Minutes of Spring 2008 Meeting of
Advisory Committee on Appellate Rules
April 10 and 11, 2008
Monterey, California

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 10, 2008, at 8:30 a.m. at the Monterey Plaza Hotel in Monterey, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Paul D. Clement attended the meeting on April 10, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present on April 10 and represented the Solicitor General on April 11. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart noted the Committee's appreciation that Solicitor General Clement was attending the meeting. The Reporter observed that congratulations are due to Judge Stewart for his recent receipt of the 2007 Celebrate Leadership Award from the Shreveport Times and the Alliance for Education; the award honors top community leaders. Mr. Levy reported that Justice Alito sent his greetings to the Committee.

II. Approval of Minutes of November 2007 Meeting

The minutes of the November 2007 meeting were approved, subject to some minor edits to the minutes' discussion of model local rules.

III. Report on January 2008 Meeting of Standing Committee

Judge Stewart reported that the Standing Committee, at its January 2008 meeting, approved for publication the proposed amendment to Rule 29 concerning amicus brief disclosures. Judge Stewart reminded the Committee that the proposed amendment to Rule 1(b)

[1] Dean McAllister attended the meeting on April 10 but was unable to be present on April 11.

concerning the definition of the term "state" was not submitted to the Standing Committee in January, because of the need for the Advisory Committee to consider a few refinements to the proposal.

Judge Stewart invited Judge Hartz to update the Committee concerning the January meeting of the Standing Committee subcommittee, which Judge Hartz chairs, on issues relating to the sealing of entire cases. Judge Hartz reported that the subcommittee has decided to limit its focus to cases that are entirely sealed; that decision, though, does not eliminate all questions of scope, since there may in some instances be questions as to what constitutes sealing of the entire case (for example, such issues may arise in connection with bankruptcy proceedings). Timothy Reagan of the Federal Judicial Center is preparing a study to inform the subcommittee's further deliberations. A representative from a district court clerk's office will be assisting the subcommittee, as will Jonathan Wroblewski of the DOJ.

Judge Rosenthal observed that the Standing Committee had a relatively light agenda for its January meeting. This enabled the Committee to engage in a preliminary discussion of the Civil Rules Committee's projects concerning Civil Rules 26 and 56.

As an additional update on events since the Advisory Committee's November 2007 meeting, Judge Stewart reported that he had written to William Thro, the Virginia State Solicitor General, to let him know that the Committee, after careful study, has determined not to take any additional action at this time on the proposal to amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing.

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

Judge Stewart noted that most circuits have now responded to his letter concerning circuit-specific briefing requirements. The letter has served the goal of drawing each circuit's attention to the issue, and it is to be hoped that the court of appeals' transition to the case management / electronic case filing system will provide an occasion for each circuit to review whether its local briefing requirements are necessary.

V. Action Items

A. For final approval

1. Item No. 06-01 (FRAP 26(a) — time-computation template) & Item No. 06-02 (adjust deadlines to reflect time-computation changes)

Judge Stewart invited the Reporter to update the Committee on the overall status of the time-computation project. The project's core innovation is to adopt a days-are-days approach to the computation of all time periods, including short time periods; to offset the change in the method of computing short time periods, the project also includes a package of proposals to alter rule-based and statutory deadlines. More than twenty public comments were received concerning the time-computation project. Five commentators, including Chief Judge Frank H. Easterbrook and the Public Citizen Litigation Group, commented favorably on the overall project; these commentators welcome the project's goal of simplifying and clarifying the time-computation rules. Four commentators commented unfavorably: The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York argued against the adoption of the time-computation proposals generally, while three other commentators (including Professor Alan Resnick) argued against adopting a days-are-days approach in the bankruptcy context. Those commenting unfavorably argue that the current system works well; that the transition to the proposed days-are-days counting method will cause great disruption due to the need to alter not only deadlines in the national rules but also deadlines in statutes, local rules and standing orders; and that to the extent that the current time-counting system can pose difficulties, this could be ameliorated by designing software that could be integrated into the CM/ECF system and that could perform the requisite calculations.

A number of commentators have argued strongly that the proposed days-are-days time-computation system should not be adopted unless and until the necessary changes have been made to relevant deadlines, not only in the national rules but also in statutes and local rules. The DOJ has stressed this point, asserting that if the time-counting changes take effect without the necessary changes to statutory time periods, the purposes of some of those statutes could be frustrated. The DOJ has submitted a list of the statutory periods that it considers to be priorities for amendment.

The Time-Computation Subcommittee carefully considered these concerns. Members discussed the arguments leveled against the project, and noted that these concerns were very similar to those that had been fully aired during the advisory committees' earlier consideration of the project. The Subcommittee therefore recommends that the project proceed. The Subcommittee takes very seriously the concerns expressed concerning time periods set by statutes and by local rules. The Subcommittee recommends that the project proceed on the assumption that the amendments will stay on track to take effect December 1, 2009. But to that end, it is essential that each Advisory Committee vote, at its spring 2008 meeting, on a list of the statutory periods (relevant to that Committee's field of expertise) which Congress should be asked to lengthen. Judge Rosenthal observed that, in addition, plans are underway to facilitate

the work that will be necessary to amend each circuit's and district's local rules. Mr. Letter noted that some statutory periods may need to be changed but different groups may not agree on what the nature of the change should be; he asked whether those provisions would be omitted from the list submitted to Congress. Judge Rosenthal stated that so far, the goal in assembling the list has been to identify candidates that (1) are used often enough to make it worthwhile to lengthen them; (2) are currently calculated using the Rules' time-computation method; and (3) are non-controversial. The list of proposed changes compiled by the Criminal Rules Committee will be run past the National Association of Criminal Defense Lawyers for their views. The hope is to work out any differences of opinion in advance, so as to be able to present to Congress a list of non-controversial proposals. Judge Rosenthal noted that discussions have already been held with legislative staffers about the general concept of the time-computation project, and the staffers gave the project a very warm reception; their view is that the proposed legislation makes sense and should not be problematic, particularly if it does not include controversial items. The discussions have included a timetable for taking the time-computation proposals to Congress in order to coordinate with a December 1, 2009 effective date for the project as a whole.

The Reporter noted that the Time-Computation Subcommittee had discussed possible approaches to the compilation of the list of statutory periods for amendment. The majority view on the Subcommittee is that the list should not include all of the possibly affected statutes, but rather should target those statutory periods that are a high priority for amendment given the frequency of their use and the relative importance of adjusting the time periods in question. She noted, however, that one member of the Subcommittee, Mr. Levy, had argued that the approach should instead be to include all the affected statutes – whether or not they are frequently used – unless a change to a particular statute would be so controversial as to threaten the overall viability of the proposal. A Committee member expressed agreement with Mr. Levy's views, stating that it seems unfair to exclude a statute from the list just because that statute does not affect a large number of practitioners. Mr. Clement asked whether there might be some merit to an approach that takes as its default position lengthening every potentially affected time period. The Reporter noted that not all periods listed on the long list of potentially affected statutes are actually in need of lengthening. In compiling that long list, the Reporter erred on the side of inclusivity; thus, some periods on the list may not actually be periods that are currently computed using the Rules' time-computation provisions. The Appellate Rules Deadlines Subcommittee's experience confirms this fact. For example, the Subcommittee examined some statutory periods concerning the publication in the Federal Register of certain Federal Circuit decisions concerning customs-related issues, and concluded that no lengthening of these periods would be appropriate, in part because those who practice in this field do not currently compute the periods using Rule 26(a). Mr. Rabiej noted that it will be a delicate task to synchronize the passage of legislation with the adoption of the package of amendments.

The Reporter also noted that a number of the public comments suggested ways of altering the time-computation template. The Time-Computation Subcommittee considered those suggestions but ultimately decided not to recommend any changes to the template rule or note.

