COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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DATE: May 11, 2000

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Will Garwood, Chair
Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 13, 2000, in Washington, D.C. At that meeting, the Advisory Committee approved several items for action by the Standing Committee. The Advisory Committee also removed several items from its study agenda. Detailed information about the Advisory Committee's activities can be found in the minutes of the meeting and in the Committee's docket, both of which are attached to this report.

II. Action Items

A. Rules 5(c) and 21(d)

Rule 5 governs petitions for permission to appeal. A typographical error was made in Rule 5(c) during the 1998 restyling of the appellate rules. At its January 2000 meeting, the Standing Committee approved for publication an amendment to Rule 5(c) to correct that error.

A few weeks after the Standing Committee's meeting, the liaison to our committee from the appellate clerks pointed out that the typographical error that appears in Rule 5(c) also appears in Rule 21(d), which governs petitions for extraordinary relief. Also, the liaison pointed out that nothing in Rule 5 or in any other rule imposes any limitation on the length of a petition for permission to appeal. Likewise, nothing in Rule 21 or in any other rule imposes any limitation on the length of a petition for extraordinary relief.

The proposed amendment to Rule 5(c) is identical to the one approved by the Standing Committee in January, except that it adds a page limitation on petitions for permission to appeal (and related papers). The proposed amendment to Rule 21(d) corrects the same typographical error as the proposed amendment to Rule 5(c) and adds a page limitation on petitions for extraordinary relief (and related papers).

Rule 5. Appeal by Permission

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

Committee Note

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

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

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

(d) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C). An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Committee Note

Subdivision (d). A petition for a writ of mandamus or prohibition, an application for another extraordinary writ, and an answer to such a petition or application are all "other papers" for purposes of Rule 32(c)(2), and all of the requirements of Rule 32(a) apply to those papers,

1 except as provided in Rule 32(c)(2). During the 1998 restyling of the Federal Rules of Appellate
2 Procedure, Rule 21(d) was inadvertently changed to suggest that only the requirements of Rule
3 32(a)(1) apply to such papers. Rule 21(d) has been amended to correct that error.
4
5 Rule 21(d) has been further amended to limit the length of papers filed under Rule 21.

B. Rules 25(c), 25(d), 26(c), 36(b), and 45(c) (Electronic Service Rules)

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. The proposed amendments to Rules 25(c), 25(d), 26(c), 36(b), and 45(c) are intended to permit papers also to be *served* electronically.

Thanks to close cooperation between Profs. Cooper and Schiltz and the willingness of the Civil Rules and Appellate Rules Committees to compromise in order to achieve consistency, the electronic service amendments that the Appellate Rules Committee is proposing are virtually identical in substance to the electronic service amendments that the Civil Rules Committee has approved. Specifically:

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

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

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

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

- Like new FRCP 5(b)(3), new Rule 25(c) provides that if a party attempting to serve a paper electronically is notified that the transmission was not successful, service has not been completed. Nothing is said, either in new FRCP 5(b) or in new Rule 25(c), about failed service in other contexts (e.g., the return of mailed service as undeliverable).

N.B.: One minor difference between new FRCP 5(b)(3) and new Rule 25(c) is that the latter provides that failed electronic service is ineffective only if the party who attempted the service learns of the failure within three calendar days after transmission. The three calendar day limit was inserted by the Appellate Rules Committee to protect against abuse. Without such a limitation, one party could tell another party 15 minutes before a hearing that an electronic transmission was not received and force postponement of the hearing.

- Like new FRCP 6(e), new Rule 26(c) provides that when a party is required to respond to a paper within a prescribed period of time after that paper is served, three days are added to that prescribed period if the paper was served electronically.

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

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

1 **Rule 25. Filing and Service**

2 **(c) Manner of Service.**

3 (1) Service may be any of the following:

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

5 counsel;

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

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

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

9 (2) If authorized by local rule, a party may use the court's transmission equipment to

10 make electronic service under Rule 25(c)(1)(D).

