**Minutes of Spring 2001 Meeting of**
**Advisory Committee on Appellate Rules**
**April 11, 2001**
**New Orleans, Louisiana**

## I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 11, 2001, at 8:35 a.m. at the Hotel Inter-Continental in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Samuel A. Alito, Jr., Chief Justice Richard C. Howe, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Also present were Judge Anthony J. Scirica, Chair of the Standing Committee; Judge J. Garvan Murtha, the liaison from the Standing Committee; Prof. Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules; Mr. Charles R. "Fritz" Fulbruge III, the liaison from the appellate clerks; Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and former Advisory Committee members Chief Justice Pascal F. Calogero, Jr., and Mr. John Charles Thomas.

Judge Garwood introduced Chief Justice Howe and Mr. Roberts, who replaced Chief Justice Calogero and Mr. Thomas, respectively, as members of this Committee. Judge Garwood thanked Chief Justice Calogero and Mr. Thomas for their devoted service to this Committee and presented both with certificates of appreciation. Judge Garwood also introduced Judge Murtha, who replaced Judge Phyllis A. Kravitch as the liaison from the Standing Committee. Finally, Judge Garwood welcomed Judge Scirica from the Standing Committee and Prof. Cooper from the Civil Rules Committee.

## II. Approval of Minutes of April 2000 Meeting

The minutes of the April 2000 meeting were approved.

## III. Report on June 2000 and January 2001 Meetings of Standing Committee

Judge Garwood asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2000 meeting, the Standing Committee approved for publication all of the rules forwarded by this Committee — including the proposed amendments to Rules 4(a)(7), 5(c), 21(d), and 26.1, as well as the electronic service package — with one

exception. In the electronic service package, this Committee had proposed amending Rule 25(c) to provide that electronic service is complete on transmission unless the party making service is notified "within 3 calendars days after transmission" that the service failed. The Standing Committee removed this 3-day qualifier, so as to maintain consistency between the electronic service provisions of the civil rules (which contained no such qualifier) and the electronic service provisions of the appellate rules.

The Reporter said that this Committee had little to report at the January 2001 meeting of the Standing Committee, as this Committee did not meet in fall 2000 and was still awaiting comments on the package of rules published in August 2000.

## IV. Action Items

### Proposed Amendments Published for Comment in August 2000

Judge Garwood said that all of the comments on the proposed amendments published for comment in August 2000 were submitted in writing; no commentator requested an opportunity to testify in person. Judge Garwood also announced that he would take up the amendments in a slightly different order than they were listed in the agenda, as he wanted first to consider those amendments in which the Civil Rules Committee had an interest, so that Prof. Cooper could participate in the discussion.

### 4. Rule 4(a)(7) (separate document requirement) [Item No. 98-02]

The Reporter introduced the following proposed amendment and Committee Note:

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

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

(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) 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.

**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.

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; *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*.

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The Reporter reviewed the lengthy history of this Committee's consideration of Rule 4(a)(7) and the Civil Rules Committee's related consideration of FRCP 58. The Reporter then summarized the public comments. Little opposition was expressed to the proposed amendment to Rule 4(a)(7); no one disagreed with the manner in which amended Rule 4(a)(7) would resolve the waiver issue or the *Townsend* issue. There was also little opposition to proposed FRCP 58(a)'s exclusion of orders disposing of certain post-judgment motions from the separate document requirement. There was, however, strong opposition to proposed FRCP 58(b) — in particular, to the 60-day cap. In addition, some commentators seemed to have difficulty understanding the separate document requirement — either as it exists under current FRCP 58 or as it would exist under amended FRCP 58.

The Reporter said that, to a point, he sympathized with the objections to the 60-day cap. He recommended that the cap be lengthened to the 150 days that this Committee had originally proposed to the Civil Rules Committee. But, the Reporter said, *some* kind of cap was necessary to address the time bomb problem. To argue that there should be *no* cap — as several commentators did — is to argue that, even though a party has only 180 days to move to reopen the time to appeal from a judgment about which the party received *no* notice (*see* Rule 4(a)(6)(A)), a party should have *forever* to appeal from a judgment about which the party *had* notice, if that judgment was not set forth on a separate piece of paper. That makes no sense.

A member said that the only objections to the Rule 4(a)(7)/FRCP 58 package that he thought deserved consideration were the objections to the 60-day cap. He argued that those objections would largely be obviated if the Civil Rules Committee substituted a 150-day cap in place of the 60-day cap. He thought that a 150-day cap would give litigants ample opportunity to protect their appellate rights. The 150 days would generally not begin to run until the judgment was "final" under 28 U.S.C. § 1291. After a final judgment was entered in the civil docket (but not set forth on a separate document), a litigant would have 180 days to appeal — 150 days before the time to appeal began to run and then 30 days to file the appeal. (The litigant would have another 30 days if the government was a party.) The lack of activity in the case for such a long period of time would put the litigant on notice that it should do *something* to preserve its right to appeal. Under amended Rule 4(a)(7), the litigant can always waive the

separate document requirement and appeal, and, under amended FRCP 58(d), the litigant can move the court to set forth the judgment on a separate document.

Prof. Cooper said that, although he was the author of the 60-day provision, he had been persuaded that extending the cap to 150 days was wise. Courts often issue orders whose finality is in doubt. When such an order is not set forth on a separate document, what signals the litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order; by contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with the case.

A member asked whether the widespread non-compliance with the separate document requirement — the non-compliance that creates the "time bombs" that the 60-day cap is meant to "defuse" — is attributable more to district court clerks or district court judges. If the former, he said, it may be that better education could solve the time bomb problem. Several members said that the problem is attributable more to judges than to clerks; a member described how different judges take different positions on whether an order granting a FRCP 12(b)(6) motion is appealable and therefore required to be set forth on a separate document. Judge Murtha said that his impression is that many district court judges simply aren't aware of the separate document requirement; he pointed out that, in all of the training that new district court judges receive, no one mentions the separate document requirement. A member reminded the Committee that, for over 30 years now, the appellate courts had been warning district courts to comply with the separate document requirement, and yet non-compliance remains widespread.

Several members expressed support for extending the cap from 60 days to 150 days. Another member objected. He said that 180 days is a long time to make potential appellees wait in cases in which judgment is not set forth on a separate document. Another member responded that no potential appellee is forced to wait 180 days, as any potential appellee can move the court to set forth the judgment on a separate document and start the time to appeal running. The first member responded that such a motion won't do the potential appellee any good if the judge refuses to grant it because the judge wrongly believes that a separate document is not necessary.

A member moved that this Committee recommend to the Civil Rules Committee that the 60-day cap in proposed FRCP 58(b)(2)(B) be extended to 150 days. The motion was seconded. The motion carried (unanimously).

Judge Garwood recommended the following change to the Committee Note:

> 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 listed in new Fed. R. Civ. P. 58(a)(1) (which include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents.

Judge Garwood explained that this amendment would make the Committee Note to Rule 4(a)(7) more precise. As the Committee Note to FRCP 58 indicates, new FRCP 58(a)(1) exempts from the separate document requirement not only orders that dispose of motions that toll the time to appeal under Rule 4(a)(4)(A) (e.g., a FRCP 60 motion filed within 10 days), but also some orders that dispose of motions that do not toll the time to appeal (e.g., a FRCP 60 motion that is not filed within 10 days). Prof. Cooper spoke in support of the recommendation. Prof. Cooper also mentioned that he would be recommending to the Civil Rules Committee that the Committee Note to proposed FRCP 58(a) be amended to clarify that both judgments and *amended* judgments need to be set forth on separate documents, and Prof. Cooper recommended that the Committee Note to Rule 4(a)(7) be similarly amended.

The Committee then discussed some of the confusion that the commentators had in understanding how new FRCP 58 and new Rule 4(a)(7) would work. A member said that he shared a commentator's confusion over whether entry in the civil docket was necessary in cases in which the judgment or order had to be set forth on a separate document. In response, Prof. Cooper said that he would recommend to the Civil Rules Committee that it reword proposed FRCP 58(b) to make it clear that, when a judgment is required to be set forth on a separate document, the judgment is not considered entered until it is *both* entered in the civil docket *and* set forth on a separate document (or, if not so set forth, when 150 days have run after the entry in the civil docket).

Several members expressed confusion about a different matter. Amended Rule 4(a)(7)(A) provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, amended Rule 4(a)(7)(A) tells the reader to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of the running of the time to appeal. When the reader turns to FRCP 58(b), though, he finds this:

> **(b) Time of Entry.** Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:
>
> (1) when it is entered in the civil docket under Rule 79(a), and
>
> (2) if a separate document is required by Rule 58(a)(1), upon the earlier of these events:
>
> (A) when it is set forth on a separate document, or
>
> (B) when 60 days have run from entry in the civil docket under Rule 79(a).

