[i]n Rule 4(a)(5)(A)(i), the Committee approved changing 'not later than' to 'within.'" In fact, the Committee approved changing "within" to "not later than."

III. Report on Actions of Standing Committee (6/97) and Judicial Conference (9/97)

Judge Logan reported that, at its June 1997 meeting, the Standing Committee approved the restylized rules and accompanying advisory committee notes ("ACNs"), with one exception: The Standing Committee deleted the sentence in the ACN to FRAP 35 that had urged the Supreme Court to delete the last sentence of Supreme Court Rule 13.3. Judge Logan further reported that neither the Executive Committee of the Judicial Conference nor any member of the Conference had placed the restylized rules on the discussion calendar for the Conference's September 1997 meeting. Thus, the rules were deemed to be submitted to the Supreme Court with the Conference's unanimous approval.

Mr. Rabiej stated that the Administrative Office was in the process of proofreading the restylized rules carefully and would submit them to the Supreme Court within three to four weeks. Judge Garwood asked that each member of the Advisory Committee be provided with a copy of the version of the restylized rules that is submitted to the Supreme Court.

IV. Moratorium on Submission of New Changes for Public Comment

Judge Garwood suggested that the Committee should give the bench and bar a chance to become familiar with the restylized rules before publishing proposed changes to those rules. He recommended that the Committee continue to send proposed amendments to the Standing Committee, but ask the Standing Committee not to publish them for comment until sometime after December 1, 1998, when the restylized rules will take effect (if approved by the Supreme Court and not blocked by Congress).

Judge Logan agreed and stated that changes to the rules should not even be submitted to the Standing Committee before 1999, unless there was an urgent need for a change. He suggested that the Advisory Committee continue to consider and approve amendments, but that the amendments be held back and then presented as a group to the Standing Committee sometime after the restylized rules take effect.

Judge Easterbrook agreed with Judge Logan. He stated that there is substantial sentiment within the Standing Committee that the bench and bar deserve a "period of reticence" in which they can grow accustomed to the new rules and be spared yet another round of amendments. Judge Stotler agreed with Judge Easterbrook and Judge Logan and strongly recommended that amendments to FRAP not be forwarded to the Standing Committee, but instead be forwarded as a group sometime after the restylized rules take effect.

After further discussion, the Advisory Committee reached a consensus that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until after the restylized rules have been in effect for at least a few months. However, the Standing Committee will continue to be informed of the work of the Advisory Committee through the Committee's minutes and reports from Judge

Garwood.

V. Presentation on Electronic Filing Technology

Judge Garwood announced that, immediately after lunch, a demonstration of electronic filing technology would be presented.

VI. Action Items

A. Item No. 97-15: Amend FRAP 40(a)(1) to provide that a petition for rehearing in a criminal case in which the United States is a party must be filed within 45 days.

FRAP 40(a)(1) generally requires that a petition for panel rehearing be filed within 14 days after entry of judgment. In 1994, at the request of the Solicitor General ("S.G."), the Rule was amended to lengthen the time for filing a rehearing petition to 45 days in *civil* cases in which the United States is a party. (Under FRAP 35(c), these same deadlines apply to petitions for rehearing en banc.) The S.G. now requests that the Rule be amended again so that the deadline is extended to 45 days in *any* case -- civil or criminal -- in which the United States is a party.

A member questioned the need for the change. He noted that the government brings an appeal in only a very small percentage of criminal cases, that the government loses very few of those appeals, and that, even when the government loses, the legal issues are rarely worthy of en banc consideration. In the rare case in which the issues are important, the government can seek an extension of time within which to file a rehearing petition. In the member's experience, those requests are virtually always granted.

Mr. Letter replied that, although the percentage of criminal cases in which the government brings and loses an appeal is small, the total number of such cases is still substantial, and in those cases it is difficult for the S.G.'s office to decide whether to petition for rehearing within 14 days. Often, the S.G. is not even informed of a decision until three or four days after it is issued, and often, in "the heat of the moment," the losing U.S. Attorney pressures the S.G. to file a rehearing petition. Extending the 14 day period would ensure that there was enough time for cooler heads to prevail and for the S.G. to give careful consideration to the matter, without having to burden the court with a potentially needless motion for an extension. Also, Mr. Letter reported, when it is clear that the issue is worthy of en banc consideration, the S.G. is reluctant to gamble on getting an extension, and thus the rehearing petition must be hastily prepared.

Several members of the Committee expressed concern about the degree to which the S.G.'s proposal would burden the system. There was substantial sentiment on the Committee that the deadline for filing a rehearing petition should be "symmetrical" -- that is, identical for the government and the defendant. Thus, agreeing to the S.G.'s request would mean that every one of the thousands of criminal defendants who lose appeals each year would get 45 days to petition for rehearing. One member predicted that such an extension would result in more and lengthier rehearing petitions. Other members pointed out the cost to the system of delaying the mandates in all criminal cases for an additional 31 days. One possible cost

would be an increase in motions to expedite the issuance of mandates.

Mr. Letter asked whether extending the 14 day deadline to 21 days would be more acceptable to the Committee. In response, Mr. Letter was asked whether the S.G. would accept a universal 21 day deadline that would apply to all parties in all cases, civil and criminal. Mr. Letter replied that a 21 day deadline in civil cases would cause significant hardship for the S.G.'s office. In criminal cases, generally only the responsible U.S. Attorney and perhaps one or two other agencies need to be consulted about a potential rehearing petition. In civil cases, though, a half dozen or more agencies may have to be consulted.

Several members of the Committee wondered why the S.G., after operating successfully under the 14 day deadline for many years, was now seeking an extension. What has changed? Mr. Letter pointed to the large number of appeals created by the enactment of the sentencing guidelines. A member responded that most of the major issues raised by the sentencing guidelines have been decided, and that few sentencing guideline cases today present issues worthy of en banc consideration.

A member moved that FRAP 40 be retained as presently written. The motion was seconded. The motion carried (6-1).

B. Item No. 97-21: Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."

FRAP 31(b) provides that "[t]wenty-five copies of each brief must be filed with the clerk and 2 copies must be served on counsel for each separately represented party." Oddly, FRAP 31(b) does not require service of briefs on *un*represented parties. A member of the Advisory Committee noted this omission at the Committee's April 1997 meeting, and the Committee added the matter to its study agenda.

The Committee considered the following amendment and ACN:

Rule 31. Serving and Filing Briefs

(b) Number of Copies. Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on <u>each unrepresented party and on</u> counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

Advisory Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to clarify that briefs must be served on all parties,

including those who are not represented by counsel. The courts of appeals have authority under the last sentence of the Rule to provide by local rule or by order that briefs need be served on only one of two or more unrepresented parties who are proceeding jointly. For example, a local rule might provide that when two unrepresented appellants have filed a joint notice of appeal and a joint brief, the brief of the appellee need only be served on one of them.

Several members expressed concern about the last two sentences of the draft ACN. One member noted that in suggesting that one pro se litigant could serve as the legal representative of another, the sentences appeared to be encouraging the unauthorized practice of law. Judge Easterbrook also pointed out that any ACN that encourages further disparity in local rules will be a "red flag" for the Standing Committee.

A member moved that the amendment and all of the ACN except the last two sentences be approved. The motion was seconded. The motion carried (unanimously).

Judge Garwood noted that, pursuant to the Advisory Committee's new policy, the amendment would not be forwarded to the Standing Committee until sometime after the restylized rules take effect.

VII. Discussion Items

A. Removal from Table of Agenda Items of Proposals Upon Which Advisory Committee, Standing Committee, and Judicial Conference Action is Completed

Judge Garwood asked that the 14 items listed under § VII(A) of the agenda be removed from the Table of Agenda Items. These are items upon which the Advisory Committee, Standing Committee, and Judicial Conference have all completed action.

A member moved that Nos. 89-5, 90-1, 91-4, 91-9, 91-24, 91-25, 91-28, 92-4, 93-3, 93-4, 93-5, 93-6, 95-9, and 96-1 be removed from the Table of Agenda Items. The motion was seconded. The motion carried (unanimously).

B. Removal from Table of Agenda Items of Proposals That Have Been Withdrawn or Made Moot By Pending Rule Changes

Judge Garwood asked that the two items listed under § VII(B) of the agenda be removed from the Table of Agenda Items. No. 92-11, regarding the requirement of some courts of appeals that government attorneys join their bars before appearing before them, was withdrawn by the S.G. No. 97-17, a proposal that FRAP 4 be amended to provide that the 10 day deadline for filing a "tolling" FRCP 60 motion be calculated pursuant to FRCP 6(a) rather than pursuant to FRAP 26(a), has been implemented in the restylized rules.

A member moved that Nos. 92-11 and 97-17 be removed from the Table of Agenda Items. The motion was seconded. The motion carried (unanimously).

The Committee took a 15 minute break.

C. Prioritization of Other Proposals on Table of Agenda Items

The Reporter informed the Committee that there were 40 proposals on the Table of Agenda items that had received little or no Committee attention and nine more proposals that had been received by Judge Garwood after the Agenda Book had been distributed. Those nine proposals come from the Methods Analysis Program's appellate working group and were conveyed in a September 15, 1997 letter to Mr. McCabe from Mr. Fisher. Copies of Mr. Fisher's letter were distributed to the Committee. Mr. Fisher stated that the working group was not seeking immediate action, but merely asking that its proposals be put on the Advisory Committee's study agenda for discussion at a future meeting. Judge Garwood indicated that the proposals would receive initial discussion at the Committee's Spring 1998 meeting.