Three suggestions were rejected by Subcommittee consensus. The first was to change the definition of the end of the last day (for purposes of electronic filing) from "midnight" to "11:59:59"; the Subcommittee does not believe that retaining the reference to "midnight" will be misleading. The second suggestion was to set the end of the last day at midnight for all filers, not just for electronic filers; the Subcommittee believes that this would not be appropriate as a default rule, and that for districts which wish to use a drop-box and opt out of the default rule, this can be accomplished by local rule. The third suggestion was to change the text of the Rule to emphasize that the Rule's time-computation provisions do not apply to date-certain deadlines; the Subcommittee believes that this fact is already clear from the text and Note.

Two other comments prompted some disagreement within the Subcommittee but did not receive majority support. In response to the comments submitted, the Subcommittee discussed whether it would be advisable to add language to the Note to make it even clearer that the national time-computation rules trump local rules' time-computation provisions (such as local rule provisions that set time periods in business days). Though there was some support for such an addition, others felt that it would not be desirable to add Note language concerning what is, in essence, a transitional issue concerning the need for conforming changes to the local rules. Instead, the materials that are provided to each local rulemaking body will make clear that if local rules set a time-counting method that differs from the national rules' approach (for example, by setting time periods in business days) those local rules should be amended. The Subcommittee also discussed the fact that the inclusion of state holidays within the definition of legal holidays may pose a trap for some litigants when a backward-counted deadline is at issue. This is because if a backward-counted deadline ends on a legal holiday, one must continue counting backwards until one reaches a day that is neither a legal holiday nor a weekend day; thus, if a backward-counted deadline ends on a state holiday, that will mean that the deadline actually falls *before* the state holiday – but a litigant who is unfamiliar with the state holiday in question might not recognize this fact. To eliminate this possible trap for the unwary, the Subcommittee discussed whether it would be advisable to redraft subdivision (a)(6) so that state holidays count as legal holidays only for forward-counted deadlines and not for backward-counted ones. Some Subcommittee members, however, felt that such a change would add excessive complexity and confusion, so the change was rejected.

Judge Stewart invited Judge Sutton, who chairs the Appellate Rules Committee's Deadlines Subcommittee, to introduce that Subcommittee's report concerning deadlines that should be amended in the light of the proposed new time-computation rules. Judge Sutton noted that the Appellate Rules Committee has already concluded that it should go along with the time-computation project, despite some members' doubts, because the Appellate Rules should take the same approach as the other sets of Rules. The Deadlines Subcommittee has taken as its goal the lengthening of the Appellate Rules deadlines so as to offset the shift in time-computation approach.

Judge Sutton noted that a number of comments had been submitted on the Appellate Rules deadlines proposals, but that, for the reasons outlined in the Reporter's memo on behalf of the Subcommittee, the Subcommittee had decided to recommend only one change in the

proposals as published. The Subcommittee does recommend altering the proposals in response to a concern raised by Howard Bashman with respect to the timing for motions that toll the time for taking a civil appeal. The Civil Rules Committee had published proposed amendments that would extend the deadline for such motions to 30 days – i.e., the same time period as that for taking a civil appeal (when the United States and its officers or agencies are not parties). Mr. Bashman points out that if the deadline for making a tolling motion falls on the same day as the deadline for filing a notice of appeal, then in a case involving multiple parties on one side, a litigant who wishes to appeal may not know, when filing the notice of appeal, whether a tolling motion will be filed; such a timing system can be expected to produce instances when appeals are filed, only to go into abeyance while the tolling motion is resolved.

Judge Rosenthal reported that the Civil Rules Committee discussed this issue at its April 7-8 meeting and determined that the best resolution would be to extend the deadline for tolling motions to 28 days rather than 30 days. The choice of a 28-day deadline responds to the concerns of those who feel that the current 10-day deadlines are much too short, but also takes into account the problem raised by Mr. Bashman. The Civil Rules Committee, however, wishes to defer to the Appellate Rules Committee's view on this issue, and so if the Appellate Rules Committee feels that 28 days is too close to 30 days, then the Civil Rules Committee's second choice would be to set the tolling motions' deadlines at 21 days.

A number of Committee members observed that 28 days is very close to 30 days, that the timing would be very tight if the tolling-motion deadline is set at 28, and that in that event it would be likely that appellants would still end up filing protective notices of appeal because they would be unsure whether or not another party would file a tolling motion. Responding to a member's observation that a 28-day deadline could permit a party to ascertain via the CM/ECF system whether another party has filed a tolling motion before the 30-day deadline for filing a notice of appeal is reached, Mr. Fulbruge pointed out that a large number of litigants are pro se litigants who will not be participating in CM/ECF.

An attorney member stated that based on his experience with the amount of work involved in preparing postjudgment motions, he favors extending the deadline for such motions to 28 days; he asked whether a possible way to resolve Mr. Bashman's concern might be to ask Congress to extend the 30-day deadline for civil appeals to 35 days and to make a corresponding change to the same deadline in Rule 4. Two other members expressed support for such a possibility. However, another attorney member countered that the 30-day time limit for civil notices of appeal is deeply ingrained in practitioners' minds and it would be unwise to tamper with that familiar deadline. Solicitor General Clement noted that he can see the benefits of extending the tolling-motion deadline to 28 days; that the proximity of the 28-day and 30-day deadlines is unlikely to be a big problem, especially since counsel will often coordinate with one another and will thus know whether a tolling motion will be made; and that he is not sure there is enough reason to alter the 30-day appeal time limit. The members who favor consideration of extending the appeal-time deadline responded that counsel do not always coordinate well with one another, and that since the time-computation project will result in the alteration of other deadlines there should not be a downside to altering the 30-day deadline as well. It was pointed

out, however, that altering the 30-day deadline would be a significant change, and one that was not mentioned when the Appellate Rules deadlines proposals were published for comment. A member noted that if the Committee agrees to the 28-day time period for the tolling motions, it can continue to review the matter to see whether the 28-day and 30-day deadlines pose a problem in practice once the time-computation amendments go into effect.

A motion was made and seconded to approve the 28-day time period for tolling motions and to change the cutoff time in Rule 4(a)(4)(A)(vi) to 28 days as well. The motion passed by a vote of 7 to 1.

Judge Sutton noted that the Advisory Committee has been asked to finalize its list of statutory periods that should be amended in the light of the proposed change in time-computation method. The statutory provisions that warrant particular attention are the 7-day deadline in 28 U.S.C. § 2107(c); the "not less than 7 days" period in 28 U.S.C. § 1453(c); the 72-hour, 5-day and 7-day time periods in 18 U.S.C. § 3771(d); the 4-day and 10-day periods in the Classified Information Procedures Act ("CIPA") § 7(b); and the 4-day and 10-day periods in 18 U.S.C. § 2339B(f)(5)(B).

The Reporter noted that the Committee had already approved the proposal with respect to the 7-day period in Section 2107(c). This period, which constitutes one of the time limits on making a motion to reopen the time to appeal, should be extended from 7 to 14 days in keeping with the proposed amendment to the corresponding time period in Rule 4(a)(6)(b). Section 1453's "not less than 7" day period limits the time for seeking appellate review, under the Class Action Fairness Act, of a district court's remand order; "not less than" was clearly a drafting error. Section 1453 should be amended to set the time limit at "not more than 10 days" to correct the drafting error and offset the shift in time-computation method. 18 U.S.C. § 3771(d) involves the procedures for appellate review of district court determinations concerning rights provided by the Crime Victims' Rights Act (CVRA). 18 U.S.C. § 3771(d)(5) sets a 10-day time period for victims to seek mandamus review in the court of appeals for certain purposes. 18 U.S.C. § 3771(d)(3) sets a 72-hour deadline for the court of appeals to decide a victim's mandamus petition and a 5-day limit on continuances in the district court. The DOJ and the Criminal Rules Committee's deadlines subcommittee recommend extending the 10-day mandamus petition deadline, but do not recommend extending the other CVRA deadlines. CIPA § 7 sets a 10-day deadline for pretrial appeals relating to orders concerning disclosure of classified information, and sets 4-day deadlines for the court of appeals to hear argument and render decision with respect to appeals taken during trial. 18 U.S.C. § 2339B(f)(5)(B) sets 10-day and 4-day deadlines (similar to CIPA § 7) relating to certain appeals of orders concerning classified information in civil actions brought by the United States concerning the provision of material support to foreign terrorist organizations. The DOJ has recommended extending the CIPA deadlines and the material-support 4-day deadlines. The Criminal Rules Committee's deadlines subcommittee has recommended amending the 4-day deadlines to state that they should be computed by excluding intermediate weekends and holidays; the subcommittee has asked the DOJ to consider further its recommendation concerning CIPA's 10-day deadline.