The problem is with the clause "[j]udgment is entered for purposes of . . . ." Rule 4(a)(7) informs the reader that FRCP 58(b) will tell him when the time begins to run for purposes of the appellate rules, but when the reader gets to FRCP 58(b), he finds a rule that, by its terms, dictates

only when the time begins to run for purposes of a long series of civil rules, each of which the reader would have to look up, and none of which relates to appellate time. This will put the reader through a lot of work and likely leave him scratching his head.

After a lengthy discussion, a member pointed out that this confusion might be avoided if the Civil Rules Committee would amend the introductory sentence in FRCP 58(b) as follows:

> **(b) Time of Entry.** Judgment is entered for purposes of these Rules ~~50, 52, 54(d)(2)(B), 59, 60, and 62~~:

The Reporter described a second way that the confusion could be avoided: amending Rule 4(a)(7)(A) so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This would eliminate the need for practitioners to examine FRCP 58(b) and the rules cited therein, and thus it would eliminate any chance that FRCP 58(b)'s introductory clause could cause confusion. Members seemed to favor the first suggestion. Although amending Rule 4(a)(7) as the Reporter suggested would eliminate confusion for appellate practitioners, FRCP 58(b), as drafted, would still create both work and confusion for trial practitioners, as it would describe when judgment is entered for *some* purposes, but then be completely silent about when judgment is entered for *other* purposes.

A member moved that this Committee recommend to the Civil Rules Committee that proposed FRCP 58(b) be amended by deleting "for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62" and substituting in its place "for purposes of these Rules." The motion was seconded. The motion carried (unanimously). Prof. Cooper said that, while he would communicate the recommendation to his Committee, he did not know if he could support it. He needed to give further thought to the impact that defining time of entry for *all* judgments would have outside the area of the running of the time for bringing post-judgment motions.

A member asked whether Rule 4(a)(7)(B) should refer to "[a] failure to *set forth* a judgment or order on a separate document" instead of to "[a] failure to *enter* a judgment or order on a separate document." Both proposed Rule 4(a)(7) and proposed FRCP 58 consistently refer to judgments being "set forth" on separate documents and "entered" in the civil docket. The Reporter said that the suggestion was a good one.

A member moved that proposed Rule 4(a)(7)(B) be amended by substituting "set forth" for "enter." The motion was seconded. The motion carried (unanimously).

After further discussion, a member moved that proposed Rule 4(a)(7) be approved as published, with the exception of the change to the text already approved and the change to the Committee Note recommended by Judge Garwood. The motion was seconded. The motion carried (unanimously).

By consensus, the Committee authorized Judge Garwood and the Reporter to make conforming changes to the Committee Note to reflect any changes to FRCP 58 made by the Civil Rules Committee at its upcoming meeting.

**20. Rule 26.1 (financial disclosure) [Item No. 99-07]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 26.1. ~~Corporate~~ Disclosure Statement**

**(a) Who Must File.**

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

(A) identif~~ying~~ies ~~all its~~ any parent corporation~~s~~ and ~~listing~~ any publicly held ~~company~~ corporation that owns 10% or more of ~~the party's~~ its stock or states that there is no such corporation, and

(B) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) **Other party.** Any other party to a proceeding in a court of appeals must file a statement that discloses any information that may be required by the Judicial Conference of the United States.

**(b) Time for Filing; Supplemental Filing.** A party must file the Rule 26.1(a) 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 Rule 26.1(a) 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(a).

Rule 26.1(a) 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(a) 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(a) does not forbid the promulgation of local rules that require disclosures in addition to those required by Rule 26.1(a) 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.

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The Reporter summarized the comments, pointing out that only the Judicial Conference provision was the subject of serious contoversy. Some commentators objected that it would be difficult for attorneys to ascertain what the Judicial Conference was requiring at any point in time. Other commentators questioned the legality under the Rules Enabling Act ("REA") of delegating what is essentially rulemaking authority to the Judicial Conference, questioned the wisdom of short-circuiting the REA process in this manner (particularly when the judiciary often warns Congress not to short-circuit the process), and/or questioned the assertion in the Committee Note that the Judicial Conference had the authority to promulgate requirements that would pre-empt local rules on the issue of financial disclosure.

Mr. Rabiej reported that the Bankruptcy Rules Committee, at its spring meeting, had decided to omit the Judicial Conference provision in its version of the financial disclosure rule. He also said that, in describing the core reporting obligation, the Bankruptcy Rules Committee used substantially different language than the Appellate, Civil, and Criminal Rules Committees used in their financial disclosure proposals.

A member said that Rule 26.1 represents a compromise between very different points of view on financial disclosure. Some believe that Rule 26.1 already goes too far, resulting in judges being overwhelmed by useless information. Others believe that Rule 26.1 does not go far enough. The Codes of Conduct Committee believes that Rule 26.1 should not be broadened or narrowed, but simply extended to the civil and criminal rules. The Judicial Conference provision

is basically a "punt" — a recognition that the lengthy and cumbersome REA process is poorly suited to resolve the ongoing dispute over financial disclosure, particularly given the lack of expertise of the rules committees.

A member expressed agreement with the objections made by the commentators to the Judicial Conference provision. He was particularly concerned about how practicing lawyers would find out what the Judicial Conference was requiring at any point in time, as there is no convenient way for lawyers to learn about Judicial Conference activities. Also, although the member was not certain if he agreed with the argument that the Judicial Conference provision was unlawful under the REA, he said that the argument at least gives him pause.

A member pointed out that the appellate rules already delegate some matters to the Judicial Conference. Rule 25(a)(2)(D) authorizes local rules on electronic filing, as long as the rules "are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." And Rule 47(a)(1) requires local rules to "conform to any uniform numbering system prescribed by the Judicial Conference of the United States."

Judge Scirica filled in some of the background to the financial disclosure proposals. To begin with, he said, many think that financial disclosure is not a procedural matter at all — but instead a matter of court management — and thus not appropriately addressed by the rules of practice and procedure. However, Rule 26.1 has existed for some time, and apparently has proven useful. After publication of articles in the *Kansas City Star* and *Washington Post* about the improper failure of judges to recuse themselves, members of Congress and others asked the Committee on Codes of Conduct and the rules committees to try to improve financial disclosure practices. The Codes of Conduct Committee, in turn, asked that the rules of civil and criminal procedure be amended to add a provision similar to Rule 26.1.

Judge Scirica point out that one problem that has not yet been mentioned is the tremendous variation among the courts of appeals and the district courts in their local rules on financial disclosure. Many courts have adopted local rules requiring disclosure far in excess of that required by Rule 26.1. These rules are controversial; not only do they create a hardship for attorneys with national practices, but many argue that they result in judges being so overwhelmed with information that they make it *more* likely that a judge will fail to recuse herself when appropriate. That said, the courts of appeals have made it very clear that they would resist any attempt to limit their ability to use local rules to govern financial disclosure.

Judge Scirica said that he sympathizes with the impulse behind the Judicial Conference provision. The rules committees are not well suited to tinker with financial disclosure rules — to decide, for example, whether parties should disclose all subsidiaries or all partnerships in which they are involved. These decisions should be made by the Codes of Conduct Committee.

That said, Judge Scirica also recognizes the seriousness of the objections made to the Judicial Conference provision. Such a provision will not be approved unless the Standing Committee has very specific assurances that attorneys will have ready access to any Judicial

Conference standards on financial disclosure. In addition, the legal objections to the Judicial Conference provision will need to be considered by the Standing Committee.

Prof. Cooper elaborated on the local rules concern. He said that this Committee had once proposed a much broader version of Rule 26.1, but, in the face of strong opposition from the chief judges of the courts of appeals, had adopted a very narrow rule and used the Committee Note to invite local rulemaking. The circuits have taken up that invitation with a vengeance. This creates a considerable hardship for practicing attorneys. Not only do attorneys have to learn and comply with various sets of local rules, but some of those local rules impose financial disclosure obligations that are extremely onerous.

Prof. Cooper said that, speaking only for himself, he does not think the Judicial Conference provision is illegal. He believes that the Judicial Conference has the power to impose financial disclosure obligations, even in the absence of a rule of practice or procedure, as such obligations pertain to court administration, and the Judicial Conference is charged with ensuring uniformity in the administration of the federal courts. That said, Prof. Cooper is not certain whether, from a policy perspective, the Judicial Conference provision is wise.

A member moved that all of proposed Rule 26.1, with the exception of the Judicial Conference provision, be approved as published. The motion was seconded. The motion carried (unanimously).