Judge Garwood stated that, unless there were any objections, he would lead the Committee through each of the 40 proposals remaining on the study agenda and ask the Committee to decide whether each item should remain on the agenda and, if so, what priority the item should receive.

1. Item No. 91-3: Final decision by rule/expanding interlocutory appeal by rule.

In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to "define [by rule] when a ruling of a district court is final for the purposes of appeal under section 1291 [of title 28]." 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the Rules Enabling Act process to promulgate rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in § 1292]." 28 U.S.C. § 1292(e). The Advisory Committee on the Civil Rules was the first to take advantage of this new authority; it proposed, and the Judicial Conference approved and forwarded to the Supreme Court, new FRCP 23(f), which permits discretionary appeals from district court orders granting or denying class action certification. New FRAP 5 was drafted to accommodate such appeals, and any other interlocutory appeals that might be authorized in the future. The question for the Advisory Committee is whether it wants to go further and use the authority provided in §§ 2072(c) and 1292(e) to define in FRAP the circumstances under which district court orders will be considered final and/or the circumstances under which interlocutory appeals will be permitted.

At Judge Garwood's invitation, the Reporter informed the Committee of the following:

Sections 2072(c) and 1292(e) resulted from a suggestion made by Prof. Thomas D. Rowe, Jr., a member of the Federal Courts Study Committee. In April 1991, Judge Kenneth F. Ripple, who then chaired the Advisory Committee, wrote to Prof. Rowe and asked him exactly what he had in mind in suggesting the amendments to §§ 2072 and 1292. Prof. Rowe replied that he did not have any specific problems in mind; he merely thought that when specific problems did arise, the Advisory Committee, Standing Committee, and Judicial Conference would have "an especially valuable additional perspective to bring to the process." Prof. Rowe cautioned, though, that his "suggestion was truly procedural in the most

contentless sense of the word." His view was that, if the Advisory Committee had ideas for improving the law, great; if not, "no harm done."

In January 1993, Judge Ripple wrote to the chief judges of all of the courts of appeals and to the S.G., and asked for suggestions about how the Advisory Committee might use its authority under §§ 2072(c) and 1292(e). Mr. Rabiej's recollection is that virtually all of the chief judges responded, and that they were overwhelmingly opposed to the Committee using its newly granted authority to broadly define in FRAP the circumstances under which district court orders will be considered final and/or the circumstances under which interlocutory appeals will be permitted. However, the only documentation of the responses to Judge Ripple's request that can be located today are copies of letters that Judge Ripple received from the Fifth, Sixth, Tenth, and District of Columbia circuits. Those letters are consistent with Mr. Rabiej's recollection. Also, according to the minutes of the Committee's April 1993 meeting, the S.G. told Judge Ripple that he "hope[d] that the Committee would not take an activist role simply because the authority had been granted."

After the Reporter conveyed this information, the Advisory Committee discussed the question of whether No. 91-3 should remain on its agenda. Several members expressed agreement with Prof. Rowe's suggestion that, in the future, specific problems relating to finality or interlocutory appeals might be productively addressed through the Rules Enabling Act process. However, at this point, the only question before the Committee was whether it should attempt to write into FRAP a broad "restatement" of the law of finality or interlocutory appeals. The consensus of the Committee was that attempting such a codification would be extraordinarily difficult and time-consuming, and thus that No. 91-3 should be removed from the study agenda.

A member moved that No. 91-3 be removed from the study agenda, without prejudice to any future proposals requesting the Committee to use its authority under §§ 2072(c) or 1292(e) to address specific problems. The motion was seconded. The motion carried (unanimously).

A member asked that the minutes reflect that the Committee's decision should in no way be interpreted as reflecting reluctance to use its authority under §§ 2072(c) and 1292(e) to address specific problems that are brought to its attention, as it did in rewriting FRAP 5 to accommodate the interlocutory appeals that will be authorized by new FRCP 23(f). At this point, however, no such specific proposals were before the Committee.

2. Item No. 95-8: Does FRAP 4(a)(7) repeal collateral order doctrine?

The Committee next considered No. 95-8, as it is related to No. 91-3.

No. 95-8 was placed on the Committee's study agenda by Mr. Munford, who is concerned that FRAP 4(a)(7) may be read to effectively repeal the collateral order doctrine. FRAP 4(a)(1)(A) generally provides that, in a civil case, a notice of appeal "must be filed . . . within 30 days after the judgment or order appealed from is entered." FRAP 4(a)(7) then provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Mr. Munford explained that the source of his concern is the phrase "entered in

compliance with Rule[] 58." Some orders that traditionally have been appealable under the collateral order doctrine are not, in fact, "entered in compliance with Rule[] 58."

A member said that he did not share Mr. Munford's concern, as, to his knowledge, orders have continued to be appealed under the collateral order doctrine notwithstanding the language in FRAP 4(a)(7) upon which Mr. Munford focuses. Judge Easterbrook agreed and referred to a unanimous decision that he wrote for the en banc Seventh Circuit that accepted as uncontroversial the proposition that FRAP 4(a)(7) does not affect the collateral order doctrine.(1) Mr. Munford replied that he is aware of at least one Fifth Circuit case to the contrary.

A member moved that No. 95-8 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

Judge Garwood asked Mr. Munford to draft a proposed amendment to FRAP 4 that would address his concern. Mr. Munford agreed.

3. Item No. 91-17: Uniform plan for publication of opinions.

In its 1990 report, the Federal Courts Study Committee recommended to the Judicial Conference that it appoint an ad hoc committee to develop uniform guidelines regarding the practice of the courts of appeals of designating certain opinions as "unpublished." In 1991, the Judicial Conference considered but declined to follow the FCSC recommendation. The question for the Advisory Committee is whether it wishes to pursue this issue, notwithstanding the lack of interest expressed by the Judicial Conference six years ago.

A member said that he favored retaining this issue on the study agenda. He said that rules governing unpublished opinions ought to be uniform. He also expressed concern that current practice favors wealthy lawyers and clients, who can afford to retrieve unpublished opinions through Westlaw and LEXIS.

Another member agreed that the Committee ought to look at this issue. He thought it quite possible that, given the technological developments of the past few years and the turnover in the membership of the Judicial Conference, the Conference might have more interest in the issue today than it did in 1991.

Another member said that at least two issues were before the Committee: First, should FRAP be amended to require that all opinions be published? Second, if not, should FRAP be amended to impose uniform rules regarding the citation and precedential effect of unpublished opinions? The member described how his circuit has struggled with these issues.

Judge Easterbrook essentially agreed, although he said that phrasing the first issue in terms of whether an opinion should be "published" is anachronistic. In years past, talking about "publishing" opinions made sense, as, roughly speaking, what was published was what was available to the bar. Westlaw and LEXIS

have changed that; whether or not they are "published," judicial opinions find their way into the Westlaw and LEXIS databases and become available to the bar. The real issue, Judge Easterbrook said, is not which opinions should be "published," but rather which opinions should be cited, and which opinions should be regarded as precedential -- that is, as binding on subsequent panels.

A member argued that uniform rules are badly needed. He said that the varying and conflicting local rules of the circuits create a hardship for government attorneys and other attorneys with national practices.

Mr. Rabiej reported that, in 1995, the Judicial Conference approved a Long Range Plan for the Federal Courts. Recommendation 37d of that plan is a proposal to develop uniform rules regarding the publication of opinions. That item was assigned to the Committee on Court Administration and Case Management ("CACM"). CACM has subsequently appointed a subcommittee to work on the issue. Mr. Rabiej said that CACM does not have "exclusive" jurisdiction -- *i.e.*, the assignment of the issue to CACM does not preclude the Advisory Committee from also taking up the issue -- but the Advisory Committee should try to avoid duplicating CACM's efforts.

A member said that he thought that the Advisory Committee ought to take up the issue, notwithstanding the assignment to CACM. He noted that the composition of CACM is considerably different from that of the Advisory Committee. He also thought it important that the Committee solicit the views of the chief judges of the circuits on this issue.

Judge Easterbrook said that the Committee should study the practice of affirming district court judgments without *any* opinion at the same time that it studies the question whether unpublished opinions should be cited or have precedential effect. A member disagreed, stating that the question of whether an opinion of some kind should be required in every case can be separated from the question of whether opinions that are issued can be cited or are precedential.

A member said that, while he would have no objection to amending FRAP to address which opinions may be *cited*, he was concerned that the question of which opinions are *precedential* is substantive and thus beyond the Committee's authority. Another member disagreed, pointing to the fact that local rules already govern both issues.

Ms. McKenna warned that, in studying this issue, it is important to go beyond what the local rules of each circuit say, and examine how unpublished opinions are treated in practice. Ms. McKenna said that the practice of some circuits is inconsistent with their rules. Ms. McKenna also pointed out that three or four circuits do not provide their unpublished opinions to Westlaw and LEXIS for inclusion in their databases. Finally, Ms. McKenna said that, although a lot of work was already underway on this issue as a result of the assignment of Recommendation 37d to CACM, she hoped that the Advisory Committee would also get involved.

