Minutes of Spring 2000 Meeting of
Advisory Committee on Appellate Rules
April 13, 2000
Washington, D.C.

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 13, 2000, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., and Mr. Sanford Svetcov. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge Phyllis A. Kravitch, the liaison from the Standing Committee; Prof. Daniel R. Coquillette, the Reporter to the Standing Committee; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. John K. Rabiej and Mr. Mark D. Shapiro from the Administrative Office ("A.O."); Ms. Marie C. Leary from the Federal Judicial Center; and Mr. Joseph F. Spaniol, Jr., consultant to the Standing Committee. (Judge Samuel A. Alito, Jr., member of the Advisory Committee, and Prof. Edward H. Cooper, the Reporter to the Civil Rules Committee, joined the meeting later in the day.)

II. Approval of Minutes of October 1999 Meeting

The minutes of the October 1999 meeting were approved.

III. Report on January 2000 Meeting of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meeting. The Reporter said that the package of amendments approved by this Advisory Committee at its October 1999 meeting had been approved for publication by the Standing Committee, with the sole exception of the proposed amendment to Rule 4(a)(7). The Reporter indicated that he would describe the Standing Committee's concerns about the amendment to Rule 4(a)(7) when the Advisory Committee took up the rule later today. The Reporter said that individual members of the Standing Committee made suggestions with respect to a couple of the other amendments, and that the Reporter would communicate those suggestions to the Advisory Committee next spring, when the Reporter summarized the public comments received on those amendments. Finally, the Reporter informed the Advisory Committee that the Standing Committee was continuing to press all of the advisory committees to draft new rules on the topics of electronic service and financial disclosure.

Judge Garwood then recognized Mr. Rabiej. Mr. Rabiej reported that the Supreme Court approved the amendments to the civil rules, criminal rules, and evidence rules that the Standing Committee and Judicial Conference had approved last year. Mr. Rabiej also described efforts being undertaken by the Judicial Conference and the A.O. to encourage federal courts to post local rules on their websites. According to Mr. Rabiej, the American Bar Association recently approved a resolution urging that all local rules be posted on the Internet. A member moved that this Committee express its support of such efforts. The motion was seconded. The motion carried (unanimously).

IV. Action Items

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

Judge Garwood asked that discussion of this item be postponed until after the arrival of Prof. Cooper.

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

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 3. Appeal as of Right — How Taken

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record — excluding the appellant's — or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal<u>, of the representation statement filed under Rule 12(b),</u> and of the docket entries — and any later docket

entries — to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

Committee Note

Subdivision (d)(1). Rule 12(b) has been amended to require that an attorney file a representation statement with a notice of appeal. Because representation statements will now be filed with the district clerk instead of with the circuit clerk, subdivision (d)(1) has been amended to direct the district clerk to send a copy of the representation statement to the circuit clerk at the same time that the district clerk sends copies of the notice of appeal and docket entries.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

(b) Filing a Representation Statement. ~~Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within 10 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal~~ An attorney who files a notice of appeal must file a representation statement with the district clerk at the same time. In the representation statement, the attorney must identify:

(1) the parties that the attorney represents on appeal;

(2) the parties that are likely to participate in the appeal as appellees; and

(3) by name and last known address, the attorneys who are likely to represent each of the likely appellees.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that representation statements will be more helpful to circuit clerks in the docketing of newly filed appeals.

The representation statements currently required by subdivision (b) have two shortcomings. First, the representation statements contain too little information. An attorney filing a representation statement is required to identify only the parties that the attorney represents on appeal; the attorney is not required to identify any other party or the attorneys for

any other party. Second, the representation statements are filed too late. Under Rule 12(a), circuit clerks are required to docket cases "[u]pon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d)." Typically, circuit clerks receive copies of notices of appeals and docket entries within a couple of days after the notices of appeals are filed. Thus, the circuit clerks usually must docket cases before they receive representation statements.

Subdivision (b) has been amended to require that the representation statement be filed with the notice of appeal. (The representation statement, like the notice of appeal, must be filed with the district clerk.) This provision has been placed in Rule 12 — and not in Rule 3 — to make it clear that the representation statement is not part of the notice of appeal. The cases describing certain provisions of Rules 3 and 4 as "mandatory and jurisdictional" — *see, e.g.*, *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978) — do not apply to representation statements.

Subdivision (b) requires the attorney who files the representation statement to identify the "likely" appellees and the attorneys who are "likely" to represent them. This may involve some guesswork on the part of the filing attorney, as in some cases it may not be clear who will participate in the appeal — or who will represent those parties — until the briefs are filed. Nevertheless, such guesswork is unavoidable at the time the appeal is docketed, and the attorney filing the notice of appeal is in a better position to do that guesswork than the circuit clerk.

The appellate clerks have two complaints about Rule 12(b), which requires an attorney who files a notice of appeal to file a representation statement in which he identifies himself and his client. First, the representation statement contains too little information; the attorney for the appellant does not have to identify any other attorneys or any other parties. Second, the representation statement comes too late to help the clerks with docketing. The clerks generally docket appeals within a day or two after they are filed, but the representation statement does not have to be filed until several days later.

At the October 1999 meeting, the Committee discussed an amendment to Rule 3(c) that had been proposed by the clerks and that would require a more complete representation statement to be filed with the notice of appeal. After the Committee balked at putting any such requirement in Rule 3(c) — because of the risk that the rules regarding representation statements would then be deemed "mandatory and jurisdictional," like the other requirements of Rule 3(c) — the Reporter agreed to draft an amendment to Rule 12(b) that would accomplish the clerks' goals. That amendment was now before the Committee.

Mr. Fulbruge informed the Committee that he had circulated the amendment drafted by the Reporter to the appellate clerks and had received nothing but positive comments in response.

Members of the Committee asked Mr. Fulbruge a number of questions about how appeals are docketed. Mr. Fulbruge explained that the problems that had led the clerks to request this amendment are caused to a substantial extent by the antiquated software used in the automatic

docketing system. That software requires clerks to identify all of the parties to the appeal — and to classify each of them as either an appellant or appellee — at the time that the case is docketed. Thus, guesswork at the time of docketing is unavoidable. Also, the software makes it difficult to change these designations, once they are entered. For that reason, it is important that the guesswork that occurs at the time of docketing be as accurate as possible. Representation statements that were filed earlier and that contained more information would help the clerks cut down on docketing errors, while not affecting the substantive rights of any party.

Members of the Committee raised several objections to the proposal. First, members were skeptical that the guesswork that clerks would have to do under the proposal would be much more accurate than the guesswork that clerks have to do now. Second, members were concerned about problems that might arise from the new requirements. Appellees might start filing motions to strike inaccurate representation statements or arguing that appellants were foreclosed from making certain arguments on account of what was included in their representation statements. Third, members pointed out that some courts already use their local rules to require parties to provide docketing information that is not required by FRAP; this problem may best be left to such local rules. And finally, members felt that by the time these amendments could take effect, the antiquated software that is creating the problem will likely have been replaced.

A member moved that Rule 12(b) not be changed to require that more information be included in representation statements. The motion was seconded. The motion carried (unanimously).

A member moved that Rule 12(b) be amended to require that representation statements be filed with notices of appeal. The motion died for lack of a second. As a result, no change to Rule 12(b) was approved, and Item No. 97-33 will be removed from the Committee's study agenda, without prejudice to the clerks returning to the Committee in a couple of years if promised improvements in docketing software do not materialize.

C. Item No. 99-03 (electronic service rules)

Judge Garwood welcomed Prof. Cooper to the meeting.

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 25. Filing and Service

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's

counsel. If authorized by local rule, a party may use the court's transmission facilities to make electronic service under Rule 25(c).

(c) Manner of Service. Service may be personal, by mail, ~~or~~ by third-party commercial carrier for delivery within 3 calendar days, or, if consented to by the party served, by electronic means. When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. Personal service includes delivery of the copy to a responsible person at the office of counsel. Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mailing or electronic mail addresses or the addresses of the places of delivery.

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically.

Subdivision (b). The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances will soon make it possible for a court to forward an electronically filed paper to all parties with the push of a button. When such court-facilitated service becomes possible, courts may decide to permit parties to use the courts' transmission facilities to serve electronically filed papers on other parties who have consented to such service. Court personnel would use the court's computer system to forward the papers, but the papers would be considered served by the filing parties, just as papers that are carried from one address to another by the United States Postal Service are considered served by the sending parties. Subdivision (b) has been amended so that the courts of appeals may use local rules to authorize such use of their transmission facilities, as well as to address the many questions that court-facilitated electronic service is likely to raise.

Subdivision (c). Subdivision (c) has been amended to permit service to be made electronically. No party may be served electronically, either by the clerk or by another party, unless the party has consented to such service.

A court of appeals may not, by local rule, forbid the use of electronic service on a party that has consented to its use. At the same time, courts have considerable discretion to use local rules to regulate electronic service. Difficult and presently unforeseeable questions are likely to arise as electronic service becomes more common. Courts have the flexibility to use their local rules to address those questions. For example, courts may use local rules to set forth specific procedures that a party must follow before the party will be deemed to have consented to electronic service.

Subdivision (c) has been further amended to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is actually notified — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

Subdivision (d)(1)(B)(iii). Subdivision (d)(1)(B)(iii) has been amended to require that, when a paper is served electronically, the proof of service of that paper must include the electronic mail address to which the paper was transmitted.

Rule 26. Computing and Extending Time

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. A paper served electronically under Rule 25(c) is delivered on transmission.

Committee Note

Subdivision (c). Rule 25(c) has been amended to provide that a paper that is served electronically will be considered *served* on the date of transmission, unless the party making service is notified that the paper was not received. Subdivision (c) has been amended to provide that a paper that has been effectively served by electronic means will also be considered *delivered* on the date of transmission. If a party is required or permitted to act within a prescribed period after a paper is served on that party, the prescribed period will begin running on the date of transmission; three days will not be added to the prescribed period, as typically occurs when service is by mail or by third-party commercial carrier.

Electronic service is treated like personal service, and not like service by mail or commercial carrier, for two reasons. First, electronic service (unlike mail or commercial carrier service) is virtually instantaneous, and a party who has been served electronically (unlike a party who has been served by mail or commercial carrier) has considerable control over when it will learn of that service. Second, extending the "three day rule" to electronic service would discourage its use, as parties would not want their adversaries to have three extra days to respond to a paper that is likely to be received instantaneously.

Rule 36. Entry of Judgment; Notice

(b) Notice. On the date when judgment is entered, the clerk must ~~mail to~~ serve on all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

Committee Note

Subdivision (b). Subdivision (b) has been amended so that the clerk may use electronic means to serve a copy of the opinion or judgment or to serve notice of the date when judgment was entered upon parties who have consented to such service.

Rule 45. Clerk's Duties

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party to the proceeding, with a copy of any opinion, and must note the ~~mailing~~ service on the docket. Service on a party represented by counsel must be made on counsel.

Committee Note

Subdivision (c). Subdivision (c) has been amended so that the clerk may use electronic means to serve notice of entry of an order or judgment upon parties who have consented to such service.

The Reporter began by reminding the Committee of the background of these proposed rules. For several years, the rules of practice and procedure — appellate, bankruptcy, civil, and criminal — have permitted the electronic *filing* of papers. The Standing Committee wants the advisory committees to take the next step and draft rules that would permit the electronic *service* of papers.

In February 1999, the Subcommittee on Technology met and made some tentative decisions about how electronic service rules should be drafted. The participants in that meeting agreed that the Civil Rules Committee would take the lead in drafting electronic service rules — and that, after public comment had been received on those rules, the other advisory committees would follow suit. The Civil Rules Committee approved electronic service rules in April 1999, those rules were approved for publication by the Standing Committee in June 1999, and the rules were published for comment in August 1999. Earlier this week, the Civil Rules Committee met, reviewed the public comments, and approved slightly revised electronic service rules. The Standing Committee is expected to give final approval to those rules in June. It is now the responsibility of this Committee — and the other advisory committees — to draft electronic service rules patterned after those approved by the Civil Rules Committee.

The Reporter said that, in almost every respect, the proposed amendments that he had drafted were identical in substance to the proposed amendments that had been approved earlier in the week by the Civil Rules Committee. Specifically:

- Like new FRCP 5(b)(2)(D), new Rule 25(c) permits electronic service only upon parties who consent.

- As is true under new FRCP 5(b)(2)(D), under new Rule 25(c) a court may not promulgate local rules that forbid electronic service to be used upon consenting parties. Nevertheless, as is true under new FRCP 5(b)(2)(D), under new Rule 25(c) courts will have considerable discretion to use local rules to *regulate* electronic service.

- Under the new civil rules, only "FRCP 5" service may be made electronically; "FRCP 4" service (the service of process that commences a lawsuit) must continue to be made manually. Likewise, under the new appellate rules, the notice of appeal will still have to be served personally or by mail (see Rule 3(d)(1)). Only service that occurs after the notice of appeal has been served may be made electronically.

- Like new FRCP 5(b)(2)(D), new Rule 25(c) provides that electronic service is complete upon "transmission."

- Like new FRCP 5(b)(3), new Rule 25(c) explicitly provides in the text of the rule that if a party attempting to serve a paper electronically is notified that the transmission did not go through, service has not been effected. Nothing is said, either in new FRCP 5(b) or in new Rule 25(c), about "bounced" service in other contexts (e.g., the return of mailed service as undeliverable).

- Like new FRCP 25(b)(2)(D), new Rule 25(b) makes it possible for a court, by local rule, to authorize the clerk to serve papers that have been electronically filed with the court.

- Like new FRCP 77(d), which permits the district court clerk to serve notice of the entry of an order or judgment electronically upon parties who have consented to electronic service, new Rules 36(b) and 45(c) permit the circuit court clerk to use electronic means to serve opinions, judgments, and notices of the entry of orders and judgments upon parties who have consented to such service.

The Reporter said that there was only one substantive difference between the rules that he had drafted and the rules that the Civil Rules Committee had approved earlier in the week. The Civil Rules Committee decided that the "three day rule" of FRCP 6(e) *should* apply to electronic

service, whereas, consistent with this Committee's prior deliberations, new Rule 26(c) provides that its three day rule does *not* extend to electronic service.

The Reporter said that, to assist this Committee in deciding whether it wanted to make the appellate rules consistent in this respect with the civil rules, the Reporter had drafted the following alternative amendments to Rule 26(c):

Rule 26. Computing and Extending Time

Alternative One:

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper <u>is not served electronically and</u> is delivered on the date of service stated in the proof of service.

Alternative Two:

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. <u>For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.</u>

Committee Note to Either Alternative:

Committee Note

Subdivision (c). Rule 26(c) has been amended to provide that when a paper is served on a party by electronic means, and that party is required or permitted to respond to that paper within a prescribed period, 3 calendar days are added to the prescribed period. Electronic service is usually instantaneous, but sometimes it is not, because of technical problems. Also, if a paper is electronically transmitted to a party on a Friday evening, the party may not realize that he or she has been served until two or three days later. Finally, extending the "three day rule" to electronic service will encourage parties to consent to such service under Rule 25(c).

Prof. Cooper explained why the Civil Rules Committee had decided to apply the three day rule to electronic service, after initially deciding not to. First, the Bankruptcy Rules Committee strongly favored extending the three day rule to electronic service, and it is important to maintain consistency between the civil rules and the bankruptcy rules. Second, the vast majority of those who commented on the proposed electronic service rules favored extending the three day rule to electronic service. Third, if the three day rule applies to electronic service, parties are more likely, at the outset of a case, to consent to the use of electronic service. Fourth, electronic transmissions are not always immediate; Prof. Cooper recently received an electronic transmission over two days after it had been sent. And fifth, the attachments to electronic messages often arrive in a garbled form, and it can take a day or two to "ungarble" them.

A member said that he thought the appellate rules and civil rules should be consistent on application of the three day rule to electronic service. He said that he had been persuaded that extending the three day rule to electronic service made sense. Other members concurred.

Mr. Fulbruge also concurred; he views consistency between the appellate and civil rules as important. Mr. Fulbruge went on to object to the statement in the Committee Note to Rule 25(b) that "[t]echnological advances will soon make it possible for a court to forward an electronically filed paper to all parties with the push of a button." Mr. Fulbruge said that he was concerned that this statement would create unreasonable expectations, as such software does not now exist and may not exist for some time. The Reporter said that the statement cited by Mr. Fulbruge was meant to be metaphorical; the point is simply that some day it may be easy for clerks to serve electronically filed papers. Moreover, no such service would be permitted — or expected — until a court's local rules authorized it. Mr. Fulbruge said that he appreciated the explanation, but would nevertheless be grateful if this statement in the Committee Note were softened.

A member pointed out that the draft electronic services rules seem to reflect an assumption that electronic service would generally be made party-to-party. However, under pilot projects now operating in a few federal courts, a party is required to file a paper electronically with the court and then to notify the other parties that they can retrieve the paper from the court. Parties do not actually transmit papers to each other. Committee members pointed out that nothing in the electronic service rules would prohibit local rules from authorizing such service.

A member moved that the electronic service rules be approved. The motion was seconded.

The Committee continued to discuss the draft rules, focusing in particular on the problem of the bounced transmission — that is, the situation in which a party attempts to serve a paper electronically and then learns, from the party's e-mail program or otherwise, that the transmission did not go through. Members were sympathetic to the notion that, if a party learns that electronic service failed, the party should try to serve the paper again. At the same time, members were

concerned about abuse. What would happen if a party, the day before a motion was to be argued, informed its adversary that it had never received the electronically served motion?

Prof. Cooper described the Civil Rules Committee's deliberations on this issue. The electronic service rules that the Civil Rules Committee published attempted to address the bounced transmission problem by inserting the following sentence in a Committee Note: "As with other modes of service, however, actual notice that the transmission was not received defeats the presumption that arises from the provision that service is complete upon transmission. The sender must take additional steps to effect service." But this statement turned out to be inaccurate. Additional research discovered that mail service has been held to be effective upon mailing, even when the paper was not delivered, and even when the sender was notified of the nondelivery by the Postal Service.

In preparation for the Civil Rules Committee's meeting earlier this week, Prof. Cooper drafted a revised rule, which provided that *any* kind of service is not effective when the party attempting service learns that the service was unsuccessful. The revised rule would have provided, inter alia, that when a party tried to serve a paper by mail, and the paper was returned by the Postal Service, the party would have to try to serve the paper again.

The Civil Rules Committee balked at the revised rule. Members were quite reluctant to tamper with the "mailbox rule." Millions of papers have been served by mail since enactment of the FRCP in 1938; the fact that only a handful of published cases address the failure of a serving party to re-serve a paper returned as undeliverable is compelling evidence that the system works well. Attorneys who learn that mail service was not successful will almost always try to serve again, both out of courtesy and out of a desire to protect their clients' interests.

The Civil Rules Committee concluded that electronic service is different, and thus that the rules should explicitly provide that failed electronic service is not effective, even though the rules will say nothing about failed personal or mail service. Because failed electronic transmissions are so common, attorneys who are contemplating whether to consent to electronic service will be concerned about the issue. Those attorneys will be more likely to consent to electronic service if they can be reassured that a failed transmission will not qualify as service.

Members of the Appellate Rules Committee agreed that neither this Committee nor the Civil Rules Committee should tinker with the rules on personal or mail service. However, on the issue of electronic service, the members struggled with how the rules can both (1) require a party whose e-mail program informs her that a service did not go through to try again, yet (2) not leave the system open to abuse. As written, the rule would permit one party to call another party on the morning of a hearing, claim that an electronic transmission was never received, and get the hearing postponed.

One member suggested that this problem might be addressed by providing in Rule 25(c) that "[s]ervice by electronic means is complete on transmission, unless the party making service

is notified *within 3 calendar days after transmission* that the paper was not received *by the party served*." The members discussed this suggestion and agreed that it provided an effective, if somewhat rough, way of distinguishing between the situation in which a party's own e-mail program promptly notifies her that a transmission did not go through and the situation in which a party is not notified of a problem with the transmission until her opponent claims on the day of a hearing that the paper was never received. The member who had moved adoption of the electronic service rules agreed to accept these proposed changes to Rule 25(c) as a friendly amendment to his motion.

A member suggested that Rule 25(c) also be amended to require that consent to electronic service be in writing, and that this requirement be mentioned in the Committee Note. Prof. Cooper pointed out that the civil rules provisions on electronic service require consent to be in writing. The Committee quickly reached a consensus that this suggestion was a good one, and it was accepted as a second friendly amendment to the motion to adopt the electronic service rules.

One member asked whether service "by electronic means" included service by fax. The Reporter replied that it did. The member asked that a few words be added to the Committee Note to clarify this issue. No member of the Committee objected to this request.

One member returned to the failed transmission issue and argued that, instead of providing that service is not effective if the serving party learns that the paper was not "received," the rule should instead provide that service is not effective if the serving party learns that the paper was not "delivered." Other members disagreed.

Before voting on the motion to approve the electronic service rules, the maker of the motion clarified that he intended to move adoption of the rules as drafted by the Reporter, with two exceptions. First, the friendly amendments that he had accepted to his motion should be incorporated. And second, draft Rule 26(c) should be replaced by "Alternative Two" of the draft circulated by the Reporter this morning.

The motion carried (unanimously).

The Reporter reviewed for the Committee the changes to the electronic service rules that had been suggested by the Subcommittee on Style. By consensus, the Committee agreed that the changes should be adopted, with the exception of the suggested changes to Rule 36(b).

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

The Committee returned to this item, having earlier deferred consideration until after the arrival of Prof. Cooper.

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a) when it is entered ~~in compliance with~~ for purposes of Rule~~s~~ 58(b) ~~and 79(a)~~ of the Federal Rules of Civil Procedure.

(B) The failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

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

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be entered on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. Under amended Rule 4(a)(7), a judgment or order is entered for purposes of Rule 4(a) when that judgment or order is entered for

purposes of Fed. R. Civ. P. 58(b). Thus, if a judgment or order is not entered for purposes of Fed. R. Civ. P. 58(b) until it is set forth on a separate document, that judgment or order is also not entered for purposes of Rule 4(a) until it is so set forth. Similarly, if a judgment or order is entered for purposes of Fed. R. Civ. P. 58(b) even though not set forth on a separate document, that judgment or order is also entered for purposes of Rule 4(a).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be entered on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Rather, such orders are entered for purposes of Fed. R. Civ. P. 58 — and therefore for purposes of Rule 4(a) — when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Fed. R. Civ. P. 58(b).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be entered on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Fed. R. Civ. P. 58 has been amended to impose such a cap. Under amended Fed. R. Civ. P. 58(b) — and therefore under amended Rule 4(a)(7) — a judgment or order is treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 60 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been

entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g.*, *Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g.*, *Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

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

[It should be noted that the time frame within which an appellant must decide whether to waive the separate document requirement has been dramatically shortened by amended Fed. R. Civ. P. 58. Under former Fed. R. Civ. P. 58, the time to bring post-judgment motions or to appeal a judgment did not begin to run if the judgment was not entered on a separate document. Thus, the appellant could, in theory, waive the separate document requirement and appeal many years after the judgment was entered in the civil docket. Under amended Fed. R. Civ. P. 58, a judgment that is supposed to be set forth on a separate document but is not will nevertheless be considered entered — and the time to bring post-judgment motions and to appeal will nevertheless begin to run — 60 days after the judgment is entered in the civil docket. Thus, the separate document requirement is essentially waived by operation of Fed. R. Civ. P. 58 on the 60th day after entry of the judgment in the civil docket.]

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been entered on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36

F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been entered on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

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

The Reporter said that at the Standing Committee's January 2000 meeting there was a great deal of discussion about the amendment to Rule 4(a)(7) that this Committee approved at its October 1999 meeting. The Standing Committee concluded that the problems that the amendment attempted to solve could be addressed more effectively if the Appellate Rules Committee and the Civil Rules Committee worked together to propose complementary amendments to their respective sets of rules. The Standing Committee directed Judge Garwood and the Reporter to work with Judge Paul Niemeyer (the Chair of the Civil Rules Committee) and Prof. Cooper to draft amendments for presentation to their respective committees in April. The two chairs and two reporters have done so.

The Reporter reminded the Committee that the amendment to Rule 4(a)(7) was intended to address four issues: (1) the widespread confusion over the extent to which orders that dispose of post-judgment motions must be entered on separate documents; (2) the "time bomb" problem — that is, the fact that every circuit except the First holds that when a judgment is required to be set forth on a separate document but is not, the time to appeal the judgment never begins to run; (3) the circuit split over whether the consent of all parties is necessary to waive the separate document requirement; and (4) the *Townsend* problem.

The Reporter said that the first and second issues had been addressed in proposed new Rule 4(a)(7)(**A**), while the third and fourth issues had been addressed in proposed new Rule 4(a)(7)(**B**). The Standing Committee raised no objection to proposed Rule 4(a)(7)(B). Thus, the draft Rule 4(a)(7)(B) being presented to the Committee today is identical to the draft Rule 4(a)(7)(B) approved by the Committee in October 1999 and considered by the Standing Committee in January 2000, except that the Committee Note has been shortened.

The Standing Committee's concerns were directed solely at draft Rule 4(a)(7)(A). The Standing Committee was supportive of the *goals* of draft Rule 4(a)(7)(A), but concerned about the *means* chosen to achieve those goals.

1. As to the time bomb problem: This Committee had proposed to amend Rule 4(a)(7) to impose a cap on the time that a party could wait to appeal a judgment that should have been set forth on a separate document but was not. Specifically, the amendment provided that such a judgment would be treated as entered for purposes of Rule 4(a)(7) — notwithstanding anything to the contrary in the FRCP — 150 days after the judgment was entered in the civil docket. On the 150th day, the time to appeal the judgment would begin to run, even if the judgment was one that had to be set forth on a separate document under FRCP 58, and even if the judgment had not been so set forth.

The Standing Committee's main concern about this proposal was that it would decouple the running of the time to bring post-judgment motions from the running of the time to bring appeals. At present, both the time to bring post-judgment motions under the FRCP and the time to bring appeals under FRAP begin to run at the same time — when judgment is set forth on a separate document. But under the proposed amendment to Rule 4(a)(7), if a judgment was supposed to be set forth on a separate document but was not, the time to bring *post-judgment motions* would never begin to run under the FRCP, while the time to *appeal* would begin to run on the 150th day under FRAP.

The Standing Committee was uncomfortable with this decoupling. The Standing Committee also pointed out that it would create a substantial loophole in the 150 day cap. Under current Rule 4(a)(4)(A), the timely filing of certain post-judgment motions tolls the time to appeal, and, according to the rule, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Because the timeliness of post-judgment motions would be measured under the FRCP (not FRAP), and because the time to bring a post-judgment motion would not begin to run under the FRCP until the judgment was *actually* set forth on a separate document, a timely post-judgment motion could be filed under the FRCP long after the time to appeal the underlying judgment had theoretically expired under the proposed amendment to Rule 4(a)(7). Such a post-judgment motion would "revive" the time to appeal, and thus defeat the cap.

Although it might be possible for this Committee to close this loophole by amending Rule 4(a)(4)(A), the Standing Committee clearly wants this Committee to work with the Civil Rules Committee to find a solution that imposes an effective cap and does so without decoupling the running of the time to bring post-judgment motions from the running of the time to bring appeals.

The Reporter said that Judge Garwood, Judge Niemeyer, Prof. Cooper, and the Reporter had come up with such a proposal. Under the proposal, FRCP 58(b) would provide that, *if* entry of the judgment on a separate document was required by FRCP 58(a), the judgment would be considered entered upon the earlier of the following: (1) actual entry on a separate document, or (2) the passage of 60 days after entry in the civil docket. As part of this proposal, Rule 4(a)(7) would be amended to provide that a judgment will be treated as entered for purposes of Rule 4 (that is, for purposes of the running of the time to appeal) when it is treated as entered for purposes of FRCP 58 (that is, for purposes of the running of the time to bring post-judgment motions). In this way, a 60 day cap is imposed on judgments that should have been entered on

separate documents but were not, and the running of the time to appeal continues to be coupled with the running of the time to bring post-judgment motions.

2. As to the confusion over the extent to which orders that dispose of post-judgment motions must be entered on separate documents: At present, there is at least a four-way circuit split on this issue. Some courts hold that Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the FRCP), while other courts hold that Rule 4(a)(7) merely incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former camp disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter camp disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

The amendment to Rule 4(a)(7) approved by this Committee in October 1999 would have made clear that FRAP simply incorporates the separate document requirement as it exists in the FRCP, and does not impose a separate document requirement of its own. However, under that amendment, the law would still be a mess. Whether an order disposing of a post-judgment motion would have to be entered on a separate document under FRCP 58 (and thus under Rule 4(a)(7)) would depend upon whether the order was appealable, and the circuits would remain all over the map on the issue of the appealability of such orders.

At its meeting earlier this week, the Civil Rules Committee approved for public comment a new FRCP 58(a). That provision retains the general requirement that judgments and amended judgments be entered on separate documents. However, the provision expressly exempts from the separate document requirement orders disposing of post-judgment motions. Thus, new FRCP 58(a) would resolve all of the conflicts over this issue by imposing a uniform national rule, and new Rule 4(a)(7)(A) would make clear that FRAP does not impose a separate document requirement of its own.

The Reporter concluded by noting that, when new FRCP 58 is published, commentators will be invited to address the question whether the separate document requirement should be abolished altogether. However, nothing about the drafting of Rule 4(a)(7) turns on this question. Whether or not the civil rules continue to impose a separate document requirement, Rule 4(a)(7) will simply incorporate the civil rules provisions by reference.

Judge Garwood mentioned that Judge Anthony J. Scirica, the Chair of the Standing Committee, was among those who had suggested that perhaps the separate document requirement should be abolished. Judge Garwood said that he personally thought that the requirement should be maintained to the extent that proposed new FRCP 58(a) does so.

Prof. Cooper pointed out that proposed new FRCP 58(a) would exempt *all* orders disposing of post-judgment motions from the separate document requirement — not just those that toll the time to appeal under Rule 4(a)(4)(A). Rule 4(a)(4)(A) qualifies which post-judgment motions can toll the time to appeal; for example, it provides that a FRCP 60 motion can toll the time to appeal only if it is brought within 10 days. Those qualifications, although important for

appellate purposes, are not important for separate document purposes. It is better to have a simple rule — e.g., a rule that *no* order disposing of a FRCP 60 motion needs to be entered on a separate document.

Prof. Cooper also pointed out that the cap imposed by new FRCP 58(b) was 60 days, while the cap imposed under the earlier proposed amendment to Rule 4(a)(7) was 150 days. Several Committee members said that they did not object to the shorter cap.

A member moved that the amendment to Rule 4(a)(7) be approved. The motion was seconded. The motion carried (unanimously).

The Committee reviewed the suggestions of the Style Subcommittee and, by consensus, agreed that Rule 4(a)(7)(B) should be redrafted to provide, "A failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not affect the validity of an appeal from that judgment or order."

The Reporter asked about the bracketed paragraph in the draft Committee Note to Rule 4(a)(7)(B). The Reporter said that he did not believe that the paragraph was necessary, but wanted the Committee to have a chance to consider it. A member moved that the bracketed paragraph be deleted. The motion was seconded. The motion carried (unanimously).

Judge Garwood and several members of the Committee expressed appreciation for the work of Prof. Cooper and the Reporter on this complicated and difficult matter.

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations, ~~and~~ listing any publicly held company that owns 10% or more of the party's stock, and providing any additional information that the Judicial Conference of the United States requires to be disclosed. Any other party to a proceeding in a court of appeals must file a statement providing any information that the Judicial Conference of the United States requires to be disclosed.

(b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under this Rule 26.1(a) changes.

(c) Number of Copies. If the statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held companies that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1 does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. However, using the Rules Enabling Act process to formulate more detailed financial disclosure requirements would be difficult. The Advisory Committees responsible for drafting the rules of practice and procedure do not have intimate knowledge of the Code of Judicial Conduct, periodic interpretations of the Code, or the ongoing experiences of judges, clerks, and parties under the Code. Moreover, the Advisory Committees cannot respond quickly as rapidly advancing technology changes the way that the Code is administered.

Rule 26.1(a) has been amended to authorize the Judicial Conference, with the assistance of the Administrative Office and others who have expertise in judicial conduct and court administration, to promulgate more detailed financial disclosure requirements, if and when the Judicial Conference decides that such requirements are advisable.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held company acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held company.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

The Reporter reminded the Committee that the Standing Committee's concern about the financial disclosure issue was in part attributable to a series of articles in the *Kansas City Star* and the *Washington Post* that described several instances in which federal judges should have recused themselves from cases but did not.

At present, Rule 26.1 requires a nongovernmental corporate party to file a corporate disclosure statement, in which it identifies all of its parent corporations and all publicly held companies that own at least 10% of the party's stock. At the time that Rule 26.1 was enacted, this Committee expressly acknowledged that judges needed more information than that required by Rule 26.1 to meet their recusal obligations — and, in the Committee Note to Rule 26.1, this Committee expressly invited local rulemaking on this issue. The courts of appeals have accepted this invitation with a vengeance; most courts of appeals have enacted local rules on financial disclosure, some of which require disclosure far in excess of that required by Rule 26.1.

The Standing Committee's concern about Rule 26.1 is twofold. First, the Standing Committee is concerned that none of the other rules of practice and procedure contain anything like Rule 26.1. At a minimum, the Standing Committee would like the other rules of practice and procedure to incorporate a provision very much like Rule 26.1. Second, the Standing Committee is concerned that Rule 26.1 may not require broad enough disclosure.

Prior to the Standing Committee's January meeting, Judge Scirica and Prof. Coquillette met with the reporters to the advisory committees to attempt to reach a consensus on a financial disclosure proposal that could be presented to the advisory committees at their spring meetings. The participants in that meeting agreed that a proposal along the following lines would be presented to each advisory committee:

- Rule 26.1 would be amended to require that disclosure statements be supplemented when necessary.

- All of the rules of practice and procedure would incorporate a provision patterned after Rule 26.1. This would act as a "floor."

- All of the rules of practice and procedure would also include a provision that would give the Judicial Conference the authority to require *all* parties (not just nongovernmental corporate parties) to submit a financial disclosure form — a form that could require information in addition to that required by Rule 26.1.

- The financial disclosure rules would be silent on the issue of local rulemaking. Although the Committee on Codes of Conduct would like to preempt any local rulemaking on the topic of financial disclosure, such a goal is impractical at this time.

Earlier this week, the Civil Rules Committee approved for publication financial disclosure provisions that were consistent with this proposal. Likewise, at its spring meeting, the Bankruptcy Rules Committee approved this proposal in principle, although the Bankruptcy Rules Committee will need more time to draft implementing rules because of complications that arise in the bankruptcy context.

The Reporter said that his draft amendments to Rule 26.1 were intended to implement the proposal that the Civil Rules Committee and Bankruptcy Rules Committee had already accepted. He noted that there were two differences between his draft and the rules approved by the Civil Rules Committee. First, the civil rules would require a "null" report — that is, they would require parties who do not have information that must be disclosed under Rule 26.1 to inform the court of that fact. Second, the civil rules specifically require the clerk of court to give the financial disclosure information to the judge. The Reporter's draft does not include any such provision. The Reporter said that the rules of practice and procedure assume that *everything* filed with a clerk is provided to a judge; he is afraid of the negative implication that might arise if the rules start specifying that certain information must be given to a judge while remaining silent about other information.

Prof. Cooper addressed the two differences between the provisions approved by the Civil Rules Committee and the provisions drafted by the Reporter. The requirement that a null report be filed was initially suggested by the Committee on Codes of Conduct. The Committee's staff now seems to be backpedaling on whether a null report should be required. The Civil Rules Committee thought that requiring such a report would be helpful, as a court could be assured that the reason it had received no Rule 26.1 information from a party is not because that party had erred, but because that party had no Rule 26.1 information to report. As to the requirement that clerks provide Rule 26.1 information to judges: One member of the Civil Rules Committee felt strongly that such a requirement should be in the rule. Although other members had their doubts, the requirement was included in the rule that was approved. Such a requirement may be more defensible in the civil rules than in the appellate rules, as in the in the district courts it is common for cases to be pending longer with more interim judicial actions before final resolution.

On the issue of local rules, Prof. Cooper said that the Committee on Codes of Conduct and several members of the Civil Rules Committee felt strongly that local rules should be forbidden — that there should be a uniform financial disclosure rule in all federal courts. But such a uniform rule is almost surely not attainable at this time; it also may not be wise, as it may be in everyone's interests to permit courts to continue to experiment with local rules. The Civil Rules Committee did not forbid local rulemaking, but it included language in the Committee Note that was intended to discourage it.

A member of the Committee agreed with Prof. Cooper that differences between the trial courts and the appellate courts might justify including in the civil rules, but not in the appellate rules, an explicit direction to clerks to convey Rule 26.1 information to judges. Other members of the Committee expressed reluctance to include such a direction in the appellate rules, in large part because of the negative implication described by the Reporter.

Mr. Rabiej said that the Committee on Codes of Conduct was adamant that courts should not use local rules to require more information than is required by Rule 26.1. The Committee on Codes of Conduct thought that such additional information was rarely helpful and often harmful, because inundating judges with too much information makes it *less* likely that judges will recuse themselves when appropriate. Mr. Rabiej pointed out that in the Committee Note accompanying the 1989 adoption of Rule 26.1, this Committee was encouraging — even inviting — of local rules. Mr. Rabiej wondered whether silence on the issue of local rulemaking now would be interpreted as a reaffirmation of that prior sentiment.

Mr. Rabiej also said that the Committee on Codes of Conduct favors the requirement of a null report. Apparently, the current practice of many clerks is to contact a party who does not file a Rule 26.1 statement to make certain that the omission was not inadvertent. Requiring a null report would reduce the burden on the clerks' offices. Several Committee members urged that Rule 26.1 be redrafted to include the requirement of a null report.

A couple of members expressed concern about some of the stylistic differences between the provisions approved by the Civil Rules Committee and the provisions drafted by the Reporter. For example, the Civil Rules Committee explicitly refers to a "form," whereas the word is not used in the new Rule 26.1. Prof. Coquillette responded that, at this point, these rules are being approved for publication only, and that, after publication, the rules can be made more consistent stylistically. Prof. Cooper asserted that there is a benefit to publishing rules that are drafted somewhat differently; it will give commentators a chance to compare the approaches and express their opinions on what works best.

The Committee came to a consensus that the language of the draft Rule 26.1 was acceptable, except that a requirement for a null report should be included in draft Rule 26.1(a) and the word "this" appearing immediately before the phrase "Rule 26(a) changes" in draft Rule 26.1(b) should be deleted. The Committee also agreed that several changes should be made to the Committee Note, including the following:

- The penultimate sentence of the second paragraph in the Committee Note to subdivision (a) should be changed, so that instead of focusing on the *disadvantage* of having the advisory committees address financial disclosure issues, the Note focuses on the *advantage* of having this work done by the Judicial Conference.

- The last sentence of the second paragraph in the Committee Note to subdivision (a) should be changed so that it refers to the inability of the "Rules Enabling Act process" to respond to technological changes, rather than to the inability of "the Advisory Committees."

- Explicit reference should be made in the Committee Note to the ability of the Judicial Conference to use its authority under amended Rule 26.1(a) to preempt local rulemaking on the subject of financial disclosure.

The Committee decided to adjourn for lunch. The Reporter was asked to use the lunch break to redraft the amendments to Rule 26.1 to incorporate these changes. The Committee adjourned for lunch at 1:00 p.m.

The Committee reconvened at 2:25 p.m. The Reporter distributed the following amendments and Committee Note:

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) Who Must File.

(1) **Nongovernmental corporate parties.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that

(a) identify~~ing~~ies all its parent corporations and list~~ing~~s any publicly held ~~company~~ corporation that owns 10% or more of the party's stock or reports that there are no such corporations, and

(b) provides any additional information that the Judicial Conference of the United States requires to be disclosed.

(2) **Other parties.** Any other party to a proceeding in a court of appeals must file a statement that provides any information that the Judicial Conference of the United States requires to be disclosed.

(b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

(c) Number of Copies. If the statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held corporations that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1(a) has been amended to require that nongovernmental corporate parties who currently do not have to file a corporate disclosure statement — that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation — inform the court of that fact. At present, when a corporate disclosure statement is not filed, courts do not know whether it has not been filed because there was nothing to report or because of ignorance of Rule 26.1.

Rule 26.1 does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. Experience with divergent disclosure practices and improving technology may provide the foundation for more comprehensive disclosure requirements. The Judicial Conference, supported by the committees that work regularly with the Code of Judicial Conduct and by the Administrative Office of the United States Courts, is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Thus, Rule 26.1 has been amended to authorize the Judicial Conference to promulgate more detailed financial disclosure requirements — requirements that might apply beyond nongovernmental corporate parties.

As has been true in the past, Rule 26.1 does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1 itself. However, along with the authority provided to the Judicial Conference to require additional disclosures is the authority to preempt any local rulemaking on the topic of financial disclosure.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

Several members of the Committee expressed support for the redraft. A member moved that the amendments and Committee Note be approved. The motion was seconded. The motion carried (unanimously).

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

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). A paper must not exceed 20 pages, exclusive of the [corporate] disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

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

Rule 5(c) has been further amended to limit the length of papers filed under Rule 5.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). A paper must not exceed 20 pages, exclusive of the [corporate] disclosure statement, the proof of service, and the accompanying documents required by Rule

21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers, except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.

Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

Rule 5(c) currently provides that a petition for permission to appeal (as well as a cross-petition for permission to appeal and an answer to a petition or cross-petition) "must conform to Rule 32(a)(1)." This is a mistake. Rule 32(a)(1) addresses only how a paper must be reproduced; it says nothing about whether the paper needs a cover or a caption, what information must be contained in the cover or caption, how the paper must be bound, what size paper must be used, what type face must be used, and so on. In October 1999, the Committee addressed this error in Rule 5(c) by approving an amendment that would substitute a reference to "Rule 32(c)(2)" for the current reference to "Rule 32(a)(1)." At its January 2000 meeting, the Standing Committee approved this amendment for publication.

After the agenda book was distributed, Mr. Fulbruge brought two concerns about the amendment to Judge Garwood's attention. First, Mr. Fulbruge pointed out that the mistake that appears in Rule 5(c) also appears in Rule 21(d), which governs petitions for extraordinary relief. Second, Mr. Fulbruge pointed out that nothing in Rule 5 or in any other rule imposes any limitation on the length of a petition for permission to appeal or related paper. Likewise, no rule imposes any limitation on the length of a petition for extraordinary relief or related paper. Rule 32(c)(2) does not help, as it specifically exempts "other papers" from the page limitations imposed on briefs by Rule 32(a)(7).

The Reporter drafted two amendments for the Committee's consideration. The draft amendment to Rule 5(c) is identical to the amendment that the Committee approved in October 1999, except that it adds a page limitation. The draft amendment to Rule 21(d) substitutes "Rule 32(c)(2)" for "Rule 32(a)(1)" — as the amendment to Rule 5(c) does — and also adds a page limitation. The page limitations are patterned after Rule 27(d)(2), which imposes page limitations on motions and responses to motions. As a result of these amendments, all of the form requirements that apply to briefs will also apply to papers filed in connection with requests for permission to appeal and requests for extraordinary writs, except that covers will not be required and different page limitations will be imposed.

Several members expressed support for the amendments. No member objected, except that one member suggested that, in both Rule 5(c) and Rule 21(d), the phrase "[e]xcept by the court's permission" be inserted prior to "[a] paper must not exceed 20 pages." By consensus, the Committee agreed with the suggestion.

A member moved that the amendments to Rules 5(c) and 21(d), as modified by the suggestion, be approved. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

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

Prof. Coquillette gave the Committee a brief update on the Standing Committee's efforts to draft "Federal Rules of Attorney Conduct" or "FRAC." Specifically, Prof. Coquillette reported on a February 2000 meeting of the Subcommittee on Attorney Conduct, at which the Department of Justice and several other organizations were invited to share comments on how, if at all, the rules of practice and procedure should address the hundreds of conflicting and confusing local rules on attorney conduct.

Prof. Coquillette said that, although no decision had yet been made by the Subcommittee, much less by the Standing Committee, he thought that a consensus was emerging on at least a couple of points. First, there is widespread agreement that the appellate courts are not experiencing a problem in this area, and that Rule 46 should be left unchanged. Second, there is also widespread agreement that the best way to address the problems in the district and bankruptcy courts is through a "dynamic state conformity" rule embodied in a "FRAC 1" — that is, a rule that would essentially provide that state rules of professional responsibility govern the conduct of attorneys in federal court.

Two problems remain. First, there is sharp disagreement over whether an additional rule of attorney conduct — a "FRAC 2" — should exempt discrete subjects from regulation by state authorities. The most contentious issue is whether federal prosecutors should be exempt from state application of Model Rule 4.2. Second, there are special problems in the bankruptcy context that might have to be addressed in a "FRAC 3." However, the Bankruptcy Rules Committee is busy with more pressing matters, so work on a "FRAC 3" is not likely for some time.

Prof. Coquillette said that there will probably be another invitational meeting in the fall, and that the advisory committees will not be asked to act on rules of attorney conduct until spring 2001 at the earliest. Prof. Coquillette stressed again that this Committee will probably not be asked to take any action with respect to attorney conduct, given that Rule 46 appears to be working well.

Judge Garwood thanked Prof. Coquillette for his report.

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

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

Mr. Letter said that, after struggling with this issue for over a year, the Justice Department has concluded that it is not an appropriate subject of rulemaking. The fact that Rule 22(a) requires habeas petitions to first be presented to district court judges is controversial only in the context of immigration. Rule 22(a) is controversial in the context of immigration because, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), a person who has been ordered deported is authorized in some circumstances to move in the court of appeals for a stay of deportation. In ruling upon such a motion, a circuit judge must review the merits of the case — that is, a judge must review the same evidence and arguments that are likely presented in an accompanying habeas petition.

Several difficult circuit splits have developed over the meaning of the IIRIRA and how it interacts with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Courts disagree even about such fundamental matters as whether district courts continue to have authority to rule on habeas petitions filed by aliens who have been ordered deported. It will likely take several years to work out the most important of these conflicts. That being the case, the Justice Department believes that this Committee would be ill-advised to intervene in this area through rulemaking. Mr. Letter recommended that Item No. 98-07 be removed from the Committee's study agenda.

Several members of the Committee concurred with Mr. Letter's recommendation. A member moved that Item No. 98-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

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

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

The Sixth Circuit divided over this question in *Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en banc). The majority, citing the admonition in Rule 3(c)(4) that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal," held that such a notice of appeal "name[d] the court to which the appeal is taken" as a *practical* matter, as there was

only one appellate court to which an appeal could lie. The dissenters, citing Supreme Court decisions characterizing the requirements of Rule 3 as "mandatory and jurisdictional," argued that the problem with such a notice of appeal is not *informality*, but rather that it does not "name the court to which the appeal is taken" *at all*.

At the Committee's October 1999 meeting, the Reporter introduced this matter and recommended that it be removed from the study agenda. The Reporter argued that the Sixth Circuit's decision was reasonable and did not conflict with the decision of any other court of appeals. Mr. Letter asked the Committee to postpone a decision on Item No. 99-05 to give the Department of Justice a chance to look at the issue and formulate a recommendation. The Committee agreed.

Mr. Letter reported that the Department of Justice had found that only three other circuits have addressed this issue, and all three agree with the approach taken by the Sixth Circuit in *Dillon*. For that reason, the Department of Justice concurred that this item should be removed from the Committee's study agenda.

A member moved that Item No. 99-05 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

D. Items Awaiting Initial Discussion

1. Item No. 99-06 (FRAP 33 — notice of bankruptcy settlements)

FRBP 7041 and 9019(a) provide special rules regarding settlements reached in bankruptcy actions. The rules require that all settlements be approved by the bankruptcy court after notice to the creditors and the trustee. The rules prevent the debtor from cutting a "sweetheart" deal with a favored creditor.

The bankruptcy judges of the Fourth Circuit have raised a concern about Rule 33, which authorizes "appeal conferences" to try to settle cases and authorizes a court of appeals to "enter an order . . . implementing any settlement agreement" that results from such a conference. The concern of the Fourth Circuit bankruptcy judges is that the debtor and a favored creditor could cut a sweetheart deal on appeal and, under Rule 33, get an order implementing that deal, without notice to the other creditors or the trustee and without an opportunity for the bankruptcy judge to consider the fairness of the settlement.

The Reporter said that he had drafted an amendment to Rule 33 to address the concern of the Fourth Circuit bankruptcy judges, but both the former and current reporter to the Bankruptcy Rules Committee had raised objections to the Reporter's draft and described several questions that will have to be answered before anyone can try to solve this problem. The Reporter said that the Bankruptcy Rules Committee was in the best position to identify and answer those questions. Thus, this Committee will simply hold this matter in abeyance until it receives a specific proposal from the Bankruptcy Rules Committee. The Reporter concluded by pointing out that, to

the best of his knowledge, the concern of the Fourth Circuit bankruptcy judges is purely theoretical. No one is aware of any party who has actually used Rule 33 in the manner feared by the bankruptcy judges.

A member of the committee agreed that this matter is extremely complicated and should first be addressed by the Bankruptcy Rules Committee. He said that even the logistics of trying to make certain that settlements reached on appeal be approved were complicated. Should the court of appeals remand the case to the bankruptcy court? Hold the appeal in abeyance until the bankruptcy court can consider the fairness of the settlement? Dismiss the appeal without prejudice? Constitute itself as a bankruptcy court and hear arguments on the fairness of the settlement?

Another member of the Committee pointed out that settlements must be approved in contexts other than bankruptcy — for example, in class actions and derivative actions. In those contexts, parties who are affected by a settlement may not be parties to the appeal in which the settlement is reached. The member said that if and when this Committee revisits this issue, it should explore whether changes to Rule 33 are needed — changes beyond those necessary to address the bankruptcy problem.

By consensus, the Committee agreed to leave Item No. 99-06 on the study agenda and await a specific proposal from the Bankruptcy Rules Committee.

2. Item No. 99-08 (FRAP 4 — give pro se litigants more time to appeal)

Mr. Howard Rich, who is incarcerated in Texas, has proposed a number of changes to FRAP, including giving pro se appellants more time to bring appeals. After a brief discussion of Mr. Rich's proposals, a member moved that Item No. 99-08 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

3. Item No. 99-09 (FRAP 22(b) — specify procedure for obtaining COA)

Before a party who has applied for a writ of habeas corpus in the district court can appeal the denial of his application, he must obtain a certificate of appealability ("COA") from "a circuit justice or a circuit or district judge." Rule 22(b)(1). Judge Scirica has pointed out that the circuits have different procedures for considering requests for a COA. In particular, circuits answer the following questions differently: (1) Should the court decide whether to grant a COA before or after it receives briefing on the merits of the appeal? (2) How many judges should be involved in deciding whether a COA should be granted? (3) When, if ever, should counsel be appointed for a party who seeks a COA? Judge Scirica has asked whether FRAP, the FRCrP, or both might be amended to bring about more uniformity.

The Committee briefly discussed the various procedures used by the courts of appeals. A couple of members said that the summary of procedures that had been prepared for Judge Scirica

did not accurately describe the procedures used in their circuits. All members of the Committee agreed that the matter was worth studying.

By consensus, the Committee requested the Department of Justice to study this matter and to make a recommendation at a future meeting. In particular, the Committee would appreciate knowing whether the Justice Department believes that there is a serious problem and, if so, whether the problem is best addressed by Congress, by case law, by local rules, or by amending FRAP and/or the FRCrP. A couple of members suggested that the Justice Department call the clerk of each circuit to determine whether the circuit's day-to-day practices are consistent with its formal policies. One member asked that the Justice Department include in its study the procedures used by courts when parties seek permission to file a second or successive habeas application.

Mr. Letter said that the Department of Justice would be happy to study this matter for the Committee and would make a report and recommendation at a future meeting.

4. Item No. 00-01 (FRAP 15(b) — clarify whether private parties can file applications to enforce agency orders)

Item No. 00-01 arises out of a suggestion by Michael Powell, an attorney in Dallas.

Before it was restylized, Rule 15(b) stated that, if a petition for review of an agency order was filed, "*the respondent* may file a cross-application for enforcement." As then written, Rule 15(b) seemed to contemplate that only the agency — which is always "the respondent" to a petition for review — could file a cross-application for enforcement.

After being restylized, Rule 15(b)(1) now states that, if a petition for review of an agency order is filed, "*a party opposing the petition* may file a cross-application for enforcement." Apparently, in at least one case, the question arose whether Rule 15(b) now permits cross-applications for enforcement to be filed not only by the agency, but by *any* party who opposes the petition for review (whether or not the agency itself has chosen to file a cross-application for enforcement). Mr. Powell suggests that FRAP should be amended to clarify this ambiguity.

Mr. Powell also raises a second question: "whether under the first sentence of Rule 15(b)(1), a private party may file an original application for enforcement of an agency order." He notes that the first sentence of Rule 15(b)(1) — "[a]n application to enforce an agency order must be filed with the clerk of a court of appeals authorized to enforce the order" — is written "in the passive" and "d[oes] not specify who may file an application."

At Judge Garwood's request, the Department of Justice consulted with several federal agencies about Mr. Powell's concern. The agencies said that they had not experienced a problem and did not expect to experience a problem in the future. The agencies stressed that Rule 15 does not give a court jurisdiction over any application for enforcement; such jurisdiction must come

from an underlying statute, and no underlying statute permits a private party to file an application for enforcement.

A member moved that Item No. 00-01 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

5. Item No. 00-02 (FRAP 29 — restrict who may file amicus briefs)

At the Standing Committee's January 2000 meeting, Charles Cooper, a member of the Committee, told Judge Garwood and the Reporter that he was concerned about the frequency with which amicus briefs are filed in the courts of appeals by law professors and others who neither have a stake in the particular dispute nor represent a client who has a stake in the particular dispute. Mr. Cooper suggested that this Committee might want to consider amending Rule 29 to place restrictions on who may file amicus briefs.

Several objections were raised to Mr. Cooper's suggestion. First, members said that amicus briefs are designed to assist the courts, and the fact that a lawyer does not have a personal stake in a case does not mean that the lawyer cannot help the court. Second, this matter is best left to courts to decide on a brief-by-brief basis. Courts can always deny permission to file an amicus brief or ignore an amicus brief after it is filed. Finally, it would be extremely difficult to craft restrictions on amicus briefs; the energy that would have to be devoted to the task, and the controversy that the task would generate, would outweigh any potential benefits.

A member moved that Item No. 00-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

6. Item No. 00-03 (FRAP 26(a)(4)/45(a)(2) — description of holidays)

Jason Bezis, a student at Boalt Hall School of Law, has called the Committee's attention to the fact that Rules 26(a)(4) and 45(a)(2) refer to three legal holidays in a different manner than 5 U.S.C. § 6103(a). The rules refer to "Presidents' Day," whereas the statute refers to "Washington's Birthday"; the rules refer to "Martin Luther King, Jr.'s Birthday," whereas the statute refers to the "Birthday of Martin Luther King, Jr."; and the rules refer to "Veterans' Day," whereas the statute refers to "Veterans Day."

No member of the Committee thought that the differences regarding the King holiday and Veterans' Day warranted Committee action. Some members thought that the difference between "Presidents' Day" and "Washington's Birthday" might be substantial enough to justify amending Rules 26(a)(4) and 45(a)(2), but these members first wanted to know whether an executive order or other official source designates the third Monday in February as "Presidents' Day." Mr. McGough offered to look into this matter and report back to the Committee at its next meeting.

7. Item No. 00-04 (new FRAP 4.1 — indicative rulings)

The Department of Justice has proposed that FRAP be amended to authorize a procedure — commonly referred to as an "indicative ruling" — that is permitted under the common law of most of the courts of appeals. The need for an indicative ruling most often arises in the following situation: A district court enters judgment. A party files a notice of appeal. Sometime later, that party — or another party — files a motion under FRCP 60(b) for relief from the judgment. At that point, the district court cannot grant the FRCP 60(b) motion, as it no longer has jurisdiction over the case. The party can ask the court of appeals to remand the case to the district court, but that would be a waste of everyone's time if the district court will not grant the FRCP 60(b) motion.

Under the indicative ruling procedure, the party files its FRCP 60(b) motion in the district court. The district court then issues an "indicative ruling" — that is, a memorandum in which the district court indicates how it would rule on the FRCP 60(b) motion if it had jurisdiction. If the district court indicates that it would grant the motion, the court of appeals remands the case.

For several reasons, the Justice Department believes that FRAP should be amended to explicitly authorize the indicative ruling procedure. First, the procedure is not well known; if FRAP embraced the procedure, more parties would become aware of it. Second, the Second Circuit does not permit district courts to issue indicative rulings; the Ninth Circuit, unlike the other circuits, requires a remand for a *denial* (as well as for a grant) of a Rule 60(b) motion. An amendment to FRAP would resolve this circuit split. Finally, the circuits that do authorize indicative rulings use somewhat different procedures. An amendment to FRAP would promote uniformity.

In a March 14, 2000 letter to Judge Garwood, Solicitor General Waxman proposed adding a new Rule 4.1 on indicative rulings and suggested language for both the rule and the Committee Note. That letter was included in the Committee's agenda book. Mr. Letter highlighted two aspects of the draft rule. First, the rule would not apply in criminal cases or in cases under 28 U.S.C. §§ 2241, 2254, or 2255, which are technically civil in nature but are closely linked to criminal matters. Second, the rule would apply to interlocutory appeals, as some circuits hold that a district court loses jurisdiction over a preliminary injunction, even though it retains jurisdiction over the underlying case in which the injunction was issued.

The Committee discussed the proposal. Most of the discussion focused on the exclusion of habeas proceedings from the proposed rule. Some members opposed the exclusion, arguing that there was no principled reason for denying indicative rulings to those involved in habeas proceedings. These members pointed out that, in most circuits, those involved in habeas proceedings can *now* seek an indicative ruling, so this rule would deprive some litigants of a right that they now have. Other members supported the exclusion, arguing that habeas proceedings are numerous, often frivolous, and often brought pro se, and that any benefits that would be gained from approving the proposed Rule 4.1 would be outweighed by the many frivolous requests for indicative rulings that it would occasion.

A couple of members said that they would be inclined to support the proposal, if the exclusion of habeas proceedings were eliminated. Others expressed concerns about the proposal. All members agreed that the proposal deserved further consideration.

By consensus, the Committee agreed that Item No. 00-04 should remain on the Committee's study agenda. Committee members suggested that the Justice Department reconsider the exclusion of habeas proceedings from proposed Rule 4.1. If this Committee was unwilling to approve a rule that excluded habeas proceedings, would the Justice Department still want to go forward with its proposal? Also, Committee members suggested that the Justice Department be prepared to better explain how the indicative ruling procedure would work in the context of interlocutory appeals. Finally, Committee members recommended that the Committee Note be tightened up. For example, one member objected to the Committee Note's reference to a district court notifying the court of appeals that it would "seriously entertain a post-judgment motion."

Mr. Letter agreed that the Justice Department would give the matter further study.

8. Item No. 00-05 (notice of appeal for corporation signed by non-lawyer)

This matter was brought to the Committee's attention by Judge Motz after the agenda books were distributed.

If a party wishes to appeal a judgment or order of a district court, it must file a notice of appeal. A notice of appeal must be signed by the party's attorney or, if the party is proceeding pro se, by the party. *See* FRCP 11(a). Because a corporation cannot appear pro se in federal court, a notice of appeal filed on behalf of a corporation must be signed by an attorney. The question is: What if it is not? What if a notice of appeal is filed on behalf of a corporation, but, rather than being signed by an attorney, the notice is signed by one of the corporation's officers? Must the appeal be dismissed? Or can the court of appeals hold the appeal in abeyance and give the corporation an opportunity to hire counsel?

A 1999 decision of the Ninth Circuit — *Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999) — appears to be the only published decision of a court of appeals addressing this issue. In *Bigelow*, the Ninth Circuit held that a notice of appeal filed on behalf of a corporation but not signed by counsel was not a nullity "so long as a lawyer promptly thereafter enters a formal appearance on behalf of the corporation and undertakes the representation." *Id.* at 1165. This issue is now pending before the Fourth Circuit.

The Committee briefly discussed this issue. Most of the members who spoke argued that this issue may not warrant rulemaking, given that there is only a single published decision addressing the issue, and given that, as far as the Committee knows, the issue has arisen in only one other case. A member suggested that, given the brief amount of time the Committee had been given to consider this issue, Item No. 00-05 should not be removed from the study agenda

at this time. Rather, the Committee should await the Fourth Circuit's decision. If the Fourth agrees with the Ninth, the Committee should remove this item from its study agenda. If the Fourth disagrees with the Ninth, Committee action might be warranted.

By consensus, the Committee agreed with this suggestion.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Scheduling of Dates and Location of Fall 2000 Meeting

Judge Garwood informed the Committee that he was not certain whether a fall meeting would be necessary. He also said that, if a fall meeting is necessary, it might last no more than a half day. He suggested that the fall 2000 meeting be scheduled for Washington, D.C., which would allow much of the Committee to attend a half day meeting without having to spend a night away from home. The Committee agreed to reserve October 2 and 3, 2000, for the meeting. Judge Garwood said that he would inform the Committee later this summer whether it would have to meet in October and, if so, how long the meeting would probably last.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:15 p.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter