Minutes of Spring 1999 Meeting of

Advisory Committee on Appellate Rules

April 15 & 16, 1999

Washington, D.C.

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 15, 1999, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., and Mr. Michael J. Meehan. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice was present representing the Solicitor General. Also present were Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office, Ms. Laural L. Hooper from the Federal Judicial Center, and Mr. Joseph F. Spaniol, Jr., from the Standing Committee's Subcommittee on Style.

Judge Garwood welcomed Mr. McGough to the Committee. Mr. McGough replaced Mr. Luther T. Munford on October 1, 1998, but was unable to attend the Committee's October 1998 meeting.

II. Approval of Minutes of October 1998 Meeting

The minutes of the October 1998 meeting were approved with the following changes:

1. In the seventh line of the third paragraph on page 5, insert "of" after "couple."

2. In the third line of the second paragraph following the draft amendment on page 11, change "misleading" to "misleadingly."

III. Report on January 1999 Meeting of Standing Committee

Judge Garwood reported on the Standing Committee's most recent meeting. Judge Garwood said that this Advisory Committee had no action items on the Standing Committee's agenda. Judge Garwood told the Standing Committee that this Advisory Committee intended to present a package of proposed amendments to the Standing Committee at its January 2000 meeting.

Judge Garwood communicated the sentiments of this Advisory Committee that the term "Advisory Committee Note" should continue to be used instead of "Committee Note," but the Standing Committee was not receptive to his comments. Judge Garwood also raised the question of whether prescribing a universal December 1 effective date for changes to local rules -- as this Committee and other advisory committees are considering -- would violate 28 U.S.C. § 2071(b). (That section provides that a local rule "shall take effect upon the date specified by the prescribing court.") Judge Garwood was not given any guidance in response to his question.

At Judge Garwood's request, Mr. Rabiej gave an update on the Standing Committee's consideration of possible Federal Rules of Attorney Conduct. Mr. Rabiej said that the ad hoc committee studying the issue would be meeting this spring and would meet again in September. The ad hoc committee hopes to have a proposal ready for the advisory committees to consider at their fall meetings. Mr. Rabiej pointed out that the McDade Amendment will take effect in a few days and that, under the Amendment, federal attorneys will be required to comply with state ethical rules. Mr. Letter described some of the ambiguities of the McDade Amendment that the Department of Justice is now studying.

At Judge Garwood's request, Mr. Rabiej also gave an update on the Standing Committee's consideration of financial disclosure statements by parties and the recusal of judges for financial interest. Mr. Rabiej said that, following a conference call involving Judge Anthony J. Scirica (Chair of the Standing Committee), the reporters to the advisory committees, and others, the Federal Judicial Center was asked to collect information about local rules and practices on this topic. No action is expected until next year.

IV. Action Items

A. Item No. 97-22 (FRAP 34(a)(1) -- require statements regarding oral argument)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

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

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

(4) a statement with respect to oral argument (see Rule 34(a)(1));

(~~4~~5) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(~~5~~6) a statement of the issues presented for review;

(~~6~~7) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;

(~~7~~8) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(~~8~~9) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(~~9~~10) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(~~10~~11) a short conclusion stating the precise relief sought; and

(~~11~~12) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(~~9~~10) and (~~11~~12), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

* * *

(h) Briefs in a Case Involving a Cross-Appeal. If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)-(~~11~~12). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.

Committee Note

Subdivisions (a), (b), and (h). Rule 34(a)(1), which previously permitted parties to file statements regarding oral argument (and authorized courts to require such statements by local rule), has been amended to require that such statements be included in the principal brief of every party. By way of implementing this change, subdivision (a) has been amended to direct that the statement with respect to oral argument appear after the table of authorities and before the jurisdictional statement. In addition, subdivision (a)'s subparts have been renumbered to reflect the addition of this requirement, and the references in subdivision (b) and subdivision (h) to subdivision (a)'s subparts have been changed accordingly.

Rule 34. Oral Argument

(a) In General.

(1) **Party's Statement.** ~~Any~~ Every party ~~may file, or a court may require by local rule,~~ must include in the party's principal brief a statement of 125 words or less explaining why oral argument should, or need not, be permitted.

Committee Note

Subdivision (a)(1). Rule 34(a)(1) has been amended to require that every party include a statement with respect to oral argument in the party's principal brief and to impose a 125 word limit on such statements. The present version of Rule 34(a)(1) -- which permits, but does not require, the filing of such statements (unless the filing of such statements is mandated by local rule) -- has resulted in conflicting local rules. Some circuits permit a party -- after being informed that the court has decided to dispense with oral argument -- to file a statement asking the panel to change its mind. *See* D.C. Cir. R. 34(j)(3); 1st Cir. R. 34.1(a); 2d Cir. R. 34(d)(1) (all parties except incarcerated pro se appellants); 9th Cir. R. 34-4(c). By implication, these circuits seem to forbid parties from making statements about the desirability of oral argument in their principal briefs or elsewhere. Other circuits *permit*, but do not require, parties to make statements about the desirability of oral argument in their principal briefs or in papers filed with or shortly after their principal briefs. *See* 3d Cir. R. 34.1(b); 4th Cir. R. 34(a); 7th Cir. R. 34(f). Still other circuits *require* parties to make statements about the desirability of oral argument in their principal briefs or in papers filed with or shortly after their principal briefs. *See* 2d Cir. R. 34(d)(2) (incarcerated pro se appellants); 5th Cir. R. 28.2.4; 6th Cir. R. 9(d); 8th Cir. R. 28A(i)(1); 10th Cir. R. 28.2(e); 11th Cir. R. 28-2(c). Rule 34(a)(1) has been amended to preempt these conflicting local rules and thereby to promote uniformity in federal appellate practice.

The Committee debated the proposed amendments at length. Those supporting the amendments argued that it was important to bring about uniformity in appellate practice, and that the current hodgepodge of conflicting local rules regarding requests for oral argument creates a hardship for attorneys with national practices. They also argued that statements regarding oral argument can be helpful to courts, particularly when attorneys do not believe that oral argument is necessary. One member who supported the amendments said that he would also support an amendment *forbidding* parties to request or waive oral argument in their briefs; his main concern was bringing about uniformity, one way or the other.

Those opposing the amendments argued that statements regarding oral argument are generally not helpful to courts, and that directing parties to include such statements in their briefs may force some attorneys who would otherwise remain silent on the question of oral argument to ask for oral argument -- particularly if the attorneys feared that a waiver of oral argument would be interpreted as an implicit admission that their case was weak. Also, requiring statements regarding oral argument might exacerbate tensions between courts and litigants. As a general matter, attorneys resent not being given oral argument. Forcing an attorney to make a formal request for oral argument, only to have the request denied, might increase that resentment. Finally, although there is a lack of uniformity, that lack of uniformity is appropriate, given that individual circuit courts maintain very different cultures regarding oral argument.

A member moved that Item No. 97-22 be removed from the study agenda. The motion was seconded.

The motion carried (6-2).

B. Item No. 98-12 (FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) -- shorten deadlines to account for new method of calculating time)

Rule 26(a)(2) directs that, in computing periods of time under the Federal Rules of Appellate Procedure ("FRAP"), intermediate Saturdays, Sundays, and legal holidays should not be counted when a deadline is less than 7 days, unless the deadline is stated in calendar days. At its October 1998 meeting, the Committee approved a proposed amendment to Rule 26(a)(2) that would extend the threshold to 11 days. If that amendment becomes law, the calculation of deadlines under FRAP will be consistent with the calculation of deadlines under the Federal Rules of Civil Procedure ("FRCP") and the Federal Rules of Criminal Procedure ("FRCrP"). *See* FRCP 6(a) and FRCrP 45(a).

Many of the deadlines in FRAP will be extended as a *practical* matter if Rule 26(a)(2) is amended as proposed. Specifically:

1. All of the 7-day deadlines in FRAP will become *at least* 9-day deadlines. In other words, no attorney with a 7-day deadline will ever have less than 9 actual days to comply. Often, attorneys will have 11 days. Legal holidays could extend that period to 12 or 13 days.

2. All of the 10-day deadlines in FRAP will become *at least* 14-day deadlines.[(1)] In other words, no attorney with a 10-day deadline will ever have less than 14 actual days to comply. Legal holidays could extend that period to 17 or 18 days.

At its October 1998 meeting, the Committee discussed whether any of the existing 7-day deadlines should be shortened to 5 days (which would, as a practical matter, ensure that every attorney will have 7 actual days to act, in the absence of a legal holiday) and whether any of the 10-day deadlines should be shortened to 7 days (which would, as a practical matter, ensure that every attorney will have at least 9 actual days, and, in the absence of a legal holiday, no more than 11 actual days to act). After considerable discussion, the Committee determined that all deadlines should remain the same, with the following exceptions:

1. Rule 27(a)(3)(A) should be amended by substituting "7" for "10."

2. Rule 27(a)(4) should be amended by substituting "5" for "7." And

3. Rule 41(b) should be amended by substituting "7 calendar days" for "7 days."

The Reporter introduced the following proposed amendments and Committee Notes, which are designed to implement the changes approved by the Committee at its October 1998 meeting:

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 FRCP 6(a).

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 attorney 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.

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 respond 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 respond 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 attorney will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

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

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for 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.

The Committee briefly discussed the merits of the proposed amendment to Rule 26(a)(2) that was approved at the October 1998 meeting, and all members of the Committee who spoke, save one, reaffirmed their support for that amendment.

A member moved that the implementing amendments be approved. The motion was seconded. The motion carried (unanimously).

The Reporter told the Committee that the Style Subcommittee had suggested changes to *unamended* parts of the rules under consideration. Several members expressed strong objections to "re-restylizing" unamended portions of rules. First, such a practice can create confusion about the scope of substantive amendments; in this instance, for example, it would camouflage the simplicity of changing a deadline from "x" days to "y" days. Second, such a practice creates a hardship for members of the bench and bar, who must pay close attention to any changes in the rules. Finally, such a practice risks unintended substantive consequences.

The Committee reached a consensus that it would not consider "re-restylizing" rules that were already restylized as part of the lengthy restylization project that culminated in last year's amendments to FRAP. By consensus, the suggestions of the Style Subcommittee were rejected.

V. Discussion Items

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

Judge Garwood introduced the following proposed amendments and Committee Notes:

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 or the entry of the judgment altered or amended in response to such a motion, whichever comes later:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(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.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment -- but before it

disposes of any motion listed in Rule 4(a)(4)(A) -- the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered or when the judgment altered or amended in response to such a motion is entered, whichever comes later.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal -- in compliance with Rule 3(c) -- within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later.

(iii) No additional fee is required to file an amended notice.

* * *

(7) **Entry Defined.** An order disposing of any motion listed in Rule 4(a)(4)(A) is entered for purposes of this Rule 4(a) when it is entered in compliance with Rule 79(a) of the Federal Rules of Civil Procedure. A judgment or any other order is entered for purposes of this Rule 4(a) when it is entered in compliance with both Rules 58 and 79(a) of the Federal Rules of Civil Procedure, or 180 days after it is entered in compliance with Rule 79(a) of the Federal Rules of Civil Procedure, whichever comes first. The failure to enter a judgment or order under Rule 58 when required does not invalidate an otherwise timely appeal from that judgment or order.

Committee Note

Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii). The Committee intends that when a district court, in ruling upon one of the post-judgment motions listed in Rule 4(a)(4)(A), orders that a judgment be altered or amended, the time to appeal that order and the altered or amended judgment runs from the date on which the order is entered or from the date on which the altered or amended judgment is entered, whichever date is later. (Almost always, the judgment will be entered after the order.) At present, Rule 4(a)(4)(B)(ii) leaves that matter in some doubt by providing that an appeal from an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) should be brought "within the time prescribed by this Rule measured from the *entry of the order*," rather than from the later of the entry of the order or of the altered or amended judgment. Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii) have been amended to eliminate that ambiguity.

Subdivision (a)(7). The courts of appeals are divided on the question of whether an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) must be entered on a separate document in compliance with FRCP 58 before that order can be appealed and before the time to appeal the original judgment begins to run. *See* 16A Charles Alan Wright, et al., Federal Practice & Procedure § 3950.2, at 113 (1996) ("The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions."). The First and Second Circuits (as well as at least one decision of the Ninth Circuit) hold that FRCP 58 applies to all orders disposing of post-judgment motions. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 234 (1st Cir. 1992) (en banc); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987). The Fifth and Seventh Circuits (as well as at least one decision of the Ninth Circuit) hold that FRCP 58 applies when post-judgment relief is granted, but not when such relief is denied. *See Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231 (9th Cir. 1989). The Eleventh Circuit holds that FRCP 58 never applies to orders granting or denying post-judgment relief. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Subdivision (a)(7) has been amended to adopt the position of the Eleventh Circuit. An order that grants, denies, or otherwise disposes of one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) is entered for all purposes of Rule 4(a) when the order is entered in the civil docket in compliance with FRCP 79(a), whether or not the order is also entered on a separate document in compliance with FRCP 58. An order that *denies* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not disturb the original judgment, and thus compliance with the separate document requirement of FRCP 58 should be unnecessary. An order that *grants* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) usually does alter or amend the original judgment, but, given that the altered or amended judgment must itself be entered in compliance with FRCP 58, it should be unnecessary to require that the order also be entered in compliance with that rule. Admittedly, an order granting one of the post-judgment motions listed in Rule 4(a)(4)(A) sometimes does not result in an altered or amended judgment, but such orders are unlikely to create the type of uncertainty that prompted the separate document requirement of FRCP 58, and thus compliance with the requirement should be unnecessary. *See* FRCP 58, advisory committee's note to 1963 amendment.

The time to appeal all judgments and all other orders -- that is, all orders other than those disposing of the post-judgment motions listed in Rule 4(a)(4)(A) -- does not begin to run until the judgment or order is entered in compliance with both FRCP 58 and FRCP 79(a), with one exception: If such a judgment or order is not entered in compliance with FRCP 58, the time to appeal begins to run 180 days after the judgment or order is entered in the civil docket in compliance with FRCP 79(a). Without such a provision, a party could wait forever to appeal a judgment or order that was not entered in compliance with FRCP 58, "open[ing] up the possibility that long dormant cases could be revived years after the parties had considered them to be over." *Fiore*, 960 F.2d at 236.

Subdivision (a)(7) has been further amended to apply the "one-way waiver" doctrine in cases in which a party has "prematurely" appealed a judgment or order that is required to be (but has not been) entered in compliance with FRCP 58. If a party chooses to appeal such a judgment or order before it is entered in compliance with FRCP 58, the appeal should be heard, even if the appellee objects to the lack of a FRCP 58 judgment or order. The separate document requirement of FRCP 58 is imposed for the benefit of the appellant. If the appellant wishes to waive that requirement by bringing a "premature" appeal, it seems pointless to dismiss the appeal, require the district court to enter the judgment or order on a separate document, and force the appellant to appeal a second time. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978).

Judge Garwood apologized for asking the Committee to reconsider this issue, after the Committee had discussed this issue and approved amendments to Rule 4(a) at its October 1998 meeting. However, for the reasons described in his March 12, 1999 memorandum to the Committee, Judge Garwood concluded that the amendments approved in October should be reconsidered in two primary respects:

First, under the amendments approved in October, the time to appeal an order disposing of one of the post-trial motions listed in Rule 4(a)(4)(A) would begin to run as soon as the order was entered on the docket pursuant to FRCP 79(a) if the order *denied* the motion, but would not begin to run until the order was both entered on the docket pursuant to FRCP 79(a) *and* entered on a separate document pursuant to FRCP 58 if the order *granted* the motion. Judge Garwood now proposes that Rule 4(a)(7) be amended so that an order disposing of one of the post-trial motions listed in Rule 4(a)(4)(A) would begin to run as soon as the order was entered on the docket pursuant to FRCP 79(a), *regardless* of whether the order granted or denied the motion. There is one exception: If the order directs that the original judgment be amended, the time to appeal would begin to run on the date on which the amended judgment is entered in compliance with both FRCP 58 and 79(a).

Second, under the amendments approved in October, a party could wait forever to bring an appeal from a judgment or order that *is* required to be entered on a separate document pursuant to FRCP 58 but is not. Judge Garwood now proposes that Rule 4(a)(7) be amended to incorporate an approach similar to the approach adopted by the First Circuit in *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992): The time to appeal a judgment or order that is required to be entered in compliance with FRCP 58 would begin to run *either* when the judgment or order is entered in compliance with FRCP 58 (as well as FRCP 79(a)) *or* 180 days after the judgment or order is entered in compliance with FRCP 79(a), whichever comes first.

Judge Garwood summarized his reasons for suggesting these two changes, which reasons were described at length in his March 12 memorandum to the Committee.

A member said that it seemed to him that the problem was with the failure of district court judges to enter orders in compliance with FRCP 58, and thus that this problem should be addressed by the Advisory Committee on Civil Rules. Other members disagreed: FRCP 58, on its face, applies only to *judgments*. It is the rules of appellate procedure, not the rules of civil procedure, which provide that the time to appeal an *order* does not begin to run until the order is entered on a separate document in compliance with FRCP 58. In other words, it is the appellate rules, not the civil rules, which give parties forever to appeal an order (or, for that matter, a judgment) that is not entered in compliance with FRCP 58. Thus it is this Committee, and not the Civil Rules Committee, that has responsibility for addressing this problem.

A member expressed support for Judge Garwood's proposal. He said that it is extremely common for district court judges to *deny* Rule 4(a)(4)(A) motions in orders that are not entered in compliance with FRCP 58. He said that it is even more common for those motions to be *granted* in orders that do not comply with FRCP 58, because almost all such orders direct that a judgment be amended, and judges know that the amended judgment will itself be entered in compliance with FRCP 58. He is afraid that there are thousands of "time bombs" waiting to explode -- that is, old orders that were not entered in compliance with FRCP 58 and thus could be appealed any time in the future.

Mr. Letter said that the Department of Justice also supports Judge Garwood's proposal. He pointed out that the proposal differs from the *Fiore* approach in an important respect: *Fiore* gives parties a certain amount of time within which to request that a judgment or order be entered in compliance with FRCP 58, and then runs the time to appeal from the date on which the judgment or order is so entered. By contrast, Judge Garwood's proposal would provide that the time to appeal a judgment or order that was not entered in compliance with FRCP 58 would begin to run a certain amount of time after the judgment or order was entered on the docket in compliance with FRCP 79(a). Judge Garwood responded that the difference between his proposal and *Fiore* was intentional; his approach is designed to be simpler and self-executing.

A member suggested that the first sentence of proposed Rule 4(a)(7) be deleted altogether. If it were, the time to appeal any judgment or order would begin to run either when it was entered in compliance with both FRCP 58 and 79(a) or 180 days after it was entered on the docket in compliance with FRCP 79(a), whichever comes first. Other members opposed this proposal. They pointed out that post-trial motions are often brought and usually denied in orders that do not comply with FRCP 58. If the first sentence of Rule 4(a)(7) were deleted, the time to appeal in *most* civil trials would not begin to run until 180 days after the case was concluded.

Judge Scirica joined the meeting at this point.

The remainder of the Committee's lengthy discussion of Judge Garwood's proposal focused on two issues:

First, several members argued that Rule 4(a)(7) should be amended so that the time to appeal *any* order -- not just orders that grant or deny the motions listed in Rule 4(a)(4)(A) -- would begin to run upon entry of the order on the docket in compliance with FRCP 79(a). In other words, no order would have to be entered on a separate document before the time to appeal the order began to run. The "separate document" requirement of FRCP 58 would apply only to judgments.

Those favoring this proposal made several points: First, the proposal would be much cleaner and simpler. Rather than distinguishing among orders, some of which would have to be entered in compliance with FRCP 58 before the time to appeal began to run and some of which would not, all orders would be treated the same. Second, this proposal would harmonize the rules of appellate procedure with the rules of civil procedure; FRCP 58, by its terms, applies only to judgments, not to orders. Third, this proposal would harmonize the rules of appellate procedure with the practice of district courts; as noted, it is extremely common for district courts to enter orders in a manner that does not comply with FRCP 58, and it is extremely common for parties to appeal those orders (usually without anyone even noticing that the orders were supposed to be entered in compliance with FRCP 58).

Those opposing the proposal responded in several ways: First, there might be some types of orders -- such as orders granting preliminary injunctions and contempt citations -- that should be entered in compliance with FRCP 58 before the time to appeal those orders begins to run. Second, if Rule 4(a) were amended as proposed, the difference between "judgments" and "orders" would become important -- and distinguishing between the two is sometimes quite difficult. Third, it is only orders granting or denying the motions listed in Rule 4(a)(4)(A) that have caused a problem for federal courts and created conflicting case law; the application of FRCP 58 to other types of orders simply has not been a problem. Finally, further research should be done before Rule 4 is amended to eliminate *all* orders from the requirement of compliance with FRCP 58. Such an amendment might have unanticipated consequences.

The second issue discussed by the Committee was the length of the cut-off for appealing orders or judgments that are required to be entered in compliance with FRCP 58 but are not. Under Judge Garwood's proposal, the time to appeal such an order or judgment would begin to run 180 days after the order or judgment was entered on the docket in compliance with FRCP 79(a) (unless, in the meantime, the court corrected its omission by entering the order or judgment in compliance with FRCP 58, in which case the time to appeal would begin to run on the date of the entry). Judge Garwood stressed that he is not wedded to 180 days as the length of the cut-off; he chose 180 days because it echoes the 180-day

grace period in Rule 4(a)(6)(A).

Several members argued that 180 days was too long. They pointed out that, in fact, this would give most parties 210 days to appeal typical orders -- 180 days before the time to appeal began to run, plus 30 days to bring the appeal once the time begins to run. Some Committee members suggested that the cut-off should be 60 or 90 days.

In the course of this discussion, the Committee voted on three motions:

First, a member moved that Rule 4(a)(7) be amended to provide that the time to appeal all orders that dispose of the motions listed in Rule 4(a)(4)(A) -- that is, both orders that grant those motions and orders that deny those motions -- would begin to run when the order is entered on the docket in compliance with FRCP 79(a). Entry on a separate document in compliance with FRCP 58 would not be required. The motion was seconded. The motion carried (unanimously).

Second, a member moved that Rule 4(a)(7) be amended so that it includes *a* cut-off on the time within which a party could wait to appeal a judgment or order that was required to be entered in compliance with FRCP 58 but that was not. The motion was seconded. The motion carried (unanimously).

Third, a member moved that the length of the cut-off be 150 days. The motion was seconded. The motion carried (5-4).

The Committee also agreed to consider further at its October 1999 meeting the question of whether Rule 4(a)(7) should be amended so that the time to appeal *any* order -- that is, not merely orders disposing of the motions listed in Rule 4(a)(4)(A), but any other order as well -- would begin to run when the order is entered on the docket in compliance with FRCP 79(a). Under this proposal, entry on a separate document in compliance with FRCP 58 would be required only for *judgments*. Committee members will give this matter some thought over the summer, and the Reporter will try to determine whether such an amendment would create any unforeseen consequences.

B. Item No. 98-03 (FRAP 29(e) & 31(a)(1) -- timing of amicus briefs)

Mr. Letter introduced this item. Mr. Letter said that when the appellate rules were restylized, Rule 29 was amended so that, instead of an amicus brief being due at the same time as the principal brief of the party being supported, an amicus brief is now due 7 days after the filing of the principal brief of the party being supported. This change created two problems:

First, an appellant might have to file a reply brief before being able to read the brief of an amicus supporting the appellee. Suppose that, on June 1, an appellee located in Washington, D.C., mails its briefs to the Ninth Circuit for filing and hand delivers a copy of its brief to the appellant. Suppose further that the Ninth Circuit receives and files the appellee's brief on June 4. Under these circumstances, the brief of the amicus in support of the respondent would be due on June 11 (7 days after *filing*), and the reply brief of the appellant would be due on June 15 (14 days after *service*) -- meaning that the appellant would have only 4 days to review and respond to the arguments raised by the amicus *if it received the amicus brief on the day it was filed*. If the amicus served its brief by mail, the appellant might not see it at all before its reply brief was due.

Second, an amicus supporting an appellee might not be able to see the appellee's brief until just before the amicus's brief is due, and thus the amicus might not be able to take account of the arguments made by the appellee in its brief. Suppose that the appellee does not permit the amicus to review drafts of its brief. If the appellee files its brief on June 1 and mails a copy of the brief to the amicus, the amicus might not receive a copy of the brief until June 4 or 5, just a couple of days before the amicus's brief is due.

Mr. Letter said that he had written to 18 organizations that frequently file amicus briefs in the courts of appeals to solicit their suggestions about how Rule 29 might be amended to fix these problems. To date, only 3 organizations have responded. Mr. Letter hopes that further responses will be forthcoming and that the Department of Justice will be able to make a formal proposal for amending Rule 29 at the October 1999 meeting of the Committee.

A couple of members commented that they were sympathetic only to the first of the two problems described by Mr. Letter. After all, for many years amicus briefs were due on the same day as the principal brief of the party being supported, and amici seemed to manage successfully. It is hard to believe that amici cannot manage just as successfully now that their briefs are due 7 days after the filing of the principal brief.

C. Item No. 98-06 (FRAP 4(b)(3)(A)) -- effect of filing of FRCrP 35(c) on time to appeal)

FRCrP 35(c) states that a district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Suppose that a defendant is sentenced on June 1. Suppose further that the defendant files a FRCrP 35(c) motion on June 2. Finally, suppose that the district court does not act upon the motion until June 30 -- long after the "7 days" referred to in FRCrP 35(c) have come and gone. This scenario raises at least two questions:

First, did the filing of the FRCrP 35(c) motion toll the time for the defendant to file a notice of appeal under Rule 4(b)(1)? Rule 4(b)(3)(A) lists certain post-judgment motions, the filing of which explicitly tolls the time to appeal under Rule 4(b)(1). FRCrP 35(c) motions are *not* among them. However, some of the courts of appeals have held that the list of tolling motions in Rule 4(b)(3)(A) is not exclusive, and that under the "*Healy* doctrine" of the common law, any "motion for reconsideration" is sufficient to toll the time to appeal under Rule 4(b)(1). Is a FRCrP 35(c) motion such a "motion for reconsideration"?

The second question is this: Given that a district court has authority to correct a sentence under FRCrP 35(c) only when "acting within 7 days after the imposition of sentence," what happens when a timely FRCrP 35(c) motion is filed but the district court does not rule upon the motion until, say, 30 days after imposition of sentence? Should the time to appeal be tolled until the district court issues an order denying the motion, even though the district court loses the authority to grant the motion after 7 days? Or should a FRCrP 35(c) motion be deemed denied -- and the time to appeal under Rule 4(b)(1) be deemed to begin to run -- once the 7-day period expires?

At the October 1998 meeting, Mr. Letter agreed to look into these issues for the Committee. Mr. Letter presented three proposals on behalf of the Department of Justice. Under the first proposal, Rule 4(b)(5) would be amended to provide that the filing of a FRCrP 35(c) motion would not toll the time for filing a notice of appeal *at all*. Under the second proposal, Rule 4(b)(5) would be amended to provide that the filing of a FRCrP 35(c) motion would toll the time for filing a notice of appeal, but only for 7 days after entry of judgment or until the district court rules on the motion, whichever comes first. Under the third proposal, Rule 4(b)(3) would be amended to achieve, in substance, the same result as the second proposal.

Mr. Letter said that the Department strongly preferred the first proposal. It would result in the clearest rule and the one most consistent with the rest of the appellate rules -- which, as noted, do not include FRCrP 35(c) motions among the "tolling" motions listed in Rule 4(b)(3)(A), and which, in fact, specifically provide that the filing of a FRCrP 35(c) motion does not render the underlying judgment non-final (*see* Rule 4(b)(5)). Mr. Letter said that the Department could foresee only one problem with the

first proposal: In a case in which a defendant wanted to appeal only his sentence -- and then only if his sentence was not corrected in response to his FRCrP 35(c) motion -- he might feel compelled to protect his appellate rights by filing a notice of appeal before the court rules on his FRCrP 35(c) motion, rather than simply waiting until the FRCrP 35(c) motion is granted or denied. Of course, even in that circumstance, the defendant could withdraw his notice of appeal if his FRCrP 35(c) motion is granted.

Most members of the Committee supported the Department's preferred approach, although a couple of members raised the following problem: Suppose that the *government* brings a FRCrP 35(c) motion and, on the seventh day after imposing sentence and entering a judgment, the district court grants the motion. Suppose further that the defendant, who did not plan to appeal the original judgment, now wants to appeal because, in his view, the government's FRCrP 35(c) motion was erroneously granted. Even if the defendant learns of the granting of the government's FRCrP 35(c) motion on the day the order is entered, he will have only 3 days to file a notice of appeal. If, as is likely, the defendant does not learn of the granting of the government's motion until a couple of days after the order is entered, he may find that the time to appeal the original judgment has run.

Mr. Letter said that his understanding is that, when a FRCrP 35(c) motion is *granted*, a new judgment is entered, and either party has 10 days to appeal that new judgment. Judge Garwood asked Mr. Letter to look into the issue so that the Committee can be sure. It may be that Rule 4(b) will have to be amended to explicitly provide that, when a FRCrP 35(c) motion is granted, a new judgment must be entered, and the time to appeal for both the government and the defendant begins to run upon the entry of that new judgment.

A member described another advantage of the Department's preferred approach: At present, there is a split in the circuits over when the 7-day period in FRCrP 35(c) begins to run. FRCrP 35(c) provides that the 7 days begins to run upon "imposition of sentence." Some courts hold that a sentence is "imposed" when it is orally pronounced in open court, while others hold that a sentence is "imposed" only when the formal judgment of sentence is entered. Under the Department's first proposal, the issue of when the 7-day period begins to run would be irrelevant, as FRCrP 35(c) motions would not toll the time to appeal *at all*.

A member moved that the Committee, in principle, adopt the first proposal of the Department. The motion was seconded. The motion carried (unanimously).

Mr. Letter agreed that the Department would draft an amendment and Committee Note in time for the Committee's October 1999 meeting and report to the Committee on whether the granting of a FRCrP 35(c) motion always results in the entry of a new judgment.

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

Rule 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F. Ripple has suggested that Rule 22(a) be amended to permit circuit judges to deny habeas petitions. He argues that it is a waste of time for a circuit judge to review a frivolous habeas petition and then, instead of denying it, transfer it to a district judge, who will have to take the time to review it before denying it. He also points out that circuit judges have *statutory* authority to deny habeas petitions under 28 U.S.C. § 2241(a), but Rule 22(a) precludes them from using that authority. At the Committee's October 1998 meeting, Mr. Letter offered to have the Department of Justice study and report back on this issue.

Mr. Letter said that this issue had turned out to be far more complicated than he anticipated, and that the Department would not be prepared to present a formal proposal until at least the October 1999 meeting. The Department was not sympathetic to the notion that circuit judges should be permitted to rule on habeas petitions in criminal cases. In criminal cases, habeas petitions are generally not coupled with other motions that require circuit judges to review the merits of the case, so circuit judges can refer those petitions to district courts without even reading them. The immigration context is different. A person who has been ordered deported is authorized to move in a court of appeals for a stay of deportation. In ruling upon such a motion, a circuit judge must review the merits of the case, and thus it might make sense to permit the circuit judge to also rule upon an accompanying habeas petition. All of this is under discussion within the Department.

Mr. Letter said that one additional complicating issue was a circuit split that has developed over the question of whether district courts have authority to rule on habeas petitions filed by aliens who have been ordered deported. Mr. Letter said that it would not make sense for Rule 22(a) to require circuit judges to transfer habeas petitions to district courts if district courts do not have authority to rule on those petitions. A member disagreed. He said that the Department should not focus on the question of whether district courts have jurisdiction to rule on habeas petitions in immigration cases, but instead on the question of who should first make that determination. It might make sense to require circuit judges to transfer habeas petitions to district courts, district courts to decide in the first instance whether they have jurisdiction, and then circuit courts to review those decisions on appeal.

The Committee very briefly discussed the merits of Judge Ripple's suggestion. Some members opposed the suggestion, arguing that it was wise policy to require all habeas petitions to be reviewed by district

courts before being presented to courts of appeals. Other members expressed some sympathy for the suggestion, stressing the inconsistency between Rule 22(a) and § 2241(a). In response, one member said that, although she was not certain, she thought that Rule 22(a)'s requirement that habeas petitions be transferred to district courts was inserted into Rule 22(a) by act of Congress.

Judge Garwood told Mr. Letter that the Committee would be grateful if the Department would continue to discuss this issue and be prepared to take a position on Judge Ripple's suggestion at the October 1999 meeting.

E. Item No. 98-08 (permit "54(b)" appeals from Tax Court)

It is not clear whether the courts of appeals have jurisdiction to review orders of the Tax Court that finally resolve some but not all of the disputes between the Internal Revenue Service and a taxpayer. The rules of the Tax Court do not contain the equivalent of FRCP 54(b). Chief Judge Richard A. Posner has suggested that either the rules of the Tax Court or FRAP be amended to permit "54(b)-type" appeals from the Tax Court. *See Shepherd v. Commissioner of Internal Revenue*, 147 F.3d 633 (7th Cir. 1998).

At its October 1998 meeting, the Committee reached a consensus that any such "54(b)-type" provision should appear in the rules of the Tax Court rather than in FRAP. But Mr. Letter asked the Committee not to remove this item from its study agenda until he had an opportunity to solicit the views of the Internal Revenue Service and the Tax Court.

Mr. Letter reported that he had consulted with the Chief Counsel of the Internal Revenue Service and the Chief Judge of the Tax Court, and both had agreed that this issue should not be addressed by this Committee. A member moved that Item No. 98-08 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

The Committee recessed for lunch and reconvened at 1:20 p.m.

F. Item No. 99-03 (electronic filing and service)

Judge Garwood asked the Reporter to lead the discussion on this item.

The Reporter said that all of the rules of practice and procedure -- appellate, bankruptcy, civil, and criminal -- include almost identically worded provisions authorizing the promulgation of local rules that permit electronic case filing ("ECF"). *See, e.g.*, Rule 25(a)(2)(D). Following enactment of the ECF rules in 1996, the Judicial Conference Committee on Automation and Technology developed the "ECF Initiative," under which several district and bankruptcy courts that had been experimenting with electronic filing agreed to serve as ECF "prototypes." The Committee on Automation and Technology hoped that the experiences of the prototype courts would help the Judicial Conference to identify the legal, policy, and technical issues that would need to be addressed before ECF could be implemented on a nationwide basis.

The Reporter said that the prototype courts have, for the most part, had positive experiences with electronic *filing*, and they are anxious to move to the next step: electronic *service*. At present, such service is not authorized by any of the rules of practice and procedure. Rather than ask each of the advisory committees to work independently on electronic service rules, the Standing Committee directed Prof. Edward Cooper, the Reporter to the Advisory Committee on Civil Rules, to draft electronic service provisions for the civil rules. The Standing Committee's hope was that, after satisfactory language regarding electronic service is found for the civil rules, similar language can be incorporated into the appellate, bankruptcy, and criminal rules.

In February 1999, the Standing Committee's Subcommittee on Technology met, and Prof. Cooper presented various proposals for amending the civil rules. After considerable discussion, the Subcommittee made a few tentative decisions, and Prof. Cooper agreed to draft amendments implementing those decisions. The Reporter described Prof. Cooper's draft amendments and the decisions that they reflected:

1. The Subcommittee decided that parties should have the option to use or not to use electronic service. Thus, under the draft amendments, electronic service cannot be imposed upon an unwilling party. However, if the parties agree to use electronic service, a district court may not forbid electronic service to be used.

One member expressed disagreement with the Subcommittee's approach. He said that courts should be

authorized to use their local rules to permit or not to permit electronic service, as those courts see fit. The Reporter responded that the Subcommittee had discussed and rejected that option. The Subcommittee wants to use the rules of practice and procedure to push courts to accept electronic service, and thus the Subcommittee intentionally drafted the rules so that courts could not forbid consenting parties from using electronic service.

A member said that nothing presently in the rules forbids parties from agreeing among themselves to serve electronically. Why are amendments to the rules of practice and procedure necessary? The Reporter responded that the Subcommittee wants to encourage the use of electronic service and, toward that end, it wants to establish a "substructure" of rules on such issues as when electronic service will be deemed complete and whether the 3-day rule of FRCP 6(e) should apply to electronic service. Without such a substructure, parties would have to discuss and try to reach agreement on each of these ground rules in every case, and that would discourage parties from using electronic service.

A member moved that the Committee agrees in principle that electronic service should not be imposed upon unwilling parties and that courts should not be able to forbid parties who have consented to electronic service from using it. The motion was seconded. The motion carried (7-1).

The Committee was asked by Prof. Cooper to consider two alternative formulations of an amendment to FRCP 5(b)(2)(D) -- the "Capra" formulation and the "Lafitte" formulation. By consensus, the Committee decided that it preferred the "Capra" formulation. However, several members noted that under both formulations, FRCP 5(b)(2)(D) would require the consent of parties to "other means" of service -- such as Federal Express or third party carriers. The members argued that such consent should not be necessary and pointed out that the appellate rules authorize such service without the consent of the parties. *See* Rule 25(c). By consensus, the Committee decided to recommend to Prof. Cooper that he redraft FRCP 5(b)(2) so that "electronic" service (to which parties must consent) is mentioned in one subsection and "any other means" of service (to which parties need not consent) is mentioned in another.

2. Although the Subcommittee did not want to permit district courts to *block* the use of electronic service by consenting parties, the Subcommittee recognized that the district courts must be free to use local rules to *regulate* such service. A number of difficult questions are likely to arise after parties begin serving each other electronically, and it is important that district courts have the flexibility to address those problems in their local rules.

Several members said that, while they agreed with the Subcommittee's approach, they were concerned that the amendments drafted by Prof. Cooper did not make explicit the authority of courts to use local rules to regulate electronic service. The amendments themselves say nothing about local rules (with the

exception of local rules permitting service by the clerk instead of by the parties, discussed below). Similarly, the Committee Note mentions local rulemaking only in connection with regulating the "means of consent" to electronic service; it says nothing about using local rules to regulate other aspects of electronic service.

A member moved that the Committee agrees that, although courts should not be able to forbid the use of electronic service when the parties consent, they must have considerable discretion to use local rules to regulate that service. The member further moved that the Committee recommends that the ability of courts to use local rules to regulate electronic service be explicitly mentioned in the text of a rule. The motion was seconded. The motion carried (unanimously).

3. The Subcommittee determined that only "FRCP 5" service may be made electronically, while "FRCP 4" service must continue to be made manually. Roughly speaking, FRCP 4 (and FRCP 4.1) service is the service of process that commences a lawsuit, while FRCP 5 service is essentially all of the service that occurs thereafter (e.g., service of answers, discovery requests, and motions). The Subcommittee was nervous about permitting electronic service of the summons and complaint. The Subcommittee also determined that requests to waive formal service made under FRCP 4(d) should continue to be in writing.

After a brief discussion, the Committee agreed by consensus with the proposals of the Subcommittee.

4. The Subcommittee struggled with the question of when electronic service will be deemed complete. The Subcommittee rejected a proposal that electronic service be deemed complete upon "receipt" because it is too vague and manipulable. The Subcommittee also rejected a proposal that electronic service be deemed complete when the sender receives "confirmation" that her message has been received. Some e-mail programs do not confirm the receipt of messages, while others do, and any confirmation rule would be subject to manipulation. The Subcommittee eventually decided that electronic service should be deemed complete upon "transmission" -- roughly speaking, when the sender hits the "send" button on her computer and launches the message on its way through cyberspace. The transmission rule closely parallels the mailbox rule of FRCP 5(b), under which service by mail is deemed complete "upon mailing."

A member expressed two concerns about the transmission rule: First, what happens when an attorney is away from the office for a couple of weeks and not able to receive e-mail? Second, what happens when the sender of the e-mail gets back a message informing the sender that the message was not received? Several members responded that they were not sympathetic to the first concern; just as an attorney can arrange to have someone open her mail, she can arrange to have someone open her e-mail. At the same

time, several members expressed agreement with the second concern.

A member moved that, although the Committee was not opposed in principle to using transmission as the effective date of electronic service, it believes that the text of a rule or a Committee Note should explicitly address the situation in which the sender of an electronic message is informed that the message was not delivered to its intended recipient. The motion was seconded. The motion carried (unanimously).

5. The Subcommittee considered the question of whether the 3-day rule of FRCP 6(e) should apply to electronic service. FRCP 6(e) currently provides that, "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period." After much discussion, the Subcommittee decided that FRCP 6(e) should be redrafted so that 3 days are added to the prescribed period whenever service is made by *any* means -- including electronic -- other than personal service. Although it may seem strange to apply the 3-day rule to electronic service, which is instantaneous, electronic service might be made at 8:00 p.m. on a Friday night and the recipient might not turn on her computer until 9:00 a.m. Monday morning.

Several members expressed concern about extending the 3-day rule to electronic service. The practitioners on the Committee pointed out that, in choosing a means of service, lawyers often seek to give their opponents as little time to respond as possible. Extending the 3-day rule to electronic service will discourage its use, as attorneys will not want their opponents to have 3 extra days to respond to something that they are likely to receive instantaneously. Instead, attorneys will use the mail. These members argued that the 3-day rule should be restricted to service by U.S. Mail. Mail is distinguishable from electronic service, in that mail is completely out of the control of attorneys for several days, whereas attorneys can, if they wish, check their e-mail daily.

A member moved that the Committee does not agree with the Subcommittee's proposal to extend the 3-day rule to electronic service, but instead prefers to leave FRCP 6(e) unchanged -- that is, to continue to limit the 3-day rule only to mail. The motion was seconded. The motion carried (6-2).

6. Finally, the Subcommittee discussed the fact that, before long, it may make sense to require the clerk, rather than the parties, to serve all papers filed with the court. Software is apparently being developed that would permit the clerk, with a touch of a button, to serve an electronically filed paper on all parties. Under the draft amendment, a district court could, by local rule, authorize service by the clerk instead of by the parties.

The Committee quickly reached a consensus that it agreed with the Subcommittee's proposal.

Judge Scirica asked whether it would be possible for the Reporter to work overnight to draft electronic service amendments to FRAP, so that the Committee could consider those amendments tomorrow, and the Standing Committee could consider them in June. After a lengthy discussion, Judge Scirica and the Committee agreed that drafting and approving electronic service rules and Committee Notes in such a short period of time would be impracticable. Instead, this Committee will, as originally planned, await action on the proposed amendments to the civil rules at the Standing Committee's June meeting, and then consider similar amendments to FRAP at this Committee's October meeting.

G. Item No. 97-32 (FRAP 12(a) -- require caption to identify only the parties to the appeal)

The circuit clerks have proposed an amendment to Rule 12(a), which currently requires that appeals be docketed under the caption used in the district court. Occasionally the district court caption includes hundreds of parties, many of whom are not parties to the appeal. This creates needless work for the clerks' offices. The clerks have proposed that Rule 12(a) be amended so that captions would identify only the parties to the appeal.

Two members expressed opposition to the clerks' proposal. They argued that there are advantages to using the same caption in both the trial court and the appellate court. Using the same caption sometimes gives judges helpful information about the case and aids judges in meeting their recusal obligations. One member wondered whether Rule 12(a) could be amended so appeals would continue to be docketed under the caption used in the district court, unless the number of parties identified in the district court caption exceeded a specific number, in which case some other method would be used. After further discussion, the Committee agreed by consensus to postpone action on this matter until the October 1999 meeting, when Mr. Charles R. "Fritz" Fulbruge, III, the liaison from the appellate clerks, could be present to answer questions.

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

Rule 12(b) presently requires only the attorney who files a notice of appeal to submit a representation statement and requires that attorney to identify only himself and his clients. The appellant's attorney is not asked to identify the appellees or their attorneys, and no other party is required to file a representation statement. This lack of information sometimes makes it difficult for the clerks to identify all of the parties and attorneys. To remedy this problem, the clerks have proposed amending Rule 3(c)(1)(A) to require a party filing a notice of appeal to simultaneously submit "a separate statement listing all parties to the appeal, the last known counsel, and the last known addresses for counsel and unrepresented parties."

The Reporter suggested that, rather than amend Rule 3's provisions on the filing of a notice of appeal, it might be better to amend Rule 12(b)'s provisions on the representation statement. A member agreed and said further that, if Rule 3 were to be amended along the lines suggested by the clerks, the Committee should add the provision as a new Rule 3(f) rather than adding it to Rule 3(c)(1)(A).

A member moved that the Committee amend Rule 12(b) to require that the representation statement filed by the appellant name not just the parties represented by the attorney who files the statement, but *all* parties and *all* attorneys. The motion was seconded.

The Committee discussed the motion at length. Members were not clear on whether amending Rule 12(b) in this manner would solve the problem identified by the clerks. The primary concern of the clerks appears to be the information available to them when they docket an appeal, but the representation statement does not have to be filed until 10 days after the notice of appeal is filed. Other members said that, in many cases, the attorney for the appellant cannot be expected to identify the appellees until he files his principal brief.

The Committee agreed, by consensus, to postpone further discussion of Item No. 97-33 until October, when Mr. Fulbruge would be present to answer questions.

I. Items Awaiting Initial Discussion

1. Item No. 99-02 (FRAP 32 -- add signature requirement)

Judge Garwood introduced the following proposed amendment and Committee Note:

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

(d) Signature. All notices of appeal, requests for permission to appeal, petitions for review or applications for enforcement of agency orders, motions, responses to motions, replies to responses to motions, briefs, petitions for panel rehearing, answers to petitions for panel rehearing, petitions for hearing or rehearing en banc, responses to petitions for hearing or rehearing en banc, and similar papers 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. The party or attorney who signs the paper must also state the signer's address and telephone number (if any).

(~~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, rehearing petition, and similar paper be signed by the attorney or unrepresented party who files it, much as FRCP 11(a) imposes a signature requirement on papers filed in district court. 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 FRCP 11(b) and 11(c).

A member said that he agreed with Judge Garwood that a signature requirement should be added to the

rules, but he thought that the first sentence of proposed Rule 32(d) could provide simply that "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." Rule 32(d) might also clarify either in its text or in its Committee Note that the signature requirement does not extend to appendices. Such a provision would match up well with the terminology of Rule 32: Rule 32(a) refers to the form of "a Brief," Rule 32(b) refers to the form of "an Appendix," Rule 32(c)(1) refers to the form of a "Motion," and Rule 32(c)(2) refers to the form of "Other Papers." Several members agreed with this suggestion.

A member moved that Rule 32 be amended as proposed, except that the first sentence of proposed Rule 32(d) be shortened as suggested. The motion was seconded. The motion carried (unanimously).

A member expressed fear that by incorporating the signature requirement of FRCP 11(a), but not the "good faith" requirements of FRCP 11(b) and 11(c), the appellate rules might be understood to imply that signing a paper submitted to a circuit court means less than signing a paper submitted to a trial court. He wondered whether FRAP should be amended to incorporate the "good faith" requirements of FRCP 11(b) and 11(c). Several members opposed this notion, pointing out that the district courts have had great difficulty interpreting and applying FRCP 11, and arguing that this Committee should not inflict similar problems on the appellate courts.

The Committee adjourned for the day at 4:30 p.m.

The Committee reconvened on Friday, April 16, 1999, at 8:29 a.m.

2. Item No. 99-01 (FRAP 24(a)(3) & 24(a)(5) -- potential conflicts with PLRA)

Last year the Committee proposed an amendment to Rule 24(a)(2) to resolve a conflict between that rule and the Prison Litigation Reform Act of 1995 ("PLRA"). Judge Garwood asked the Reporter to do some follow-up research to determine whether there might be further conflicts between Rule 24(a) and the PLRA. In a memorandum dated March 15, 1999, the Reporter described five potential conflicts between Rule 24(a) and the PLRA. At Judge Garwood's request, the Reporter briefly summarized the five potential conflicts:

Conflict No. 1: The PLRA requires prisoners who bring civil actions or appeals from civil actions to "pay the full amount of [the] filing fee," 28 U.S.C. § 1915(b)(1), albeit sometimes in installments, § 1915(b). By contrast, Rule 24(a)(2) provides that, after any litigant (including a prisoner) receives permission to proceed on appeal IFP, the litigant may proceed "without prepaying or giving security for fees and costs." There is undoubtedly a conflict between Rule 24(a)(2) and the PLRA, but this Committee already addressed this conflict at its April 1998 meeting, when it approved a proposed amendment to Rule 24(a)(2). Under that proposal, the phrase "unless the law requires otherwise" would be inserted after the phrase "fees and costs."

Conflict No. 2: Under Rule 24(a)(1), a party who moves the district court for permission to proceed on appeal IFP need file only the Form 4 affidavit. Under the PLRA, a *prisoner* must also file a trust fund statement. § 1915(a)(2). One could argue that, because Rule 24(a)(1) is silent on the question of submitting a trust fund statement, it implies that nothing besides the Form 4 affidavit need be filed, and thus implicitly conflicts with the PLRA.

A member reminded the Committee that Form 4, as amended on December 1, 1998, specifically directs: "If you are a prisoner . . . you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts." That being the case, there is no conflict between Rule 24(a)(1) and the PLRA. Other members agreed.

Conflict No. 3: Under Rule 24(a)(3), a party who proceeds IFP in the district court is automatically entitled to proceed IFP on appeal "without further authorization," unless the district court finds that the appeal is taken in bad faith or that the party is no longer indigent. By contrast, nothing in the PLRA authorizes a party who was permitted to proceed IFP in the district court to *automatically* be given the same status in the appellate court. The PLRA is silent on this issue with respect to *non-prisoners*, and thus one could argue that Rule 24(a)(3) and the PLRA are not in conflict. But the PLRA fairly clearly provides that, before a *prisoner* can be given permission to proceed on appeal IFP, he must move for that permission and submit with his motion a copy of his trust fund statement.

The Committee has several options for addressing the potential conflict between Rule 24(a)(3) and the PLRA. The conflict arises only in cases involving prisoners, so one easy way of addressing the problem would be to insert a couple of words into Rule 24(a)(3) to limit its application to non-prisoners; Rule 24(a)(3) would then be silent on the question of prisoner litigation. Another option would be to renumber what is now Rule 24(a)(3) as Rule 24(a)(3)(A), limit it to non-prisoners as just suggested, and add a subsection (B) that explicitly provides that prisoners are *not* entitled to "carryover" IFP status. A third option would be simply to insert the words, "Unless the law requires otherwise," at the beginning of Rule 24(a)(3).

A member said that he had a philosophical objection to treating prisoners and non-prisoners differently in the text of FRAP. He would prefer the third option. A member disagreed. He pointed out that it was Congress's decision to treat prisoners differently from non-prisoners; all the Committee is doing is implementing a Congressional directive. In addition, the phrase "[u]nless the law requires otherwise" is not particularly helpful. It leaves parties wondering to which of the thousands of statutes, regulations, and rules the phrase is referring.

Several other members agreed with the first member. They, too, wanted to avoid distinguishing between prisoners and non-prisoners in the rules, and they did not want Rule 24(a) to specifically incorporate the provisions of the PLRA, given that the PLRA is likely to be amended in the future. The Committee reached a consensus that Rule 24(a)(3) should be amended by inserting at the beginning the phrase, "Unless the law requires otherwise." Judge Garwood asked the Reporter to draft an amendment and Committee Note for the Committee's October meeting.

Conflict No. 4: Rule 24(a)(5) permits a party to move in the court of appeals for permission to proceed on appeal IFP after the district court has denied him that permission or found that his appeal is not taken in good faith. Such a motion need be accompanied by only the Form 4 affidavit (and a copy of the district court's statement of reasons for its action). The PLRA does not preclude a party from moving the court of appeals for permission to proceed on appeal IFP, either before or after such permission has been denied by the district court. However, the PLRA clearly requires that a *prisoner* filing such a motion with a court of appeals must submit a trust fund statement, as well as a Form 4 affidavit. This potential conflict is identical to "Conflict No. 2," and the consensus of the Committee was that, just as Conflict No. 2 is adequately addressed by the language in the newly revised Form 4, so, too, is this conflict.

Conflict No. 5: Rule 24(a)(5) requires that a party seeking to proceed on appeal IFP first seek the permission of the district court and then, if that permission is denied for any reason (including a finding of bad faith), move the court of appeals within 30 days for permission to proceed on appeal IFP. However, the PLRA provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." § 1915(a)(3). There is a potential conflict between the fact that Rule 24(a)(5) permits a party who has been found by the district court to be appealing in bad faith to file a *motion* in the court of appeals for permission to proceed on appeal IFP and the fact that the PLRA precludes a party who has been found by the district court to be appealing in bad faith from *appealing* that finding in the court of appeals.

Most of the courts of appeals do not see a conflict. All of the courts of appeals that have addressed the issue (save the Sixth Circuit) have held that, after the district court makes a finding of bad faith, the party may, consistently with the PLRA, move in the court of appeals for permission to proceed IFP (even though, as a practical matter, this permits the party to get appellate review of the district court's finding). After a brief discussion, the Committee reached a consensus that the majority interpretation of the PLRA

is correct, and thus that there is no conflict between Rule 24(a)(5) and the PLRA.

Judge Garwood asked the Reporter to draft an amendment and Committee Note implementing the one additional change to Rule 24(a) agreed upon by the Committee.

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

The Reporter introduced this item.

Rule 5(c) requires that a petition for permission to appeal "must conform to Rule 32(a)(1)." Rule 32(c) requires that "other papers" -- which includes petitions for permission to appeal -- must conform to "Rule 32(a)," with two exceptions. It is thus not clear whether petitions for permission to appeal must conform only with the requirements of Rule 32(a)(1) (as Rule 5(c) seems to say) or with all of the requirements of Rule 32(a), save two (as Rule 32(c) seems to say).

A member said that the use of "Rule 32(a)(1)" in the restylized Rule 5(c) was an obvious mistake, and that the mistake could be correct by replacing "Rule 32(a)(1)" with "Rule 32(a)." Another member suggested that it would be better to replace "Rule 32(a)(1)" with "Rule 32(c)(2)," which would make it clear that petitions for permission to appeal are "other papers" for purposes of the rule. Also, amending Rule 5(c) in this manner would make it clear that the two exceptions to the Rule 32(a) requirements made for "other papers" apply to petitions for permission to appeal.

A member moved that Rule 5(c) be amended by replacing the reference to "Rule 32(a)(1)" with a reference to "Rule 32(c)(2)." The motion was seconded. The motion carried (unanimously). Judge Garwood asked the Reporter to draft an amendment and Committee Note for consideration by the Committee in October.

4. Item No. 98-10 (FRAP 46(b)(3) -- delete requirement of hearing in reciprocal discipline cases)

Under Rule 46(b), an attorney who has been suspended or disbarred by a state supreme court may request a hearing before being suspended or disbarred by a court of appeals. The Fourth Circuit Rules Advisory Committee has recommended that Rule 46(b) be amended so that a hearing would be necessary only if material facts were in dispute.

A member asked how often attorneys request hearings in these "reciprocal discipline" cases. A member responded that such hearings were rare in the Fifth Circuit. Another member said that he could recall only one such hearing in the Third Circuit.

A member said that, in light of the extremely small number of hearings requested, he favored leaving Rule 46(b) alone. A member agreed and said that he also favored retaining the hearing requirement as a policy matter, as it served as a check on state supreme courts.

A member proposed restricting the ability to request a hearing to cases in which there was a dispute of fact or law. Several other members objected, saying that they saw no reason to amend Rule 46(b).

A member moved that Item No. 98-10 be removed from the study agenda. The motion was seconded. The motion carried (6-1), with 1 abstention.

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

No additional old business or new business was raised.

Judge Garwood noted that Mr. Meehan's term as a member of the Committee would expire on October 1. Judge Garwood expressed appreciation for Mr. Meehan's dedicated service to the Committee and said that he hoped Mr. Meehan would join the Committee at its October 1999 meeting.

VII. Scheduling of Dates and Location of Fall 1999 Meeting

The Committee agreed that it will meet in Tucson, Arizona, on October 21 and 22, 1999.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 9:30 a.m.

Respectfully submitted,

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Patrick J. Schiltz

Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and Committee Notes approved by the Committee at this meeting.

1. There are no 8- or 9-day deadlines in FRAP.