A member said that Recommendation 37d seemed to him to be addressed mainly to the availability of unpublished opinions, and not to the question of whether unpublished opinions can be cited and/or treated as precedential.

Mr. McCabe agreed with Ms. McKenna that the Advisory Committee had a valuable role to play in studying this issue, notwithstanding the involvement of CACM. CACM is primarily devoted to addressing matters of internal case management, whereas the Advisory Committee addresses more fundamental policy issues. Moreover, the Advisory Committee has broader representation than CACM, and the Advisory Committee's process is public.

Judge Garwood stated that he intended to appoint a subcommittee of the Advisory Committee to address this issue, and that he would ask the subcommittee to work with CACM's subcommittee to try to avoid duplication.

Judge Stotler reinforced the notion that the Advisory Committee's subcommittee should be careful to avoid duplicating work being done by others. She pointed out that the Judicial Conference is also considering the ABA's uniform citation proposal and is attempting to establish a universal database containing all opinions -- published and unpublished -- of all federal courts.[(2)]

Judge Garwood said that he did not think any of the judges on the Fifth Circuit read any of the court's unpublished opinions. Indeed, unpublished opinions, unlike published opinions, are not even circulated to the court. Judge Logan reported that the practice of the Tenth Circuit is different. Until he took senior status, Judge Logan received and read the unpublished opinions of his court.

Mr. Fulbruge reported that, during the year ended June 30, 1997, the Fifth Circuit issued roughly 500 published opinions and 2700 unpublished opinions. He agreed with Judge Garwood that no Fifth Circuit judge could possibly read all of the court's unpublished opinions.

Ms. McKenna said that the circuits differ: In some, unpublished opinions are not circulated to the court, and thus are presumably not read by the judges. In others, the unpublished opinions are circulated and, presumably, read.

A member of the Committee pointed out that state courts are also confronting this issue. In some states, only 10 to 15 percent of the court's opinions are published. Thus, with respect to many issues, the only way that a practitioner can get a sense of the court's recent thinking is to read the court's unpublished opinions.

Chief Justice Calogero described the practice of the Louisiana courts. The Supreme Court publishes all of its opinions, although some are very brief. The Court of Appeals does not publish all of its opinions. Chief Justice Calogero said that he understands the need for being able to issue unpublished opinions, but he is concerned that judges sometimes use the option of designating opinions as unpublished as a "crutch" to avoid coming to grips with difficult issues.

A member moved that No. 91-17 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

4. Item No. 95-1: Amend FRCP 23 so class members do not need to intervene to appeal.

There is a sharp split in authority over whether an absent class member who has appeared before the district court and objected to a proposed class action settlement must formally intervene as a party in order to have standing to appeal a judgment approving the settlement to which she objected. Some circuits hold that such intervention is necessary, while others hold that it is not. A commentator has urged that FRCP 23(e) be amended to provide that no such intervention is necessary. If such an amendment is adopted, the commentator suggests that a "conforming amendment" to FRAP "may also be appropriate."

A member stated that, in his view, this is a "substantive" matter that should not be addressed in FRAP.

Mr. Rabiej reported that this proposal was considered by the Advisory Committee on Civil Rules, and that the Committee had decided not to act upon it.

A member stated that any action on this proposal should first come from the Advisory Committee on Civil Rules. Another member agreed. He stated that the problem may be that FRCP 23, as presently worded, misleads absent class members into believing that intervention is not necessary, but fixing FRCP 23 is obviously not the responsibility of this Advisory Committee.

A member moved that No. 95-1 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

5. Item No. 95-2: Amend FRAP 3 & 24 re: denial of in forma pauperis status.

Two commentators complain that the United States District Court for the Western District of Tennessee often denies permission to proceed on appeal IFP in the same order in which it denies the relief sought by the plaintiff. This triggers two 30 day deadlines: The deadline in FRAP 4(a)(1) to file a notice of appeal, and the deadline in FRAP 24(a)(5) to move in the court of appeals for permission to proceed IFP. Although the former deadline can be extended by the district court for excusable neglect or good cause (FRAP 4(a)(5)(A)) and "tolled" by the filing of one of the motions listed in FRAP 4(a)(4)(A), the latter cannot, putting the litigant in the awkward position of having to petition for permission to proceed on appeal IFP before the litigant even knows whether he will be appealing.

A member stated that, to his knowledge, this problem had not been experienced outside the Western District of Tennessee, and thus was not worth the Committee's attention. Another member agreed, pointing out that FRAP 24(a)(5) states that, after the district court denies leave to proceed on appeal IFP, the litigant "*may*" seek permission to proceed IFP from the court of appeals within 30 days, not that the litigant *must* do so. The member further noted that, in cases in which an appellant has proceeded IFP in the district court, his court treats the appeal from the merits as an automatic application for permission to proceed IFP on appeal.

Mr. Fisher speculated that this problem may be unique to the Sixth Circuit. He said that, to his knowledge, all other circuits read FRAP 24(a)(5) as had been suggested and permit a litigant to seek permission to proceed on appeal IFP more than 30 days after being informed of the denial of his motion by the district court.

A member moved that No. 95-2 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

6. Item No. 95-3: Amend FRAP 15(f) to conform to recent amendments to FRAP 4(a)(4).

FRAP 4(a)(4)(A) provides that if a party timely files in the district court any of several specified motions -- *e.g.*, a motion for a new trial under FRCP 59 -- "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." FRAP 4(a)(4)(B)(i) further provides that if a party files a notice of appeal after the court announces or enters its judgment, but before the court disposes of any of the motions listed in FRAP 4(a)(4)(A), "the notice becomes effective . . . when the order disposing of the last such remaining motion is entered."

Judge Stephen Williams of the D.C. Circuit has proposed that FRAP 15 be amended so that petitions to review or applications to enforce agency orders are treated the same as appeals from district court orders. First, Judge Williams suggests that FRAP 15 be amended so that if a party moves an agency to rehear, reopen, or reconsider an order, the time to file a petition to review or application to enforce that order would not begin to run until the agency disposes of the last such motion outstanding. Second, Judge Williams suggests that FRAP 15 be amended so that a petition to review or application to enforce an agency order that is filed after the order has been entered or announced, but before the agency has disposed of any motions to rehear, reopen, or reconsider the order, would become effective when the agency disposes of the last such petition outstanding.

Mr. Letter stated that, although the S.G. does not have any objection to the Committee studying Judge Williams' proposal, the S.G. was skeptical that FRAP could be amended to achieve what Judge Williams suggests. Mr. Letter further stated that Judge Williams has himself "backed off" his proposal. The problem is that agencies have widely differing rules regarding petitions to rehear, reopen, or reconsider. Some of those rules are internal, and others are imposed by statute. Amending FRAP in the manner suggested by Judge Williams would be nearly impossible and might exceed the Committee's powers under the Rules Enabling Act.

A member suggested that Judge Williams' two proposals could be separated. He agreed that Judge Williams' first proposal -- essentially defining in FRAP when an agency action is final for purposes of appeal -- should be dropped. He pointed out, though, that there may be some value in studying Judge Williams' second proposal. FRAP could provide that when a petition for review of an agency action is filed, and then a motion is made before the agency which motion has the legal effect of rendering the action unappealable because of lack of finality, the petition for review will be deemed effective after the agency disposes of the "finality-blocking" motion. In other words, FRAP 15 might be amended to conform to FRAP 4(a)(4)(B)(i), even if it cannot be amended to conform to FRAP 4(a)(4)(A).

A member agreed with this suggestion, but stated that, before the Committee takes any action on Judge Williams' second proposal, it should study how much of a "trap" currently exists for attorneys involved in agency practice. The member reminded the Committee that FRAP 4(a)(4)(B)(i) was necessary to remove a trap that FRAP itself created. (See the ACN to the 1993 amendment to FRAP 4(a)(4).) FRAP does not create a similar trap with respect to petitions to review agency action.

A member moved that the first of Judge Williams' two suggestions -- amending FRAP 15 to define finality in agency proceedings similar to the manner in which FRAP 4(a)(4)(A) defines finality in district court proceedings -- be removed from the study agenda, but that the second of Judge Williams' two suggestions -- amending FRAP 15 so that premature petitions to review agency actions are treated the same as premature notices of appeal under FRAP 4(a)(4)(B)(i) -- be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

7. Item No. 95-4: Amend computation of time to conform to FRCP method.

8. Item No. 97-1: Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a).

These two proposals are identical. The Federal Rules of *Civil* Procedure compute time differently than the Federal Rules of *Appellate* Procedure. FRCP 6(a) provides that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." FRAP 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under FRCP than they are under FRAP, creating a trap for unwary litigants. The question before the Committee is whether FRAP 26(a)(2) should be amended to remove this trap.

Judge Easterbrook pointed out that there are actually three different methods of calculating time: The appellate rules method, the civil rules method (which is identical to the criminal rules method), and the bankruptcy rules method (which differs from both the appellate rules method and the civil/criminal rules method). He stated that the Standing Committee should adopt a uniform method of calculating deadlines that would apply in all four sets of rules -- preferably, a rule that said that "all days count," except that, when the last day of a time period falls on a Saturday, Sunday, or legal holiday, the deadline moves ahead to the next working day.