The Committee discussed the CVRA's 72-hour deadline for decisionmaking by the court of appeals. Mr. Fulbruge noted that the brevity of this deadline imposes a significant burden on the court. A judge noted, however, that in practice the attorneys involved might not object if the court takes longer than 72 hours. A member questioned the wisdom of including this deadline among the list of statutory provisions that should be amended.

Judge Stewart asked the Committee to vote on each statutory deadline separately. The Committee by voice vote approved the following requests concerning the statutory deadlines. The 7-day deadline in 28 U.S.C. § 2107(c) should be increased to 14 days. The "not less than 7" day period in 28 U.S.C. § 1453(c) should be changed to "not more than 10" days. The four-day deadlines in CIPA and the material-support statute should be amended to specify that intermediate weekends and holidays are excluded. Concerning the 10-day deadlines in CIPA and the material-support statute, the Committee voted to defer to the views of the Criminal Rules Committee. By consensus, the Committee decided not to recommend any changes to the 72-hour or 5-day periods in the CVRA; but the Committee voted to recommend changing the CVRA's 10-day mandamus petition deadline to 14 days.

By voice vote, the Committee approved the amendment to Rule 26(a) as published; later in the meeting, the Committee voted to delete from proposed Rule 26(a)(6)(B) the definition of the term "state" (because the Committee voted to approve for publication a FRAP-wide definition of that term). The Committee voted to approve the package of Rule deadlines changes as published with one alteration. The one alteration, as discussed above, is that instead of changing the cutoff time in Rule 4(a)(4)(A)(vi) to 30 days, the Committee voted to change that time period to 28 days.

2. Item No. 01-03 (FRAP 26 – clarify operation of three-day rule)

Judge Stewart invited Judge Sutton to introduce the Appellate Rules Deadlines Subcommittee's recommendation concerning the proposed amendment to Rule 26(c)'s three-day rule. The amendment would clarify the interaction between the three-day rule and Rule 26(a)'s time-computation provisions, and would bring Rule 26(c)'s version of the three-day rule into conformity with the three-day rules in Civil Rule 6 and Criminal Rule 45. Two comments can be taken to express support for this amendment. On the other hand, Chief Judge Easterbrook commented that Rule 26(c)'s three-day rule should be abolished altogether. Judge Sutton noted that Chief Judge Easterbrook's criticisms of the three-day rule are forceful, especially as they apply to circuits that have made the transition to electronic filing; he suggested that this issue should be placed on the Committee's study agenda.

By voice vote, the Committee approved the amendment to Rule 26(c) as published (subject to style changes which had been suggested by Professor Kimble) and placed on its study agenda the proposal to eliminate the three-day rule.

3. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative rulings)

Judge Stewart invited the Reporter to introduce the published amendment adding new Rule 12.1. The proposal grows out of a suggestion by the Solicitor General in 2000 and is designed to promote awareness of and uniformity in the practice of indicative rulings concerning motions which the district court lacks authority to grant due to a pending appeal.

Proposed Appellate Rule 12.1 corresponds with proposed Civil Rule 62.1, which was approved at the Civil Rules Committee's April 7-8 meeting. The Civil Rules Committee made a change to the Note of Rule 62.1 as published: Instead of stating that the district court "can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue," the Note now states that the district court "can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue."

A number of comments were received concerning the proposals. The Public Citizen Litigation Group suggests altering the proposal to bar the court of appeals from dismissing an appeal unless the movant expressly requests dismissal. Public Citizen also suggests that when the Note discusses the need for a separate notice of appeal with respect to the court's disposition of a motion, the Note should refer to the possibility that an amended notice of appeal may be used. The DOJ has expressed support for the indicative-ruling proposal in the civil context. However, the Solicitor General's letter voices concern over the possibility that new Rule 12.1 might be misused in the criminal context. The Solicitor General suggests that the second paragraph of Rule 12.1's Note be revised to read: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in United States v. Cronic, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)." Members of the Seventh Circuit Bar Association's Rules and Practice Committee have suggested that if the new rules are aimed primarily at Civil Rule 60 motions, then the comments should mention that fact so as to avoid other motions being made under the new rules. Professor Bradley Shannon has questioned the propriety of the indicative-ruling procedure in the light of principles of American procedure, if not principles of justiciability.

The Reporter did not recommend adopting Public Citizen's suggestion that the court of appeals be barred from dismissing an appeal unless the movant expressly requests dismissal. Public Citizen's concern about unwarranted dismissals of appeals is understandable, but on the other hand there may be reasons to preserve some flexibility for the court of appeals. No change was warranted in response to the suggestion by members of the Seventh Circuit Bar Association committee; the Notes to Rules 62.1 and 12.1 already focus on the use of the indicative-ruling mechanism in the Civil Rule 60(b) context, but a deliberate choice has been made not to limit the Rules to that context. The Reporter also disagreed with Professor Shannon's critique of the

appropriateness of the indicative-ruling practice; she noted that the practice is well established and does not raise justiciability problems.

The Reporter did recommend that the Committee adopt changes to Rule 12.1's Note to respond to suggestions by Public Citizen and by the Solicitor General. Specifically, she recommended altering the Note as suggested by Public Citizen, so that the first sentence of the last paragraph would read: "When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion." She also recommended replacing the existing second paragraph of the Note with the following language: "The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c)." This language differs from that suggested by the Solicitor General because rather than stating that the Rule "is limited" to those three categories of application in the criminal context, it states the Committee's expectation, leaving room for the possibility that other uses may arise.

The Solicitor General stated that the DOJ would prefer its suggested Note language to that proffered by the Reporter; in the DOJ's view, "anticipates" – the term used in the Reporter's suggested formulation – weakens the language undesirably. A member asked how the DOJ could be sure that the three situations listed in its suggested language are the only criminal contexts in which the indicative-ruling practice might prove useful. A judge member questioned how likely the indicative-ruling practice is to be used in the criminal context. Another judge observed that in a recent Tenth Circuit decision, the court abated an appeal in order to permit the appellant to file a Section 2255 motion in the district court; he observed that it would be undesirable for the Note to state that such a procedure is foreclosed. Another judge member asked the DOJ to explain the reason for its concern about the Reporter's suggested Note language. Mr. Letter responded that the DOJ is concerned that without limiting language in the Note, the indicative-ruling mechanism might be misused by jailhouse litigants. The judge member responded that his instinct is to avoid defining or limiting the uses to which the mechanism can be put. The Solicitor General asked whether the Committee would be willing to say "envisions" rather than "anticipates." A member wondered whether, given the DOJ's concerns, it might be better to remove the Note's reference to the criminal context. It was noted, however, that the Criminal Rules Committee is planning to consider whether to adopt an indicative-ruling provision for the Criminal Rules; the Criminal Rules Committee might benefit from the opportunity to observe how the practice develops under new Appellate Rule 12.1. A member expressed support for the term "anticipates." By voice vote, the Committee decided to adopt the Reporter's suggested changes to the Note language for the Note's second paragraph and for the first sentence of the Note's last paragraph.

A member questioned the Note's statement that "[a]fter an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand." She observed that if a timely tolling motion is filed – or a Rule 60(b) motion is filed within the current 10-day time limit – then the effectiveness of the notice of appeal is suspended until the district court rules on the last such remaining motion. The Committee determined, subject to later consultation with the Civil Rules Committee, that the Note language should say "while it [the appeal] remains pending and effective" – so as to flag the fact that a notice of appeal is not effective while a timely tolling motion remains pending. After the meeting, the Committee, in consultation with the Civil Rules Committee, reconsidered this change. By email circulation, the Committee deleted "and effective" and added a new parenthetical at the end of the Note's first paragraph. That parenthetical reads: "(The effect of a notice of appeal on district-court authority is addressed by Appellate Rule 4(a)(4), which lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)"

Another member provided some stylistic edits to paragraphs one and three of the Note. The Committee also approved changes to paragraphs one and five of the Note that correspond to the changes made by the Civil Rules Committee with respect to proposed Civil Rule 62.1.

4. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

Judge Stewart invited the Reporter to introduce the published amendment to Appellate Rule 4(a)(4)(B)(ii). The proposed amendment is designed to fix a problem (which dates from the 1998 restyling) by replacing the Rule's current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "a judgment's alteration or amendment upon" such a motion.

Three comments were submitted on this proposal. Peder K. Batalden notes that amended Rule 4(a)(4)(B)(ii) "[t]ether[s] the time to appeal from the *amended judgment* to the entry of the *order*" disposing of the last remaining tolling motion, and he argues that this can create hardship when a long period elapses between the entry of the order and the entry of the amended judgment. Mr. Batalden suggests "delet[ing] entirely the language 'or a judgment's alteration or amendment upon such a motion' from the amended rule." Public Citizen suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion." Likewise, participants in a Seventh Circuit Bar Association committee lunch suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

The Reporter recommended that the Committee approve the proposal as published. The commentators' further suggestions for amending Rule 4(a) are separable from the current

proposal and would go well beyond it. They can be added to the Committee's agenda for further study.

By voice vote, the Committee approved the proposal as published. By consensus, the commentators' suggestions were placed on the Committee's study agenda.

5. Item No. 07-AP-C (FRAP 22 – proposed changes in light of pending amendments to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255)

Judge Stewart invited the Reporter to present the published amendment to Rule 22. The amendment deletes from Rule 22 the requirement that the district judge who rendered the judgment either issue a certificate of appealability (COA) or state why a certificate should not issue. The relevant requirement will be delineated in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255. The proposed amendment to Rule 22 was published in tandem with the proposed amendments to Rule 11(a) of the habeas and Section 2255 rules.

Professor Kimble provided some suggestions on the style of the Rule 22 proposal. The other comments submitted on the proposals were uniformly negative; their criticisms focused on the fact that the proposed amendments to Rule 11(a) would require the district judge to rule on the COA issue at the same time that he or she decides the merits. The Massachusetts Attorney General fears that these proposed amendments "would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal." Also, she suggests that the rules should give petitioners an opportunity to narrow the claims on which they seek a COA. Other commentators argued strongly that it is important for the petitioner to have a chance to read the district court's merits decision and brief the COA issue before the district court decides whether to grant a COA.

The Reporter noted that the Criminal Rules Committee's writs subcommittee has decided to recommend republication in order to seek comment on a different proposal; the new proposal will still direct the district judge to rule on the COA issue at the time of the merits decision, except that it will give the judge the option of directing the parties to submit arguments on whether or not a COA should issue. The new proposal will also permit a party to move for reconsideration within 14 days if a COA is issued or denied at the same time as the merits decision is announced. The published Rule 22 amendment would be compatible with this proposal.

The Committee by voice vote approved Rule 22 as published, subject to Professor Kimble's style changes.

B. For publication

1. Item No. 07-AP-D (FRAP 1 – definition of "state")

Judge Stewart invited the Reporter to introduce the proposed amendments concerning the definition of the term "state." The proposal to define the term "state" grew out of the time-computation project's discussion of the definition of "legal holiday"; that definition includes state holidays, and it was thought useful to define "state," for that purpose, to encompass the District of Columbia and federal territories, commonwealths and possessions. As published for comment, the proposed amendment to Rule 26 includes such a definition for purposes of the time-computation rule. At its November 2007 meeting, the Committee approved a new Appellate Rule 1(b) that would adopt such a definition for the Appellate Rules in general. However, because it seemed advisable for the Committee to consider a few additional matters in connection with the Appellate Rule 1(b) proposal, that proposal was not presented to the Standing Committee at its January 2008 meeting.

Proposed Appellate Rule 1(b) is similar to the proposed amendment to Civil Rule 81 that was published for comment in summer 2007. The Civil Rules Committee invited comment on whether the term "possession" should be included in the definition. The DOJ, in its comment on the Civil Rule 81 amendment, opposed the inclusion of the term "possession." The DOJ argues that possession might be incorrectly interpreted to include U.S. military bases overseas. The Civil Rules Committee, at its April 7-8 meeting, deleted the term "possession" from the Civil Rule 81 amendment, and, with that deletion, approved the proposal. Deleting the term "possession" from the Appellate Rule 1(b) definition seems harmless, since it appears that "possession" is no longer a commonly used term and is equivalent to "territory."

In light of proposed Rule 1(b), the Committee should also consider amending Rule 29(a) to remove the current reference to "a ... Territory, Commonwealth, or the District of Columbia," since that will be redundant once the term "state" is defined in Rule 1(b). When publishing the proposed amendments for comment, the Committee should highlight the fact that the term "state" is used in Rules 22, 44, and 46, so that those who comment can take those provisions into account. New Rule 1(b) should not cause any problem concerning the application of Rule 22; if an entity that is encompassed within Rule 1(b)'s definition of "state" is not subject to the federal habeas framework, the question of Rule 22's applicability to that entity will simply never arise. There is no reason to think that Rule 1(b)'s definition would cause problems in the application of Rule 29(a) (concerning amicus filings), Rule 44 (concerning constitutional challenges to state statutes), or Rule 46 (concerning admission to the bar). In any event, comment can be solicited on these questions.

The Committee by voice vote approved proposed Rule 1(b) for publication, subject to the deletion of the term "possession," and likewise approved the proposed amendment to Rule 29(a) for publication. The Committee also voted to delete from proposed Rule 26(a)(6)(B) the definition of the term "state."

VI. Discussion Items

A. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Stewart invited the Reporter to discuss her memo concerning the proposal to amend Appellate Rules 4(a)(1)(B) and 40(a)(1).

The Reporter stated that as a policy matter, the proposed amendments seem like a very good idea. It would be useful to make clear that the longer periods for taking civil appeals or seeking rehearing apply to suits involving federal employees as well as federal officers, and apply to certain types of individual-capacity suits as well as to official-capacity suits. (As highlighted by Public Citizen's comments, it would be desirable to clarify whose view of the facts should control for purposes of determining whether an individual-capacity suit qualifies for the longer periods.) But though the proposals make good sense as a policy matter, it is also necessary to consider the implications of the fact that the 30-day and 60-day appeal periods are set by statute as well as by rule. Under the Supreme Court's decision in *Bowles v. Russell*, that raises the question whether the proposed amendment to Rule 4(a)(1)(B) would enlarge the availability of the 60-day period beyond what is permitted by the relevant statute – 28 U.S.C. § 2107. Analysis of the statute's text and history suggests that the statutory term "officer" may not include all federal "employees." The evidence is less conclusive on the question of individual-capacity suits, and here there is a circuit split, with the Second Circuit taking a narrow view and the Fourth, Fifth and Ninth Circuits taking a broader view.

The Solicitor General reiterated the DOJ's view that the proposals are desirable as a policy matter. He stated that the DOJ will continue to study the issues raised by the Reporter, and to determine whether it wishes to advocate adoption of some portion of the proposals (such as the proposed amendment to Rule 40 concerning rehearing).

Members discussed various aspects of the proposed formulation. A judge asked whether there might be an alternative to referring to individual-capacity suits for acts or omissions occurring in connection with duties performed on the United States' behalf. Would a more functional approach be better – for example, to draw the line at whether the United States is representing the defendant? It was suggested, though, that such a formulation might not capture all the instances in which the extra time might be useful to the government. A member suggested that when revising the proposal, one should also think about mentioning *former* officers and employees. That member also stated that the Reporter's suggested formulation for determining whether an individual-capacity suit qualifies for the longer periods is flawed because it specifies that the allegations in question must be "colorable"; such an invitation to the court to second-guess the factual validity of the allegations would give rise to uncertainty concerning the applicability of the longer period. A member suggested that a better formulation would be to ask whether a defendant claims that the act occurred in connection with federal duties. A member suggested that where there is ambiguity concerning the scope of the statute's 60-day period, it might be appropriate for the rulemakers to amend Rule 4 to clarify that ambiguity.

By consensus, the proposed amendments to Rules 4 and 40 were retained on the Committee's study agenda.

B. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to update the Committee on developments relating to *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

Bowles' implications continue to play out in the Supreme Court and in the lower federal courts. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), did not directly concern appeal times; rather, it concerned the statute of limitations for suits filed against the United States in the Court of Federal Claims. But because the question was whether that statute of limitations is jurisdictional and thus non-waivable, both the argument and the Court's opinion touched upon *Bowles*. The *John R. Sand & Gravel* Court held that the Court of Federal Claims limitation statute does set a jurisdictional time limit which must therefore be raised by the court *sua sponte*. In the process of distinguishing between limitations periods that are waivable and those that are non-waivable, the Court stated that "Some statutes of limitations ... seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as ... promoting judicial efficiency, see, e.g., *Bowles v. Russell*." This description of *Bowles* is interesting since it seems to depart from the *Bowles* Court's stress on the statutory nature of the deadline that was at issue in that case.

Jurisdictional issues are also implicated in *Greenlaw v. United States*. Greenlaw appealed, and the United States did not cross-appeal. On appeal, not only did the court of appeals reject Greenlaw's challenge to his sentence, it held that the district court had erred in failing to apply a statutory mandatory minimum. It vacated the sentence and remanded for the imposition of a longer sentence. When Greenlaw sought Supreme Court review, the United States agreed that the court of appeals erred in increasing Greenlaw's sentence in the absence of a cross-appeal. The U.S. argued, though, that the Court should vacate and remand rather than addressing the question of the nature of the cross-appeal requirement. But the Court granted certiorari and invited separate counsel to brief and argue the case in support of the judgment below. The case will be argued April 15, 2008.

Meanwhile, the courts of appeals are working out *Bowles*' implications in a variety of contexts. Under the developing caselaw, statutorily-backed appeal deadlines are likely to be held jurisdictional. Some courts have now held certain entirely rule-based appeal deadlines to be non-jurisdictional. And there is a nascent circuit split concerning rule-based provisions that fill gaps in statutory appeal deadline schemes; some courts hold such provisions non-jurisdictional because they are rule-based, while other courts, focusing on the fact that the provisions fill gaps in a statutory scheme, hold even the rule-based gap-filling provisions to be jurisdictional requirements. Finally, a recent Tenth Circuit decision thoughtfully addresses whether a court can raise a non-jurisdictional deadline *sua sponte*.

C. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

Judge Stewart invited the Reporter to introduce the topic of the proposed amendment to Appellate Rule 7; that amendment would address the question of whether a Rule 7 bond for costs on appeal can include attorney fees. At its November 2007 meeting, the Committee concluded that it needed additional data before deciding whether and how to proceed with such an amendment. Since that time, Andrea Thomson (Judge Rosenthal's rules law clerk) worked with the Reporter to review Rule 7 decisions that were available on Westlaw. James Ishida and Jeffrey Barr conducted research in the PACER system to supplement the information gained through the Westlaw search. Input was also obtained from Daniel Girard (a member of the Civil Rules Committee) concerning Rule 7 bonds in the class-action context. Mr. Girard notes that appeals from class settlement approvals have become routine, and that, as a practical matter, an appeal from a class settlement approval effectively stays the order. He observes that some of the leading cases on the question of attorney fees and Rule 7 bonds arose in the class action context. He concludes, however, that seems to be no reason to treat class suits differently from non-class suits with respect to whether and when attorney fees can and should be included in Rule 7 bonds. Meanwhile, Marie Leary performed a pilot study looking at CM/ECF information from three districts – the Southern District of New York, the Central District of California, and the Eastern District of Michigan – for a period from 1996 to 2006. The Reporter turned to Ms. Leary for a summary of her findings.

Ms. Leary reported that her work thus far yields two conclusions. First, requests for, and orders requiring, Rule 7 bonds are infrequent. Second, the Committee has a choice with respect to further research by the FJC. The Committee could select a small number of districts for an in-depth study (which would include an examination of court filings that are not available on PACER); to further narrow the study, it might be advisable to cut the time period to five rather than ten years. Alternatively, the Committee could select a larger number of districts which could be examined in less depth – i.e., just using the documents that are available from PACER.

Judge Stewart suggested that the option of an in-depth study seems more useful. A member questioned whether there really is a circuit split concerning the propriety of including attorney fees in Rule 7 bonds; he noted that in the two cases on the minority side of the split, the courts were not confronted with statutes that authorize the award of attorney fees. The Reporter agreed that those two cases did not involve such statutes, but observed that the rationale of the D.C. Circuit's decision in *American President Lines* would seem to foreclose the inclusion of attorney fees in Rule 7 bonds whether or not such fees are authorized by statute. Another member questioned whether the research into this agenda item is worth continuing. Members asked whether the Rule 7 issues differ in the class action context, and whether in that context attorney fees are the only concern – what about the inclusion in a Rule 7 bond of administrative costs attributable to the delay in implementation of a class settlement? A member suggested that Ms. Leary should not proceed with further research at the moment; instead, he suggested, the Committee should seek input from the Civil Rules Committee concerning the role of appeal bonds in class suits. It was also suggested that selected practitioners could help the Committee understand how these questions play out in class litigation.

By consensus, the Committee retained the matter on the study agenda and directed the Reporter to consult Professor Cooper and selected practitioners for their views on the role of appeal bonds in class suits.

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

Judge Stewart noted that Mr. Levy had done great work in developing for the Committee's consideration the proposed amendments concerning amicus briefs with respect to rehearing. He invited Mr. Levy to present his proposal.

Mr. Levy noted that he was motivated to make this proposal because he periodically receives inquiries concerning whether amicus briefs can be filed in the rehearing context and, if so, what the requirements are. There are two reasons why courts ought to permit amicus filings in the rehearing context. Such filings can broaden the court's perspective and thus can usefully inform its decision. Moreover, permitting amicus filings can lead would-be amici to feel that the process is fair because they were allowed to be heard. From a practitioner's viewpoint, it does not seem as though permitting such filings would burden the court; those filings would be short and would be filed on a tight time frame. Mr. Levy argued that this issue is appropriate for a nationally uniform rule, and that in comparison to other possible topics for rulemaking, this one does not seem as central to judges' day-to-day work.

The Reporter noted that Fritz Fulbruge had obtained useful feedback from the appellate clerks on the circuits' current practices. Mr. Fulbruge observed that there is a valid reason to have a national rule, in the sense that there is currently disuniformity among the circuits. The proposal could provide helpful clarification.

Mr. Letter questioned whether the proposal should cover amicus filings prior to a court's grant of rehearing. He noted that the United States has in the past made amicus filings in support of rehearing, but his recollection is that these occurred only in unique areas involving the government, such as supporting rehearing on behalf of a qui tam relator under the False Claims Act. He suggested that an important consideration is what the judges think of the proposal. He asserted that if the court grants rehearing but orders no new briefing by the parties, it would be odd to let amici file briefs at that stage. He raised the broader point that it might be useful to consider whether it would be appropriate to adopt a rule providing that the *parties* will be permitted to submit new briefs once rehearing en banc is granted. Mr. Letter also noted that the DOJ had done an internal study concerning practices with respect to rehearing, and found enormous circuit-to-circuit variations in the likelihood that rehearing en banc will be granted. He questioned whether that variation might weigh against the adoption of a national rule.

A judge observed that amicus filings in the rehearing context could be useful if they help the court to understand whether and why a particular case poses an important issue; but he noted that other judges may well disagree. Another judge remarked that the Eighth Circuit does not

encourage amicus filings on rehearing petitions; he noted the concern that having a rule on the subject could encourage more such filings, and he suggested that a national rule would not be helpful.

An attorney member stated that she did not feel strongly about the proposal, but that amicus filings do occur in the rehearing context and that there are always questions as to the permitted length and the time limits for filing. She suggested that it would be useful to provide clarification on such points. She observed, though, that it seems problematic to permit new amici to file at the en banc stage if the court does not permit the parties to file new briefs. A judge noted that the Fifth Circuit always orders new briefing at the en banc stage; he observed that many en bancs in the Fifth Circuit are generated by the judges rather than by the parties. He noted that for judges who were not on the panel that initially heard the appeal, new briefs are helpful. A practitioner observed that the likelihood of rehearing en banc often seems more closely tied to the court's internal dynamics than to the lawyers' arguments.

A judge member stated that the practitioners' discussion of this issue had convinced him that there is a need for clarification of the practices governing amicus filings in the rehearing context. He therefore believes that each circuit should adopt a local rule on the topic. But he would be troubled by the adoption of a national rule because there is so much room for differing views, especially in a circuit that does not often decide to en banc cases. He suggested that the Committee wait and see how the local rules on this point develop. He agreed with a member's earlier observation that amicus briefs in the rehearing context are more useful when they spell out why the decision is an important one. An attorney member agreed that the circuit practices regarding en banc grants vary widely; she asked whether the Committee could encourage the circuits to adopt local rules on point.

A judge observed that the circuits are more likely to adopt such local rules if they hear from attorney groups that the lack of such rules is causing hardship. Mr. Levy suggested that groups such as the American Academy of Appellate Lawyers might be able to help; he stated that he would still prefer a national rule, but that local rules would be better than nothing.

A judge member observed that the Supreme Court's Rule 44.5 prohibits amicus briefs in connection with petitions for rehearing. Mr. Levy responded that the proper analogy, in Supreme Court practice, is not to petitions for rehearing but to petitions for certiorari; and there, amicus briefs are permitted. Another lawyer member observed that one reason why the Supreme Court bars amicus filings in connection with rehearing petitions is that the Court knows it almost never grants petitions for rehearing. Another member observed that the D.C. Circuit – which has a reputation of not granting petitions for rehearing en banc – has now begun to grant such petitions occasionally.

That member stated that he would like to think seriously about adopting a national rule stating that when rehearing en banc is granted, the court will permit further briefing by the parties. A judge responded, though, with a counter-example. In the Tenth Circuit, there is a practice of pre-circulation of panel opinions before they are filed. If the judges who are not on

the panel disagree with the panel opinion, the court might decide to en banc the appeal initially. In such a sua sponte grant of en banc consideration, the parties would not have had an opportunity to learn anything from the panel opinion. Another judge expressed reluctance to tie the court's hands; he suggested that there might be instances where the court needs to go en banc (for example, because there is a clearly undesirable circuit precedent) but does not need further input from the parties. An attorney member responded that these concerns could be addressed if the rule requires the court in most instances to permit additional briefing, but allows exceptions to that requirement.

Judge Stewart observed that the proposals concerning further briefing by the parties when en banc rehearing is granted were distinct from the current agenda item concerning amicus filings. On the latter topic, Mr. Levy suggested that as a fallback position he would favor encouraging the adoption of local circuit rules. A judge suggested that this goal might be furthered by inducing an attorney organization to advocate the adoption of such local rules; he also observed that the Committee might gain useful information if judge members called some colleagues in circuits that do not have a local rule on point and asked why not. A member questioned whether the circuits would pay attention to such requests; he wondered whether the Committee might wish to consider circulating a proposal to place a default provision in Rule 29 in order to prompt circuits to take action to opt out; circulating such a proposal to judges on the various courts of appeals might be more likely to focus attention on the need for local rules.

By consensus, the matter was retained on the study agenda. Judge Sutton volunteered to contact selected judges for their views on the local rule question, and Mr. Levy, Mr. Letter and Ms. Mahoney agreed that they would work with the Reporter to contact attorney organizations to encourage them to seek the adoption of local rules.

E. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing)

Judge Stewart invited the Reporter to introduce Judge Smith's proposal to amend Rule 35(e) so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing. The Reporter noted that during the Committee's November 2007 meeting some members voiced support for the proposal; they argued that permitting a response to the petition before court grants en banc consideration would show that the process is fair. Moreover, those members noted that sometimes the court will not permit additional briefing once rehearing en banc is granted; in those instances, the party would find it particularly important to be able to submit a response to the petition for rehearing en banc. Other members, however, questioned the need for an amendment; they observed that in practice, courts generally seem to request a response, so they wondered whether there is a need for the Rules to require courts to permit a response. The Committee also raised the question of whether the proposed change should extend

to sua sponte grants of rehearing en banc. Requiring a response before a sua sponte grant of en banc rehearing might be seen as a change from current practice in some circuits, and would cause Rule 35 to work differently than Rule 40 currently does. The Reporter noted that one would also need to decide whether the proposed amendment should cover initial hearings en banc as well as rehearing en banc; if one is going to cover rehearing en banc, it probably makes sense to cover initial hearing en banc also. The agenda materials provide two options for the Committee's consideration – one that would apply only where there is a petition for en banc consideration, and another that would also cover sua sponte en banc consideration.

An attorney member stated that in his experience the court has always asked for a response before granting en banc consideration. Another attorney member agreed that he has not observed a practical problem; he stated, though, that he had been surprised to learn that Rules 35 and 40 do not work the same way on this point, and he suggested that there seems to be no reason not to amend Rule 35 to track Rule 40's approach. He noted, however, that whether to cover sua sponte grants is a harder question. Another attorney member queried whether Judge Smith had reported observing a practical problem in this area. Judge Stewart responded that his impression was that Judge Smith had suggested the change in order to eliminate a lack of parallelism between the two Rules. Mr. Letter observed that the DOJ had not found the current Rule to be problematic. A judge member noted that the proposed amendment would contain an out for the court – because it would merely state that "ordinarily" the court will permit a response – and he questioned the amendment's value. He also noted that each court's en banc traditions vary.

Judge Stewart noted that Judge Smith had not proposed extending the requirement of a response to sua sponte grants of en banc consideration. Rather, Judge Smith's proposal would only apply to petitions for en banc consideration; that approach was reflected in the first of the two options proffered by the Reporter. A motion was made and seconded to adopt the first option as an amendment to Rule 35. The motion was defeated by a vote of 5 to 2. Judge Stewart stated that he would write to Judge Smith to apprise him of the Committee's decision not to proceed with the proposed amendment.

F. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)

Judge Stewart invited the Reporter to present the proposed amendment to Form 4. The privacy rules which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). At its November 2007 meeting, the Committee discussed the fact that the privacy rules would require immediate changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. The Committee also discussed other possible changes that might be made in Form 4.

Since that time, the Administrative Office made interim changes to the version of Form 4 that is posted on the AO's website, and Mr. Fulbruge updated his colleagues on the new privacy requirements. But those interim measures do not remove the need to amend the official version of Form 4 to conform to the privacy requirements. The Reporter therefore recommended that the Committee publish for comment a proposed amendment to Form 4 that will make the necessary changes. She also suggested that the Committee retain on its study agenda the question of additional possible changes to Form 4.

The proposed amendment would alter Questions 7 and 13 so that they will no longer request the names of minor dependents or the applicant's full home address and social security number. Question 7 in the interim version posted by the AO reads in part "Name [or, if a minor (i.e., underage), initials only]". That is the approach taken in the proposed amendment provided in the agenda materials. However, Professor Kimble suggests deleting "(i.e., underage)." The Reporter questioned whether such a change would be a style matter; if one believes that "underage" would be easier for i.f.p. applicants to understand than "minor," then one might view this question as one of substance. However, this question can be avoided if the Committee is willing to select a particular age, such as "under 21." Specifying an age would make the form much more user-friendly. There is some question as to what age one should specify. It is unclear what law should define minority for purposes of the privacy rules. The statute which the rules implement does not shed light on this question. It seems that in most states the age of majority is 18; but in a few states the relevant age is higher.

Mr. Fulbruge stated that it would be helpful for the Form to specify an age rather than referring to "minors." Mr. Letter inquired whether the Reporter had looked to federal law for a definition of the age of majority. For example, the Federal Juvenile Delinquency Act uses 18 as the age of majority. The Reporter stated that she had not surveyed the definitions under federal law; it is unclear what law should govern for the purposes of the privacy rules as they apply to Form 4. State law usually governs the question of parental support obligations.

A member suggested that the Form should read "Name [or, if under 18, initials only]." By consensus, the Committee decided to approve for publication the amendment shown in the agenda materials, subject to the change described in the preceding sentence.

VII. Additional Old Business and New Business

A. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007))

Judge Stewart invited the Reporter to discuss the Tenth Circuit's recent decision in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007).

Mr. Warren was injured in a car accident and sued American Bankers in federal court in diversity. On June 23, the district court dismissed the complaint but did not set out the judgment

in a separate document as required by Civil Rule 58(a). Warren filed a notice of appeal on Monday, July 24; then, on July 28, he filed a motion to reconsider in the district court. The defendant moved to strike the motion for lack of jurisdiction (due to the pending appeal). The district court held that no separate document was required with respect to the dismissal of the complaint, because that dismissal was for lack of subject matter jurisdiction; that the notice of appeal was effective to take the appeal, and that the notice deprived the district court of jurisdiction to consider the motion to reconsider. Warren then amended his notice of appeal to encompass the denial of the motion to reconsider.

On appeal, the Tenth Circuit held that the district court erred in failing to apply Rule 58(a)'s separate document requirement. It reasoned, however, that despite the failure to comply with the separate document requirement, there was jurisdiction over the appeal from the original judgment because 150 days had passed since the entry of the dismissal order. Next, it held that the "motion to reconsider" was in reality a timely Rule 59(e) motion to alter or amend the judgment. The court suggested that the July 24, 2006 notice of appeal had not yet become effective at the time that the Rule 59(e) motion was filed, and reasoned that in any event the timely Rule 59(e) motion "further suspended" the effectiveness of the previously-filed notice of appeal. Thus, the court of appeals concluded that the district court was wrong to conclude that it lacked jurisdiction to consider the Rule 59(e) motion. The court accordingly vacated and remanded for the district court to address the Rule 59(e) motion.

The Reporter suggested that the Tenth Circuit was clearly correct in rejecting the district court's view that the separate document requirement does not apply to dismissals for lack of subject matter jurisdiction. The Tenth Circuit also noted an "exception" to the separate document requirement where an order contains no analysis; the Reporter was not sure that such an exception comports with the separate document rules, but she noted that the Tenth Circuit caselaw on this predated 2002 and she observed that the rulemakers had not seen fit to address that issue in the 2002 amendments. The Tenth Circuit also suggested in *Warren* that the 2002 amendments superseded the teaching of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), that a party could waive the separate document requirement. On this point, the Tenth Circuit erred. Rule 4(a)(7)(B) provides: "A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order." As the 2002 Committee Note to Rule 4 explains, the 2002 amendments were intended to codify *Mallis*'s holding. Under Rule 4(a)(7)(B), Warren's appeal was "valid[]" despite the court's failure to provide a separate document. However, the *Warren* court provided an additional, and sounder, rationale for its conclusion that the district court had jurisdiction to rule on the Rule 59(e) motion: It also reasoned that the filing of the timely Rule 59(e) motion suspended the previously-taken appeal, thus re-vesting the district court with jurisdiction to determine the motion.

The interesting question in this context is whether the Rule 59(e) motion was indeed timely. If Warren had never filed a notice of appeal, it would be indisputable that his July 28 motion was timely because the dismissal was never entered on a separate document and 150 days had not yet run from the entry of the dismissal order in the civil docket. The question is whether,

by filing the notice of appeal and thus waiving the separate document requirement, Warren should be viewed as having triggered a conclusion that his deadline for postjudgment motions ran from the June 23 dismissal. The Reporter suggested that such a conclusion would be flawed; the 2002 Committee Note to Rule 4 expressly rejects an analogous line of reasoning with respect to appeal deadlines.

Based on this discussion, Judge Hartz raised a concern that where a separate document is required and the district court fails to provide one, an appellant might make a very belated (but still technically timely) postjudgment motion that, under Rule 4(a)(4), suspends the effectiveness of the appeal pending the disposition of the motion. To address this problem, Judge Hartz proposed that the Committee consider adopting a time limit – perhaps 10 days after the filing of a notice of appeal, or perhaps some number greater than 10 days – within which tolling motions must be filed even when there has been no provision of a separate document. He explained that in the Tenth Circuit there are many violations of the separate document rule and there are also many pro se litigants. In many cases a district court dismisses a pro se complaint before the government defendant responds. In such instances, a violation of the separate document requirement may go unremarked and a late-filed motion by the pro se litigant may operate to suspend the effectiveness of the appeal – even at a very late stage in the appeal process.

An attorney member responded that in some instances the separate document provides information to the litigant that is relevant to the litigant's calculations – for example, the separate document might state whether a dismissal is with or without prejudice. Another attorney member asked whether the problem Judge Hartz identified could be addressed by encouraging better district court compliance with the requirements of Civil Rule 58. Judge Rosenthal suggested that violations of the separate document requirement are most likely to arise when a law clerk is just starting out and has not yet learned about the requirement.

Judge Hartz noted, however, that the 2002 amendments themselves arose in part from a recognition that noncompliance with the separate document requirement will occur. He stated that in many of the pro se cases in the Tenth Circuit in which the problem arises, it is unlikely that the government defendant will alert the court to the lack of the separate document.

An attorney member noted that the problem for litigants is what to do when judges fail to comply with the requirement; he suggested that 10 days is probably too short a deadline, and that 21 days might be better. Another attorney member suggested that 28 days might be better still; but she also noted that imposing such a cutoff could effectively limit the district court's ability to delay the due date for postjudgment motions (by delaying the provision of a separate document).

Judge Hartz suggested that it would be helpful for him to discuss these issues with the Tenth Circuit Clerk. The Reporter noted that it would also be advisable to consult the Civil Rules Committee. A judge member suggested that it would be useful for Mr. Fulbruge to survey the circuit clerks for their views. Mr. Fulbruge predicted that the survey will disclose variations in how the circuits handle these issues; he noted that the Fifth Circuit's staff attorney office does a lot of work on pro se appeals.

Judge Stewart stated that the issue raised by Judge Hartz warrants further study. Mr. Fulbruge will survey the circuit clerks. Also, the Committee should check with the FJC to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. Judge Bye noted that the Eighth and Tenth Circuits would be meeting together in summer 2008, and he observed that it would be useful to raise the topic at that meeting. By consensus, the matter was retained on the study agenda.

B. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to discuss the questions raised by Judge Diane Wood concerning Rule 4(c)'s inmate-filing provision. Judge Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007).

As discussed in the agenda materials, questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The origins of the current Rule can be traced to the Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), in which the Court held that Houston filed his notice of appeal when he delivered the notice to the prison authorities for forwarding to the district clerk. After deciding *Houston*, the Supreme Court revised its Rule 29.2 to take a similar approach. In 1993, the Appellate Rules were amended to add Rule 4(c). In 1998, Rule 4(c) was amended to provide that if the institution has a system designed for legal mail, the inmate must use that system in order to get the benefit of Rule 4(c). In 2004, the Committee discussed a suggestion by Professor Philip Pucillo that the Rules be amended to clarify what happens when there is a dispute over timeliness and the inmate has not filed the affidavit mentioned in Rule 4(c)(1). The Committee decided to take no action on that suggestion. Shortly thereafter, a Tenth Circuit decision illustrated the problem identified by Professor Pucillo: in *United States v. Ceballos-Martinez*, 371 F.3d 713, 717 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

Turning to the questions raised by Judge Wood's suggestion, the Reporter observed that the rule could be read to require postage prepayment when the institution has no legal mail system; that was, indeed, the Seventh Circuit's view in *Craig*. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the

litigant's appeal will be time-barred unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause. On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand.

When the institution has a legal mail system and the inmate uses that system, it may be the case that prepayment of postage is not required. This was the view adopted by the Seventh Circuit in *Ingram*, and the Tenth Circuit's *Ceballos-Martinez* opinion accords with such a view. But a later Tenth Circuit case has questioned this aspect of the *Ceballos-Martinez* court's reasoning. And it could be risky for an inmate to rely on such a view, even in the Seventh Circuit: what if the inmate's assumption that his or her institution's system qualifies as a legal mail system turns out to be incorrect?

As indicated by the Committee's earlier discussion of *Bowles v. Russell*, it is unclear whether courts will consider any postage-prepayment requirements in Rule 4(c)(1) to be jurisdictional. Rule 4(c)(1) itself is not mirrored in any statute. On the other hand, that provision fills a gap in the statutory scheme for civil appeals, by defining timely filing for purposes of 28 U.S.C. § 2107. As noted previously, some Ninth Circuit decisions have viewed similar gap-filling provisions in Rule 4 to be jurisdictional. Thus, it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But the rulemakers have authority to alter those requirements through a rule amendment; as the *Houston* court explained, Section 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

An attorney member stated that Judge Wood has identified an ambiguity in the Rule, and that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. A judge member agreed that this issue warrants study by the Committee. An attorney member wondered whether prison regulations require the inmate to affix postage to outgoing legal mail. Another attorney member observed that policies vary by institution. Judge Rosenthal observed that the Committee should include in its consideration any rules that may apply to incarcerated aliens. Judge Stewart reported that at the March 2008 Judicial Conference meeting, he attended a session dealing with issues relating to pro se prisoners. He noted that there are a great many pro se prisoner appeals, and that the Committee should also consider immigration appeals. By consensus, the matter was retained on the Committee's study agenda.

C. 08-AP-B (FRAP 28.1 – word limits in connection with cross-appeals)

Judge Stewart invited the Reporter to discuss Judge Alan Lourie's proposal concerning word limits on cross-appeals. Judge Lourie has expressed concern that litigants are abusing the

cross-appeal briefing length limits set by Appellate Rule 28.1(e), and he asks the Committee to consider amending the Rule to eliminate such abuses.

Appellate Rule 28.1, which took effect December 1, 2005, governs briefing in situations involving cross-appeals. Rule 28.1(e) sets page limits and (alternatively) type-volume limits for the appellant's principal brief, the appellee's principal and response brief, the appellant's response and reply brief, and the appellee's reply brief. The Rule enlarges the permitted length of the principal-and-response brief and the response-and-reply brief to account for the fact that such briefs serve a double function, but the Rule does not allocate the permitted length as between the two components. This forms the root of Judge Lourie's concern. He describes instances in which the combined briefs devote almost all of the permitted length to a discussion of the appeal, and use a relatively tiny amount of space to discuss the cross-appeal. He argues that this allows litigants improperly to expand their discussion of issues relating to the appeal. He also suggests that some cross-appeals might be filed in order to obtain additional space in which to discuss the issues relating to the main appeal. Judge Lourie proposes that Rule 28.1 be amended to limit the number of words, in a principal-and-response brief and a response-and-reply brief, that can discuss matters unrelated to the cross-appeal.

Judge Lourie raises a valid concern: The extra length provided for the principal-and-response and response-and-reply briefs ought to be used to discuss the cross-appeal. Moreover, it certainly would be improper to file a cross-appeal solely to obtain extra length for discussing issues relating only to the main appeal. However, the latter concern seems speculative, because it seems unlikely that a litigant would file a cross-appeal in order to enlarge the briefing limits. By filing a cross-appeal, the cross-appellant would gain an extra five pages, but would give the appellant an extra 15 pages. Theoretically, a crafty litigant could try to secure the status of appellant (thus getting the 15 extra pages) by filing a notice of appeal earlier than its opponent, or – if the litigant is the plaintiff – by filing the notice of appeal on the same day as the opponent. But since the Rule only sets default designations, subject to change by the court, a litigant would not be assured that such strategies would secure it the status of appellant (rather than cross-appellant). In addition, other mechanisms exist to control frivolous appeals, including frivolous cross-appeals.

In any event, the feasibility of Judge Lourie's proposal is unclear. The Committee considered that question in 2002, when it was discussing the proposal that led to the adoption of Rule 28.1; at that time, concerns were raised that enforcing separate word limits with respect to the appeal and cross-appeal would be impracticable. More recently, Judge Stewart asked Mr. Fulbruge to survey the appellate clerks for their views concerning Judge Lourie's proposal. The clerks' responses indicate that they feel that such a provision would be difficult to enforce.

Mr. Fulbruge underscored the clerks' view that the proposed length limits would be impossible to police. Mr. Letter recalled that the DOJ was very involved in the drafting of Rule 28.1; at the time, the DOJ considered the problem identified by Judge Lourie, but concluded that the problem could not readily be addressed in the rule. Moreover, the DOJ's view was that such

abuses were likely to be infrequent, because most lawyers would realize that abuses of the cross-appeal briefing length limits would hurt the lawyers' cause by annoying the judges on the panel.

By consensus, the Committee decided not to proceed with the proposed amendment. Judge Stewart stated that he would write to Judge Lourie to let him know of the Committee's decision.

* * *

One final issue discussed by the Committee was when to seek publication of the amendments that it had just approved. Mr. Rabiej reminded the Committee that the preferred practice is to hold proposed amendments so that they can be published in groups rather than one-by-one. The Committee noted, however, that there is a need to amend Form 4 as soon as possible to comply with the privacy rules. Given that Form 4 should be published for comment in summer 2008, the Committee decided by consensus to seek permission to publish the proposed amendments to Rules 1 and 29 at that time as well.

VIII. Schedule Date and Location of Fall 2008 Meeting

A tentative decision was made to hold the Committee's fall 2008 meeting on November 13 and 14, 2008. The meeting will likely be held on the east coast. More details concerning the meeting's date and location will follow.

IX. Adjournment

The Committee adjourned at 10:20 a.m. on April 11, 2008.

Respectfully submitted,

Catherine T. Struve
Reporter