The Committee returned to its discussion of the Judicial Conference provision. A member said that, before the provision could become law, it would have to be approved not only by this Committee and the Standing Committee, but by the Judicial Conference and the Supreme Court. He said that if the Judicial Conference and the Supreme Court concluded that they had authority to enact the Judicial Conference provision, that was good enough for him.

A member said that she, too, was happy to leave it to the Standing Committee to address the question whether the Judicial Conference requirement is lawful under the REA. As to the wisdom of the provision, she thought that, on balance, it was a good way to deal with a tricky problem, but she did not feel strongly. However, she is concerned about making certain that lawyers have access to any requirements promulgated by the Judicial Conference.

A member said that the problem for attorneys goes beyond learning about new requirements imposed by the Judicial Conference. Attorneys also need a place to go to confirm that, as of a particular date, the Judicial Conference has *not* imposed any requirements — or any new requirements.

A member suggested amending the Judicial Conference provision to refer to the disclosure of "any information that may be *publicly designated* by the Judicial Conference," rather than to the disclosure of "any information that may be *required* by the Judicial Conference." This would underscore the importance of making certain that attorneys are informed of any action taken by the Judicial Conference with respect to financial disclosure.

Also, using "designated" in place of "required" might soften somewhat the objection to the delegation of "rulemaking" power to the Judicial Conference.

A member said that he did not think it made any difference whether the Judicial Conference provision referred to information that is "required" or "designated." The rule states that the financial disclosure statement "must" include the information, and thus the obligation is mandatory, whether the contents of the statement are "required" or "designated." Another member responded that, although the end result is the same, "designated" may be a more politically palatable term.

A member moved that proposed Rule 26.1(a)(1)(B) and (a)(2) be changed by deleting "required" and substituting in its place "publicly designated." The motion was seconded. The motion carried (unanimously).

A member moved that the Judicial Conference provisions of proposed Rule 26.1 be approved as modified, contingent on the Standing Committee assuring itself that lawyers would have ready access to any standards promulgated by the Judicial Conference and that the Judicial Conference provisions were consistent with the REA. The motion was seconded. The motion carried (unanimously).

Judge Scirica concluded by stating that the ultimate goal was to have uniform financial disclosure rules that apply in every federal court. This is not an area in which there should be variation from one federal court to another; after all, the same recusal standards apply to every federal judge. But the Judicial Conference is comprised of judges, and judges can be very protective of their local rules, so there is no guarantee that the Judicial Conference provision will result in uniformity. That said, the Judicial Conference provision has a better chance of bringing about uniformity than trying to get five rules committees, the Standing Committee, the Judicial Conference, and the Supreme Court all to agree on every modification to the financial disclosure rules.

Judge Garwood thanked Prof. Cooper for participating in the discussions of Rule 4(a)(7)/FRCP 58 and the financial disclosure provisions.

Following the lunch break, the Committee discussed the financial disclosure provision approved by the Bankruptcy Rules Committee. That provision defines the scope of the financial disclosure obligation much differently than the provisions approved by the Appellate, Civil, and Criminal Rules Committees. For example, the bankruptcy provision requires disclosure when a party "directly or indirectly" owns 10 percent or more of "any class" of a publicly *or* privately held corporation's "equity interests."

Members of the Committee expressed several concerns about the provision approved by the Bankruptcy Rules Committee, objecting both to its substance and to its ambiguity. A couple members stressed, though, that while they prefer the provision approved by the Appellate, Civil,

and Criminal Rules Committees, they thought it important that there be uniformity across the four sets of rules, even if that meant adopting the Bankruptcy Rules Committee's provision.

### 1. Rule 1(b) (abrogating statement regarding jurisdiction) [Item No. 97-18]

The Reporter introduced the following proposed amendment and Committee Note:

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

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

**Committee Note**

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

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The Reporter summarized the comments, focusing in particular on the argument of the National Association of Criminal Defense Lawyers ("NACDL"). The NACDL argues that there is a conflict between Rule 4(b)(1)(B) — which requires the government to file an appeal in a criminal case within 30 days after entry of the order being appealed — and 18 U.S.C. § 3731 — which requires the government to file an appeal in a criminal case within 30 days after the challenged order "has been rendered." The NACDL argues that, because "rendered" means "announced" rather than "entered," and because § 3731 is jurisdictional, Rule 4(b)(1)(B) is "presently invalid" as it extends the jurisdiction of the courts of appeals. The NACDL objects to abrogating Rule 1(b) because it would remove this trap for the government.

Mr. Letter said that he had consulted his colleagues in the Criminal Division of the Department of Justice, and they said that they had never heard this argument and strongly disagreed with it on the merits. The Reporter said that, even if the NACDL was correct, preserving a trap for the government is a poor reason for refusing to abrogate Rule 1(b).

A member moved that the abrogation of Rule 1(b) be approved as published. The motion was seconded. The motion carried (unanimously).

**2. Rule 4(a)(1)(C) (coram nobis) [Item No. 97-41]**

The Reporter introduced the following proposed amendment and Committee Note:

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

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

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

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

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

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

**Committee Note**

**Subdivision (a)(1)(C).** The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or

denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

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The Reporter summarized the comments.

A couple of members agreed with the comment of Judge Frank Easterbrook that there are motions that arise much more frequently than coram nobis motions and that create similar problems. However, these members disagreed with Judge Easterbrook that coram nobis applications should be addressed in Rule 4 only as part of a sweeping rule that categorizes all of these difficult motions. These members argued that the coram nobis problem should be fixed now, and that other problems can be addressed in the future.

A member moved that proposed Rule 4(a)(1)(C) be approved as published. The motion was seconded. The motion carried (unanimously).

### 3. Rule 4(a)(5)(A)(ii) (excusable neglect/good cause) [Item No. 95-07]

The Reporter introduced the following proposed amendment and Committee Note:

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

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

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

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

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

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

**Committee Note**

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

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

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

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

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The Reporter summarized the comments. The Reporter said that, while all commentators agreed that Rule 4(a)(5)(A) should be amended to resolve the circuit split, several commentators urged that the rule be amended to adopt the majority position that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. The Reporter disagreed with this position, for several reasons.

First, it is not true that, because showing good cause is said to be easier than showing excusable neglect, the proposed amendment to Rule 4(a)(5)(A) would make the excusable neglect standard superfluous. The good cause and excusable neglect standards are not interchangeable; one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault — that is, in which the need for an extension is occasioned by something within the control of the attorney or party. The good cause standard applies in situations in which there is no "neglect" — excusable or otherwise — because the need for an extension is occasioned by something that is not within the control of the attorney or party.

Second, it is not true, as the commentators argue, that the good cause standard cannot apply to "post-expiration" motions. If, for example, the Postal Service failed to deliver a notice of appeal, the party might have good cause to seek a "post-expiration" extension. It would be unfair to make such a party prove that his "neglect" was "excusable," since he wasn't neglectful. Similarly, contrary to what the commentators argue, the "excusable neglect" standard could apply to "pre-expiration" motions. For example, a movant may bring a "pre-expiration" motion for an extension of time when a mistake made by the movant makes it unlikely that she can meet the original deadline.

Finally, amending Rule 4(a)(5)(A) to adopt the majority position would leave Rule 4(a)(5)(A) in tension with Rule 4(b)(4). If this Committee agrees with the commentators that the majority position should be embraced, then this Committee should go further and amend Rule 4(b)(4). All of the criticisms made of proposed Rule 4(a)(5)(A) apply with equal force to current Rule 4(b)(4).

The Reporter went on to state that he thought that the stylistic suggestions made by Judge Jon Newman would be helpful. Specifically, Judge Newman suggested making the following changes to the Committee Note:

> Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought ~~after the expiration of the original deadline~~ during the 30 days following the expiration of the original deadline. . . .
>
> Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause,

regardless of whether a motion for an extension is filed before or ~~after the time prescribed by Rule 4(b) expires~~ during the 30 days following the expiration of the original deadline.

Several members of the Committee expressed agreement with the Reporter. A member moved that proposed Rule 4(a)(5)(A) be approved as published, except that the Committee Note be changed as Judge Newman suggested, and except that the Reporter be instructed to add language to the Committee Note clarifying the difference between the good cause and excusable neglect standards. The motion was seconded. The motion carried (unanimously).

**5. Rule 4(b)(5) (tolling effect of FRCrP 35(c) motion) [Item No. 98-06]**

The Reporter introduced the following proposed amendment and Committee Note:

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

**(b) Appeal in a Criminal Case.**

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(c), nor does the filing of a motion under 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(c) does not suspend the time for filing a notice of appeal from a judgment of conviction.

**Committee Note**

**Subdivision (b)(5).** Federal Rule of Criminal Procedure 35(c) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. *See, e.g.*, *United States v. Carmouche*, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); *United States v. Morillo*, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a

judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(c) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(c) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(c), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

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The Reporter summarized the comments.