One member expressed his support for amending FRAP 26(a)(2), so that at least the appellate, civil, and criminal rules would be uniform on this point. Another member agreed.

A member moved that Nos. 95-4 and 97-1 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

9. Item No. 95-5: Amend FRAP 32 to require submission of digitally readable copy of brief, when available.

No. 95-5 comes from Judge Easterbrook, who has suggested amending FRAP 32 to require counsel to file one copy of each brief on digital media -- that is, on a computer disk -- and to serve a copy of the disk on each party. This would permit judges with impaired vision to enlarge the text and all judges to search the text for particular words or citations.

Judge Easterbrook reported that the Seventh Circuit amended its local rules to implement this change. Counsel appearing before the Seventh Circuit must now file both a paper copy and an electronic copy of their briefs, and must serve both a paper copy and an electronic copy on the other parties. This rule applies only if the brief was prepared on computer; if not, filing and service of paper copies is sufficient. Judge Easterbrook said that a number of the judges on the Seventh Circuit are pleased with the change, particularly because they no longer have to carry around stacks of briefs, but instead can carry briefs on disk or in their laptop computers.

Judge Easterbrook expressed the hope that the Advisory Committee would not read his suggestion narrowly. He pointed out that, by the time that FRAP can be amended to require the filing and service of briefs on disk, it might already be clear that putting briefs on CD-ROM or filing and serving briefs through the Internet would be preferable.

Judge Garwood said that he supported keeping No. 95-5 on the study agenda, but that he would like to survey the chief judges and circuit clerks about the proposal before taking any action.

Mr. Fulbruge said that the Fifth Circuit now requests -- but does not require -- attorneys to provide the court with electronic copies of their briefs. He said that the Fifth Circuit has found it extremely helpful to receive briefs on disk; it makes information management much easier for the clerk's office and for the staff attorneys.

A member moved that No. 95-5 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

The Committee broke for lunch at 12:00 noon. At 1:45 p.m., the Committee reconvened and watched a brief demonstration of electronic filing technology. The Committee then returned to the task of paring and prioritizing its study agenda.

10. Item No. 95-6: Amend FRAP 3(d) & 15(c) to require appellant/ petitioner to serve copies of notice of appeal.

FRAP 3(d)(1) requires that notice of the filing of a notice of appeal must be given by the district clerk, rather than by the party who files it. Likewise, FRAP 15(c) requires that notice of the filing of a petition for review or application for enforcement of an agency order must be given by the circuit clerk, rather than by the filing party. The question for the Advisory Committee is whether FRAP should be amended to require service by the filing party instead of by the clerk.

Several members briefly expressed satisfaction with the manner in which the rules currently operate. No member spoke in favor of the proposal.

A member moved that No. 95-6 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

11. Item No. 95-7: Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.

12. Item No. 97-2: Amend FRAP 4(a)(5) -- standard for granting extension in first 30 days different than in second 30 days.

These two proposals are identical. On its face, FRAP 4(a)(5) permits a district court to extend the time to file a notice of appeal if two conditions are met: (1) First, a party must move for an extension "no later than 30 days after the time prescribed by this Rule 4(a) expires." FRAP 4(a)(5)(A)(i). In general, FRAP 4(a) requires a notice of appeal in a civil case to be filed within 30 days (60 days if the United States is a party) after the judgment or order appealed from is entered. (2) Second, a party must "show[] excusable neglect or good cause." FRAP 4(a)(5)(A)(ii).

With one exception, FRAP 4(a)(5) does not distinguish between the "original" 30 day period -- that is, the 30 days following entry of the judgment or order -- and the "second" 30 day period -- that is, the 30 days following expiration of the original deadline for filing a notice of appeal. (The exception is that a motion to extend the time to file a notice of appeal may be heard ex parte if it is filed during the original 30 day period, but only upon notice to the other parties if it is not filed until the second 30 day period.) Thus, the Rule seems to provide that a district court may grant a motion for an extension -- regardless of whether it is filed during the original or second 30 day period -- if the movant shows *either* excusable neglect *or* good cause.

Almost all of the courts of appeals do not interpret the Rule in this manner. Rather, the courts have distinguished between motions made during the original 30 day period and those made during the second 30 day period, holding that the "good cause" standard applies to the former, while the "excusable neglect" standard applies to the latter. *See, e.g.*, *Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from seven other circuits). In making this distinction, these courts have relied heavily upon the ACN to the 1979 Amendment to FRAP 4(a)(5), which provides in relevant part:

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b), seems to be more appropriate.

The First Circuit does not follow the majority rule. It holds that whether a motion for an extension is examined under the "excusable neglect" or "good cause" standard depends not upon *when* the motion was filed, but upon whether the reason given for requesting the extension involves neglect on the part of

the movant. If it does, then the "excusable neglect" standard applies. If it does not -- as would be the case, for example, if the original notice of appeal was not timely filed because of a mistake made by the Postal Service -- then the "good cause" standard applies. *See Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 453 (1st Cir. 1995).

Mr. Munford has suggested that FRAP 4(a)(5) be amended to resolve this circuit split.

The Reporter called the Committee's attention to restylized FRAP 4(b)(4) -- the criminal counterpart to FRAP 4(a)(5). FRAP 4(b)(4) clearly provides that the "excusable neglect" standard can be applied either "before or after the time has expired," and that the "good cause" standard can likewise be applied "before or after the time has expired." The ACN to restylized FRAP 4(b)(4) confirms that the Rule "does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so . . . ." Thus, there is a bit of a "conflict" between the majority construction of FRAP 4(a)(5) and restylized FRAP 4(b)(4).

A member noted that the majority construction of FRAP 4(a)(5) seems inconsistent with the language of the Rule, and that the source of the discrepancy appears to be the 1979 ACN. But, the member said, Wright & Miller report the following:

As originally drafted, the Rule allowed an extension on a showing of good cause only if the motion was filed during the original appeal time. The Note of the Advisory Committee to that earlier draft stated that only excusable neglect would justify an extension on motion filed after expiration of the original time. The text of the Rule was changed, but the Note was not changed.

16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3950.3, at 148 (1996).

One member said that he favored amending FRAP 4(a)(5) to read more like FRAP 4(b)(4) and thus to make clear that either the "excusable neglect" or "good cause" standard can be applied at any time. Another member said that the wording of FRAP 4(b)(4) reflected an intentional decision by the Committee that, in the criminal context, either standard can be applied at either stage.

Another member said that he did not have a strong view on the matter, but that, if the Committee was comfortable with the majority interpretation of FRAP 4(a)(5), then the Rule should be amended to give fair warning to litigants. As written, the Rule does not suggest that the standard applied after expiration of the original period will be tougher than that applied before expiration, as most circuits have held.

One member asked whether the 1979 ACN could be "amended." Several members expressed the view that it could not.

A member moved that Nos. 95-7 and 96-2 be retained on the study agenda with low priority, and that No.

97-2 (which is identical to No. 95-7) be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

13. Item No. 96-2: Amend FRAP 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect.

Under FRAP 4(b)(1)(A), a defendant in a criminal case must file a notice of appeal within 10 days after entry of judgment against him. The district court may extend the deadline, but only "[u]pon a finding of excusable neglect or good cause." FRAP 4(b)(4). In *United States v. Marbley*, 81 F.3d 51, 53 (7th Cir. 1996), Judge Posner expressed dissatisfaction with FRAP 4(b), describing it as "ripe for reexamination," and suggesting that "[i]t might be better to permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard." Judge Posner pointed out that "today the right of a criminal defendant to appeal is considered so fundamental that the usual consequence of an inexcusable failure to perfect the appeal is merely to have the appeal heard later through the Sixth Amendment route." Judge Posner communicated his displeasure with FRAP 4(b) to Judge Logan, and Judge Logan put Judge Posner's suggestion on the study agenda.

No. 96-2 was not separately discussed by the Committee, except that one member made a brief comment in support of it during the discussion of Nos. 95-7 and 97-2 (to which No. 96-2 is related). As noted above, at the same time that a motion was made with respect to Nos. 95-7 and 97-2, it was also moved that No. 96-2 be retained on the study agenda with low priority. That motion was seconded, and it carried (unanimously).

14. Item No. 96-3: Add presumption against oral argument for all matters other than the substance of the appeal (in FRAP 34?).

A member stated that this suggestion was his, that he had thought better of it, and that he now moved that No. 96-3 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

15. Item No. 97-3: Amend FRAP 6 to require service of statement of issues on all parties not just on appellee.

FRAP 6(b)(2)(B)(i) requires that, in a bankruptcy case, the appellant must file with the clerk possessing the record and "serve on the appellee" a statement of the issues that the appellant intends to pursue on appeal and a designation of the parts of the record to be sent to the appellate court. A commentator asks why the appellant should not be required to serve the statement of issues and record designation on *all* parties. And the commentator asks a similar question about FRAP 6(b)(2)(B)(ii), which requires an appellee who wishes to designate additional parts of the record to be sent to the appellate court to serve that designation only "on the appellant."

The Reporter informed the Committee that he had received a call from Prof. Alan N. Resnick, the Reporter to the Advisory Committee on the Bankruptcy Rules. Prof. Resnick explained that this

"discrepancy" was intentional: Bankruptcy proceedings can involve hundreds or even thousands of "parties," but an appeal from an order entered in such a proceeding may involve only a couple of those parties. Prof. Resnick said that FRAP 6(b)(2)(B) works well in ensuring that statements of issues and designations of records are served on those parties who need them, but not on those parties who do not. Prof. Resnick does not know any bankruptcy judge or bankruptcy attorney who believes that FRAP 6(b)(2)(B) needs "fixing," and he recommends that the Advisory Committee leave well enough alone.

A member moved that No. 97-3 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

16. Item No. 97-4: Amend FRAP 15(c)(1) re: informal rulemaking.

FRAP 15(c)(1) requires the petitioner to serve a copy of her petition for review or application for enforcement of an agency order "on each party admitted to participate in the agency proceedings." A problem arises when the agency order has resulted from an informal rulemaking process. Agencies do not "admit" parties to "participate" in such proceedings; rather, they solicit comments, both formal and informal, and sometimes receive comments from thousands of persons. In such cases, upon whom should a petition for review be served? The Advisory Committee expressed interest in pursuing this issue at its April 1997 meeting; it suggested at that time the possibility of patterning an amendment to FRAP 15(c)(1) after D.C. Cir. Local Rule 15(a) (which provides that "in cases involving informal agency rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute").

Mr. Letter said that the D.C. Circuit Advisory Committee had struggled with this problem. He recalled an administrative proceeding that involved 25,000 commentators, each of which was considered a "party" by the agency. He strongly recommended that No. 97-4 be retained on the study agenda, and that the Advisory Committee talk with the clerk and chief staff counsel of the D.C. Circuit about how D.C. Cir. Local Rule 15(a) has worked.

A member asked whether the D.C. Circuit Advisory Committee had given any thought to adopting a rule that would require that a petition for review be served on every commentator who had filed a written request for such service with the agency. Mr. Letter replied that the Committee had considered such a rule, but thought that it did not have the authority to order the agencies to invite and collate such requests.

A member agreed that FRAP 15(c)(1), as written, is ambiguous because it is often not clear who was "admitted to participate" in the proceedings of an agency. Another member agreed, noting that each agency has its own rules about who is considered a "party" to agency proceedings.

A member wondered why, if this issue is primarily a problem for the D.C. Circuit, and if the D.C. Circuit's local rule is working well, the Advisory Committee should give the issue any further attention. Another member responded that the question whether the D.C. local rule is working well and the question whether other circuits are experiencing problems are precisely what the Committee should study.

A member moved that No. 97-4 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

17. Item No. 97-5: Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.

There appears to be a conflict between FRAP 24(a)(2) and the Prisoner Litigation Reform Act of 1996 ("PLRA"), Pub. L. No. 104-134. FRAP 24(a)(2) provides that, if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying or giving security for fees and costs." By contrast, the PLRA requires that "[a] prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor" must file "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the . . . notice of appeal." 28 U.S.C. § 1915(a)(2). The PLRA also requires that a prisoner who "files an appeal in forma pauperis . . . shall be required to pay the full amount of the filing fee," § 1915(b)(1), although a prisoner unable to afford to prepay the entire fee may make an initial partial payment and then make subsequent partial payments until the entire fee has been paid. (A prisoner who has "no assets and no means by which to pay the initial partial filing fee" is not required to do so. § 1915(b)(4).)

One member stated that it was obvious that FRAP 24(a)(2) needed to be amended to address this conflict. Several other members agreed.

A member moved that No. 97-5 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

18. Item No. 97-13: Amendments made necessary by Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132).

The Committee next considered No. 97-13, as it relates to No. 97-5.

A member stated that the two major problems created in FRAP by the Antiterrorism and Effective Death Penalty Act -- amending the caption of current FRAP 22 to refer to "section 2255 proceedings" when the Rule itself does not mention § 2255 and creating an ambiguity regarding whether a district court judge may issue a certificate of appealability -- were addressed in the new rules. No other conflicts had been brought to the Committee's attention. That being the case, he recommended that No. 97-13 be removed from the study agenda, without prejudice to any specific problems that might be brought to the Committee's attention in the future.

A member moved that No. 97-13 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

19. Item No. 97-6: Amend FRAP 27(b) to permit appellate commissioners to rule on procedural motions.

FRAP 27(b) provides that a court of appeals "may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions." A commentator suggests that the Rule might be amended so that courts could also authorize "appellate commissioners" to rule on procedural motions. Appellate commissioners are apparently routinely used in the Ninth Circuit.

A member pointed out that, as far as he can tell, the position of "appellate commissioner" does not exist outside the Ninth Circuit, and the position is not authorized or even mentioned in any statute or regulation. Judge Easterbrook agreed.

Mr. McCabe reported that the Ninth Circuit tried, without success, to interest the Judicial Conference in creating the position and that, after it became clear that the Judicial Conference had no interest in the proposal, the Ninth Circuit went forward and created the position anyway.

A member said that FRAP should not be amended to address the powers of appellate commissioners until the position is formalized in some way outside the Ninth Circuit. Other members agreed.

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

20. Item No. 97-7: Amend FRAP 28(j) to allow brief explanation and statement of significance.

21. Item No. 97-26: Amend FRAP 28(j) to (1) require that parties attach copies of supplemental authorities to their letters, (2) require all 28(j) submissions to be made at least 24 hours before oral argument, and (3) limit 28(j) submissions to materials that did not become available until after the party filed its most recent brief.

FRAP 28(j) permits a party to notify the court of "pertinent and significant authorities" that come to the party's attention after the party's brief has been filed, but before decision. A party is authorized to notify the court of such authorities by letter, but parties are warned that "[t]he letter must state without argument the reasons for the supplemental citations" and that "[a]ny response . . . must be similarly limited." In fact, FRAP 28(j) is widely violated, as parties often are unable to resist the temptation to slip in a few words of argument. A commentator argues that in some circumstances -- such as when "the relevance of a new authority to a particular argument may not be immediately obvious" -- "both counsel and the courts would be better served if the rule permitted a *brief* explanation of the new authority and its significance to be included in the letter." That is the source of No. 97-7.

No. 97-26 comes from Judge Alex Kozinski of the Ninth Circuit. Judge Kozinski reports that his court receives FRAP 28(j) submissions in a high percentage of cases, that the letters often do not attach the authorities they cite, that the submissions sometimes arrive minutes before oral argument, and that the authorities cited often were available at the time the briefs were filed, but were simply overlooked by counsel. He proposes amending FRAP 28(j) to (1) "require the parties to attach copies of the cases or

statutes to their letters," (2) "require that, absent extraordinary circumstances, all 28(j) submissions be made at least 24 hours before oral argument," and (3) "limit 28(j) submissions to materials that became available after the filing of the party's most recent brief."

A member stated that he favored No. 97-7. FRAP 28(j) violations are a persistent problem in his court. He is inclined to amend the Rule to permit some explanation, but to place a strict word limit -- one easily enforced by the clerks -- on the explanation.

The member said that he did not favor No. 97-26. He cannot imagine a judge *not* wanting to be informed of a supplemental authority. Although he sympathizes with Judge Kozinski's frustration, he does not favor amending FRAP 28(j) to bar the parties in some circumstances from informing the court of supplemental authorities. If a supplemental authority exists, he would rather hear about it late than not hear about it at all.

Another member expressed support for both No. 97-7 and No. 97-26. He expressed frustration at being ambushed in cases in which he followed the Rule in both spirit and letter -- by informing the court of supplemental authorities as soon as they came to his attention, and by resisting the temptation to argue about those authorities in his FRAP 28(j) letter -- only to have his opponent make argumentative 28(j) submissions at the last minute.

Another member expressed opposition to both No. 97-7 and No. 97-26. He argued that the problem giving rise to No. 97-7 was a problem of enforcement. FRAP 28(j) is perfectly clear; the circuit courts just lack the will to enforce it. He agreed with the earlier comments about FRAP 97-26.

Judge Easterbrook said that the Seventh Circuit had studied proposals similar to both No. 97-7 and No. 97-26 and decided to act on neither. The Seventh Circuit concluded that a word limit on 28(j) explanations would likely be no better enforced that the current ban on explanation, and that trying to regulate the timing of 28(j) submissions would be fruitless: Parties are going to notify the court of supplemental authorities, even if the rules discourage or forbid it.

One member suggested that it may be helpful at least to amend FRAP 28(j) to instruct the parties to notify the court of supplemental authorities as soon as they are discovered. Judge Easterbrook responded that the Seventh Circuit had done that in its local rules, with no discernable impact on the conduct of attorneys.

A member expressed confusion at why a lawyer would be concerned about being "ambushed" with a 28(j) submission made to the court immediately before oral argument. He said that the practice in his court -- and, he assumes, in most circuits -- is to give the ambushed party a chance to file a supplemental brief after oral argument to address the authorities cited in the last minute 28(j) submission. This gives the ambushed party an advantage.

A member moved that No. 97-7 be removed from the study agenda. The motion was seconded. The motion failed (3-4). By consensus, No. 97-7 was assigned low priority.

A member moved that No. 97-26 be removed from the study agenda. The motion was seconded. The motion carried (5-2).

22. Item No. 97-8: Amend FRAP 29 to permit a state officer or agency to file without consent or leave of court.

FRAP 29(a) permits "[t]he United States or its officer or agency" to file an amicus brief without the consent of the parties or leave of the court. It permits "a State" to do likewise, but says nothing about an "officer or agency" of a state. A commentator has requested that FRAP 29(a) be amended so that state officers and agencies are treated the same as federal officers and agencies.

A member said that amending FRAP 29 was unnecessary because in the unusual case in which an attorney general of a state seeks to file an amicus brief in the name of one of the state's officers or agencies, but not in the name of the state itself, the attorney general can seek and be virtually assured of receiving permission to file the brief.

Another member asked Mr. Fisher and Mr. Fulbruge whether state officers and agencies had any difficulty getting permission to file amicus briefs. Both clerks replied that they could not recall such permission being denied.

A member moved that No. 97-8 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

23. Item No. 97-9: Amend FRAP 32 -- cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.

A commentator has asked that FRAP 32 be amended to provide uniform national rules regarding the color of the cover of (1) a petition for rehearing (or rehearing en banc); (2) a response to a petition for rehearing (or rehearing en banc); and (3) supplemental briefs. Local practice among the circuits varies.

One member said that he did not understand the need for such a rule, given that FRAP 32(c)(2)(A) states that no covers are *necessary* on rehearing petitions and the like. The Reporter responded by explaining that the problem is with varying local rules, which provide that if, say, a rehearing petition is filed with a cover, the cover must be a particular color. Judge Easterbrook agreed. He said that the Seventh Circuit has such a local rule, and the rule is widely violated by attorneys unfamiliar with Seventh Circuit practice. He urged the adoption of uniform national rules.

A member agreed. He said that the varying local rules created a hardship for government attorneys and others with national practices. He said that he personally has made several dozen calls over the years to clerks about cover colors.

Another member asked whether new FRAP 32(d) solves this problem by providing that "[e]very court of appeals must accept documents that comply with the form requirements of [FRAP 32]." Judge Easterbrook replied that a problem remains: If a litigant puts *no* cover on her petition, the petition must be accepted. But if she uses a cover of the "wrong" color, the petition can be rejected consistent with FRAP 32(d).

A member moved that No. 97-9 be retained on the study agenda with low priority. The motion was seconded. The motion carried (unanimously).

24. Item No. 97-10: Amend FRAP 36 re: disposition without opinion.

25. Item No. 97-28: **Amend FRAP 36 to require that the court of appeals issue an opinion in every case in which a judgment is entered.**

FRAP 36(a)(2) contemplates that a court of appeals can render a judgment without an opinion. Two commentators object that this practice violates due process, is unfair to litigants, creates doubts about the grounds for the court's decision, and "effectively -- and unfairly -- insulates the appellate court's judgment from a rehearing petition and from a petition for certiorari." The commentators ask that FRAP 36 be amended to require that an opinion of at least a few sentences be issued in every case.

A member expressed opposition to the proposals, noting that some courts -- such as his own -- simply could not function if they had to write an opinion in every case. Another member agreed that any attempt by the Committee to amend FRAP 36 to bar dispositions without opinion would encounter fierce opposition among many circuit judges. Judge Easterbrook agreed, but added that the proposals were serious and deserved discussion. He noted that the present practice reflects a trade-off between circuit size and opinion writing: If Congress expanded the number of judges on each circuit, disposing of appeals without opinion would become less necessary. But Congress has resisted expanding the circuit courts, leaving a few circuits with little choice but to dispose of some appeals without opinion.

Mr. Fulbruge said that, in the Fifth Circuit, very few appeals are disposed of without any opinion, but a substantial number are disposed of with one or two sentence "opinions" that either say that the Fifth Circuit is affirming for the reasons given by the district court or give only a few words of explanation of the judgment.

A member said that his understanding is that the Eleventh Circuit disposes of about a third of its cases without opinion. Another member said that the Virginia Supreme Court likewise disposes of a substantial number of appeals without opinion. Chief Justice Calogero said that the Louisiana Supreme Court issues an opinion in all cases. He pointed out, though, that the Court has discretionary review and that many of its opinions are brief per curiams drafted by staff attorneys.

A member expressed the view that the issue was worth studying, even if the proposals had little chance of getting through the Judicial Conference. Judge Garwood agreed, and said that he would poll the chief judges of the courts of appeals on the matter.

Ms. McKenna reported that the practice of disposing of appeals without opinion is far more prevalent in the Third Circuit than in the Eleventh. She also warned that the statistics kept by various circuits on this matter are sometimes misleading.

A member moved that Nos. 97-10 and 97-28 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

26. Item No. 97-11: Amend FRAP 39 re: procedure for determining award of attorney's fees for appeal.

27. Item No. 97-24: Amend FRAP 38 or 39 to clarify whether it is the court of appeals or the district court that determines the amount of attorneys' fees awarded as sanctions or costs on appeal.

Nos. 97-11 and 97-24 apparently refer to the same proposal.

A commentator suggests that FRAP 39 be amended to set forth the procedure under which attorneys' fees can be requested "as an element of costs on appeal" and to specify whether it is the court of appeals or the district court that determines the amount of those fees. This suggestion is ambiguous, as FRAP 39 does not authorize an award of attorneys' fees "as an element of costs on appeal," and thus the issue should never arise. *See Hirschensohn v. Lawyers Title Ins. Corp.*, 1997 WL 307777, at *6 (3rd Cir. June 10, 1997). There are specific statutes -- most notably, the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 -- that, in the context of particular types of actions, define attorneys' fees as an element of recoverable "costs." But the courts of appeals hold that assessing costs under one of these statutes "is separate and distinct from the question of 'costs' under Rule 39." *McDonald v. McCarthy*, 966 F.2d 112, 116 (3rd Cir. 1992). It is not clear whether the commentator was suggesting that FRAP 39 be amended to specify the process by which attorneys' fees will be awarded as "costs" under statutes such as § 1988, or whether instead the commentator meant to address the award of attorneys' fees as a *sanction* under FRAP *38*.

A member said that this matter should be removed from the study agenda, as it simply has not presented much of a problem for the courts of appeals. His court's approach is typical: The question of whether *any* attorneys' fees should be awarded is decided by the court of appeals. The question of the *amount* of those fees -- when the amount is disputed -- is remanded to the district court, which can take testimony and other evidence.

A member moved that Nos. 97-11 and 97-24 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

28. Item No. 97-12: Amend FRAP 44 to apply to constitutional challenges to federal regulations.

FRAP 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Judge Cornelia Kennedy of the Sixth Circuit has asked the Committee to consider whether FRAP

44 should be expanded to require notice in cases in which a party questions the constitutionality of a federal *regulation*.

FRAP 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

Thus, FRAP 44 likely does not extend to federal regulations because § 2403(a) is limited to "any Act of Congress." Interestingly, though, § 2403(*b*) contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state, and yet that duty is not implemented in FRAP 44. Thus, there are two issues before the Committee: (1) Should FRAP 44 be amended as Judge Kennedy suggests? (2) Should FRAP 44 be amended to require any party who questions "the constitutionality of any statute of [a] State" in a case "to which [that] State or any agency, officer, or employee thereof is not a party" (§ 2403(b)) to provide written notice of that challenge to the clerk?

A member said that he was hesitant to adopt Judge Kennedy's suggestion. First, it seems inconsistent with Congressional intent, as expressed in § 2403(a). Second, it will create drafting and interpretation problems, as courts and parties struggle to distinguish "regulations" from "policy statements" from "interpretive bulletins" and so on. And finally, the need for the change is doubtful. If a regulation is not authorized by statute, it will be struck down on that basis. If it is authorized by statute, then the constitutionality of the *statute* will be challenged. It is hard to imagine a "stand alone" challenge to the constitutionality of a *regulation*.

Another member agreed and added that, in any such case that arose, the agency would almost certainly already be a party.

Mr. Letter said that the S.G. did not support Judge Kennedy's suggestion, although he did not object to studying the § 2403(b) problem.

A member moved that the Committee continue to study (with low priority) the question whether FRAP 44 should be amended to require any party who questions the constitutionality of a state statute in a case in which that state is not a party to provide written notice of that challenge to the clerk. The motion was seconded. The motion carried (unanimously). (No motion was made with respect to Judge Kennedy's proposal, although a member commented that it would not hurt to discuss it again at the time the Committee considers amending Rule 44.)

29. Item No. 97-14: Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.

For over two years, the Standing Committee has been studying the wide variety of local rules governing attorney conduct in the district courts and the courts of appeals. The primary focus of the study has been on the standards governing attorney conduct in the district courts. The courts of appeals have made relatively infrequent use of FRAP 46 (the Rule has been cited in only 37 appellate opinions since 1990), and, for the most part, FRAP 46 has been applied to conduct that is universally considered sanctionable (such as making misrepresentations to the court).

Prof. Daniel R. Coquillette, the Reporter to the Standing Committee, has suggested four options for addressing this problem: (1) Do nothing. (2) Draft a model local rule that could be adopted voluntarily by the district courts, and possibly by the courts of appeals. (3) Draft national rules governing those types of attorney misconduct that are of "primary concern" to the bench and bar. (4) Draft both a model local rule and national rules.

Judge Easterbrook reported that, at its June 1997 meeting, the Standing Committee essentially decided to keep its options open. There is widespread agreement among the members of the Committee that *something* ought to be done, but widespread disagreement as to *what*. Judge Easterbrook said that the Standing Committee has asked Prof. Coquillette to draft national rules and model local rules, but that request does not in any way indicate what action the Committee will eventually take.

A member said that this matter should stay on the Advisory Committee's study agenda, but that the Advisory Committee should devote no time to it until the Standing Committee decides what it intends to do with respect to the district courts. At that point, this Advisory Committee could decide whether to recommend conforming amendments to FRAP. In the appellate courts, the disparity of standards has just not been a problem. There are very few FRAP 46 cases, and almost all of those cases involved obvious misbehavior.

A member moved that No. 97-14 be retained on the study agenda, but with (very) low priority until the Standing Committee adopts attorney conduct rules governing practice in the district courts. The motion was seconded. The motion carried (unanimously).

30. Item No. 97-16: Amend unspecified FRAP to address potential overlap in jurisdiction between the Federal Circuit and the regional circuits in patent cases.

In 1996, Judge J. Clifford Wallace of the Ninth Circuit contacted the Administrative Office to describe a series of related cases that (in his view) supported his longstanding contention that the exclusive patent jurisdiction of the Federal Circuit should be eliminated. Judge Wallace's suggestion was referred to the Committee on Federal-State Jurisdiction, which considered and rejected Judge Wallace's proposal. John Rabiej then forwarded Judge Wallace's memo to this Advisory Committee. Mr. Rabiej stated that, although "[t]he Federal/State Jurisdiction Committee's action on Judge Wallace's suggestion officially completes action on Judge Wallace's suggestion . . . the Appellate Rules Committee can consider the matter sua sponte."

The Reporter briefly summarized the litigation cited by Judge Wallace (the *FilmTec* litigation) and

described how one of the parties to that litigation was essentially permitted to get two inconsistent appellate decisions (one from the Federal Circuit and one from the Ninth Circuit) on the same issue.

A member said that he favored dropping No. 97-16 from the study agenda. The *FilmTec* litigation was not only highly unusual, but the problem it created stemmed not from the fact that the two circuits lacked the authority to prevent the inconsistent determinations, but from the fact that they chose not to use the authority that they had.

A member moved that No. 97-16 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

31. Item No. 97-18: Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."

At the April 1997 meeting of the Advisory Committee, Judge Easterbrook suggested that FRAP 1(b) is wrong in asserting that "[t]hese rules do not extend or limit the jurisdiction of the courts of appeals." The Supreme Court has held that the time limits imposed by FRAP 3, 4, and 5 are jurisdictional. *See, e.g.*, *Smith v. Barry*, 502 U.S. 244 (1992); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Moreover, the ACN accompanying FRAP 3 specifically states (quoting *United States v. Robinson*, 361 U.S. 220, 224 (1960)) that the timely filing of a notice of appeal under FRAP 3 and 4 "is 'mandatory and jurisdictional.'" Thus, certain of the Rules *do* "extend or limit the jurisdiction of the courts of appeals." Moreover, the recent enactment of 28 U.S.C. § 1292(e), which gives the Supreme Court authority to define in FRAP when interlocutory appeals will be permitted, further illustrates the jurisdictional nature of the Rules.

Judge Easterbrook again asked that the Advisory Committee give consideration to FRAP 1(b), which, he said, is "flat wrong," and should be deleted. A member agreed.

A member moved that No. 97-18 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

32. Item No. 97-19: Amend FRAP 4(b)(1)(B)(ii) to clarify whether, in multi-defendant criminal cases, the government must file its notice of appeal within 30 days after the *first* notice of appeal is filed by a defendant or within 30 days after the *last* notice of appeal is filed by a defendant.

FRAP 4(b)(1)(B) provides that, when the government is entitled to bring an appeal in a criminal case, its notice of appeal must be filed "within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." The use of the phrase "any defendant" creates an ambiguity in multi-defendant cases: Does the 30 days begin to run after the *first* notice of appeal is filed by a defendant or not until the *last* such notice of appeal is filed? The Committee took a stab at correcting this problem at its April 1997 meeting, but the complexity of the problem soon became apparent, and the Committee decided to postpone further discussion.

A member said that it was obvious that the Committee had to address this problem, and he added another concern: He pointed out that 18 U.S.C. § 3731 provides that appeals brought by the United States in criminal cases "in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered." FRAP 4(b)(1)(B)(ii), by permitting the United States to appeal in some circumstances more than "thirty days after the decision, judgment or order has been rendered," seems inconsistent with § 3731. Judge Logan said that he had written an opinion addressing this conflict.[(3)]

A member moved that No. 97-19 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

33. Item No. 97-20: Amend FRAP 27(a)(3)(A) by adding a sentence explicitly stating that a court need not give notice or await a response before *denying* a motion.

FRAP 27(a)(3)(A) provides:

Time to file. Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

At its April 1997 meeting, the Advisory Committee expressed its understanding that FRAP 27(a)(3)(A) implicitly provided that a circuit court could *deny* any motion without giving notice or awaiting a response. However, the Committee questioned whether FRAP 27(a)(3)(A) should be amended to make that authority explicit.

Judge Easterbrook said that he saw no reason to address this issue at this time. Rather, he recommended that the Advisory Committee wait to see if a problem develops in practice.

A member moved that No. 97-20 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

34. Item No. 97-22: Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.

FRAP 34(a)(1) states that "[a]ny party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted." The Rule does not specify when such a statement should be filed, nor does it say anything about the manner in which such a statement should be made. At the April 1997 meeting of the Advisory Committee, several members suggested that FRAP 34(a)(1) should be amended to establish a uniform national rule governing statements by parties concerning the need for oral argument.

A member said that his court has a local rule requiring that statements regarding opening argument be made in each party's opening brief, and that he had found the rule helpful. Another member said that his court has a similar rule, and that parties generally put their statement regarding oral argument either on the cover of the brief or at the end of the brief. The member was concerned, though, that parties be given a chance to "back out" of a request for oral argument. As far as he is concerned, if a party wants to waive oral argument as late as the day before the argument is scheduled, the party should not be prohibited from making that request.

Mr. Letter said that the S.G. favors the issue being addressed, one way or the other, in FRAP. Rules governing statements regarding oral argument should be uniform. The current hodgepodge of local rules creates unnecessary inconvenience for the government and others with national appellate practices.

A member moved that No. 97-22 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

Judge Garwood said that he would survey the chief judges of the circuits on this issue.

35. Item No. 97-23: Amend FRAP 34(g) to specify whether an attorney or unrepresented party may, during oral argument, use a physical exhibit (such as a chart or diagram) that has not been admitted into evidence.

Apparently, disputes have sometimes arisen regarding whether an attorney (or unrepresented party) may, during oral argument before the court of appeals, make use of a chart, diagram, or other physical exhibit that was not admitted into evidence by the district court or agency. At its April 1997 meeting, the Advisory Committee decided to add to its study agenda the question whether this issue should be more explicitly addressed in FRAP 34(g).

A member said that he sees no reason for a rule. He has never seen a problem arise, and he cannot imagine that a rule could address any potential problem better than the panel before which the problem arises. Another member agreed; this has never been a problem in his court.

A member said that he did not want to drop No. 97-23 from the study agenda. He described a recent experience in which the judge and parties had a conference regarding one attorney's desire to set up a computer with several monitors in the courtroom. The member said that he anticipated more such issues arising in the future, and he thought FRAP 34(g) might well be amended to provide guidance in those situations.

Judge Easterbrook agreed that technology will continue to present such issues, but he disagreed that FRAP 34 should be amended to address these issues. The technology is developing too rapidly, and the situations presented to courts are too diverse, for this area to be profitably addressed by rule. Rather, Judge Easterbrook said, FRAP 34 should continue to maintain its silence on this issue, so that each judge has discretion to address each problem as it arises.

Another member agreed with Judge Easterbrook, pointing out that nothing in FRAP 34 prohibits judges from accommodating technological innovations.

Another member agreed, but stated that he would still like the Committee to study how FRAP 34 might be amended to *encourage* the use of technology in the courtroom.

A member moved that No. 97-23 be removed from the study agenda. The motion was seconded. The motion carried (4-2).

36. Item No. 97-25: Merge FRAP 35 (governing en banc determinations) and FRAP 40 (governing panel rehearings) into a single rule.

At its April 1997 meeting, the Advisory Committee decided to add to its study agenda the question whether FRAP 35 (which governs en banc determinations) and FRAP 40 (which governs panel rehearings) should be merged into a single rule.

A member expressed opposition to the proposal, noting that it would be extremely difficult to combine FRAP 35 -- which permits *initial* arguments before the court en banc (as well as en banc rehearings of panel decisions) -- with FRAP 40 -- which addresses only *rehearings* of panel decisions.

Another member also expressed opposition to the proposal, arguing that the Committee should not undertake such an extensive rewriting of two important rules so soon after the restylized rules were approved.