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) ~~Personal service includes delivery of the copy to a responsible person at the office of counsel.~~ Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified within 3 calendar days after transmission that the paper was not received by the party served.

(d) Proof of Service.

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their maili~~ng~~ or e-mail addresses, or the addresses of the places of delivery.

Committee Note

Rule 25(a)(2)(D) presently authorizes the courts of appeals to permit papers to be *filed* by electronic means. Rule 25 has been amended in several respects to permit papers also to be *served* electronically. In addition, Rule 25(c) has been reorganized and subdivided to make it easier to understand.

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

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

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

Subdivision (c)(4). The second sentence of new subdivision (c)(4) has been added to provide that electronic service is complete upon transmission. Transmission occurs when the sender performs the last act that he or she must perform to transmit a paper electronically; typically, it occurs when the sender hits the "send" or "transmit" button on an electronic mail program. There is one exception to the rule that electronic service is complete upon transmission: If the sender is notified within 3 calendar days — by the sender's e-mail program or otherwise — that the paper was not received, service is not complete, and the sender must take additional steps to effect service. A paper has been "received" by the party on which it has been served as long as the party has the ability to retrieve it. A party cannot defeat service by choosing not to access electronic mail on its server.

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

Rule 26. Computing and Extending Time

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

Committee Note

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

Rule 36. Entry of Judgment; Notice

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

Committee Note

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

Rule 45. Clerk's Duties

(c) Notice of an Order or Judgment. Upon the entry of an order or judgment, the circuit clerk must immediately serve ~~by mail~~ a notice of entry on each party~~ to the proceeding~~,

1 . with a copy of any opinion, and must note the ~~mailing~~ date of service on the docket.

2 Service on a party represented by counsel must be made on counsel.

3 **Committee Note**

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

C. Rule 4(a)(7)

This amendment should be considered in conjunction with the amendments to FRCP 54(a) and 58 that are being proposed by the Civil Rules Committee.

This amendment attempts to resolve four circuit splits. Two circuit splits — which I will describe in a moment — are addressed in new Rule 4(a)(7)(**A**). Two other circuit splits — which are described in the Committee Note — are addressed in new Rule 4(a)(7)(**B**).

A prior version of this amendment was presented to the Standing Committee at its January 2000 meeting. At that meeting, the Standing Committee raised no objection to proposed Rule 4(a)(7)(**B**). Except for minor stylistic changes in the text of the rule and some tightening up of the Committee Note, the proposed Rule 4(a)(7)(B) that appears below is identical to the proposed Rule 4(a)(7)(B) that the Standing Committee considered without objection in January. I will say no more about it.

The concerns of the Standing Committee related solely to proposed Rule 4(a)(7)(**A**). That provision attempted to resolve circuit splits over two issues.

1. The first split that the prior version of Rule 4(a)(7)(A) attempted to resolve related to what we have called the "time bomb" problem. FRCP 58 provides that a "judgment" is not "effective" until it is "set forth on a separate document." According to every circuit except the First Circuit, if a judgment is not entered on a separate document, neither the time to bring post-judgment motions nor the time to appeal ever begins to run. Ignorance of the separate document requirement appears to be widespread; every year, hundreds of cases are terminated with judgments that are not set forth on separate documents. As a result, there are thousands of "time bombs" ticking away in the federal system — that is, long dormant cases that could be appealed at any time.

The version of Rule 4(a)(7)(A) presented to the Standing Committee in January attempted to impose a "cap" on the length of time that litigants would have to appeal a judgment that should have been entered on a separate document but was not. Specifically, the prior version of Rule 4(a)(7)(A) provided that a judgment that had not been set forth on a separate document

would be treated as entered for purposes of the appellate rules — notwithstanding anything to the contrary in the FRCP — 150 days after the judgment was entered in the civil docket. On the 150th day, the time to appeal the judgment would begin to run.