A member said that he understood the motivation behind the NACDL's comments; obviously, criminal defense attorneys want as much time as possible to file notices of appeals. However, if this Committee believes that the 10-day appeal period provided in Rule 4(b)(1)(A) is too short, it should address the problem directly by amending Rule 4(b)(1)(A) rather than indirectly by permitting FRCrP 35(c) motions to toll the time to appeal.

A member asked about the mechanics of amended Rule 4(b)(5). If a Rule 35(c) motion is granted, is a new judgment entered? And, if so, does a criminal defendant have to file a notice of appeal from the amended judgment? The member said that, if a notice of appeal from the amended judgment is needed, he would be concerned. In real life, what typically happens is that judgment is entered, the defense attorney files a notice of appeal, and the defense attorney withdraws. If the court then grants the government's FRCrP 35(c) motion and enters an amended judgment, there won't be a criminal defense attorney around to file a new notice of appeal. A member responded that, while this was a problem, it is a problem that exists now and that won't be affected by the proposed amendment.

A member moved that proposed Rule 4(b)(5) be approved as published. The motion was seconded. The motion carried (unanimously).

**6. Rule 5(c) (typo/page limits — petitions for permission to appeal) [Item No. 98-11]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 5. Appeal by Permission**

**(c) Form of Papers; Number of Copies.** All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the 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.

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The Reporter summarized the comments.

A member said that she was inclined to agree with those commentators who argued that the limit on the size of Rule 5 papers should be expressed in words rather than in pages. Other members expressed reservations about using word limits. A member said that abuses such as manipulating font size or margins were a real problem with briefs, but have never been much of a problem with such things as Rule 5 papers. That is why, when the D.C. Circuit adopted word limits on briefs, it did not adopt word limits on motions or other papers.

The Reporter asked about enforcement. Unless this Committee requires a certificate of compliance to be filed with every Rule 5 paper, a word limit could be enforced only if the clerks counted every word of every paper. Mr. Fulbruge said that, in the Fifth Circuit, about half of all petitions and motions are handwritten and filed by pro se litigants (usually prisoners). Word limits cannot effectively be enforced against such papers; page limits provide at least some restraint.

A member moved that proposed Rule 5(c) be approved as published. The motion was seconded. The motion carried (unanimously).

**7. Rule 21(d) (typo/page limits — petitions for extraordinary writs) [Item No. 98-11]**

The Reporter introduced the following proposed amendment and Committee Note:

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**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). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the 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.

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The Reporter summarized the comments. The Reporter said that he sympathized with those commentators who argued that the limit on Rule 21 papers should be extended to 30 pages. The Reporter said that, as a practitioner, he had occasion to file petitions for mandamus, and those petitions were, for all practical purposes, the same as principal briefs on the merits. Just as principal briefs are limited to 30 pages by Rule 32(a)(7)(A), so should Rule 21 papers be limited to 30 pages by Rule 21(d). A couple of members agreed.

Other members disagreed. They argued that 20 pages is adequate for most Rule 21 papers, and that parties can seek the court's permission to exceed the limit in appropriate cases. Mr. Fulbruge endorsed the 20-page limit. He said that, in the Fifth Circuit, most Rule 21 papers are filed pro se by prisoners, and most are frivolous. A 30-page limit would result in wasting the time of judges and clerks.

A member moved that proposed Rule 21(d) be approved as published, except that the page limit be increased from 20 to 30. The motion was seconded. The motion carried (4-3).

### 8. Rule 15(f) (premature petitions to review agency action) [Item No. 95-03]

The Reporter introduced the following proposed amendment and Committee Note:

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

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

appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

**Committee Note**

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

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

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The Reporter summarized the comments. The Reporter said that, with one exception, the comments on proposed Rule 15(f) were positive, although Judge Easterbrook made a number of good drafting suggestions that were reflected in a revised draft of proposed Rule 15(f) that the Reporter had prepared for the Committee.

The one commentator who expressed opposition to proposed Rule 15(f) was an extremely important one: the United States Court of Appeals for the District of Columbia Circuit

and its Advisory Committee on Procedure. Chief Judge Raymond Randolph informed this Committee that the judges on the D.C. Circuit unanimously and strongly opposed Rule 15(f).

The Reporter said that he was not entirely persuaded by the reasons given by the D.C. Circuit for its opposition to proposed Rule 15(f) (which, the Reporter reminded the Committee, was initially proposed by a highly respected member of the D.C. Circuit). At bottom, the D.C. Circuit's opposition seems to reflect concern about the administrative burden on its clerk and the impact on its statistics. That said, the Reporter remarked that he thought it would be futile to attempt to advance proposed Rule 15(f) over the determined opposition of the D.C. Circuit, given the large percentage of administrative law cases that are handled by that court.

A member agreed. He said that he, too, was skeptical of the reasons given by the D.C. Circuit for opposing proposed Rule 15(f). He also noted that, at least in part, the D.C. Circuit seemed to misunderstand proposed Rule 15(f); contrary to the comments of the D.C. Circuit, nothing in proposed Rule 15(f) would provide that the filing of a petition for rehearing *does* render an agency action non-final and thus non-reviewable. However, the member said, his impression is that, outside of the D.C. Circuit, the problem addressed by proposed Rule 15(f) is more theoretical than real, and he is reluctant to push an amendment designed to solve a D.C. Circuit problem over the opposition of the D.C. Circuit.

A member said that he continues to support proposed Rule 15(f). He disagrees with the D.C. Circuit about the seriousness of the problem that Rule 15(f) would solve; he has seen many instances of litigants falling into the "trap" that Rule 15(f) would eliminate. He also believes that a good part of the D.C. Circuit's opposition is motivated by a concern that, under Rule 15(f), the circuit's statistics would look worse. That is not a good reason for maintaining in place a trap that results in litigants inadvertently losing their right to seek appellate review of adverse agency actions. Although the member understands the concern about trying to push proposed Rule 15(f) over the opposition of the D.C. Circuit, he would at least like to invite Chief Judge Randolph and the clerk of the D.C. Circuit to talk with this Committee about proposed Rule 15(f) when this Committee next meets in Washington.

Another member said that he opposes Rule 15(f) on the merits. He said that the analogy between agency actions and court cases — and thus between proposed Rule 15(f) and current Rule 4(a)(4)(B)(i) — is inapt. In multiple party court cases, the filing of a post-trial motion by Party One effectively stays the appeal for Party Two and Party Three; the case will not go forward with respect to any of the parties until the district court disposes of Party One's motion. In agency actions, the filing of a petition for rehearing with the agency by Party One often does *not* stay the "appeal" for Party Two and Party Three; Party Two and Party Three can seek review of the agency order prior to the disposition of Party One's petition for rehearing.

A member said that he thought that the multiple party problem could be addressed by fine tuning Rule 15(f). Another member said that the problem was more theoretical than real, as the D.C. Circuit (and the other circuits) will almost always stay the "appeals" of Party Two and Party Three while Party One's petition for rehearing is pending with the agency.

A member moved that the Committee not proceed with proposed Rule 15(f) at this time, but instead revisit the matter after further conversation with the D.C. Circuit. The motion was seconded. The motion carried (unanimously).

### 9. Rule 24(a) (IFP status/PLRA) [Item Nos. 97-05 & 99-01]

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 24. Proceeding in Forma Pauperis**

**(a) Leave to Proceed in Forma Pauperis.**

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be

financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless

(A) the district court — before or after the notice of appeal is filed — certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis~~. In that event, the district court must~~ and state<u>s</u> in writing its reasons for the certification or finding<u>;</u> <u>or</u>

(B) <u>the law requires otherwise.</u>

**Committee Note**

**Subdivision (a)(2).** Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

**Subdivision (a)(3).** Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization,

subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g.*, *Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

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The Reporter summarized the comments.

Several members expressed agreement with the commentators who recommended that the phrase "unless *the law* requires otherwise" be replaced by the phrase "unless *a statute* requires otherwise." Mr. Letter said that the Justice Department's representative on the Criminal Rules Committee had further suggested that the word "requires" should be replaced with "provides."

A member moved that the proposed changes to Rule 24(a) be approved as published, except that "unless the law requires otherwise" should be replaced by "unless a statute provides otherwise." The motion was seconded. The motion carried (unanimously).

A member said that she had difficulty following the Committee Note at a couple of points because it spoke in the present tense about the current — rather than the amended — version of Rule 24(a). She asked the Reporter to try to make clarifying changes in the Committee Note. For example, in the last sentence of the first paragraph of the Committee Note to subdivision (a)(2), it would be better to say "Rule 24(a)(2) *has provided* that" rather than "Rule 24(a)(2) *provides* that."

The Committee adjourned for lunch at 12:00 noon.

The Committee reconvened at 1:35 p.m.

### 10. Rule 25(c) (electronic service — authorized, consent, when complete) [Item No. 99-03]

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 25. Filing and Service**

**(c) Manner of Service.**

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail~~, or~~ ;

(C) by third-party commercial carrier for delivery within 3 calendar days~~.~~ ; or

(D) by electronic means, if the party being served consents in writing.

(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).

(3) 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.

(4) ~~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 by the party served.

**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. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

**Subdivision (c)(1)(D).** New subdivision (c)(1)(D) has been added to permit service to be made electronically, such as by e-mail or fax. No party may be served electronically, either by the clerk or by another party, unless the party has consented in writing 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 given written consent to electronic service.

**Subdivision (c)(2).** The courts of appeals are authorized under Rule 25(a)(2)(D) to permit papers to be filed electronically. Technological advances may someday make it possible for a court to forward an electronically filed paper to all parties automatically or semi-automatically. 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. New subdivision (c)(2) has been added 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)(4).** The second sentence of new subdivision (c)(4) has been added 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 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.

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The Reporter summarized the comments. He said that many of the practical questions raised by the commentators were good ones, but they are precisely the types of questions that the parties can address when they consent to electronic service or courts can address in their local rules. The strong sentiment of the Standing Committee is that parties and courts should experiment with electronic service for a few years before the rules of practice and procedure are amended to impose more specific requirements on electronic service.

Some commentators complained that it was unclear how the electronic service provisions are to be reconciled with Rule 31(b), which requires that "2 copies" of every brief must be served on counsel for each separately represented party. The Reporter said that similar problems already exist in the rules: Rule 25(a)(2)(D) authorizes the electronic *filing* of briefs, even though Rule 31(b) requires that 25 copies of each brief must be filed with the clerk. And Rule 25(a)(2)(D) authorizes the electronic filing of motions, even though Rule 27(d)(3) requires the filing of "[a]n original and 3 copies." The rules don't address any of these discrepancies, perhaps because none of them causes any harm. Electronic filing is permitted only "by local rule," and any such rules presumably will address the question of how many hard copies must be filed in addition to the electronic copy. And electronic service will be permitted only upon consent, so parties can decide for themselves whether service of hard copies is necessary. Some parties will not think to address this issue in their consent agreements, but, even if they don't, all parties will still receive at least an electronic copy of everything.

The Reporter said that he agreed with the suggestion of the D.C. Circuit that a line be added to the Committee Note clarifying that consent to electronic service is not an "all-or-nothing" affair. Parties can define the terms of their consent; for example, they can consent to service by fax but not by e-mail, or they can consent to electronic service only if follow-up hard copies are always sent.

A member moved that proposed Rule 25(c) be approved as published, except that the Committee Note be revised as the D.C. Circuit suggested. The motion was seconded. The motion carried (unanimously).

### 11. Rule 25(d) (electronic service — proof of service) [Item No. 99-03]

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 25. Filing and Service**

**(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 mail~~ing~~ or e-mail addresses, or the addresses of the places of delivery.

**Committee Note**

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

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The Reporter summarized the comments. Members expressed agreement with Judge Easterbrook's suggestion that the word "electronic" be used in place of "e-mail" and the D.C. Circuit's suggestion that "facsimile number" be added to Rule 25(d)(1)(B)(iii).

A member moved that Rule 25(d)(1)(B)(iii) be amended as follows and approved:

(iii) their mail~~ing~~ or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

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

By consensus, the Committee gave Judge Garwood and the Reporter permission to make conforming changes to the Committee Note.

**12. Rule 26(c) (electronic service — 3-day rule) [Item No. 99-03]**

The Reporter introduced the following proposed amendment and Committee Note:

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**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. 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.

**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).

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The Reporter summarized the comments. He said that, while a couple of commentators objected to extending the 3-day rule to electronic service, that matter has already been debated at length by the Standing Committee, the Civil Rules Committee, and this Committee, and the Standing Committee has decided that the 3-day rule should apply to electronic service.

A member moved that proposed Rule 26(c) be approved as published. The motion was seconded. The motion carried (unanimously).

**13. Rule 36(b) (electronic service — notification of judgment) [Item No. 99-03]**

The Reporter introduced the following proposed amendment and Committee Note:

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**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.

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The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 36(b) be approved as published. The motion was seconded. The motion carried (unanimously).

**14. Rule 45(c) (electronic service — notification of entry of judgment/order) [Item No. 99-03]**

The Reporter introduced the following proposed amendment and Committee Note:

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**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~~ date of 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.

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The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 45(c) be approved as published. The motion was seconded. The motion carried (unanimously).

**15. Rule 26(a)(2) (time calculation) [Item Nos. 95-04 & 97-01]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 26. Computing and Extending Time**

**(a) Computing Time.** The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

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

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

**Committee Note**

**Subdivision (a)(2).** The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure. This creates a trap for unwary litigants. No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over.

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The Reporter summarized the comments.

A member said that he had encountered the problem described by commentator Roy Wepner regarding the interaction between the "3 day rule" of Rule 26(c) and the "time calculation rule" of Rule 26(a)(2). In deciding whether a deadline is less than 11 days for purposes of Rule 26(a)(2), should the court first count the 3 days that are added to the deadline

under the 3-day rule of Rule 26(c)? Or should the court add those 3 days only after it first calculates the deadline under Rule 26(a)(2)? Courts have split over this question when applying the Civil Rules counterparts to Rules 26(a)(2) and 26(c), and there is every reason to believe that the split will now carry over into the appellate rules. The member urged that Mr. Wepner's suggestion be placed on the study agenda.

A member said that he was bothered by the fact that the change in the way time was calculated would mean that the 10-day period for criminal defendants to appeal under Rule 4(b)(1)(A) would be lengthened as a practical matter. Under the new computation method, criminal defendants would never have less than 14 days to file an appeal, and legal holidays could extend that period to as much as 18 days. The member asked whether Rule 4(b)(1)(A) might be amended so that the 10-day appeal period was stated in *calendar* days.

A member opposed the suggestion. He said that he was not bothered by the extra time, and that he did not want to unnecessarily complicated the rules. The Reporter also raised concerns about the suggestion. He pointed out that many criminal defense attorneys would miss the significance of the use of the word "calendar" (especially since the concept of "calendar days" is not used in the rules of criminal procedure) and blow the deadline, resulting in many motions for extensions of time and many ineffective assistance of counsel claims.

Some members questioned the 10-day deadline of Rule 4(b)(1)(A) and asked why defendants were not given 30 days to appeal in criminal cases, as the government is. By consensus, the Committee agreed to add this issue to its study agenda, along with the concern raised by Mr. Wepner.

A member moved that Rule 26(a)(2) be approved as published. The motion was seconded. The motion carried (unanimously).

### 16. Rule 4(a)(4)(A)(vi) (obsolete parenthetical) [Item No. 98-12]

The Reporter introduced the following proposed amendment and Committee Note:

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

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

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

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil

Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

**Committee Note**

**Subdivision (a)(4)(A)(vi).** Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

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The Reporter summarized the comments.

A member moved that proposed Rule 4(a)(4)(A)(vi) be approved as published. The motion was seconded. The motion carried (unanimously).

**17. Rule 27(a)(3)(A) (reduce time to respond to motion) [Item No. 98-12]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 27. Motions**

**(a) In General.**

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 7 days after service of the motion unless the

court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~7-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

**Committee Note**

**Subdivision (a)(3)(A).** Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10-day deadline, which means that, except when the 10-day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10-day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10-day deadline in subdivision (a)(3)(A) has been reduced to 7 days. This change will, as a practical matter, ensure that every party will have at least 9 actual days — but, in the absence of a legal holiday, no more than 11 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

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The Reporter summarized the comments.

Several members agreed with those commentators who urged that the deadline for responding to motions be reduced to 8 days, rather than to 7 days. Under the current 10-day rule, litigants always have at least 10 actual days to respond to motions, whereas under the proposed 7-day rule, litigants would sometimes have only 9 actual days. This shortening of the already tight deadline for responding to motions could create a hardship.

A member pointed out that the hardship could be avoided simply by *increasing* the deadline from 10 days to 11 days. Under amended Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays are not excluded when a deadline is 11 days or more. Thus, increasing the deadline to 11 days would bring about roughly the same practical result as decreasing it to 8 days, and practitioners could calculate the deadline using the "old" counting method with which they are familiar. Other members expressed a preference for stating the deadline as 8 days.

A member moved that Rule 27(a)(3)(A) be approved as published, except that "8 days" be substituted for "7 days." The motion was seconded. The motion carried (unanimously).

**18. Rule 27(a)(4) (reduce time to reply to response to motion) [Item No. 98-12]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 27. Motions**

**(a) In General.**

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

**Committee Note**

**Subdivision (a)(4).** Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, parties generally must reply to responses to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to reply to responses to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7-day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every party will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

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The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 27(a)(4) be approved as published. The motion was seconded. The motion carried (unanimously).

**19. Rule 41(b) (time to issue mandate stated in calendar days) [Item No. 98-12]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**

**(b) When Issued.** The court's mandate must issue 7 <u>calendar</u> days after the time to file a petition for rehearing expires, or 7 <u>calendar</u> days after entry of an order denying a timely petition for panel rehearing, <u>petition for</u> rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

**Committee Note**

**Subdivision (b).** Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7-day deadline, which means that, except when the 7-day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar

days." This change in the method of computing deadlines means that 7-day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

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The Reporter summarized the comments.

A member moved that proposed Rule 41(b) be approved as published. The motion was seconded. The motion carried (unanimously).

**21. Rule 27(d)(1)(B) (cover colors — motions) [Item No. 97-09]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 27. Motions**

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

(1) **Format.**

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

**Committee Note**

**Subdivision (d)(1)(B).** A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover

must be white. The amendment is intended to promote uniformity in federal appellate practice.

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The Reporter summarized the comments.

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

**22. Rule 32(a)(2) (cover colors — supplemental briefs) [Item No. 97-09]**

The Reporter introduced the following proposed amendment and Committee Note:

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

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

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

**Committee Note**

**Subdivision (a)(2).** On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

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The Reporter summarized the comments.

A member moved that proposed Rule 32(a)(2) be approved as published. The motion was seconded. The motion carried (unanimously).

**23. Rule 32(c)(2)(A) (cover colors — "other papers") [Item No. 97-09]**

The Reporter introduced the following proposed amendment and Committee Note:

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

**(c) Form of Other Papers.**

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for <u>panel</u> rehearing and a petition for <u>hearing or</u> rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~; and~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

**Committee Note**

**Subdivision (c)(2)(A).** Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

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The Reporter summarized the comments.

A member moved that proposed Rule 32(c)(2)(A) be approved as published. The motion was seconded. The motion carried (unanimously).

**24. Rule 28(j) (limit length and permit argument in Rule 28(j) letters) [Item No. 97-07]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 28. Briefs**

**(j) Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. <u>The body of the letter must not exceed 250 words.</u> Any response must be made promptly and must be similarly limited.

**Committee Note**

**Subdivision (j).** In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250-word limit.

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The Reporter summarized the comments. He said that, although the comments were generally supportive, several commentators were concerned that the 250-word limit was insufficient when a party wishes to bring multiple citations to the attention of the court. Commentators suggested that the overall word limit be increased, or that the word limit be stated on a "per citation" basis, or that Rule 28(j) provide that the numbers and words contained within citations not count toward the 250-word limit. The Reporter said that, if this Committee shared the commentators' concerns about multiple citation letters, he would recommend simply increasing the overall word limit — say, to 350 words — rather than putting the clerks' offices through the hassle of calculating words per citation or resolving disputes over whether certain words were or were not part of the "citation."

The Committee discussed and rejected various suggestions, including requiring parties to certify the number of words in each Rule 28(j) letter, having *no* limit on the size of Rule 28(j) letters, stating the limit on the size of Rule 28(j) letters in pages rather than in words, and restoring the prohibition on "argument."

A member moved that proposed Rule 28(j) be approved as published, except that the limitation on the length of letters be increased from 250 words to 350 words. The motion was seconded. The motion carried (unanimously).

### 25. Rule 31(b) (service of briefs on unrepresented parties) [Item No. 97-21]

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 31. Serving and Filing Briefs**

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

**Committee Note**

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

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The Reporter summarized the comments, all of which were supportive of the amendment.

A member moved that proposed Rule 31(b) be approved as published. The motion was seconded. The motion carried (unanimously).

**26. Rule 32(a)(7)(C) and Form 6 (compliance with type-volume limitation) [Item No. 97-30]**

The Reporter introduced the following proposed amendment and Committee Note:

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

**(a) Form of Brief.**

(7) **Length.**

(C) **Certificate of compliance.**

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

- the number of words in the brief; or

- the number of lines of monospaced type in the brief.

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

**Committee Note**

**Subdivision (a)(7)(C).** If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

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**Form 6. Certificate of Compliance With Rule 32(a)**

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

- this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

- this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- 9 this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

- 9 this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

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The Reporter summarized the comments. The Reporter stated that the D.C. Circuit was the only commentator on proposed Rule 32(a)(7)(C) and proposed Form 6. The D.C. Circuit suggested that Form 6 be amended to refer to "the *applicable* type-volume limitation" rather than to "the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)," to account for the fact that, in some cases, the length of briefs will be controlled by court order rather than by Rule 32(a)(7)(B).

A member expressed support for the D.C. Circuit's suggestion, and pointed out that altering Form 6 as the D.C. Circuit recommended would make it easier to use the form to certify compliance with other word limitations in the appellate rules, if this Committee were to decide to replace all of the page limitations with word limitations. Other members disagreed, arguing that the D.C. Circuit's recommendation would sacrifice a great deal of clarity and accomplish little. No party is *required* to use Form 6, and, in cases in which the length of briefs is governed by court order, the parties either will not have to file a certificate of compliance or Form 6 can easily be adapted to refer to the terms of the court's order.

A member moved that proposed Rule 32(a)(7)(C) and proposed Form 6 be approved as published. The motion was seconded. The motion carried (unanimously).

### 27. Rule 32(d) (signature requirement) [Item No. 99-02]

The Reporter introduced the following proposed amendment and Committee Note:

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

**(d)** **Signature.** Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

**(~~d~~e)** **Local Variation.** Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

**Committee Note**

**Subdivisions (d) and (e).** Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. (An appendix filed with the court does not have to be signed.) By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.,* 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

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The Reporter summarized the comments. He said that he was not persuaded by the objections to proposed Rule 32(d), in large part because the signature requirement in Rule 32(d) is substantively identical to the signature requirement in FRCP 11(a). The latter has existed for decades — and applied to appellate proceedings prior to 1968 — yet none of the concerns feared by the commentators has materialized. The Reporter said that he did think it would be helpful to add a line to the Committee Note making it clear that only the original of a paper need be signed.

A member moved that proposed Rule 32(d) be approved as published, except that the Committee Note be amended to clarify that only one copy of each paper need be signed. The motion was seconded. The motion carried.

**28. Rule 44(b) (constitutional challenges to state statutes) [Item No. 97-12]**

The Reporter introduced the following proposed amendment and Committee Note:

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**Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party**

**(a) Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

**(b) Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

**Committee Note**

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

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

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

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The Reporter summarized the comments.

A member moved that proposed Rule 44(b) be approved as published. The motion was seconded. The motion carried (unanimously).

## V. Discussion Items

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

Judge Scirica reported briefly on the ongoing efforts to draft Federal Rules of Attorney Conduct ("FRAC"). As this Committee has discussed several times, the primary motivation behind those efforts is the enforcement by some states of a broad interpretation of Model Rule 4.2 against federal prosecutors. At this point, the Bush Administration has not taken a position on enforcement of Rule 4.2 against federal prosecutors or decided whether it will continue the negotiations conducted by the Clinton Administration with the Conference of Chief Justices. Likewise, it is not clear what the new Congress thinks about Rule 4.2 or the McDade Amendment. Given this uncertainty, the FRAC project will likely be dormant for some time. However, a great deal of work has been done, so the Standing Committee will be prepared to act if called upon by Congress.

### B. Item No. 99-09 (FRAP 22(b) — COA procedures)

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. At the April 2000 meeting of this Committee, the Department of Justice agreed to study this matter.

Mr. Letter said that he raised this subject at a meeting of the appellate chiefs from every United States Attorney's Office. The overwhelming majority of the appellate chiefs felt that the variation in circuit procedure was not creating a problem for litigants and that the advisory committees should allow more time for circuit-by-circuit experimentation before trying to impose detailed rules. The one exception cited by the appellate chiefs was the practice in some circuits of making the government file a brief on the merits before the court decides whether to grant a COA and, if so, on what issues. The government believes that this practice defeats the purpose of the COA procedure, which is to spare the government from having to participate in meritless habeas proceedings. The Department of Justice proposes that this Committee approve a new Rule 22(b)(4), which would provide that the government cannot be required to submit a brief until the court first decides whether and to what extent to grant a COA.

Judge Garwood asked Judge Scirica for his reaction to the Justice Department's position. Judge Scirica said that he asked only that this Committee take a look at this area and use its best judgment regarding whether rulemaking was appropriate. He is happy to defer to the considered judgment of this Committee.