A member moved that No. 97-25 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

37. Item No. 97-27: Amend FRAP 46(a)(1) to make eligible for admission to the bar of a court of appeals those attorneys who have been admitted to practice before the Supreme Court of the Commonwealth of the Northern Mariana Islands.

FRAP 46(a)(1) provides that an attorney is eligible for admission to the bar of a court of appeals if that attorney is admitted to practice before the United States Supreme Court, "the highest court of a state," another court of appeals, or "a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands)." A commentator informs the Committee that there are *two* courts in the Northern Mariana Islands from which appeals may be taken to the Ninth Circuit: the U.S. District Court for the Northern Mariana Islands and the Supreme Court of the Commonwealth of the Northern Mariana Islands. He suggests that FRAP 46(a)(1) be amended so that lawyers who are admitted to practice before the latter but not the former are eligible for admission to the bar of a court of appeals.

A member expressed opposition to the proposal. He said that it was difficult to believe that any such lawyer exists -- that is, a lawyer who belongs to the bar of the Supreme Court of the Commonwealth of

the Northern Mariana Islands, but who does not belong to the bar of the U.S. District Court for the Northern Mariana Islands. If such a lawyer does exist, he or she should simply join the District Court bar.

Judge Easterbrook wondered whether the Supreme Court of the Commonwealth of the Northern Mariana Islands is not "the highest court of a state" for purposes of FRAP 46(a)(1). After all, FRAP 46(a)(1) does not explicitly mention the highest courts of the District of Columbia, or Puerto Rico, or American Samoa, yet Judge Easterbrook has never heard of any problem involving attorneys admitted to practice before any of those courts.

One member suggested that the Committee contact the commentator to determine whether he is aware of any attorney in the Northern Mariana Islands for whom FRAP 46 has presented a problem. Another member agreed. A couple other members disagreed, though, expressing the view that such an inquiry would be a poor use of Committee time.

A member moved that No. 97-27 be removed from the study agenda. The motion was seconded. The motion carried (6-1).

38. Item No. 97-29: Amend FRAP 28(a)(5) to require that the "statement of the issues presented for review" be phrased as "deep issues" -- that is, in separate sentences that show how the legal question arises, in no more than 75 words, and with a question mark at the end.

In an article in the 1994-95 edition of *The Scribes Journal of Legal Writing*, Bryan A. Garner advocated what he referred to as the "deep issue" approach to framing legal questions. Under this approach, a description of an issue presented to an appellate court for review should, *inter alia*, "consist of separate sentences," "contain no more than 75 words," and "end with a question mark." At the end of his article, Mr. Garner proposed two alternative amendments to FRAP 28(a)(5) (which, as written, simply requires that a brief contain "a statement of the issues presented for review"). These amendments would require attorneys to use the "deep issue" framework in describing the issues presented for review.

Judge Logan said that he had asked that Mr. Garner's proposal be put on the study agenda out of respect for Mr. Garner, who has done outstanding work in assisting the Committee with the restylized rules project. Judge Logan said, though, that he had tried to use Mr. Garner's approach in writing opinions, and found it difficult to implement in multi-issue cases.

A member asked the judges present whether they were encountering substantial problems with the manner in which litigants were framing the issues presented. Judges Garwood and Logan said that statements of the issues are written no better or worse than other parts of most briefs. Judge Easterbrook said that poorly written briefs are a significant problem, but it is not a problem that can be addressed through FRAP. Judge Garwood agreed that FRAP should not be used to teach attorneys how to write.

A member moved that No. 97-29 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

39. Item No. 97-30: Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.

This proposal comes from Mr. Munford. Mr. Munford reported that the Fifth Circuit had recently adopted a local rule that is essentially the same as restylized FRAP 32, and that the Fifth Circuit has adopted a standard certificate of compliance that attorneys can use to certify that their brief complies with the type-volume limitations contained in the rule. Mr. Munford wonders whether it might be helpful to include such a form in FRAP. The form would be exemplary, not mandatory.

Two members of the Committee agreed that such a form would be helpful.

Mr. Rabiej pointed out that it is not clear whether forms that are merely exemplary need to be approved by the Supreme Court and reviewed by Congress. That has been done in the past, he said, but recently some have questioned whether the involvement of the Supreme Court and Congress is necessary.

A member moved that No. 97-30 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

40. Item No. 97-31: Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.

This proposal also comes from Mr. Munford and arises from a recommendation made by the American Academy of Appellate Lawyers. Amendments to FRAP generally take effect on December 1. Mr. Munford suggests that, for the convenience of the appellate bench and bar, FRAP 47(a)(1) should be amended to require that amendments to the local rules of the courts of appeals also take effect on December 1.

A member expressed reservations about the proposal. He noted that at times the circuit courts find themselves "out of step" with the national rules or with newly enacted statutes, and have to act immediately to change their local rules.

Judge Easterbrook agreed. He pointed to the recently enacted Antiterrorism and Effective Death Penalty Act, which required his circuit and others to move quickly to implement local rules. Amending FRAP 47(a)(1) as Mr. Munford suggests would present a difficult drafting exercise; essentially, the Rule would have to say, "All local rules must take effect on December 1, unless it is important that they take effect before December 1."

Mr. Fisher reported that the Tenth Circuit attempts to make changes to local rules effective on January 1, one month after changes to the national rules take effect.

A member noted that the publication deadlines of the United States Code Annotated may be relevant to this problem. It is important that, if local rules are to take effect on the same date, that the date be set so

that the amended rules will make it into the next edition of the U.S.C.A.

A member suggested that the publication deadlines of the popular state compilations published by West are even more important. More attorneys look up local rules in those volumes than in the U.S.C.A.

Judge Easterbrook cautioned that the Committee should not confuse the issue of when new rules are provided to a publisher with the issue of when new rules take effect. A set of rules scheduled to take effect on December 1 could be provided to a publisher long before then. Also, he reminded the Committee again that any constraints on local rules would have to include an exception for emergencies.

A member suggested that the rule could be drafted very generally -- *e.g.*, "Except in an emergency, all local rules must take effect on December 1." Each circuit could then define for itself what qualifies as an "emergency." Presumably, very few local rules would qualify, and thus the vast majority of new local rules would take effect on December 1.

Judge Easterbrook pointed to the language of 28 U.S.C. § 2071(e) as providing helpful guidance: "If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment." Perhaps the emergency exception to a "December 1" rule could be phrased in terms of "immediate need."

A member expressed interest in the Tenth Circuit's practice of making changes in local rules effective one month after changes in the national rules. This gives the circuits a chance to be certain of the nature of changes to the national rules before they make changes to their local rules. Another member pointed out, though, that changes in national rules are usually known 14 months before they take effect.

A member moved that No. 97-31 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

VIII. Additional Old Business and New Business

There was no additional old business.

Mr. Letter noted that the S.G. had recently sent a proposal for an amendment to FRAP to Mr. Rabiej, and that initial discussion of the proposal could wait until the Spring 1998 meeting.

Judge Garwood announced that, with respect to scheduling that meeting, his first preference would be April 16 and 17. His second preference would be March 19 and 20. The meeting will be in Washington, D.C. Judge Garwood asked Mr. Rabiej to survey the members of the Advisory Committee regarding their availability on those dates.

Judge Garwood concluded the meeting by presenting a certificate of appreciation to Judge Logan, and by thanking Judge Logan for his excellent work as Chair of the Advisory Committee. Judge Garwood said that the appellate bench and bar owed an enormous debt to Judge Logan.

IX. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:00 p.m.

Respectfully submitted,

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Patrick J. Schiltz

Reporter

1. *Otis v. City of Chicago*, 29 F.3d 1159, 1165 (7th Cir. 1994) (en banc) ("[W]e know from *Mallis* [*Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978)] and *Schaefer* [*Shalala v. Schaefer*, 509 U.S. 292 (1993)] that a Rule 58 judgment is not the *sine qua non* of appeal. It has been clear since *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), that § 1291 permits appeals from final 'decisions' that are not final 'judgments.' See also *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995-96 (1994).").

2. Judge Stotler clarified this comment in an October 6, 1997 memorandum to Judge Garwood. Judge Stotler reported that while CACM "is generally charged with carrying out Long Range Plan Recommendation 37d," the Committee on Automation and Technology ("CAT") is specifically charged with studying the "desirability, feasibility, and cost of establishing a centrally maintained, publicly accessible electronic database of all opinions submitted by federal courts for inclusion in the database." Judge Stotler stated that the Advisory Committee's work should not overlap with CAT's, as CAT is studying the feasibility of establishing a database containing opinions that the federal courts choose to submit, while the Advisory Committee is studying the advisability of establishing uniform rules governing the publication, citation, and precedential value of appellate opinions. However, the Advisory Committee's work could overlap with CACM's, depending upon how broadly CACM construes Recommendation 37d.

3. *United States v. Sasser*, 971 F.2d 470, 472-75 (10th Cir. 1992) (holding that the court had no jurisdiction over an appeal by the United States that was "filed in the district court within 30 days after . . . (ii) the filing of a notice of appeal by any defendant" for purposes of FRAP 4(b), but that was not filed "within thirty days after the decision, judgment or order has been rendered" for purposes of § 3731).