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

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

The Standing Committee asked Judge Niemeyer and Prof. Cooper to work with Prof. Schiltz and me to try to find a solution to the "time bomb" problem that would impose an effective cap and would do so without decoupling the running of the time to bring post-judgment motions from the running of the time to bring appeals. We believe that we have come up with such a solution.

Under our proposal, FRCP 58(b) would provide that, when a judgment must be set forth on a separate document, that judgment will be treated as entered upon the earlier of the following: (1) actual entry on a separate document, or (2) the passage of 60 days after entry in the civil docket. Rule 4(a)(7) would simply provide that a judgment will be treated as entered for purposes of Rule 4 (that is, for purposes of the running of the time to appeal) when it is treated as entered for purposes of FRCP 58 (that is, for purposes of the running of the time to bring post-judgment motions). In this way, a 60 day cap is imposed on judgments that should have been entered on separate documents but were not, and the running of the time to appeal continues to be coupled with the running of the time to bring post-judgment motions.

2. The second issue that the prior version of Rule 4(a)(7)(A) attempted to address related to whether orders that dispose of post-judgment motions must be entered on separate documents. A lot turns on this question.

Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. If an order disposing of a post-judgment motion is not "entered" until it is set forth on a separate document, then the time to appeal a judgment never begins to run if such an order is not entered on a separate document. It is extremely common for orders that deny post-judgment motions *not* to be set forth on separate documents; in those circuits that hold that orders disposing of post-judgment motions are not entered until set forth on separate documents, the "time bomb" problem is magnified.

Courts have disagreed about the extent to which orders disposing of post-judgment motions must be set forth on separate documents. This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by FRCP 58) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former camp disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter camp disagree among themselves about the scope of the separate document requirement imposed by FRCP 58.

The version of Rule 4(a)(7)(A) presented to the Standing Committee in January would have partially solved this problem by making it clear that Rule 4(a)(7) simply incorporates the separate document requirement as it exists in the FRCP, and does not impose a separate document requirement of its own. The Standing Committee supported this proposal, as far as it went. The Standing Committee's concern was that, under the amendment, the law would still be a mess. True, a court trying to determine whether a particular order disposing of a post-judgment motion had to be entered on a separate document would know to look solely to the FRCP (and not to FRAP), but, in trying to figure out whether the FRCP required entry on a separate document, the court would confront an almost impenetrable body of conflicting case law.

Again, Judge Niemeyer, Prof. Cooper, Prof. Schiltz, and I have come up with what we believe to be an effective solution. Under our proposal, FRCP 58(a) would continue to provide that judgments and amended judgments must be entered on separate documents. However, Rule 58(a) would expressly exempt from the separate document requirement all orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) (as well as certain other post-judgment motions). Thus, new FRCP 58(a) would resolve the conflicts over this issue by imposing a uniform national rule, and new Rule 4(a)(7)(A) would make clear that FRAP does not impose a separate document requirement of its own.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

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

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

Committee Note

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

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

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

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

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

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

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

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

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

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

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been entered on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g.*, *Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

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

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

D. Rule 26.1 (Financial Disclosure)

Like the other advisory committees, the Appellate Rules Committee approved amendments regarding financial disclosure at its spring meeting. At your request, Profs. Cooper, Coquillette, Schiltz, and Schlueter conferred by telephone on May 4 and made a number of changes in the financial disclosure amendments that had been approved by the Appellate, Civil, and Criminal Rules Committees, in order to achieve as much substantive and stylistic consistency as possible. The proposed amendment to Rule 26.1 reproduced below reflects several stylistic changes made as a result of the reporters' conference. I have approved those changes on behalf of the Appellate Rules Committee.

My understanding is that the three sets of financial disclosure amendments differ substantively in only two respects (putting aside differences that are necessary because of the differences between trial courts and appellate courts, or between civil cases and criminal cases):

First, the civil rules provision, unlike the appellate rules provision and the criminal rules provision, explicitly requires the clerk to give financial disclosure information to the judge. The Appellate Rules Committee (and, I'm told, the Criminal Rules Committee) chose not to adopt such a provision. The rules of practice and procedure assume that *everything* filed with a clerk is provided to a judge; the Appellate Rules Committee is afraid of the negative implication that might arise if the rules start specifying that certain information must be given to a judge while remaining silent about other information. That said, such a requirement may be more defensible in the civil (and criminal) rules than in the appellate rules, as in the district courts it is common for cases to be pending longer with more interim judicial actions before final resolution.

Second, the criminal rules provision requires "[a]ny . . . party" to a criminal proceeding to identify "any organizational victims of the criminal activity." The appellate rules provision does not include such a requirement. Putting aside the Fifth Amendment and other problems raised by the specific proposal approved by the Criminal Rules Committee, the Appellate Rules Committee believes that any expansion of disclosure obligations beyond what is presently required by Rule 26.1 should be left to the Judicial Conference, using the authority given to it under the amended rules. In our view, the Standing Committee should focus on extending Rule 26.1 to the other rules of practice and procedure and providing a process for future expansion of disclosure obligations. To try to undertake such an expansion now — especially such a controversial expansion — might imperil the other goals.

1 **Rule 26.1 ~~Corporate~~ Disclosure Statement**

2 **(a) Who Must File.**

3 (1) **Nongovernmental corporate party.** Any nongovernmental corporate party to a

4 proceeding in a court of appeals must file a statement that:

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

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

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

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

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

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

1 Rule 26.1(a) has been amended to require that nongovernmental corporate parties who
2 currently do not have to file a corporate disclosure statement — that is, nongovernmental
3 corporate parties who do not have any parent corporations and at least 10% of whose stock is not
4 owned by any publicly held corporation — inform the court of that fact. At present, when a
5 corporate disclosure statement is not filed, courts do not know whether it has not been filed
6 because there was nothing to report or because of ignorance of Rule 26.1(a).
7
8 Rule 26.1(a) does not require the disclosure of all information that could conceivably be
9 relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case.
10 Experience with divergent disclosure practices and improving technology may provide the
11 foundation for more comprehensive disclosure requirements. The Judicial Conference,
12 supported by the committees that work regularly with the Code of Judicial Conduct and by the
13 Administrative Office of the United States Courts, is in the best position to develop any
14 additional requirements and to adjust those requirements as technological and other
15 developments warrant. Thus, Rule 26.1(a) has been amended to authorize the Judicial
16 Conference to promulgate more detailed financial disclosure requirements — requirements that
17 might apply beyond nongovernmental corporate parties.
18
19 As has been true in the past, Rule 26.1(a) does not forbid the promulgation of local rules
20 that require disclosures in addition to those required by Rule 26.1(a) itself. However, along with
21 the authority provided to the Judicial Conference to require additional disclosures is the authority
22 to preempt any local rulemaking on the topic of financial disclosure.
23
24 **Subdivision (b).** Rule 26.1(b) has been amended to require parties to file supplemental
25 disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the
26 parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's
27 stock after the party has filed its disclosure statement, the party should file a supplemental
28 statement identifying that publicly held corporation.
29
30 **Subdivision (c).** Rule 26.1(c) has been amended to provide that a party who is required
31 to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule
32 or an order entered in a particular case provides otherwise.

III. Information Items

I have only one item of information to share with you: Prof. Schiltz will be leaving Notre Dame Law School this summer to accept an appointment as Associate Dean and Professor of Law at the law school that the University of St. Thomas is opening in Minneapolis (Prof. Schiltz's hometown). Prof. Schiltz will be instrumental in hiring faculty and staff, raising funds, designing the building, putting together the curriculum, and otherwise shaping this new Catholic law school, which will open its doors in August 2001. I am pleased to inform you that Prof. Schiltz will also be continuing to serve as Reporter to the Appellate Rules Committee.