Members of the Committee discussed the various procedures used in the circuits. In some circuits, the government is never required to file a brief until a decision is made on the application for a COA. In other circuits, the government is often required to file a brief — and sometimes to engage in oral argument — before a decision is made regarding a COA. In still other circuits, the procedure used in capital cases differs from the procedure used in non-capital cases.

A member expressed opposition to the proposed Rule 22(b)(4); as a judge, he has found that it can be difficult to make a decision regarding a COA until the government files a brief. Another member also expressed opposition to proposed Rule 22(b)(4); he argued that circuits should be given the freedom to decide whether and to what extent they wish to receive briefing from the government before deciding on COAs.

Mr. Rabiej pointed out that current Rule 22 was enacted by Congress, not this Committee, and that the rule represented a carefully balanced political compromise. He said that, if this Committee is intent on altering Rule 22, it ought to first consult with Congress.

A member asked whether proposed Rule 22(b)(4) would be more acceptable if the phrase "except by local rule" or "except by order in a particular case" was added. Members said that the "local rule" exception would render the rule useless; the rule would simply describe the status quo. The "order in particular case" exception would not eviscerate the rule. Again, though, some members oppose any rulemaking on this issue.

By consensus, the Committee agreed to postpone further consideration of this matter until its fall 2001 meeting. In the meantime, the Justice Department will consider whether it wishes to pursue proposed Rule 22(b)(4), given the opposition of some members of this Committee.

### C. Item No. 00-03 (FRAP 26(a)(4) & 45(a)(2) — names of legal holidays)

Mr. Jason Bezis has called this 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."

At its April 2000 meeting, this Committee agreed that the differences regarding the King holiday and Veterans' Day did not warrant Committee action. However, 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). Mr. McGough offered to look into this matter.

Mr. McGough reported that, during the 1998 restyling of the rules, this Committee changed "Washington's Birthday" to "Presidents' Day" based upon the advice of a consultant, who appears to have consulted only a dictionary. This Committee did not seem to realize that a statute designates the day as "Washington's Birthday" or that many in Congress and elsewhere feel strongly that the day should be referred to in the traditional way.

Mr. Rabiej said that the Criminal Rules Committee, which is in the midst of restyling its rules, has decided to refer to "the day set aside by federal statute for observance of . . . Washington's Birthday" rather than to "Presidents' Day."

The Reporter said that he would prepare amendments to Rules 26(a)(4) and 45(a)(2) in time for the fall 2001 meeting of this Committee, so that a final decision can be made on this matter. The Committee agreed to postpone further discussion until then.

### D. Item No. 00-04 (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.

The Justice Department's proposal was discussed at some length at this Committee's April 2000 meeting. At that time, members raised several concerns. Some members objected to the exclusion of proceedings under 28 U.S.C. §§ 2241, 2254, and 2255 from the rule. Other members expressed confusion over how the rule would operate in the case of interlocutory appeals. Still other members questioned the need for rulemaking on this subject or expressed concern about particular language in the Committee Note. The Justice Department agreed to give the matter further study.

Mr. Letter reported that the Justice Department continued to believe that habeas proceedings should be excluded from the rule, but did not feel strongly about it. Likewise, the Department was willing to drop any reference to interlocutory proceedings from the rule or Committee Note.

After further Committee discussion, the Reporter suggested that any rule on indicative rulings should be placed in the FRCP, not in FRAP. Placement in the FRCP would be more logical; after all, the rule authorizes parties to file the post-judgment motions authorized by *the FRCP* in the *district* court and authorizes the *district* court to issue a particular type of ruling. The appellate court has no real involvement in the indicative ruling procedure unless and until the district court indicates that it would grant the post-judgment motion, in which case a routine motion to remand is made in the appellate court. The rule on indicative rulings is a rule governing a district court's consideration of post-judgment motions listed in the FRCP; as such, it belongs in the FRCP. This point is reinforced by the fact that FRCrP 33, the closest existing analog to the proposed rule on indicative rulings, is found in the criminal rules, not in the appellate rules.

Several members agreed with the Reporter. A member moved that the proposal of the Justice Department on indicative rulings be referred to the Civil Rules Committee and removed from the study agenda of this Committee. The motion was seconded. The motion carried (unanimously).

### E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which 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. To date, there is only one decision on this issue. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999). However, the issue is pending before the Fourth Circuit, so the possibility of a future conflict exists.

Judge Motz asked that further discussion of this matter be postponed. She stated that the Fourth Circuit had not yet issued its decision on this issue. The Reporter said that it is likely that the panel is holding the case in anticipation of the Supreme Court's decision in *Becker v. Montgomery*, which is scheduled for argument on April 16. In *Becker*, the Sixth Circuit held that it was required to dismiss an appeal because the pro se appellant failed to sign the notice of appeal.

By consensus, the Committee agreed to postpone further discussion of this matter until its fall 2001 meeting.

### F. Items Awaiting Initial Discussion

#### 1. Item No. 00-06 (FRAP 4(b)(4) — failure of clerk to file notice of appeal)

Judge Easterbrook forwarded to this Committee a copy of his opinion for the Seventh Circuit in *United States v. Hirsch*, 207 F.3d 928 (7th Cir. 2000), and asked this Committee to consider amending Rule 4(b)(4) to address the failure of a district clerk to file a notice of appeal in a criminal case when requested by a defendant under FRCrP 32(c)(5).

The Reporter suggested that this matter be removed from this Committee's study agenda. Judge Easterbrook himself said in *Hirsch* that the situation that he wishes Rule 4(b)(4) to address "is rare and may be unique," given that he was "unable to find any other case in which judges have had to ponder how to proceed when the clerk does not carry out that mechanical step." Moreover, *Hirsch* itself was not such a case. The transcript made clear that the defendant in *Hirsch* had not, in fact, asked the clerk to file a notice of appeal on his behalf. Until this situation actually arises, this would not be a fruitful subject of rulemaking.

A member moved that Item No. 00-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

### 2. Item No. 00-07 (FRAP 4 — specify time for appeal of Hyde Amendment order)

The Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) authorizes criminal defendants who are acquitted to recover attorney's fees from the government if the court finds that the position of the government was "vexatious, frivolous, or in bad faith." The courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for attorney's fees under the Hyde Amendment is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). *Compare United States v. Truesdale*, 211 F.3d 898, 904 (5th Cir. 2000) (applying the time limitations of Rule 4(a)); *with United States v. Robbins*, 179 F.3d 1268, 1270 (10th Cir. 1999) (applying the time limitations of Rule 4(b)). Judge Duval has asked whether Rule 4 should be amended to resolve this conflict.

Several members pointed out that this circuit split closely resembles the circuit split over the *coram nobis* issue and suggests the need for a general rule defining the time to appeal from orders granting or denying "civil type" motions that are brought in connection with criminal proceedings. For example, Rule 4 might be amended to provide that the 10-day deadline of Rule 4(b)(1)(A) applies only to the appeal of the judgment of conviction or sentence, and that a 30-day deadline applies to all other appeals.

Mr. Letter said that Assistant United States Attorneys had argued both sides of the Hyde Amendment issue, and he said that the Justice Department would be happy to study this issue further. Judge Garwood asked that the Department try to identify other instances in which there is disagreement over the appellate deadline that is applied to an order disposing of a motion brought in connection with criminal proceedings. He also asked that, if appropriate, the Department propose a general rule of the type that has been suggested.

By consensus, the Committee agreed to leave this matter on its study agenda.

### 3. Item No. 00-08 (FRAP 4(a)(6)(A) — clarify whether verbal communication provides "notice")

Rule 4(a)(6)(A) provides that a party who does not receive "notice" of the entry of a judgment within 21 days can file a motion to reopen the time to file an appeal, as long as the party does so within 180 days after the entry of the judgment or within 7 days after the party receives "notice" of that entry, whichever occurs earlier. There is some tension in the case law over whether a party who learns about the entry of a judgment in a conversation — but not in

writing — has received "notice" for purposes of Rule 4(a)(6)(A). At least four circuits have expressly held that only *written* notice will suffice, but two circuits have implied that oral notice is sufficient.

This matter was brought to the attention of this Committee by Judge Duval, who was unable to attend the meeting. By consensus, the Committee agreed to postpone discussion of this matter until its fall 2001 meeting, when Judge Duval could be present. Judge Garwood said that he would ask Judge Duval to be prepared to make a recommendation at the fall meeting.

### 4. Item No. 00-09 (FRAP 22 — clarify post-AEDPA treatment of CPCs)

Prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a prisoner seeking to appeal the denial of habeas relief had to seek a certificate of probably cause ("CPC"). Under the AEDPA, such a prisoner must seek a COA; in theory, CPCs no longer exist. However, some district court judges have mistakenly continued to issue CPCs instead of COAs, and the circuits have disagreed about how such cases should be handled. Mr. Stuart Buck, a law clerk to Judge David Nelson, has suggested that Rule 22 be amended to address this disagreement.

The Committee discussed Mr. Buck's suggestion and concluded that, before such an amendment could become effective under the REA process, the problem of district courts issuing CPCs will likely have disappeared. A member moved that Item No. 00-09 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

### 5. Item No. 00-10 (neutral assignment of judges to panels)

Judge William R. Wilson, a former member of the Standing Committee, has suggested that a provision be added to FRAP to require the "neutral" assignment of appellate judges to panels.

The Committee discussed Judge Wilson's suggestion at length and identified a number of potential problems with trying to enact such a rule:

- It would be extremely difficult to come up with a workable concept of "neutrality." Many common circuit practices could be considered "non-neutral," such as taking judges who are behind in their work off of panels or not assigning three inexperienced judges to the same panel.

- Any rule requiring neutrality would have to be accompanied by several exceptions — such as an exception that would allow the same judges that heard an appeal of a case to hear a later related appeal. Drafting these exceptions would be difficult.

- To the Committee's knowledge, the "non-neutral" assignment of judges to panels has not been a problem. An article cited by Judge Wilson focused mainly on the non-neutral assignment of judges to panels of the Fifth Circuit in the early 1960s. Over the past 40 years, there is almost a complete dearth of even anecdotal evidence of panels being unfairly "stacked." Judges can be trusted to ensure that panel assignments are fairly made.

- This is more an issue of internal court administration than procedure, and thus not appropriate for inclusion in FRAP.

- Any proposed rule would likely be resisted by the chief judges of the circuit courts, who make up half the membership of the Judicial Conference.

A member moved that Item No. 00-10 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

### 6. Item No. 00-11 (FRAP 35(a) — disqualified judges/en banc rehearing)

Both 28 U.S.C. § 46(c) and Rule 35 require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc. The circuits have split on the question of whether judges who are recused are counted in calculating what constitutes a "majority." In some circuits, judges who are recused are counted in the "base" but, of course, cannot vote to hear the case en banc. This leads to some troubling results.

Suppose, for example, that a circuit has 12 active judges and that, in a particular case, 5 of those 12 judges are recused. Even if 6 of the 7 non-recused judges wish to take a case en banc, the case cannot be heard en banc, because 6 is not a majority of 12. This permits just one judge — perhaps sitting on a panel with a visiting judge and a senior judge — effectively to control circuit precedent, even over the objection of all 6 of his non-recused colleagues. In a recent opinion, Judge Edward Carnes asked this Committee to consider amending Rule 35 to provide that a case can be heard en banc upon a majority vote of those active judges who are not recused.

Several members of the Committee said that this issue is worth studying. Judge Scirica warned that this Committee should tread carefully, given that a statute is involved. Judge Scirica said that although a newly enacted rule of appellate procedure would supercede the statute in this case, asking Congress to change the statute remains an option.

By consensus, the Committee agreed to request the Federal Judicial Center to prepare a report on the en banc practices of the circuit courts, encompassing not just the precise issue raised by Judge Carnes but also the extent to which senior judges are permitted to participate in en banc proceedings.

### 7. Item No. 00-12 (FRAP 28, 31 & 32 — cover colors in cross-appeals)

The Department of Justice has proposed a series of amendments that would address the number of briefs, the length of briefs, the timing of the filing of briefs, and the colors of the covers of briefs filed in cross-appeals. FRAP simply does not address these issues clearly, resulting in a wide variety of circuit practices.

The Committee discussion focused mainly on the length of briefs. The majority of circuits limit the brief of the appellant (the "first" brief) to 14,000 words, the brief of the appellee/cross-appellant (the "second" brief) to 14,000 words, the reply brief and brief of the cross-appellee (the "third" brief) to 14,000 words, and the cross-reply brief (the "fourth" brief) to 7,000 words. The Justice Department proposal is consistent with the majority rule, except that the Department proposes that the second brief be limited to 16,500 words instead of 14,000 words.

Several members expressed disagreement with the 16,500 word limit on the second brief; they said that the second brief should be limited to 14,000, as under the majority rule. Mr. Letter objected that this gives the party who is designated as the appellant/cross-appellee 7,000 more words of total briefing. A member responded that, while that is true, the appellee/cross-appellant also gets the last word, which is often more valuable than 7,000 extra words.

By consensus, the Committee asked the Department of Justice to prepare three alternative proposals:

- the Department's current proposal, except that the proposal should be changed to limit the second brief to 14,000 words instead of 16,500 words;

- a proposal that would combine all provisions applicable to briefs filed in cross-appeals into one rule, rather than scattering those provisions through several rules, as does the Department's current proposal; and

- a proposal that would require parties in cross-appeals to file separate briefs. For example, instead of the appellee/cross-appellant filing a single brief that acts as a principal brief on the merits of its appeal and as a response to the principal brief filed by the appellant/cross-appellee, the appellee/cross-appellant could file two separate briefs.

Mr. Letter said that he hoped to have these three alternatives available for the Committee's consideration at its fall 2001 meeting.

### 8. Item No. 00-13 (FRAP 29 — preclusion of amicus briefs)

Judge Michael Boudin, a member of the Standing Committee, has asked that this Committee consider amending Rule 29 to expressly authorize courts to bar the filing of a brief by a private amicus, even if the parties consent. At present, the scope of a court's authority is not clear. Judge Boudin's concern is with the use of private amicus briefs to force the recusal of members of a panel assigned to a case.

Committee members expressed some skepticism about the seriousness of this problem especially given that the Committee on Codes of Conduct has issued an opinion that an amicus is *not* a party for purposes of recusal obligations. It is true that a general "appearance of impropriety" standard still applies, and it is true that an amicus could still try to force the recusal of a judge by hiring, say, the judge's daughter to prepare its brief. But these tactics seem rare, and nothing in Rule 29 would preclude a court from barring the filing of a particular amicus brief under these circumstances.

The Reporter offered to draft an amendment implementing Judge Boudin's suggestion for consideration by the Committee at a future meeting. By consensus, the Committee agreed to maintain this matter on its study agenda.

### 9. Item No. 00-14 (citation of unpublished decisions)

The Department of Justice has proposed that a new Rule 32.1 be added to FRAP to govern the citation of unpublished or non-precedential opinions. Mr. Letter explained that the wide variations in local practice has imposed a hardship on attorneys who have national practices. He stressed that the proposed rule would not address *whether* unpublished decisions have precedential value, but only whether such decisions can be *cited*. Every court will still have the freedom to give as much weight as it wishes to such decisions.

The Reporter reminded the Committee that it had recently considered the substance of this proposal. In fact, Item No. 91-17 — which included, inter alia, the question whether FRAP should regulate the citation of unpublished opinions — stayed on this Committee's study agenda for seven years. On January 28, 1998, Judge Garwood wrote to the chief judges of the courts of appeals, asking for their views on several questions, including the question: "Should FRAP be amended to specify the circumstances, if any, under which 'unpublished' opinions may be cited by counsel in their briefs and other submissions . . . ?" All of the chief judges, save two, responded to Judge Garwood's letter. With virtual unanimity and much passion, those judges answered "absolutely not." Indeed, the chief judges were adamant that they did not want this advisory committee to regulate unpublished decisions in any way. In light of the reaction of the chief judges — who, after all, make up half of the Judicial Conference — this Committee voted unanimously at its April 1998 meeting not to proceed with proposals to regulate the citation of unpublished decisions. The Reporter said that he thought it would be a waste of this Committee's time — and perhaps risk the appearance of a lack of respect for the chief judges who responded to Judge Garwood's 1998 letter — to take up this precise proposal again just three years later.

Judge Garwood agreed. He mentioned that he had met with the chief judges of the 13 courts of appeals in March 1998. The chief judges used the occasion of that meeting to tell Judge Garwood in person what they had told him in writing: They do not want this Committee to become involved in any way in attempting to regulate unpublished opinions. Judge Garwood said that in light of the recent and vehemently negative reaction of the chief judges, he did not think this Committee should even "stick its toe" in this area.

The Committee briefly discussed the Justice Department's proposal, the use of unpublished decisions, and the likelihood that the attitude of the chief judges might be different today than it was 3 years ago, given the turnover of chief judges and given the controversy surrounding the Eighth Circuit's *Anastaoff* decision. By consensus, the Committee agreed to postpone further discussion of this matter to a later meeting.

## VI. Additional Old Business and New Business

There was no additional old business or new business.

## VII. Scheduling of Dates and Location of Fall 2001 Meeting

The Committee will next meet on November 8 and 9 in San Francisco.

## VIII. Adjournment

By unanimous consent, the Committee adjourned at 5:25 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter